THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

W.C.C. File No. 1213162

William E. Miller, Jr., Employee, Claimant ..... Appellant,

v.

Owen Steel Company, Inc., Employer, and
Great American Insurance Group
c/o Strategic Comp Services, Carrier, ... Respondents.

RESPONDENTS' BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES, REGULATIONS & RULES

STATEMENT OF ISSUES ON APPEAL

I. WHETHER THE COMMISSION'S DETERMINATION THAT CLAIMANT IS NOT ENTITLED TO WORKERS' COMPENSATION BENEFITS IS SUPPORTED BY SUBSTANTIAL EVIDENCE AND SHOULD BE UPHELD?

II. WHETHER THE COMMISSION PROPERLY STATED THAT THE TWO MRIS IN THE RECORD APPEARED TO BE NEARLY IDENTICAL?

III. WHETHER THE COMMISSION PROPERLY DID NOT GIVE CONTROLLING WEIGHT TO CERTAIN MEDICAL EVIDENCE IN THE RECORD?

STATEMENT OF THE CASE

Claimant William E. Miller ("Claimant") filed a Form 50 with the South Carolina Workers' Compensation Commission ("Commission") alleging that, on August 15, 2012, he suffered an injury by accident while working for Owen Steel Company, Inc. ("Owen Steel"). (R. 436). Claimant alleged that he injured his head, back, and neck with radicular symptoms to his arms and legs as a result of a fight between himself and Mr. Steve Raulerson. Claimant sought permanent and total disability for his injuries, as well as payment of temporary total disability from the date of accident and payment of all causally related medical treatment.

Owen Steel and its workers' compensation carrier, Great American Insurance Group c/o Strategic Comp Services (jointly "Respondents"), denied the claim, disputing that Claimant's injuries were a result of an accident within the course and scope of his employment, specifically asserting that "claimant's current problems with his back, head, and/or neck are not causally connected to the Claimant's alleged August 15, 2012 work-related accident." (R. 437). Respondents asserted that Claimant could not "satisfy his burden of proving a compensable injury ... pursuant to Section 42-1-160 and/or Section 42-9-35 of the Act. In addition, [Respondents] maintain[ed] that the Claimant's right to compensation may be barred pursuant to Section 42-9-60 of the Act." (Id.).

The parties were heard by Single Commissioner Derrick L. Williams on December 10, 2012, who issued his Decision on January 27, 2013. (Amended Decision and Order, dated January 27, 2013, R. 36-51 ("Single Commissioner Decision")).[1] The Single Commissioner denied Claimant benefits finding, among other things, that based on the medical evidence and the

[1] An earlier version of the Single Commissioner's Decision, dated January 25, 2013, inadvertently omitted an itemized list of APA submissions.

testimony at the hearing, "Claimant did not satisfy his burden of proving that he sustained a compensable injury to the head, back, and/or neck while in the course and scope of his employment ..." (Single Commissioner Decision, R. 49). In addition, the Single Commissioner found that Claimant's version of the events of August 15, 2012 was not credible, and that the employer witness's testimonies were more believable than was Claimant's testimony. (Id., R. 48-49).

Claimant timely appealed to the Full Commission, raising three issues. (R. 438-439). An Appellate Panel of the Full Commission heard oral argument on April 16, 2013 and issued its Decision and Order on July 2, 2013. (Decision and Order of the Appellate Panel, dated July 2, 2013, R. 1-35 ("Commission Decision")). As did the Single Commissioner, the Commission found that the case turned "mainly on the medical reports. Based on the substantial evidence, including the medical records of the Claimant and the testimony of the Claimant, we find that when we review the two MRIs from before and after the alleged accident, they strike this Panel as nearly identical. Based on the substantial evidence, including the medical records of the Claimant and the testimony of the Claimant, we find that to say that the altercation in the workplace caused Claimant's alleged injuries would be pure speculation." (Commission Decision, R. 29). The Commission adopted the credibility determinations of the Single Commissioner, stating that they did not "fully believe Claimant's version of events in this case." (Commission Decision, R. 30). Relying on the medical records and Claimant's testimony, the Commission also found that Claimant's symptoms before the altercation "closely mirror[ed] the symptoms complained of as an alleged result of the August 15, 2012 altercation," and that "Claimant complained of numbness, tingling, stabbing and rapidly worsening pain, tightness, and multiple other problems with [his] neck, back and arms prior to the alleged incident." (Id.,

R. 29-31). Based on Claimant's testimony and the in-take form Claimant filled out on his first visit with Dr. Boyd, the Commission specifically found that, Claimant "failed to inform Dr. Boyd that he had back and neck issues prior to the August 15, 2012 altercation." (Id.). The Commission upheld the Single Commissioner's determination that "Claimant did not satisfy his burden of proving that he sustained a compensable injury to the head, back, and/or neck while in the course and scope of his employment," and denied benefits. (Id., R. 31-35).

Claimant timely appealed to this Court.

FACTUAL BACKGROUND

At the time of the hearing before the Single Commissioner, Claimant was a forty-six (46) year old male with a high school diploma and approximately one and a half years of college education. (R. 58, lines 14-20). He was employed with Owen Steel from 2004 to August 27, 2012. (R. 58, line 25 – 59, line 1) (R. 99, line 23 – 100, line 1). Claimant was hired by Owen Steel initially as a welder and was later promoted to a fabricator and then to the maintenance department. (R. 59, lines 4-11).

Claimant admitted at the hearing before the Single Commissioner that he had a history of prior neck and back pain for which he received injections and medication. (R. 76, line 10 – 77, line 16). He also testified that he had not been released by his treating physician, Dr. Benjamin Levinson, prior to August 15, 2012 and was still undergoing treatment for his back and neck issues on that date. (R. 89, lines 6-15). Co-workers testified that Claimant had complained to them about back and neck pain prior to the August 15, 2012 incident. (R. 151, lines 15-20) (R. 170, line 14 – 171, line 10) (R. 188, line 23 – 189, line 10).

Claimant testified that he was involved in an altercation with Mr. Raulerson on August 15, 2012 at around three o'clock in the afternoon. At the time, Mr. Raulerson was an acting

assistant supervisor for Owen Steel. (R. 59, lines 17-25). Claimant testified that he was speaking to Brian Ingle when someone from the paint shop approached and asked whether or not power would be on in the paint shop over the weekend. At some point, Mr. Raulerson came into the area and asked Claimant, "[w]hat seems to be the problem?" Claimant stated that a discussion ensued about whether the power would be on over the weekend and that Mr. Raulerson initially disagreed with Claimant about the power. At some point, Mr. Raulerson admitted that Claimant may be correct. Claimant testified that he responded with, "[h]uh," then got up and walked away into the bathroom. Claimant stated that he made this comment because he felt Mr. Raulerson was questioning his intelligence. (R. 60, line 7 – 61, line 6). Jason Frye's written statement indicated this was a "smart aleck reply under [Claimant's] breath so to speak." (R. 384).

Claimant testified that he was in the bathroom washing his hands when Mr. Raulerson got into his face and demanded to know what Claimant had said. Claimant alleged that Mr. Raulerson was "pounding his finger" into his chest and saying "[y]ou're going to listen to me. You're going to tell me what you said." (R. 61, lines 14-21).

At this point, the versions of events diverge. Claimant testified that he tried to leave the bathroom by walking past Mr. Raulerson. During this process, Claimant stated that he put his hand up to "stiff arm him" to "move him out of my way." After trying to move Mr. Raulerson, Claimant stated that Mr. Raulerson shoved him. (R. 64, lines 10-17). Mr. Raulerson testified that both he and Claimant were pushing and shoving each other in the bathroom. (R. 176, lines 1-7). Mr. Frye indicated both Claimant and Mr. Raulerson were shoving each other, and that Claimant shoved Mr. Raulerson into the bathroom. (R. 384).

Throughout the confrontation, both Claimant and Mr. Raulerson were yelling at each other and exchanging curse words. (R. 64, lines 18-22) (R. 384). After getting around Mr. Raulerson, Claimant stated that he and Mr. Raulerson were in the hallway adjacent to the bathroom. At this point, Claimant alleges Mr. Raulerson shoved him and he felt something in his neck pop. (R. 64, line 23 – 65, line 6). Claimant testified at the hearing that he injured his neck before he threw a punch and kicked Mr. Raulerson. (R. 65, lines 9-12) (R. 120, line 2 – 122, line 7). Despite alleging that he felt his neck "pop" after the shove, Claimant testified that he attempted to punch Mr. Raulerson in the mouth, with the explanation that he thought Mr. Raulerson was preparing to lunge at him. (R. 65, lines 9-12) (R. 121, line 7 – 122, line 7). Mr. Raulerson testified that he was standing in the doorway and was not preparing to lunge at Claimant. None of the other witness testimony indicates Mr. Raulerson was preparing to lunge at Claimant. (R. 381-385) (R. 143, lines 12-23) (R. 164, line 19 – 165, line 21) (R. 181, line 24 – 183, line 1). Instead, Mr. Raulerson testified that Claimant hit and kicked him and, when Claimant attempted to hit him again, Mr. Raulerson pushed him against the wall. (R. 163, line 14 – 166, line 14) (R. 169, lines 18-25).[2] Other witnesses also testified that Claimant kicked Mr. Raulerson. (R. 156, lines 5-11) (R. 385 (Ray Hollins' statement indicating he saw Claimant, "kicking at, and punching at something. I did not see Steve Raulerson until Jason Frye broke them up")). Claimant testified he did not recall kicking Mr. Raulerson but that it was possible that he did not recall that because "it was so quick that it just, you know, it was – it's a possibility." (R. 65, line 24 – 66, line 5) (R. 102, lines 12-18).

[2] Mr. Raulerson provided a statement that he followed Claimant into the bathroom where an argument ensued. "I asked [Claimant] what his problem was and there is where we got into an argument face to face and a push / shove took place in the door way of the restroom. We came out of the restroom and we were still fussing and cussing each other. [Claimant] then balled his fist and I told him if he wanted to hit me, to hit me. And so he did. Then I shoved him against the wall and at that time Jason Frye and Jack Osborne stepped in and broke us up." (R. 381) (R. 169, line 18 – 170, line 4).

Co-worker Jackie Osborne submitted a written statement that he saw Claimant and Mr. Raulerson "face to face yelling at each other[.] [Claimant] stated quit pushing me I've got a bad back & neck while bellying up to Steve pushing each other a couple more times, Steve stated I know you want to hit me so go ahead, then all at once [Claimant] punch Steve in the face, Steve step forward, [Claimant] kick him in the belly[.] [Claimant] back out into the [maintenance] shop where Jason Frye step in front of [Claimant] and I step in front of Steve to stop the fight." (R. 383).

Another co-worker, Brian Ingle, provided a statement that Claimant and Mr. Raulerson were "pushing each other then [Claimant] kicked [Mr. Raulerson] and hit [Mr. Raulerson] in the face[.] Then [Claimant] said Don't hit me I have a bad neck and back[.] Then Jason Frye broke them up." (R. 382) (R. 143, lines 4-23). Mr. Ingle testified that Mr. Raulerson pushed Claimant after Claimant hit him. (R. 146, line 22 – 147, line 6). Mr. Raulerson confirmed that, prior to kicking and punching him, Claimant did not say anything about his neck being injured. (R. 176, lines 14-17).

Claimant testified that Mr. Stacy Oxedine and Mr. Poran (sp) came in and talked with the employees who had witnessed the altercation about what had happened. (R. 68, line 23 – 69, line 1). Shortly thereafter, Claimant was called into Mr. Sloan's office, who was the maintenance superintendent. Claimant testified that Mr. Sloan and Mr. Oxedine gave him four days off. (R. 69, lines 3-22). Claimant did not testify that he told either Mr. Sloan or Mr. Oxedine at that time that he had hurt his neck in the altercation.

Because of an intervening weekend, Claimant was off for six consecutive days during which he did not seek any medical attention for his alleged injuries. (R. 72, lines 2-22). He acknowledged that he worked full days the following Wednesday, Thursday and Friday, driving

himself to work on his motorcycle. (R. 72, line 23 – 73, line 3) (R. 73, lines 19-24) (R. 109, line 25 – 110, line 14) (R. 384). Mr. Oxendine testified that Claimant also worked that Saturday. (R. 196, lines 17-20). Claimant alleges that, at some point, he told Mr. Sloan he had been injured in the "incident" and that Mr. Sloan replied that he "would take care of it," which Claimant assumed meant that the employer would send him to a doctor. (R. 73, lines 4-15).[3]

Some time over the following weekend, Claimant and his wife decided he should go to a doctor.[4] Claimant's wife testified that, during the six days following the incident, she tried to get him to go to a doctor, but he would not go. (R. 129, lines 7-9). Claimant testified that he went to work while she would try to make an appointment. Mr. Oxedine testified that, on August 27, 2012, Claimant left a safety meeting in anger because, in going over the timesheets, he realized he had been suspended for four days while Mr. Raulerson had been suspended for only three. (R. 196, line 20 – 197, line 15). Claimant went so far as to take a photo of the time sheet summary. (R. 197, line 19 – 198, line 2).

Claimant admitted that he left a safety meeting in anger, but alleged that he was angry because he was in pain and was not getting medical help. (R. 118, lines 11-19) (R. 125, lines 13-25). Claimant stated that he told Mr. Sloan and Mr. Oxedine that he was upset because he was in pain "and nobody would make any effort to take me to a doctor;" however, Mr. Oxedine did not confirm that Claimant made any such statement to him. Claimant allegedly told only Mr. Sloan that he was leaving work to go to a doctor's appointment. (R. 75, lines 2-25).[5] No other witness

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[3] In his Brief, Claimant misconstrues what Mr. Sloan allegedly said to Claimant, indicating Mr. Sloan said he would take care of the request for medical treatment. (App. Br. pp. 5, 7). As Claimant himself admitted, he only assumed that was what Mr. Sloan meant. (R. 73, lines 4-15).

[4] Although Claimant now asserts that, during the time he was suspended, his "neck began to swell," (App. Br. p. 5), there is no testimony or evidence in this record to support this assertion.

[5] Despite the fact that Claimant called three Owen Steel employees as witnesses in his direct case, (Mr. Ingle, Mr. Raulerson and Mr. Frye), some of whom he attempted to treat as hostile witnesses, (*see* R. 137, lines 18-19) (R. 144, line 21 – 146, line 16) (R. 157, line 19 – 158, line 12) (R. 177, lines 8-9), he did not call Mr. Sloan, the only person who could have confirmed, or potentially denied, the statements Claimant attributes to him.

confirmed any of this information. In addition, his co-workers testified that Claimant rode his motorcycle to work more than once following the incident, which Claimant admitted. (R. 72, line 23 – 73, line 3) (R. 73, lines 19-24) (R. 109, line 25 – 110, line 14).

Claimant testified that, other than the August 15, 2012 altercation with Mr. Raulerson, he had never had "a physical altercation or a fight with an employee at Owen." (R. 70, line 25 – 71, line 6). However, Claimant admitted that he had been reprimanded in the past for getting into arguments with other employees and supervisors. (R. 100, lines 14-18). Two of these incidents involved Mr. John Gardner and Mr. Cliff Zimms. (R. 100, line 19 – 101, line 1). Claimant was reprimanded and given two days off without pay for insubordination for cursing at Mr. Gardner, who was his supervisor at the time. (R. 102, line 19 – 103, line 1) (R. 123, line 1 – 124, line 13). Claimant admitted that he was terminated briefly for an altercation involving Mr. Zimms, when he threw welding leads at Mr. Zimms. (R. 100, line 23 – 101, line 7) (R. 391). Claimant testified that he threw the leads at Mr. Zimms because he thought Mr. Zimms was "belittling" him, which made him angry. (R. 101, line 17 – 102, line 8) (R. 135, line 24 – 136, line 17) (R. 124, line 17 – 125, line 11). Mr. Raulerson testified at length about prior altercations he had had with Claimant as well as arguments Claimant got into with other employees. (R. 171, line 13 – 175, line 9). Mr. Frye also testified that he had been in a prior altercation with Claimant. (R. 184, line 21 – 185, line 1). Mr. Frye testified that Claimant wanted him to get out of a seat so he could sit down. When Mr. Frye did not get up, Claimant pinched him on the arm and a confrontation ensued. (R. 185, lines 2-18).[6]

Although his evaluations reflected that he was a "very good mechanic," (R. 202, lines 3-20), Claimant was written up several times for fighting and insubordination. (R. 386-390) (R.

[6] Mr. Frye also testified that he heard Claimant talk about getting into a fight with his neighbor over a dog. (R. 187, line 19 – 188, line 9).

193, line 17 – 199, line 9). Claimant ultimately was fired on August 28, 2012 for "multiple cases of aggression and insubordination." (R. 390) (R. 198, line 6 – 199, line 9).

Claimant agreed that, on August 27, 2012, he told Dr. Levinson that he was experiencing "neck pain as a result of assistant supervisor pushing the man up against the wall." (R. 330) (R. 76, lines 10-23). Dr. Levinson prescribed Percocet. (R. 79, lines 18-21). Claimant recounted his version of events to Dr. Scott Boyd as well. (R. 83, lines 8-15). Claimant acknowledged that, when he filled in the in-take questionnaire for Dr. Boyd, he claimed his symptoms first appeared on August 15, 2012 and failed to acknowledge prior steroid injections he had had for this same problem, saying he must have just made a mistake on a form he otherwise filled out in detail. (R. 85, line 10 – 88, line 16) (R. 424-426).

Claimant agreed that the symptoms or problems told Dr. Boyd he was having were the "exact same problems" for which he had sought treatment from Dr. Levinson, although he asserted his symptoms were "not to the extent that they were on the 15th." (R. 78, lines 2-5) (R. 88, line 17 – 89, line 5) (R. 425). Claimant acknowledged that he was still under Dr. Levinson's care for neck problems on August 15, 2012. (R. 89, lines 6-15).

In fact, Claimant had begun seeing Dr. Levinson for neck and back problems as early as September 2011, for which he was prescribed Percocet and, later, Ultracet. (R. 90, line 9 – 96, line 25). Claimant saw Dr. Levinson on January 16, 2012 and on February 8, 2012 complaining of "rapidly worsening" neck pain of "severe intensity" that had been diagnosed one to two months prior. The pain was "the majority of the day," and Percocet helped but "very little." Dr. Levinson's notes indicate "[v]ery tight in the back of the neck, stabbing pain from ears to between shoulder blades." (R. 405-413). Dr. Levinson ordered an MRI. (R. 412). On February 16, 2012, Dr. Levinson's notes indicate that Claimant continued "to utilize his Percocet due to a

new problem regarding his neck." The "new pain" was "a sharp and occasional sensation. The pain is in the cervical spine with radiation into the posterior aspect of his bilateral shoulders ... He reports this pain is associated with occasional dizziness and an electric sensation that travels down his arms." (R. 414-416).

Dr. Levinson summarized the results of the MRI as follows:

> 1. Left central disc extrusion at C6-7 causing severe central canal stenosis with cord compression as well as left neural foraminal stenosis. There is no cord edema.
>
> 2. Mild to moderate bilateral neural foraminal stenosis and mild central canal stenosis at C5-6 on the basis of a disc osteophytic bulge with unconvertebral joint hypertrophy, left greater than right.
>
> 3. Congenital shortening of the pedicles.

(R. 349-350, 416). Following this visit, Dr. Levinson referred Claimant to Dr. Tony Owens to receive injections for pain management. (R. 94, lines 7-11) (R. 431-432).

Claimant was again seen by Dr. Levinson on March 14, 2012 with a diagnosis of neck pain that "has been rapidly worsening. It is of severe intensity" and constant. "Very tight in the back of the neck, stabbing pain from ears to between shoulder blades." Dr. Levinson continued the Percocet prescription and added Ultracet. (R. 417-420).

On July 9, 2012, a little over a month before the August 15 altercation, Claimant presented to Dr. Levinson with a diagnosis of neck pain that "has been rapidly worsening. It is of severe intensity" and constant. Claimant was still using Percocet, but it helped "very little." Dr. Levinson again noted, "[v]ery tight in the back of the neck, stabbing pain from ears to between shoulder blades." (R. 334-338).

Claimant next saw Dr. Levinson on August 27, 2012, a full 12 days after the August 15 incident. Dr. Levinson's notes indicate Claimant is experiencing severe, stabbing pain, like a

knife in his neck ..." (R. 330-333).[7] Dr. Levinson's notes indicate that the plan for Claimant's neck pain is that he is "to discuss with attorney on route to take." (R. 332). As of September 4 and September 13, 2012, Dr. Levinson's notes again indicate Claimant is experiencing severe, stabbing pain, like a knife in his neck. (R. 326-329, 322-325). Consistent with prior medical notes, Dr. Levinson stated that the "course has been progressively worsening," and was of severe intensity. (R. 322). He also noted on September 4 that Claimant was "going to get an attorney." (R. 328).

Dr. Levinson ordered a second MRI, which was read by Dr. Paul Atchison. Dr. Atchison's analysis of the September 4, 2012 MRI is as follows:

> 1. Central disc extrusion at C6-7 causing severe central canal stenosis with cord compression. The left central/foraminal component has contracted in the interval since the prior study. There is no residual left neural foraminal stenosis.
>
> 2. Mild central canal stenosis and mild to moderate bilateral neural foraminal stenosis at C5-6, unchanged from prior study.
>
> 3. Congenital shortening of the pedicles.

(R. 428). Both Drs. Levinson and Atchison determined that Claimant had a disc extrusion at C6-7 causing severe canal stenosis with cord compression. Likewise, both Drs. Levinson and Atchison determined that Claimant had mild central canal stenosis at C5-6 and mild to moderate bilateral foraminal stenosis at C5-6. Dr. Atchison even noted that this was unchanged from the prior study.

Claimant underwent surgery with Dr. Boyd on September 26, 2012. (R. 116, lines 16-20) (R. 295-296 (noting that a "single large fragment of soft disk material was pulled through

[7] Although Dr. Levinson's notes from Claimant's August 27, 2012 visit note that Claimant stated he had "the sensation of a 'brain freeze,'" (R. 330), even Dr. Levinson put that particular symptom in quotation marks. It is unclear what "brain freeze" is supposed to refer to, what it might be related to, or whether it even has any medical significance whatsoever, despite Claimant's repeated focus (no fewer than six times) on this one, new "symptom." (App. Br. pp. 5, 7, 11, 14). That "symptom" is not repeated in any subsequent medical records.

[the surgical opening] and represented all of the large disk fragment noted on preoperative imaging")). Following the surgery, Claimant returned to Dr. Levinson on October 8, 2012 complaining of lower back pain resulting from "using a jackhammer...[while] at work." (R. 97, lines 16-25) (R. 451-454). Claimant denied this statement and indicated that Dr. Levinson was lying, (R. 98, lines 2-15), despite having agreed repeatedly that he had no reason to doubt the accuracy of any of Dr. Levinson's other medical records. (R. 90, line 22 – 96, lines 4-8).

As of November 26, 2012, Dr. Boyd had released Claimant back to work for light duty. (R. 448).

STANDARD OF REVIEW

Judicial review of a Commission decision is directed by the substantial evidence rule of the Administrative Procedures Act, S.C. Code Ann. § 1-23-380(A)(5) (Supp. 2012). Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981). A reviewing court should affirm the decision of the Full Commission unless it is clearly erroneous in view of the substantial evidence of the whole record. Lark, 276 S.C. at 136, 276 S.E.2d at 307. The reviewing court may not substitute its own judgment for that of the Full Commission as to the weight of the evidence on a question of fact, but may reverse if the decision is affected by an error of law. S.C. Code Ann. § 1-23-380(A)(5). The Administrative Procedures Act "mandates that the commission take the evidence, judge the credibility and weight of that evidence, and from that judgment determine the facts of the case." Rogers v. Kunja Knitting Mills, Inc., 312 S.C. 377, 381, 440 S.E.2d 401, 403 (Ct. App. 1994).

Substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the same conclusion the administrative agency reached in order to

justify its action. Pierre v. Seaside Farms, Inc., 386 S.C. 534, 540, 689 S.E.2d 615, 618 (2010).[8] "The possibility of drawing two inconsistent conclusions from the evidence does not prevent the Commission's finding from being supported by substantial evidence." Sharpe v. Case Prod., Inc., 336 S.C. 154, 160, 519 S.E.2d 102, 105 (1999). Instead, the findings of the Full Commission are presumed correct and can be set aside only if unsupported by substantial evidence or based on an error of law. McGuffin v. Schlumberger-Sangamo, 307 S.C. 184, 186, 414 S.E.2d 162, 163 (1992). It is not within the appellate court's purview to reverse findings of the Full Commission which are supported by substantial evidence. Broughton v. South of the Border, 336 S.C. 488, 496, 520 S.E.2d 634, 637 (Ct. App. 1999).

"The final determination of witness credibility and the weight to be accorded evidence is reserved to the Full Commission." Ross v. American Red Cross, 298 S.C. 490, 492, 381 S.E.2d 728, 730 (1989). Where there is a conflict in the evidence, either by different witnesses or the testimony of the same witness, the factual findings of the Commission are conclusive. Anderson v. Baptist Med. Ctr., 343 S.C. 487, 492-93, 541 S.E.2d 526, 528 (2001). Furthermore, it is the Commission's prerogative to believe or disbelieve expert testimony. *See* Pack v. South Carolina Dept. of Transp., 381 S.C. 526, 536, 673 S.E.2d 461, 466-67 (Ct. App. 2009) (observing that the "Commission need not accept or believe medical or other expert testimony, even when it is unanimous, uncontroverted, or uncontradicted"); *see also* Sharpe, 336 S.C. at 161, 519 S.E.2d at 106 (stating that "in compensation proceedings, where uncontroverted medical opinions are merely deductions drawn from certain symptoms, the final conclusion remains with the triers of fact").

[8] Respondents note that one case relied on by Claimant for the substantial evidence standard of review, Alexander v. Forklifts Unlimited, 365 S.C. 509, 618 S.E.2d 307 (Ct. App. 2005), has been vacated. Alexander v. Forklifts Unlimited, 376 S.C. 466, 657 S.E.2d 743 (2008).

ARGUMENTS

I. The Commission's determination that Claimant is not entitled to workers' compensation benefits is supported by substantial evidence and should be upheld.

A. Substantial evidence supports the Commission finding that Claimant's alleged injuries were not causally related to a workplace altercation.

Because it is supported by substantial evidence in the record, the Commission's determination that Claimant failed to establish a causal relationship between his current medical condition and his alleged accident at work should be upheld on appeal. First, it is black letter law that a "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." Clade v. Champion Labs, 330 S.C. 8, 11, 496 S.E.2d 856, 858 (1998). It is not the Respondents' burden to prove that Claimant did **not** suffer a compensable injury, as Claimant appears to suggest. (*See* App. Br. pp. 13, 16, 17). Instead, it is Claimant's burden to prove that his alleged injuries are compensable.

Second, it is important to note that the Commission made several findings regarding whether Claimant had met his burden of proving he suffered a compensable injury. After noting that, "this case turns mainly on the medical reports," the Commission found that the February 2012 and September 2012 MRI reports were "nearly identical."[9] The Commission specifically stated that, "[b]ased on the substantial evidence, including the medical records of the Claimant and the testimony of the Claimant, we find that to say that the altercation in the workplace caused Claimant's alleged injuries would be pure speculation." (Commission Decision, R. 29). The Commission also found that, "Claimant's symptoms contained in the medical reports prior to August 15, 2012 closely mirror the symptoms complained of as an alleged result of the August 15, 2012 altercation," citing supporting evidence in the record. (Commission Decision, R. 29-

[9] Claimant's challenge to this finding is addressed below in Section II.

30). Based on all of the evidence, including the medical records and testimony, the Commission found that Claimant did not prove his "current medical condition [was] caused by this alleged accident," (Commission Decision, R. 30, 31), and Claimant failed to "satisfy his burden of proving that he sustained a compensable injury to the head, back, and/or neck while in the course and scope of his employment with the [Respondents]." (Commission Decision, R. 31).

Claimant's main argument essentially boils down to positing a straw man argument that he then proceeds to knock down. Despite these multiple findings and the Commission's confirmation of a thorough review of the record, including all of the medical evidence and the testimony, Claimant repeatedly asserts that the Commission "ruled solely on [its] comparison of the two MRI reports." (*See* App. Br. pp. 9, 13, 15, 21, 22, 24). In addition, Claimant argues that the Commission held that the two MRI reports were "identical." (Id.). Neither assertion is accurate. The Commission noted that the Single Commissioner weighed the evidence presented at the hearing and made his findings, which the Commission affirmed as amended, based on that evidence. (Commission Decision, R. 20-21, 24, 29). In reaching its Decision, the Appellate Panel also reviewed the entire record and considered the oral arguments of the parties on appeal. (Commission Decision, R. 6).

The Commission made multiple findings regarding Claimant's failure to meet his burden of proving a compensable injury, as noted above. The Commission's finding that the February and September MRIs were "nearly identical," (Commission Decision, R. 29), was part of, but by no means the entire basis for the Commission's conclusion that Claimant was not entitled to workers' compensation benefits. (Id., R. 29-32). In fact, the independent findings that Claimant failed to prove a compensable injury, that Claimant's symptoms after August 15 mirror those from before, that Claimant's version of the altercation was not credible, that Claimant failed to

prove a causal link between the workplace altercation and his current medical condition, do not require any analysis of the MRIs or findings regarding the same, and are sufficient to uphold the Commission's denial of benefits. Thus, regardless of how it rules on the Commission's consideration of the MRI reports, which Respondents assert was proper, this Court can affirm the Commission Decision "on any ground(s) appearing in the Record on Appeal." Rule 220(c), SCACR; 16 Jade Street, LLC v. R. Design Constr. Co., LLC, 398 S.C. 338, 349, 728 S.E.2d 448, 454 (2012) (noting that the alternative ground raised to the lower tribunal constituted an additional sustaining ground for affirmance on appeal).

Claimant asserts that the medical evidence he has submitted in this case should be controlling and that medical causation can only be established with expert opinion in complex cases, citing Lorick v. South Carolina Elec. & Gas Co., 245 S.C. 513, 141 S.E.2d 662 (1965). However, the statement in Lorick relied on by Claimant has been dismissed as non-binding dicta. In fact, the South Carolina Supreme Court has specifically rejected the rule that expert testimony is required in medically complex cases. Tiller v. National Health Care Center of Sumter, 334 S.C. 333, 339, 513 S.E.2d 843, 846 (1999) (rejecting the requirement of expert testimony in workers' compensation cases); *see also* Hargrove v. Titan Textile Co., 360 S.C. 276, 294, 599 S.E.2d 604, 613 (Ct. App. 2004) (explaining that, "[a]lthough medical testimony is entitled to great respect, the fact finder may disregard it if there is other competent evidence in the record"). Instead, "the Commission is given discretion to weigh and consider all the evidence, both lay and expert, when deciding whether causation has been established." Tiller, 334 S.C. at 339-340, 513 S.E.2d at 846, *citing* Ballenger v. Southern Worsted Corp., 209 S.C. 463, 457, 40 S.E.2d 681, 682-83 (1946) ("[m]edical testimony should not be held to be conclusive, irrespective of other evidence; and it is not, under the decisions of this Court").

It is somewhat perplexing that Claimant should cite to Ballenger for the proposition that expert testimony is required, when that case stands for the exact opposite. To the extent Claimant cited Ballenger as a case where the testimony of the claimant and his wife established causation, it is factually distinguishable on several key points. In Ballenger, there was no finding that the claimant's version of the accident causing his eye injury was unreliable. Furthermore, there was a direct, undisputed injury to the claimant's eye (hot liquid spilled over the claimant's upper body, including his face and eyes) for which he received immediate medical attention. Finally, there was credible evidence that, prior to the accident, the claimant had experienced no problems whatsoever with his eyes or vision. Here, in contrast, Claimant's version of the incident has been found to be not credible, including whether there was any injury whatsoever to his neck during the altercation with Mr. Raulerson. In addition, there is extensive evidence in this record of severe, constant, rapidly worsening cervical pain for which Claimant was receiving ongoing medical treatment, including injections and medications, at the time he claims he was injured.

Relying on 5 Star, Inc. v. Ford Motor Co., 395 S.C. 392, 718 S.E.2d 220 (Ct. App. 2011), Claimant goes so far as to assert that "expert testimony is necessary when the subject matter falls outside of the realm of the general public." (App. Br. p. 16). This rule does not apply in the workers' compensation context. Tiller, 334 S.C. at 339, 513 S.E.2d at 846. First, 5 Star was a product liability action tried before a jury, not a workers' compensation claim heard by a Commission with subject-matter expertise. The Commission is entitled to use its experience, technical competence and specialized knowledge in evaluating the evidence before it. Roper Hosp. v. Board of S.D. Dept. of Health & Envt'l Control, 306 S.C. 138, 141, 410 S.E.2d 558, 560 (1991); S.C. Code Ann. § 1-23-330(4) (in contested cases, the "agency's experience,

technical competence and specialized knowledge may be utilized in the evaluation of the evidence"); Johnson v. Beauty Unlimited Landscape Co., 379 S.C. 403, 410, 665 S.E.2d 656, 659 (Ct. App. 2008) (deferring to Commission's reasoning in distinguishing an intraocular implant from the term "corrective lens" as used in the Commission's regulations). Second, in 5 Star, the plaintiff, who bore the burden of proving all of the elements of his negligence claim, failed to present **any** evidence of Ford's conduct, let alone any expert witness to testify whether Ford had been negligent in designing a particular switch. This Court held that, as a result of this lack of evidence, Ford's motion for directed verdict at the close of the plaintiff's case should have been granted. Respondents note that this Court did not require Ford to come forward with expert testimony disproving the plaintiff's case; rather, it is the party bearing the initial burden of going forward that must provide the requisite expert testimony. In a workers' compensation case, that burden rests solidly on the claimant.[10]

Claimant's reliance on Dr. Boyd's "fill-in-the-box" statement at R. 358-359 is misplaced. First, Dr. Boyd did not state, to a reasonable degree of medical certainty that "the push against the wall by his supervisor, when Claimant felt/heard his neck pop was the most likely trauma that created the acute injury to the neck requiring surgery," as Claimant asserts in his Brief. (*See* App. Br. pp. 16, 19, 21, 24). Instead, Dr. Boyd made two separate statements: 1) that the injury to Claimant's neck "most probably occur[red] as a result of recent trauma to the neck/spine," and 2) that the "incident as reported [by Claimant was] consistent with the injury to [Claimant's] cervical spine requiring surgery and resulting in his current medical condition." (R. 358-359). In the first statement, Dr. Boyd does not specify what "recent trauma" may have caused Claimant's current condition. Claimant waited a full 12 days before seeking medical care. He

[10] Respondents also note that the 5 Star Opinion has been appealed to the South Carolina Supreme Court, which has accepted the petition for certiorari review. 5 Star v. Ford Motor Co., 2013 S.C. LEXIS 97 (May 1, 2013).

was off work for seven or eight days and worked several normal workdays prior to seeking medical care. During this time, he was driving his motorcycle to work. (R. 72, line 23 – 73, line 3) (R. 73, lines 19-24) (R. 109, line 25 – 110, line 14) (R. 384). Here, like the medical testimony in Lorick, 245 S.C. at 525, 141 S.E.2d at 668, the evidence falls short of meeting Claimant's burden of proving causation. Second, saying the incident, as described by Claimant, is **consistent** with the injury to Claimant's cervical spine is **not** equivalent to saying the incident caused or even most probably caused the condition of his cervical spine. Bridges v. Housing Auth., 278 S.C. 342, 345, 295 S.E.2d 872, 874 (1982) (when relying on medical evidence along to prove a causal connection, "the testimony must meet the 'most probably' rule, and it is not sufficient that the malady in question 'possibly' or 'could have' or 'might have' resulted from the injury"), *quoting* Gambrell v. Burleson, 252 S.C. 98, 101, 165 S.E.2d 622, 623 (1969). Third, the form letter filled out by Dr. Boyd, and both his and Dr. Levinson's medical notes specifically state that their chronology of events is based entirely on statements made to them by Claimant. (R. 358-359). As noted above, the Commission found Claimant's version of the events of August 15, 2012 unreliable and not credible. (Commission Decision, R. 30-31). Thus, any conclusion that might be drawn from Dr. Boyd's statements and notes and/or Dr. Levinson's notes regarding whether a causal link exists between the August 15 altercation and Claimant's medical condition in September 2012 is tainted by Claimant's lack of credibility.

To reach this conclusion, the Commission did not need to determine that either Dr. Boyd or Dr. Levinson were "incompetent or in complete error about his condition and the diagnosis," as Claimant suggests. (App. Br. p. 18). The Commission did not take issue with Claimant's diagnosis or need for surgery and subsequent care. What the Commission held was that Claimant failed to prove that his diagnosis and need for treatment were **caused** by an injury or

accident that occurred during the course and scope of his employment with Owen Steel. (Commission Decision, R. 30-31). This is not a case where causation needs to be proven entirely through medical records and opinions, such as where a claimant alleges that treatment for one work-related injury results in other compensable injuries, as was the case in Mullinex v. Winn Dixie Stores, Inc., 318 S.C. 431, 458 S.E.2d 76 (Ct. App. 1995). Thus, the analysis in Mullinex is inapplicable here.

In the end, the Commission was presented with a Claimant who: 1) had a history of constant, severe ongoing back and neck pain and problems during the months leading up to the altercation, 2) was actively treating for the back and neck problems at the time of the altercation, 3) complained to coworkers of back and neck problems prior to the altercation, and 4) whose testimony regarding the altercation was found to not be credible. Further, the Commission reviewed medical records documenting symptoms prior to the incident that closely mirrored the symptoms reported after August 15, 2012, as well as the results of two MRI reports that are nearly identical. Based on all of the evidence in the record, the Commission determined that, to find the injuries occurred as a result of the workplace altercation would be "pure speculation," and that "Claimant's version of the events in this case" was not believable. Concordantly, the Commissioner found that Claimant failed to prove the altercation was the proximate cause of Claimant's alleged injuries and/or that his injuries were compensable under the Act. (Commission Decision, R. 29-31).

As for Claimant's suggestion that Respondents erroneously stated that Claimant failed to inform his neurosurgeon of his prior diagnosis and treatment, (App. Br. pp. 11-12, 13), this is a finding of fact made by the Commission, (Commission Decision, R. 30), that has not been properly raised on appeal by Claimant. *See* Rule 208(b)(1)(B), SCACR (statement of issues on

appeal must be concise and direct and, "[o]rdinarily, no point will be considered which is not set forth in the statement of the issues on appeal"). Furthermore, the Commission's finding is supported by substantial evidence in the records. (*See* R. 86, line 22 – 87, line 21) (R. 88, lines 1-16) (R. 424, 426). That there may be other evidence in the record that suggests otherwise does not mean the Commission's finding is erroneous. "The possibility of drawing two inconsistent conclusions from the evidence does not prevent the Commission's finding from being supported by substantial evidence." Sharpe, 336 S.C. at 160, 519 S.E.2d at 105. Instead, where, as is the case here, there is conflicting evidence, an appellate court will uphold the Commission's resolution of the factual issues so long as they are supported by substantial evidence. Anderson, 343 S.C. at 492-93, 541 S.E.2d at 528.

In addition, although Claimant asserts that he told Dr. Boyd about his past neck problems and treatment, Dr. Boyd's notes also reflect that Claimant said his neck condition was gradually improving and that he was doing fine with his neck and back prior to the August 15, 2012 incident. (R. 291). Those statements are impossible to reconcile with Dr. Levinson's notes of rapidly worsening neck pain that was severe, constant and intense, with stabbing pain running from his ears to between his shoulder blades. (R. 405-420, 334-338).

Because the Commission's findings of fact and conclusions of law are based on and supported by the substantial evidence presented in this case, this Court should affirm the Commission Decision in its entirety. Alternatively, if this Court finds any error in the Commission's review of the MRIs, which Respondents dispute (and discuss in more detail below in Section II), there are independent, unappealed bases on which this Court can and should affirm the Commission.

B. Claimant is not entitled to benefits under Section 42-9-35.

Claimant erroneously asserts that, pursuant to S.C. Code Ann. § 42-9-35, he is entitled to an award based on an aggravation of his pre-existing neck condition. (App. Br. pp. 11-12). First, Claimant did not allege any injury under Section 42-9-35 in his Form 50. (R. 436 (alleging only accidental injury by accident)). Second, the Single Commissioner determined that Claimant did not suffer any aggravation of his pre-existing back and neck problems. (Single Commissioner Decision, R. 50). Claimant did not appeal that finding, (R. 438-439), which is now the law of the case. Ham v. Mullins Lumber Co., 193 S.C. 66, 7 S.E.2d 712 (1940); Brunson v. American Koyo Bearings, 367 S.C. 161, 165-66, 623 S.E.2d 870, 872 (Ct. App. 2005) (the factual findings and legal conclusions of the single commissioner are the law of the case unless specifically challenged on the application for review to the full commission). Thus, this issue is not preserved for appellate review by this Court, and this Court should summarily dismiss any arguments regarding aggravation of a pre-existing condition.

In the event this Court reaches this issue, however, Claimant's arguments should be rejected. The "determination of whether a claimant's condition was accelerated or aggravated by an accidental injury is a factual matter for the Commission." Brown v. Jordan Oil Co., 291 S.C. 272, 275, 353 S.E.2d 280, 282 (1987). In order to recover under Section 42-9-35, a claimant must present evidence, stated to a reasonable degree of medical certainty, that that "the subsequent injury aggravated the preexisting condition." S.C. Code Ann. § 42-9-35.

Here, after reviewing the evidence, the Commission affirmed the Single Commissioner's finding that Claimant failed to meet his burden of proving "that a subsequent injury aggravated a pre-existing condition or permanent physical impairment ..." (Commission Decision, R. 33). In fact, as noted above, Claimant failed to satisfy his burden of proving that he sustained a

compensable injury of any kind "to the head, back, and/or neck while in the course and scope of his employment with [Respondents]." (Id., R. 31). In addition, Claimant has not presented medical evidence stating, to a reasonable degree of medical certainty, that "the subsequent injury aggravated the preexisting condition," as is required under S.C. Code Ann. § 42-9-35. Dr. Boyd simply does not say anything about the altercation or any other workplace event aggravating a pre-existing condition or injury. In contrast, the physicians in both Hargrove and Brown, the two cases relied on by Claimant, specifically discussed whether the claimant's work conditions aggravated or exacerbated a pre-existing condition. Hargrove, 360 S.C. at 293, 599 S.E.2d at 613 (physician testified that both of the claimant's jobs would have exacerbated her symptoms); Brown, 201 S.C. at 275, 353 S.E.2d at 282 (the claimant's treating physician testified that the work-related accident aggravated the claimant's preexisting condition).

This Court should reject Claimant's arguments based on Section 42-9-35.

C. A number of Claimant's assertions or statements are not supported by the record in this case and should be disregarded.

Claimant makes a number of assertions regarding the facts and history of this case that are not supported by the record and should be rejected. For example, Claimant asserts that the hearing before the Single Commissioner was "almost exclusively related to" whether or not Claimant was barred from compensation under S.C. Code Ann. § 42-9-60. (App. Br. p. 10). This statement is not only factually incorrect, (R. 56, line 21 – 57, line 11), but also irrelevant. The hearing covered all aspects of Claimant's claim and the Commission Decision was based on a review of the entire record and argument before both the Single Commissioner and the Appellate Panel. (Commission Decision, R. 6).

Claimant asserts an "undisputed chronology of events" and "facts" throughout his Brief. (*See* App. Br. pp. 6-9, 18, 20, 21, 22). However, a number of the facts as asserted by Claimant

are vigorously disputed by Respondents. For example, Claimant asserts that his prior treatment for spinal stenosis and disc herniation caused only "intermittent pain, shooting sensations and other symptoms." (*See* App. Br. pp. 7, 14, 22). In fact, as early as January 2012 and continuing through July 2012, Dr. Levinson's notes reflect "**rapidly worsening**" neck pain that was **constant** and of "**severe intensity**." Percocet was consistently prescribed, but helped "very little." Dr. Levinson's notes regularly indicate "[v]ery tight in the back of the neck, **stabbing pain** from ears to between shoulder blades." (R. 405-413, 417-420, 334-338) (emphasis added). Following Claimant's first MRI in February 2012, Dr. Levinson began a series of cervical steroid injections to address Claimant's cervical degenerative disc disease and forminal stenosis. (R. 414-416).

Although Claimant now alleges that "all witnesses to this incident agree that, during the altercation, Raulerson pushed Miller against the wall," (*See* App. Br. pp. 4, 7, 11, 18), Mr. Ingle, Mr. Osborne and Mr. Hollins only testified and/or stated Claimant and Mr. Raulerson were pushing and shoving each other. (R. 382, 383, 385). Mr. Ingle did agree that, at some point, Claimant's back was toward the wall; however, he never stated that Mr. Raulerson pushed or shoved Claimant against the wall. (R. 139, line 1 – 156, line 11) (R. 382). Although Claimant's counsel elicited testimony at the hearing from Mr. Frye that Mr. Raulerson shoved Claimant against the wall, (R. 182, lines 7-15), Mr. Frye also testified that his memory of the incident was fresher when he wrote his statement than at the hearing. (R. 181, lines 11-23). Mr. Frye's statement does not say anything about Claimant being shoved against the wall. (R. 384). Furthermore, to the extent that other witnesses confirmed that Claimant came in contact with a wall, not one eye witness stated that Claimant was "pushed against a wall **forcefully** ..." (App.

Br. p. 18).[11] Not even Claimant testified that he was shoved forcefully. (R. 65, lines 5-12) (R. 380). As to the facts surrounding the altercation itself, the one thing all witnesses agreed upon is that Claimant punched and kicked Mr. Raulerson.

With respect to the August 15, 2012 altercation, the only testimony supporting the repeated allegation that Claimant was pushed against a wall "and heard his neck 'pop,'" (*see* App. Br. pp. 3, 4, 7, 10, 11, 17, 18, 22), is Claimant's own, self-serving testimony. The first recorded statement regarding a "pop" in his neck was Claimant's August 27, 2012 visit to Dr. Levinson, a full 12 days after the incident. Tellingly, Dr. Levinson's notes of that visit also indicate Claimant is going "to discuss with attorney on route to take." (R. 330-333).[12] Claimant's repeated insistence that he reported the "pop" to Owen Steel two days before he knew he had been fired for insubordination rings hollow, and fails to take into account the fact that he was already planning to engage an attorney.

Thus, whether or not Claimant heard a "pop" in his neck during the altercation is an entirely subjective assertion of which only Claimant can know the truth or falsity. However, because the Commission placed Claimant's credibility surrounding his version of the incident in doubt, this statement is highly suspect. (Commission Decision, R. 30-31). The Commission is the final arbiter of witness credibility. Ross, 298 S.C. at 492, 381 S.E.2d at 730. Not a single Owen Steel witness testified that Claimant mentioned any "pop" during or after the incident.

There simply is no credible evidence in this record that Claimant suffered any "trauma" to his head or neck in the incident between himself and Mr. Raulerson on August 15, 2012. Contrary to Claimant's repeated assertion otherwise, the only injuries that are supported by the record in this case as having been incurred during the altercation were the result of Claimant

[11] Claimant repeatedly emphasizes Mr. Raulerson's size. (*See* App. Br. pp. 4, 11, 18). However, at 6'1" and between 222 and 225 pounds, (R. 320, 324, 328, 332, 336), Claimant was not a frail or small man.

[12] Thus, by the time Claimant saw a physician for his alleged injury, he was already planning legal action.

punching and kicking Mr. Raulerson. (R. 169, lines 18-25). Any purported injury or trauma to Claimant's head and/or neck was alleged only by him, a full 12 days the incident, and only after he had already decided to consult an attorney. Understandably, as noted above, the Commission determined that Claimant's version of the incident was not credible.

Similarly, the alleged "report" of the incident and injury to Mr. Sloan is based completely on nothing more than Claimant's self-serving testimony. There is no evidence, including no testimony even by Claimant himself, that immediately after the incident he reported to Mr. Sloan or anyone else that he had hurt his neck in the incident. Instead, Claimant testified that Mr. Oxedine and Mr. Poran (sp) began talking with the employees about what had happened.[13] Claimant testified only that he told Mr. Sloan his "side of it, and they told me that they were going to give me four days off." (R. 68, line 23 – 69, line 24). It is disingenuous of Claimant to assert that various facts are "undisputed" when only he knew he would testify to what he told or did not tell Mr. Sloan, and what Mr. Sloan said back to him, knowing full well that Mr. Sloan was not designated as a witness.[14]

Claimant also asserts that it is undisputed that he did not work over the weekend of August 25-26, 2012. (App. Br. p. 7). However, Mr. Oxendine testified that Claimant worked the following Wednesday, Thursday, Friday, as well as Saturday, August 25. (R. 196, lines 17-20).

Although Claimant claims that it is undisputed that he told Mr. Sloan he was leaving work on August 27 to go to the doctor, (App. Br. pp. 7, 12) (R. 75, lines 2-14), that Mr. Sloan told him Owen Steel "would send him to a doctor," (App. Br. pp. 3, 5), and that Mr. Sloan told

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[13] Although Claimant asserts that all the witness statements were taken on August 28, some are undated (including Claimant's), (R. 380, 382, 383)), some note that they were signed on the 28th, but not when they were first drafted, (R. 381, 384, 385). Furthermore, Mr. Oxedine testified that the statements were taken the day of the incident. (R. 204, lines 3-20).

[14] As noted above, Claimant called several Owen Steel employees as witnesses, Mr. Ingle, Mr. Raulerson and Mr. Frye, but failed to call Mr. Sloan.

Claimant he was glad he had gone to the doctor, (App. Br. p. 12), as noted above, the only evidence of this is Claimant's own testimony, which the Commission found to be unreliable. Furthermore, Mr. Oxedine testified that Claimant left work on August 27 angry over the fact that he had been suspended for four days in light of the fact that Mr. Raulerson had been suspended for only three days. (R. 196, line 20 – 198, line 2). Furthermore, Mr. Oxedine testified that he was not told on August 27, 2012 that Claimant had an appointment to see a doctor. (R. 199, lines 21-23).

Although Claimant relies extensively on Dr. Levinson's and Dr. Boyd's medical notes following the August 15 altercation, (App. Br. pp. 7, 8, 14, 15), the background and chronology of the supposed "precipitating event" was provided to both physicians by Claimant. (R. 291, 322, 326, 330). This is true as well of the questionnaire signed by Dr. Boyd, which was based in part on "the discussions with and statements by the patient (William Miller)," who conveyed to Dr. Boyd, "that he felt a pop during a physical altercation at work on or about August 15th after which his symptoms began and increased prior to his treatment." (R. 358-359). Again, because the Commission found Claimant's version of the altercation unreliable, (Commission Decision, R. 30-31), any medical conclusions linking Claimant's symptoms on August 27, 2012 (and later) to the August 15, 2012 altercation are tainted by Claimant's lack of credibility and, as a result, cannot serve as the basis for an award of benefits. Clade, 330 S.C. at 11, 496 S.E.2d at 858 (award cannot be based on speculation).

Although Dr. Levinson's notes from September 13, 2012 indicate Claimant's condition was "progressively worsening" and of "severe intensity," (App. Br. p. 8) (R. 322), his notes from appointments **prior** to the August 15, 2012 altercation consistently describe Claimant's neck condition as "**rapidly** worsening," and of "severe intensity." (R. 405, 410, 417, 421) (emphasis

added). Relying on R. 291, Claimant emphasizes that he advised Dr. Boyd that his neck condition was gradually improving and that he was doing fine with his neck and back prior to the August 15, 2012 incident, as if that were proof of the fact that he was doing fine prior to August 2012. (*See* App. Br. pp. 13, 15). As noted above, those statements are impossible to reconcile with Dr. Levinson's notes of rapidly worsening neck pain that was severe, constant and intense, with stabbing pain running from his ears to between his shoulder blades. (R. 405-420, 334-338).

Although Claimant asserts repeatedly that Dr. Boyd stated that "he found a fresh bone fragment in Claimant's neck," (App. Br. pp. 3, 6, 16, 19, 21), there is no medical documentation of a "fresh bone fragment" or any bone fragment in Claimant's neck that required surgical repair. Instead, Dr. Boyd noted "a large C6-7 disc herniation with extruded fragment," (R. 291), that was surgically removed and repaired. (R. 295-296). Dr. Boyd's handwritten note regarding a "[v]ery large, fresh/acute disc fragment compressing spinal cord," (R. 258), does not add anything regarding causation but is merely a statement regarding the physical condition of Claimant's cervical spine at the time Dr. Boyd examined him. Disc fragments (which are not "bone"), can occur as a result of degenerative disease or as the result of a trauma but are not necessarily indicative of one or the other. In this case, the only reliable evidence points to Claimant's pre-existing, rapidly worsening degenerative disc disease and spinal stenosis.

This Court should reject Claimant's attempts to misconstrue the record of this case.

II. The Commission did not commit any error in stating that the two MRIs in the record appeared to be nearly identical.

Despite Claimant's assertions otherwise, the Commission did not make an improper determination in this case. One of the factual findings the Commission reached after reviewing Claimant's medical records and his testimony was that the two MRIs in the case, "from before

and after the alleged accident ... strike this Panel as nearly identical." (Commission Decision, R. 29).

Relying on Burnette v. City of Greenville, 401 S.C. 417, 737 S.E.2d 200 (Ct. App. 2012), Claimant argues that the Commission erred in comparing the two MRIs. Claimant is wrong. In Burnette, the single commissioner reviewed two MRIs and found that the later one showed "only a 'minimal' protrusion with no nerve root displacement or impingement, and comparatively, no greater pathology of any significance (if any) than the MRI of 2004 ..." which the Court noted, was an opinion not expressed by any physician. 401 S.C. at 425, 737 S.E.2d at 204. Here, in contrast, the Commission simply reviewed the physicians' analysis of the MRIs, and noted that the two MRIs from before and after Claimant's alleged workplace injury, appeared to be "nearly identical." A review of the two MRI reports reveals this to be an accurate assessment.

Dr. Levinson's analysis of the February 16, 2012 MRI is as follows:

> 1. Left central disc extrusion at C6-7 causing severe central canal stenosis with cord compression as well as left neural foraminal stenosis. There is no cord edema.
>
> 2. Mild to moderate bilateral neural foraminal stenosis and mild central canal stenosis at C5-6 on the basis of a disc osteophytic bulge with unconvertebral joint hypertrophy, left greater than right.
>
> 3. Congenital shortening of the pedicles.

(R. 416).

Dr. Atchison's analysis of the September 4, 2012 MRI is as follows:

> 1. Central disc extrusion at C6-7 causing severe central canal stenosis with cord compression. The left central/foraminal component has contracted in the interval since the prior study. There is no residual left neural foraminal stenosis.
>
> 2. Mild central canal stenosis and mild to moderate bilateral neural foraminal stenosis at C5-6, unchanged from prior study.
>
> 3. Congenital shortening of the pedicles.

(R. 428).

Both Drs. Levinson and Atchison determined that Claimant had a disc extrusion at C6-7 causing severe canal stenosis with cord compression. Likewise, both Drs. Levinson and Atchison determined that Claimant had mild central canal stenosis at C5-6 and mild to moderate bilateral foraminal stenosis at C5-6. Dr. Atchison even noted that this was unchanged from the prior study. It was the Commission's duty to review and weigh all of the evidence in the record, including the medical evidence. Unlike the Commissioner in Burnette, here the Commission reviewed the physicians' medical conclusions regarding the two MRIs but did not reach an independent medical opinion not expressed by the medical providers.[15] In addition, here the Commission also reviewed Claimant's symptoms both before and after the alleged "workplace trauma," and found they mirrored each other closely. (Commission Decision, R. 29-30). Perhaps the most fundamental difference between the instant case and Burnette is that, here, whether the incident unfolded as Claimant alleges – that he was shoved forcefully against a wall at which time he heard a "pop" in his neck – is entirely dependent on Claimant's self-serving and uncorroborated version of the events of August 15, 2012, which the Commission found was not credible. (Commission Decision, R. 31).[16]

Even if, for the sake of argument, this Court should determine that the Commission erred in finding that the two MRIs were "nearly identical," this Court should nonetheless affirm the Commission Decision. As is discussed above, the Commission made multiple findings regarding Claimant's failure to meet his burden of proving a compensable injury. The Commission found:

[15] Ironically, Claimant appears to suggest that the Commission's conclusions might be more acceptable had they reviewed and analyzed the MRI films themselves. (*See* App. Br. pp. 13, 15, 16, 22, 24, 25). This concept has not been, and should not be, adopted by any South Carolina court.

[16] Respondents also note that this Court's Opinion in Burnette has been appealed to the South Carolina Supreme Court and that that petition for certiorari review is currently pending.

1) that Claimant's symptoms after August 15, 2012 mirror those from before, 2) that Claimant complained of "numbness, tingling, stabbing and rapidly worsening pain, tightness, and multiple other problems with his neck, back, and arms prior to this alleged accident," 3) that Claimant failed to inform Dr. Boyd that he had back and neck issues that he had been treated for prior to the August 15, 2012 altercation, 4) that "Claimant's version of events in this case" were not credible or believable, 5) the "employer witness testimonies as a whole were more believable than Claimant's testimony," 6) that Claimant failed to prove a causal link between the workplace altercation and his current medical condition, and 7) "Claimant did not satisfy his burden of proving that he sustained a compensable injury to the head, back, and/or neck while in the course and scope of his employment" with Respondents, (Commission Decision, R. 29-32), all of which are supported by substantial evidence. None of these findings require or are based on any analysis of the MRIs or findings regarding the same, and are sufficient to uphold the Commission's denial of benefits. Thus, regardless of how it rules on the Commission's consideration of the MRI reports, which Respondents assert was proper, this Court should affirm the Commission Decision "on any ground(s) appearing in the Record on Appeal." Rule 220(c), SCACR; 16 Jade Street, 398 S.C. at 349, 728 S.E.2d at 454.

This Court should hold that the Commission's finding with regard to the similarity of the two MRIs is supported by substantial evidence. Alternatively, if this Court should overturn the Commission's finding with regard to the MRIs, the Commission Decision should be upheld on the basis of other, sustainable grounds set forth therein.

III. The Commission did not err in not giving controlling weight to certain medical evidence in the record.

First, Respondents note that Claimant did not raise this issue to the Full Commission, (R. 438-439), which is, therefore, not preserved for appellate review. Ham, 193 S.C. 66, 7 S.E.2d

712 (1940); Brunson, 367 S.C. at 165-66, 623 S.E.2d at 872 (the factual findings and legal conclusions are the law of the case unless specifically challenged on the application for review to the full commission).

In the event the Court considers this issue, however, it is entirely without merit. The Commission properly and appropriately evaluated all of the evidence in this record, including the testimony of witnesses and the medical evidence, in order to reach its decision. The Commission is not required to give "controlling weight" to any particular piece of medical evidence under the Act. Pack, 381 S.C. at 536, 673 S.E.2d at 466-67 (observing that the "Commission need not accept or believe medical or other expert testimony, even when it is unanimous, uncontroverted, or uncontradicted"); Sharpe, 336 S.C. at 161, 519 S.E.2d at 106 (stating that "in compensation proceedings, where uncontroverted medical opinions are merely deductions drawn from certain symptoms, the final conclusion remains with the triers of fact").

Furthermore, as noted above, Dr. Boyd's statements, as well as his and Dr. Levinson's medical records, fall short of establishing causation in this case. Their notes and statements specifically note that they obtained the history of what occurred from Claimant, and his chronology of events was deemed not credible by the Commission. Therefore, to the extent either physician reached an opinion regarding causation (beyond a general, un-disclosed "recent trauma"), which Respondents argue they did not, that opinion is tainted by Claimant's lack of credibility.

The portion of Doe v. South Carolina Dept. of Health & Human Servs, 398 S.C. 62, 727 S.E.2d 605 (2011), that Claimant relies on is from Justice Hearn's dissent/concurrence where she discusses matters not even reached by the Court's Majority. In any event, Doe is irrelevant to the issues at hand, as it centers on the proper application of the State-run portion of Medicaid, the

Medicaid Home and Community-Based Services program, authorized under Section 1915(c) of the Social Security Act, 42 U.S.C. § 1396. In the footnotes cited by Claimant, Justice Hearn is discussing the policy underpinnings of 20 C.F.R. § 404.1527(d)(2),[17] which admittedly has "no similar requirement under our regulations." 398 S.C. at 82, 727 S.E.2d at 615. Footnote 16 is merely dicta in a concurrence/dissent based on a statutory and regulatory scheme that does not apply in this case.

Claimant's reliance on federal disability cases is equally misguided. Edwards v. Astrue, 2009 U.S. Dist. LEXIS 131689 (D. S.C. 2009), involved a claim for disability insurance benefits and Supplemental Security Income under Titles II and XVI of the Social Security Act ("SSA"). The analyses under SSA and the South Carolina Workers' Compensation Act are fundamentally different. A finding of disability under the SSA is based on an analysis of five sequential questions, which involves some burden shifting between the claimant and the Commissioner of Social Security. 2009 U.S. Dist. LEXIS 131689 **4-5. Under 20 C.F.R. § 416.927(d)(2),[18] which is substantively similar to 20 C.F.R. § 404.1527(d)(2) and has no counterpart in the Act or our Workers' Compensation Regulations, more weight is given to the treating physician than other medical opinions. This is simply not the law in workers' compensation cases in South Carolina, and Claimant has presented no case law or other authority suggesting our Act should be interpreted in light of these federal disability regulations. Instead, "[e]xpert medical testimony is designed to aid the Commission in coming to the correct conclusion; therefore, the Commission determines the weight and credit to be given to the expert testimony." Tiller, 334 S.C. at 340, 513 S.E.2d at 846.

[17] Now codified at 20 C.F.R. § 404.1527(c)(2).
[18] Now codified at 20 C.F.R. § 416.927(c)(2).

The only other two cases cited by Claimant in this section, decided by intermediate courts from foreign jurisdictions, are neither relevant nor authoritative. Kiel v. Texas Emp. Ins. Assoc., 679 S.W.2d 656, 1984 Tex. App. LEXIS 6288 (Tex. App. 1984), involved whether the claimant's heart attack arose in the course of his employment. First, the definition of "injury" in the Texas workers' compensation statute is markedly different from that in South Carolina's Act. *See* 679 S.W.2d at 658, 1984 Tex. App. LEXIS 6288 *4. Second, Kiel was tried to a jury, not heard by a Commission with subject-matter expertise. As noted above, the Commission is entitled to use its experience, technical competence and specialized knowledge in evaluating the evidence before it. Roper Hosp., 306 S.C. at 141, 410 S.E.2d at 560; S.C. Code Ann. § 1-23-330(4) (in contested cases, the "agency's experience, technical competence and specialized knowledge may be utilized in the evaluation of the evidence"); Johnson, 379 S.C. at 410, 665 S.E.2d at 659 (deferring to Commission's reasoning in distinguishing an intraocular implant from the term "corrective lens" as used in the Commission's regulations). Third, in Kiel, as was the case in Brown and Hargrove, the expert testified specifically that there was a causal link between the work or incident that contributed to the claimant's heart attack and death. That is not the case here. Fourth, the Texas Court of Appeals announced and applied a rule that is in direct conflict with South Carolina law, *i.e.*, that "unrebutted expert testimony may be considered as conclusive ..." 679 S.W.2d at 658-59, 1984 Tex. App. LEXIS 6288 *6. *See, e.g.*, Pack, 381 S.C. at 536, 673 S.E.2d at 466-67 (observing that the "Commission need not accept or believe medical or other expert testimony, even when it is unanimous, uncontroverted, or uncontradicted"); Sharpe, 336 S.C. at 161, 519 S.E.2d at 106 (stating that "in compensation proceedings, where uncontroverted medical opinions are merely deductions drawn from certain symptoms, the final conclusion remains with the triers of fact").

Loughan v. Slutz Seiberling Tire, 483 So.2d 1389, 1986 Fla. App. LEXIS 6802 (Fla. Dist. Ct. App. 1986), is equally inapplicable. The issue in Loughan was whether the repair of one compensable injury (repair of fractured clavicle) caused bursitis in the claimant's shoulder, as opposed to whether a work-related injury occurred in the first place, which is the issue under contention here.[19] In addition, the Florida Court of Appeals stated that "[i]t is an abuse of discretion for a deputy to reject uncontroverted medical testimony without a reasonable explanation," 483 So.2d at 1391, 1986 Fla. App. LEXIS 6802 *4, which is not the rule in South Carolina. Tiller, 334 S.C. at 340, 513 S.E.2d at 846 (while medical testimony is entitled to "great respect," it "should not be held conclusive irrespective of other evidence" and, once admitted, should be "considered just like any other testimony"); Hargrove, 360 S.C. at 294, 599 S.E.2d at 613 (Commission may disregard medical testimony in favor of other competent evidence in the record). Furthermore, despite Claimant's intimation otherwise, there is no evidence in this record that the Commission failed to review and evaluate all of the medical evidence in this case.

This Court should rule that the Commission properly evaluated the medical evidence in this case, along with the other evidence in this case, and was not required to give controlling weight to any particular physician's statement.

[19] In this respect, Loughan is similar to Mullinex, which is also inapplicable here.

CONCLUSION

For the reasons stated herein, this Court should affirm the Commission Decision.

Respectfully submitted,

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May 2, 2014

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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W.C.C. File No. 1213162

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Respondents' Brief of Owen Steel Company, Inc. and Great American Insurance Group c/o Strategic Comp Services complies with Rule 211(b), SCACR. The undersigned also certifies that this Respondents' Brief complies with the South Carolina Supreme Court's April 16, 2014 Order re: Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings.

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PROOF OF SERVICE

I certify that I have served the **Respondents' Brief** on William E. Miller, Jr., by depositing a copy of it in the United States Mail, postage prepaid, on May 2, 2014, addressed to his attorney of record:

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