THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
Workers' Compensation Commission

Appellate Case No.: 2019-000597

Nicholas B. Thompson, Employee, Appellant,

v.

Bluffton Township Fire District, Employer, and State Accident Fund, Carrier, Respondents.

FINAL BRIEF OF RESPONDENTS

D. Alan Westerlund, Jr.
Willson, Jones, Carter, & Baxley, PA
421 Wando Park Boulevard
Suite 100
Mount Pleasant, SC 29464
(843) 284-0835
Attorney for Respondents

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

STATEMENT OF ISSUES ON APPEAL

1. DID THE APPELLATE PANEL CORRECTLY DETERMINE THAT APPELLANT FAILED TO PROVE BY A PREPONDERANCE OF THE EVIDENCE IN THE RECORD THAT THERE IS A CAUSAL CONNECTION BETWEEN THE ALLEGED REPETITIVE ACTIVITIES THAT OCCURRED WHILE APPELLANT WAS ENGAGED IN THE REGULAR DUTIES OF HIS EMPLOYMENT AND THE INJURY?

2. DID THE APPELLATE PANEL CORRECTLY DETERMINE THAT APPELLANT FAILED TO PROVIDE PROPER NOTICE OF HIS ALLEGED REPETITIVE TRAUMA INJURY?

STATEMENT OF THE CASE

On April 19, 2017, Appellant filed a Form 50 Request for Hearing on which he alleged an injury to the back and legs which occurred "on, before, and after June 1, 2016" as the result of both injury and repetitive trauma. The Form 50 stated that "Claimant was injured while lifting a very heavy individual (about 400 pounds)." On May 30, 2017, Appellant filed an Amended Form 50 Request for Hearing on which he alleged an injury to the back and legs which occurred "on or about June 1, 2016" as the result of injury. The Amended Form 50 removed the allegation of repetitive trauma. On June 30, 2017, Appellant filed a second Amended Form 50 Request for Hearing on which he alleged an injury to the back, legs, bladder, and bowels which occurred "on/before/after June 1, 2016" as the result of injury and repetitive trauma. The second Amended Form 50 stated that "Claimant was injured lifting an approximately 400 lb. patient; twisting/lifting during Belfair Fire; Cutting/moving trees after Hurricane Matthew." Respondents denied Appellant sustained an injury by accident or repetitive trauma arising out of and in the course of employment.

On October 23, 2017, Commissioner R. Michael Campbell, II conducted a hearing on Appellant's Form 50. Commissioner Campbell filed a Decision and Order dated September 19, 2018 in which he concluded that Appellant did not sustain a compensable injury to any part of his

body as a result of the three alleged accidents which occurred on/before/after June 1, 2016. He further concluded that Appellant did not sustain a compensable repetitive trauma injury, as he failed to prove a direct causal relationship between the condition under which his work was performed and his injury. Appellant failed to provide the employer with proper notice of either an injury by accident or repetitive trauma injury as required by S.C. Code Ann. § 42-15-20. He further failed to establish by a preponderance of the evidence that he sustained an aggravation of a pre-existing condition. As a result, Commissioner Campbell denied the claim and did not award Appellant entitlement to any benefits under the S.C. Workers' Compensation Act.

On September 28, 2018, Appellant filed a Form 30 Request for Commission Review. The SC Workers' Compensation Commission Appellate Panel conducted an appeal hearing on December 18, 2018. During oral argument at the appeal hearing, Appellant dropped his allegation of a compensable injury by accident and opted instead to pursue only the repetitive trauma claim. The Appellate Panel issued its Decision and Order on March 7, 2019, in which it affirmed the Single Commissioner Decision and Order, as it found that Commissioner Campbell did not err in finding that Appellant failed to meet his burden of proof for entitlement to benefits under the SC Workers' Compensation Act for either injury by accident or repetitive trauma injury and denying the claim in its entirety.

Appellant filed a Notice of Appeal with the SC Court of Appeals on April 4, 2019. Respondents now timely submit this brief arguing the Appellate Panel's March 7, 2019 Decision and Order should be upheld as a matter of law.

STATEMENT OF FACTS

Appellant was hired by Bluffton Township Fire District as a firefighter on April 22, 2013. (R. p. 94, line 4) He works one 24-hour shift, then has two days off. (R. p. 101, line 21-p. 102, line 2) Each shift that he works has different daily duties. (R. p. 138, line 20) Throughout a shift, he is able to sleep, sit down and rest, and eat meals. (R. p. 140, lines 10-17)

Appellant presented to Dr. Daniel Hall at The Joint Chiropractic on September 8, 2014 for complaints of lower back pain that went into his right buttock and upper leg. (R. pp. 210-211) His back pain began one year before, was rated between 6/10 and 10/10, and consisted of sharp pain, tingling, shooting, pain, and numbness. (R. p. 214) Twisting and bending made his pain worse. (R. p. 214) Appellant testified that he went to The Joint related to his left shoulder and neck, but adjustments were not specifically focused on the lower back. (R. p. 637, lines 12-25) This testimony is not consistent with the medical records from The Joint.

On November 24, 2014, Appellant presented to Bluffton Family Chiropractic with discomfort in the right sacroiliac area rated 8/10. (R. p. 216) The pain radiated into his right leg, right knee, and right foot and was described as continuous, aching, dull, shooting, and tingling. (R. p. 216) His symptoms were aggravated by bending, lifting, turning, and twisting. (R. p. 216) When asked whether he went to Bluffton Family Chiropractic because he was having back pain, Appellant testified that "I wouldn't necessarily describe it as pain. It wasn't like the shooting nerve stuff that I've got going on now. It was more of a - - a tightness, I guess." (R. p. 636, lines 14-17) This testimony is not consistent with the medical records from Bluffton Family Chiropractic. X-rays revealed moderate degenerative disc disease at L5-S1, as well as foraminal narrowing of L4-5 and L5-S1. (R. p. 216) Appellant was advised to apply ice for 20 minutes and avoid heavy lifting in

order to encourage healing time. (R. p. 219) Avoidance of heavy lifting would impact his ability to perform his job duties as a firefighter.

On November 16, 2015, Appellant saw Dr. David Dorsner with a report of lower back pain with radiculopathy on the right side which had been present for five months and which was due to his work. (R. pp. 226-227) Appellant provided hearing testimony that he did not tell Dr. Dorsner that his back pain was directly related to his job. (R. p. 105, lines 6-12) This is clearly inconsistent with the medical records. A physical examination found right leg radiculopathy with a positive right straight leg raise. (R. p. 227) Dr. Dorsner diagnosed him with sciatica, back pain, and radiculopathy. (R. p. 227) He performed an injection, prescribed Skelaxin and Diclofenac, recommended stretching exercises, and ordered a lumbar spine brace. (R. p. 227) Use of a lumbar spine brace would impact Appellant's ability to perform his job duties as a firefighter. November 16, 2015 lumbar spine x-rays showed sacralized L5 segment whose sacralized transverse processes articulate abnormally with the sacral alae bilaterally, which was felt to be a possible source of pain. (R. p. 233) Dr. Dorsner then referred Appellant to Dr. John Batson for possible steroid injections. (R. p. 230)

Appellant saw Dr. Batson at Lowcountry Spine & Sport on December 2, 2015 with complaints of lower back pain radiating down the right leg, rated 5/10 average and 10/10 maximum. (R. p. 236) He reported that "the pain interrupts activity/exercise, sleep, work." (R. p. 236) He further reported balance/walking difficulty, weakness, numbness, and tingling in the right leg. (R. p. 236) His pain was aggravated by bending forward, bending backward, sitting, standing, walking, exercise/physical activity. (R. p. 236) These were all activities that he would perform at work as a firefighter. A physical examination was positive for right lower segment tenderness at and below L4-5. (R. p. 237) Dr. Batson diagnosed Appellant with low back pain, sprain of ligaments of lumbar spine, and radiculopathy of the lumbosacral region. (R. p. 238) He recommended continued use of

anti-inflammatories, use of a lumbar corset, and physical therapy. (R. p. 238) Appellant advised Dr. Batson that he would look to buy a lumbar corset over-the-counter. (R. p. 238) Use of a lumbar corset would impact Appellant's ability to perform his job duties as a firefighter.

Appellant saw Dr. Susan Cramer on February 10, 2017. He completed intake paperwork on which he reported severe low back pain and discomfort, tingling in the right leg, issues in bathroom, weight gain, and numbness/tingling which "just started out of nowhere." (R. p. 240) He specifically did not indicate that his pain was the result of an "injury on the job," which was one of the options that he could have circled on the intake paperwork. (R. p. 240) Dr. Cramer's note dated February 10, 2017 reflects complaints of lower back pain on the right which began a year ago, has been progressively worsening over time, and got acutely worse three months ago, but nothing particularly worsened it. (R. p. 460) Dr. Cramer's note reflects that Appellant saw Dr. Batson previously, who suggested he go to physical therapy, but he could not afford it. (R. p. 460) She ordered a lumbar spine MRI, which was performed on February 10, 2017 and revealed a transitional appearance of the L5 vertebral body with near-complete sacralization; moderate central stenosis at L4-5 secondary to diffuse annular bulging, central disc extrusion, and facet arthrosis; mild central stenosis at L5-S1 secondary to right paracentral disc protrusion; mild congenital central stenosis at L1-2, L2-3, and L3-4; severe bilateral lateral recess stenosis at L4-5 with probable bilateral L5 traversing nerve root impingement; and mild bilateral L4-5 foraminal stenosis without exiting nerve root impingement. (R. p. 471)

Appellant returned to Dr. Cramer on February 15, 2017 and again did not report a work-related injury. (R. pp. 464-466) He received a right S1 transforaminal epidural steroid injection and right L5 transforaminal steroid injection at that time. (R. pp. 464-466) On February 28, 2017, Appellant returned to Dr. Cramer for follow up after the injections. Dr. Cramer's note indicates

Appellant complained of lower back pain bilaterally, right greater than left, that began 8 months ago and "was due to lifting a person. The injury happened at work." (R. p. 467)

Appellant saw Dr. James Lindley at The Neurological Institute of Savannah & Center for Spine on February 16, 2017. He complained of severe low back pain and radiating right leg pain and paresthesias which began about one year ago. (R. p. 473) Three months ago, his symptoms became more intense and began radiating into the right leg to the foot. (R. p. 473) Dr. Lindley discussed options of a minimally invasive decompression and interbody fusion at L4-5 or an L4-5 disc replacement. (R. p. 475) Appellant informed Dr. Lindley that he wanted to proceed with the disc replacement. (R. p. 475) Dr. Lindley later changed his surgical recommendation to an L4-5 decompressive laminectomy with interlaminar stabilization and a right L5-S1 laminotomy to decompress the right S1 nerve root. (R. p. 478)

Dr. Cramer completed an FMLA form on February 20, 2017 on which she indicated that Appellant's condition commenced in approximately November 2016. (R. p. 324) Dr. Lindley completed an FMLA form on which he indicated that the approximate date on which Appellant's condition commenced was February 2016. (R. p. 328) A Go Fund Me campaign started on Appellant's behalf states that he was injured "in the line of duty last summer," referring to summer 2016. (R. p. 248)

On February 22, 2017, Appellant met with Captain Pete Reid of the Bluffton Township Fire District and completed an accident report. The accident report indicates "Employee Nicholas Bradley Thompson on 2/22/2017 notified Capt. Pete Reid that he wished to file a Worker's Compensation claim for a back injury. Employee unable to report specific date of injury other than June 2016. No previous accident report or injury claim filed by employee." (R. p. 332) Appellant's signature appears at the bottom of the accident report. (R. p. 332) A Form 12A dated February 23,

2017 reflects that the employer was notified on February 22, 2017 that Appellant alleged low back pain after lifting a resident from the floor of a confined space on June 1, 2016. (R. p. 334)

Appellant went to Rowe Spine and Pain Care on September 20, 2017, by referral from Dr. Lindley with a report of "hurting his back while lifting a heavy patient (450lbs) last year." (Supp. R. p. 7) The note does not reference the other two alleged work accidents, or the alleged repetitive work duties.

At the hearing before the Single Commissioner, Appellant was still pursuing a claim for injury by accident related to three specific accidents. He testified that the first event which caused significant back pain was when he performed a lift and assist call with a patient weighting approximately 400 pounds. (R. p. 107, lines 12-24) He guesses this event took place somewhere around April or March 2016. (R. p. 110, lines 2-5) He did not directly inform his supervisor that he hurt his back at that time. (R. p. 154, line 3) He did not complete an incident report that day. (R. p. 113, line 7) He did not request medical treatment following the incident. (R. p. 154, line 6)

Appellant testified that the second event he was involved in was a fire on July 9, 2016. (R. p. 113, lines 18-22) He testified that he had to redirect high pressure water flow through a three inch hose while crouching down for approximately 20-25 minutes. (R. p. 114, line 8-p. 115, line 9) He took a break, and then went back and maintained the same position for an additional 15 minutes. (R. p. 115, lines 14-19) He did not report an on-the-job injury afterward. (R. p. 155, line 22) He did not request medical treatment or complete an injury report. (R. p. 157, lines 3-6)

After Hurricane Matthew in October 2016, Appellant was on shift for roughly five days and performed disaster cleanup. (R. p. 119, lines 5-17) His activities included cutting trees and removing trees from roadways. (R. p. 119, lines 21-25) He did not report that he injured his back on the job.

(R. p. 157, lines 15-17) However, he believed that his back injury was work-related as of October 2016. (R. p. 158, line 9)

Other than his testimony, Appellant submitted no evidence to prove that the three alleged injuries by accident occurred. He admitted that he did not report any of them and did not complete accident reports afterward.

Captain Pete Reid is a Personnel Officer with Bluffton Township Fire District and a licensed attorney in South Carolina. (R. p. 170, lines 6-11) He handles all of the general human resource functions, including FMLA, workers' compensation, reporting of accidents, and accident investigations. (R. p. 170, lines 17-25) Captain Reid testified that Appellant came to him on February 13, 2017 to discuss FMLA paperwork. (R. p. 172, lines 18-19) Appellant had seen Dr. Cramer and anticipated the need for surgery, so Captain Reid prepared an FMLA eligibility notice and medical certification. (R. p. 172, line 21-p. 173, line 4) Appellant did not report that his back injury was work related. (R. p. 173, line 13) Appellant returned to Captain Reid on February 22, 2017, reported that a recommendation for surgery had been denied, and reported that his mother urged him to report a workers' compensation claim. (R. p. 173, line 23-p. 174, line 7) At that time, Appellant related a single incident related to him lifting a heavy patient. (R. p. 174, lines 10-11) Appellant could not specify a particular date, but felt it was in the June timeframe and they settled on a date of June 1. (R. p. 174, lines 14-19) Appellant signed the paperwork, verifying that he read it, understood it, and agreed with the contents of the report. (R. p. 175, lines 3-6) Appellant did not relate any other calls or back pain related to anything other than a lifting incident when he met with Captain Reid on February 22, 2017. (R. p. 175, line 11) He did not relate his back injury to fighting a fire, cleaning up after Hurricane Matthew, or his alleged repetitive job duties. (R. p. 176, line 3)

Captain Reid previously worked as a firefighter with a different department and is fairly knowledgeable about the daily duties of firefighters. (R. p. 178, lines 2-3) Captain Reid does not consider the day-to-day job duties of a firefighter to be repetitive. (R. p. 178, line 12) It is expected that a firefighter will sleep, cook, eat, and work out during the course of a 24-hour shift. (R. p. 179, lines 7-20) Throughout a 24-hour shift, a firefighter does a wide variety of tasks. (R. p. 179, line 24) Each day has different station duties and daily duties. (R. p. 180, line 6)

On July 11, 2017, counsel for Appellant obtained a causation statement from Dr. Lindley. In order to allow the Respondents the opportunity to cross-examine Dr. Lindley regarding the opinions given in the statement, Dr. Lindley's deposition was conducted on January 18, 2018. Dr. Lindley is a board certified neurosurgeon. (R. p. 551, lines 18-20) He first saw Appellant on February 16, 2017. Dr. Lindley has not seen any accident reports or medical reports which detail Appellant's three alleged work accidents. (R. p. 563, line 18) He has not seen an ergonomic study related to the repetitive nature of Appellant's job. (R. p. 564, lines 4-5) He has not seen any evidence that proves that the alleged work accidents occurred and is speculating on the accuracy of the events based on what he and his nurse had been told by Appellant. (R. p. 589, lines 20-25)

Dr. Lindley believes it is speculative to say that Appellant's back injury is due to the repetitive nature of his job because "there are multiple factors, so we don't know exactly which factor was the primary reason for the problem or was it multiple factors where there was wear and tear over time." (R. p. 567, line 23-p. 568, line 2) Dr. Lindley cannot state to a reasonable degree of medical certainty that Appellant's back condition is causally-related to his employment. (R. p. 568, lines 13-20; p. 568, lines 23-25; p. 580, lines 21-24) Dr. Lindley cannot say whether an exacerbation of Appellant's back condition is related to repetitive trauma versus the three alleged work accidents versus the general physical nature of his job. (R. p. 586, lines 21-22; p.587, line 8)

STANDARD OF REVIEW

The Administrative Procedures Act ("APA") establishes the standard for judicial review of decisions of the Workers' Compensation Commission. Hargrove v. Titan Textile Co., 360 S.C. 276, 599 S.E.2d 604 (Ct. App. 2004). Upon review, appellate courts have the power to reverse or modify a decision if the findings and conclusions of the administrative agency are affected by an error of law, clearly erroneous in view of the reliable and substantial evidence on the whole record, arbitrary or capricious, characterized by an abuse of discretion, or a clearly unwarranted exercise of discretion. Gray v. Club Group, Ltd., 339 S.C. 173, 528 S.E.2d 435 (Ct. App. 2000). Under the APA, an appellate court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact, but it may reverse for errors of law. Bentley v. Spartanburg County, 730 S.E.2d 296, 398 S.C. 418 (S.C. 2012) (citing S.C. Code Ann. § 1-23-380(5)). Specifically, "[i]n workers' compensation cases, the Appellate Panel is the ultimate fact finder." Shealy v. Aiken County, 341 S.C. 448, 535 S.E.2d 438 (S.C. 2000) (citing Hunter v. Patrick Constr. Co., 289 S.C. 46, 344 S.E.2d 613 (1986)). "The final determination of witness credibility and the weight to be accorded evidence is reserved to the Full Commission." Id. (citing Ford v. Allied Chem. Co., 252 S.C. 561, 167 S.E.2d 564 (1969)). It is not the task of the appellate court to weigh the evidence as found by the Full Commission. Id. (citing Ellis v. Spartan Mills, 276 S.C. 216, 277 S.E.2d 590 (1981)).

The substantial evidence rule of the APA governs the standard of review in a workers' compensation decision. Frame v. Resort Servs., Inc., 357 S.C. 520, 593 S.E.2d 491 (Ct. App. 2004). This Court must affirm the findings of fact made by the Full Commission if they are supported by substantial evidence. Jordan v. Kelly Co., 381 S.C. 483, 486, 674 S.E.2d 166, 168

(2009). Substantial evidence is neither a mere scintilla of evidence, nor 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 conclusion the administrative agency reached in order to justify its action. Pratt v. Morris Roofing, Inc., 357 S.C. 619, 594 S.E.2d 272 (2004). Thus, substantial evidence is a lesser standard than by a preponderance of the evidence. Id.

ARGUMENT

I. THE APPELLATE PANEL CORRECTLY DETERMINED APPELLANT FAILED TO PROVE BY A PREPONDERANCE OF THE EVIDENCE IN THE RECORD THAT THERE IS A CAUSAL CONNECTION BETWEEN THE ALLEGED REPETITIVE ACTIVITIES THAT OCCURRED WHILE APPELLANT WAS ENGAGED IN THE REGULAR DUTIES OF HIS EMPLOYMENT AND THE INJURY.

The record and the Decision and Order show that the Appellate Panel considered the record as a whole and reached a reasonable conclusion based on all of the evidence submitted by both parties. Contrary to the arguments of Appellant, they did not commit any error of law in this matter.

a. The Commission correctly reviewed the record as a whole and in its discretion determined Appellant did not meet his burden of proving a compensable repetitive trauma injury by a preponderance of the evidence.

S.C. Code Ann. § 42-1-172(B) provides, "[a]n injury is not considered a compensable repetitive trauma injury unless a commissioner makes a specific finding of fact by a preponderance of the evidence of a causal connection that is established by medical evidence between the repetitive activities that occurred while the employee was engaged in the regular duties of his employment and the injury." An appellate court may not substitute its judgment for that of the

agency as to the weight of the evidence on questions of fact. Bentley v. Spartanburg County, 730 S.E.2d 296 (S.C. 2012) (citing S.C. Code Ann. § 1-23-380(5)).

Black's Law Dictionary does not include a definition of "repetitive." Meriam-Webster Dictionary defines "repetitive" as "repetitious" and "containing repetition." "Repetition" is defined as "the act or an instance of repeating or being repeated" and "a motion or exercise (such as a push-up) that is repeated and usually counted."

Appellant testified regarding a number of physical requirements of his job as a firefighter, but failed to describe any actual repetitive activities. He provided hearing testimony that he works one 24-hour shift, then has two days off. (R. p. 101, line 21-p. 102, line 2) Each shift that he works has different daily duties. (R. p. 138, line 20) Throughout a shift, he is able to sleep, sit down and rest, and eat meals. (R. p. 140, lines 10-17) He did not submit any evidence to substantiate his claim that his occupation involves repetitive activities. He did not submit an ergonomics report or a job duty analysis report. He offered no expert testimony as to the repetitive nature of his job.

Captain Pete Reid, an employer representative who testified at the Single Commissioner hearing, previously worked as a firefighter with a different department and is fairly knowledgeable about the daily duties of firefighters. He does not consider the day-to-day job duties of a firefighter to be repetitive. (R. p. 178, lines 2-12) It is expected that a firefighter will sleep, cook, eat, and work out during the course of a 24-hour shift. (R. p. 179, lines 7-20) Throughout a 24-hour shift, a firefighter does a wide variety of tasks. (R. p. 179, line 24) Each day has different station duties and daily duties. (R. p. 180, line 6) Captain Reid cannot state any repetitive duties which a firefighter is required to perform. (R. p. 186, line 9)

The Appellate Panel Decision and Order accurately points out that Appellant's job description includes reference to performing a variety of physical activities, none of which are

performed on a constant or repetitive basis. (R. pp. 544-546) There is no evidence in the record whatsoever which supports Appellant's argument that his job as a firefighter involves repetitive activities.

What Appellant appears to be arguing is that it is the general physical nature of his job which entitles him to workers' compensation benefits. Looking at S.C. Code Ann. § 42-1-172(B), there is the requirement of a causal connection between the "repetitive activities" and the injury. Following the plain meaning rule, the legislature used the word "repetitive" for a reason, and to construe that language to include any and all physically-demanding jobs would be inappropriate.

The first medical visit Appellant had after June 1, 2016 was when he saw Dr. Susan Cramer on February 10, 2017. He completed intake paperwork on which he reported severe low back pain and discomfort, tingling in the right leg, issues in bathroom, weight gain, and numbness/tingling which "just started out of nowhere." (R. p. 240) He specifically did not indicate that his pain was the result of an "injury on the job." (R. p. 240) Appellant returned to Dr. Cramer on February 15, 2017, and again did not report a work-related injury. (R. pp. 464-466) Dr. Cramer's February 28, 2017 note is the first medical note to mention any alleged work accident. This note indicates that Appellant's back pain began 8 months ago and "was due to lifting a person. The injury happened at work." (R. p. 467) There is no mention of any other work accidents or the alleged repetitive activities involved in Appellant's job.

Appellant saw Dr. James Lindley at The Neurological Institute of Savannah & Center for Spine on February 16, 2017. He complained of severe low back pain and radiating right leg pain and paresthesias which began about one year ago. (R. p. 473) Three months ago, his symptoms became more intense and began radiating into the right leg to the foot. (R. p. 473) There is no mention of any work accidents or the alleged repetitive activities involved in Appellant's job.

Appellant relies on the opinion of Dr. Lindley regarding causation. He obtained a causation statement from Dr. Lindley dated July 11, 2017. However, Respondents conducted Dr. Lindley's deposition on January 18, 2018, and he provided further clarification of his opinions. Dr. Lindley has not seen any evidence that proves that the three work accidents Appellant alleged at the Single Commissioner hearing occurred and is speculating on the accuracy of the events based on what he and his nurse had been told by Appellant. (R. p. 589, lines 20-25) Dr. Lindley admitted that he has not seen an ergonomics study related to the repetitive nature of Appellant's job. (R. p. 564, lines 4-5) His opinion regarding whether Appellant's job is repetitive or not is based upon a layman's definition of "repetitive." (R. p. 585, line 23)

Dr. Lindley testified that he is not sure if the repetitive nature of Appellant's job caused his back condition or if the work accidents caused the back condition. (R. p. 566, lines 19-20) Dr. Lindley believes it is speculative to say that Appellant's back injury is due to the repetitive nature of his job because "there are multiple factors, so we don't know exactly which factor was the primary reason for the problem or was it multiple factors where there was wear and tear over time." (R. p. 567, line 23-p. 568, line 2) Dr. Lindley cannot state to a reasonable degree of medical certainty that Appellant's back condition is causally-related to his employment. (R. p. 568, lines 13-20; p. 568, lines 23-25; p. 580, lines 21-24) Dr. Lindley cannot say whether an exacerbation of Appellant's back condition is related to repetitive trauma versus the three alleged work accidents versus the general physical nature of his job. (R. p. 586, lines 21-22; p. 587, line 8)

The Commission appropriately considered the competing opinions between Dr. Lindley's July 11, 2017 statement and his January 18, 2018 sworn deposition testimony, then appropriately placed greater weight on the deposition testimony. Dr. Lindley provided sworn testimony that he cannot state to a reasonable degree of medical certainty that Appellant's back condition is causally-

related to his employment. It is the Commission's job to consider the evidence as a whole, then determine which evidence should be given greater weight. "The final determination of witness credibility and the weight to be accorded evidence is reserved to the Commission and it is not the task of the court to weigh the evidence as found by the Commission." Sharpe v. Case Produce, Inc., 336 S.C. 154, 160, 519 S.E.2d 102, 105 (1999).

Based upon the greater weight of the evidence, the Appellate Panel correctly ruled that Appellant failed to prove a causal relationship between the condition under which his work was performed and his injury, as required by S.C. Code Ann. § 42-1-172.

b. Appellant's argument that the Commission applied the wrong standard when evaluating Appellant's alleged repetitive trauma injury is unsubstantiated by the record.

As noted above, a repetitive trauma injury is not compensable unless a commissioner makes a specific finding of fact by a preponderance of the evidence of a causal connection that is established by medical evidence between the repetitive activities that occurred while the employee was engaged in the regular duties of his employment and the injury. It is the duty and obligation of the Commission, in its role as fact finder, to consider all of the evidence presented and, in reviewing the record as a whole, to use its discretion as to the weight given to the evidence submitted in forming findings and conclusions based on that evidence. This is precisely what the Appellate Panel did in this matter.

At no point in the Appellate Panel's Order does the Appellate Panel include a requirement of "absolute certainty," as alleged by Appellant, rather than preponderance of the evidence. Rather, the Commission clearly lays out that they considered all of the evidence as a whole and reached the determination that Appellant failed to prove by a preponderance of the evidence a

causal connection between the repetitive activities that occurred while the employee was engaged in the regular duties of his employment and the injury. The Commission considered the medical reports, the accident report, the job description, the testimony of Dr. Lindley, the testimony of Appellant, and the testimony of Capt. Pete Reid. The Commission did not require absolute certainty on the part of Dr. Lindley regarding medical causation, but rather read his deposition testimony and reached the logical conclusion that his testimony, in combination with the remaining record, did not prove Appellant's case by a preponderance of the evidence.

The Appellate Panel took into account the Claimant's job description, which does not indicate that any duties are performed on a constant or repetitive basis. (Finding of Fact # 25) (R. p. 36) It also took into account the testimony of Captain Pete Reid, who cannot state any repetitive duties which a firefighter is required to perform. (Finding of Fact #25) (R. p. 37) The Appellate Panel also considered the deposition testimony of Dr. Lindley, who testified numerous times that he cannot state within a reasonable degree of medical certainty that the Claimant's back condition is causally-related to his employment. (R. p. 568, lines 13-20; p. 568, lines 23-25; p. 580, lines 21-24)

In his Initial Brief, Appellant alleges that the Commission's analysis of Dr. Lindley's testimony was a "mistreatment of the three *examples* of particularly demanding repetitive activities *as if they were each independent episodes of a workplace injury*, rather than as 'mini accidents' that are the part and parcel of repetitive trauma cases." This is not an accurate portrayal of the history of the claim or the analysis performed by the Commission. Appellant originally filed a Form 50 alleging both injury by accident and repetitive trauma. (R. p. 41) He then filed an Amended Form 50, removing the allegation of repetitive trauma. (R. p. 42) Finally, he filed a second Amended Form 50, again alleging both injury by accident and repetitive trauma. (Supp.

R. p. 2) Specific to injury by accident, the second Amended Form 50 noted three incidents involving 1) lifting a heavy patient, 2) fighting the Belfair fire, and 3) clean-up after Hurricane Matthew. (Supp. R. p. 2)

At the Single Commissioner hearing, Appellant's counsel primarily argued for compensability of a back injury due to "three specific work injuries." (R. p. 79, lines 2-3) According to Appellant's counsel, "the *first issue* is compensability of these injuries and, you know, in addition to the injury to the back, a repetitive trauma injury." (emphasis added) (R. p. 81, lines 4-7) Due to the allegations of three injuries by accident and repetitive trauma on one Form 50, Respondents were made to essentially defend four claims at once. They were required to question Dr. Lindley regarding both the three alleged injuries by accident and the alleged repetitive trauma at his deposition. In his Form 30 Request for Review and Brief to the Appellate Panel, Appellant continued arguing that the Commission should have found the three injuries by accident compensable. (R. pp. 43-47) It was not until the hearing before the Appellate Panel that the Claimant dropped his allegation of an injury by accident due to the three work accidents, acknowledging that there was no proper notice given for any of the three alleged accidents, and decided to proceed on repetitive trauma only. (R. p. 192, line 20-p. 193, line 3) To now claim that the Commission was incorrect to analyze the three work accidents he listed on his Form 50 as independent episodes of a workplace injury rather than "mini accidents" is an attempt to revise the history of the claim.

Appellant's Initial Brief appears to argue that it is the Respondents' burden to disprove compensability. To the contrary, it is the Appellant's burden to prove entitlement to benefits under the Act. Appellant's Initial Brief makes multiple references to Respondents not offering "contrary evidence" or records to suggest some other cause for injury. This was not needed, as Appellant

failed to acquire the required opinion, stated to a reasonable degree of medical certainty, relating the alleged repetitive activities that occurred while he was engaged in the regular duties of his employment and the injury

II. THE APPELLATE PANEL PROPERLY FOUND THAT APPELLANT FAILED TO PROVIDE PROPER NOTICE OF HIS ALLEGED REPETITIVE TRAUMA INJURY.

Respondents maintain that Appellant's argument regarding notice is moot, as he failed to prove a compensable repetitive trauma injury. However, should the Court of Appeals believe Appellant obtained the requisite evidence to prove a compensable repetitive trauma injury, Respondents contend that Appellant failed to meet the notice requirement for repetitive trauma claims. "In the case of repetitive trauma, notice must be given by the employee within ninety days of the date the employee discovered, or could have discovered by exercising reasonable diligence, that his condition is compensable." S.C. Code Ann. § 42-15-20(C).

Appellant presented to Dr. Daniel Hall at The Joint on September 8, 2014, and Bluffton Family Chiropractic on November 24, 2014, with lower back pain and radicular symptoms. (R. pp. 210-211; R. p. 216) He was advised to avoid heavy lifting in order to encourage healing time. (R. p. 219) This would have directly impacted his ability to perform his job duties as a firefighter.

There is no disputing that Appellant believed his lower back pain with right-sided radiculopathy was work-related on November 16, 2015, when he saw Dr. David Dorsner. (R. pp. 226-227) Dr. Dorsner diagnosed Appellant with sciatica, back pain, and radiculopathy and ordered a lumbar spine brace. (R. p. 227) Use of a lumbar spine brace at work would interfere with his ability to perform his job duties as a firefighter. Thus, as of November 15, 2015, Appellant's back injury,

which he reported was related to his work, both required medical care and interfered with his ability to perform his job.

This is further evident by Appellant's report to Dr. John Batson on December 2, 2015, that "the pain interrupts activity/exercise, sleep, *work*." (emphasis added) (R. p. 236) He further reported balance/walking difficulty, weakness, numbness, and tingling in the right leg. (R. p. 236) His pain was aggravated by bending forward, bending backward, sitting, standing, walking, exercise/physical activity. (R. p. 236) These were all activities that he performed during the performance of his job duties as a firefighter. Dr. Batson diagnosed Appellant with low back pain, sprain of ligaments of lumbar spine, and radiculopathy of the lumbosacral region and recommended use of a lumbar corset. (R. p. 238) Thus, as of December 2, 2015, Appellant sought medical care related to his back pain with radiculopathy and admitted that his symptoms interfered with his ability to perform his job.

Appellant did not provide notice of his allegation of repetitive trauma injury to the employer until April 19, 2017, when he filed a Form 50 Request for Hearing. (R. p. 41) That Form 50 alleged both an injury by accident and repetitive trauma, but described only that Appellant was injured while lifting a very heavy individual. It mentioned neither the two additional accidents nor the alleged repetitive work activities. Appellant's Amended Form 50 dated May 30, 2017 actually withdrew the claim of repetitive trauma and alleged only an injury by accident on or about June 1, 2016, when Appellant was lifting a very heavy individual. (R. p. 42) A second Amended Form 50 was filed on June 30, 2017, again alleging repetitive trauma and adding details about the two additional alleged accidents. (Supp. R. p. 2) It did not provide any details about the alleged repetitive trauma. Appellant did not formally provide notice of what he felt was the repetitive trauma until his deposition on July 10, 2017.

Appellant relies on King v. International Knife and Saw – Florence 718 S.E.2d 227, 395 S.C. 437 (S.C. Ct. App. 2011) to support his argument regarding notice. However, this reliance is misplaced. In King, the Court stated that "King's condition was not compensable until it either required medical care or interfered with his ability to perform his job, whichever occurred first." 718 S.E.2d 227, 231, 395 S.C. 437, 445. Based upon the King precedent, Appellant in this case sought medical treatment with Dr. David Dorsner on November 16, 2015 for work-related lower back pain with right-sided radiculopathy. On December 2, 2015, Appellant told Dr. John Batson that his pain interrupted work. Dr. Daniel Hall told him to avoid heavy lifting and Dr. Batson told him to wear a lumbar corset. Both of these recommendations would clearly affect his ability to perform his job. King supports a denial of the claim for lack of timely notice.

Additionally, Appellant offered no testimony or proof of any reasonable excuse for not giving timely notice.

CONCLUSION

Based on the foregoing, this Court should affirm the Appellate Panel Decision and Order.

Respectfully submitted,

WILLSON JONES CARTER & BAXLEY, P.A.

D. Alan Westerlund, Jr., Esquire
421 Wando Park Boulevard, Suite 100
Mt. Pleasant, SC 29464
Attorneys for Respondents

Date: October 31, 2019

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
Workers' Compensation Commission

Appellate Case No.: 2019-000597

Nicholas B. Thompson, Employee, Appellant,

v.

Bluffton Township Fire District, Employer, and State Accident Fund, Carrier, Respondents.

CERTIFICATE OF COUNSEL

I certify that the Final Brief of Respondents complies with SC Appellate Court Rule 211(b).

October 31, 2019

D. Alan Westerlund, Jr.
Willson, Jones, Carter & Baxley, PA
421 Wando Park Boulevard
Suite 100
Mt. Pleasant, SC 29464
(843) 284-0835
Attorneys for Respondents