THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

R. Michael Campbell, II, Commissioner
T. Scott Beck, Commissioner
Gene McCaskill, Commissioner

W.C.C. FILE NO.: 1713216
Appellate Case No. 2019-000795

Angela Elmer,
Claimant, Appellant,

v.

City Of North Charleston,
Employer,

and

Companion TPA,
Carrier. Respondents.

INITIAL BRIEF OF RESPONDENTS

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STATEMENT OF THE CASE

Appellant sustained an admitted injury arising out of a motor vehicle accident on September 7, 2017. Appellant was a Master Patrol Officer with the City of North Charleston Police Department and was rear-ended in her vehicle during the course and scope of her employment. The records indicate that it was a small collision with minor impact and minimal damage to both cars. Appellant treated with Dr. Weissglass, and she was released on October 23, 2017, when she reported to Dr. Weissglass a complete resolution of her symptoms, both neck and back, and indicated that she was back to her baseline. Appellant testified both at the hearing and her deposition that she told Dr. Weissglass that she felt she was back to her pre-work accident status and was ready to return to work full duty with no restrictions.

Since that time, Appellant alleged several flare-ups of her back pain. One of the flare-ups occurred in December 2017, for which she did not seek medical treatment. Others occurred in February 2018 as well as April 2018, which resolved in May 2018. Dr. Weissglass, who treated Appellant since the original accident happened, stated that the flare-ups were not related to her work-related motor vehicle accident, but to her underlying, pre-existing condition. Appellant originally hurt her back in 2006, and she underwent low back surgery in 2012. After her back surgery but before her work accident, Appellant experienced intermittent pain and several flare-ups for which she sought medical treatment. Prior to the work accident, she had seen a chiropractor regularly for adjustments and monthly maintenance.

Based on the medical evidence and hearing testimony, the Single Commissioner found that Respondents provided proper benefits under the Act to Appellant following her work injury on September 7, 2017, until she was released from care on October 23, 2017, with a complete resolution of her symptoms. The Single Commissioner further found that that Appellant's

subsequent flare-ups after October 23, 2017, were not causally related to her work accident but were a result of her underlying condition, that Appellant was not entitled to temporary compensation for time missed in April or May of 2018, and that she was not entitled to any permanent disability as a result of her work-related injury.

The Single Commissioner's October 29, 2018 Order was timely appealed by Appellant, and a hearing was held before the Full Commission ("Commission") on February 19, 2019. The Commission issued its Order on April 12, 2019, affirming the Findings of Fact and Conclusions of Law of the Single Commissioner in full. Appellant subsequently served her Notice of Appeal to this Court on May 7, 2019.

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.

ARGUMENTS

I. THE COMMISSION CORRECTLY ALLOWED THE SUBMISSION OF DR. WEISSGLASS' DEPOSITION.

Due to testimony during Dr. Forrest's August 6, 2018 deposition, Respondents scheduled the deposition of Appellant's original treating physician, Dr. Weissglass. On August 8, 2018, Dr. Weissglass' deposition was scheduled for August 22, 2018. Notice was timely and properly given, and Appellant was given more than ten days advance notice. Appellant's counsel then notified the Respondents that he could not attend the deposition on that date due to scheduling conflicts. (E-mail Time-Stamped 9:34AM dated August 21, 2018). As a result, the deposition was rescheduled for August 23, 2018, the morning of the hearing. (E-mail Time-Stamped 10:06AM dated August

21, 2018). If the deposition had gone forward on the originally scheduled date, the transcript would have been available at the hearing. However, due to the conflict of Appellant's counsel, which was accommodated by Respondents, the transcript was not available until the day after the hearing, and Respondents immediately sent the transcript to the Commission for consideration upon receipt. (E-mail Time-Stamped 3:01PM dated August 24, 2018). It is disingenuous for Appellant's counsel to object to the transcript not being ready at the time of the hearing when the reason is that the deposition was rescheduled to accommodate the scheduling conflict of Appellant's counsel.

Furthermore, the Appellant was notified on the Respondents' Pre-Hearing Brief that the deposition would be submitted. (Respondents' Form 58). Under S.C. Code Ann. Regs. 67-611, the nonmoving party (Respondents) is required to file a Form 58 Pre-hearing Brief with the Commissioner and serve a copy on the opposing party at least ten days before the hearing. Here, Respondents complied with the regulation and clearly noted on their Form 58 that Dr. Weissglass' deposition would be an exhibit at the hearing. (Respondents' Form 58). Per Morgan v. JPS Automotives, 321 S.C. 201, 467 S.E.2d 457 (1996), the South Carolina Court of Appeals found that a Commissioner can properly adjourn a hearing to allow a party to procure additional evidence when the evidence is in existence, identified, and necessary for the decision but unavailable at the hearing. In fact, the Court specifically found that when a party notifies the Commissioner and the opposing party of a request for an adjournment on the Form 58 Pre-Hearing Brief, an adjournment causes no prejudice to the opposing party and the Commissioner should permit submission of that evidence in the interest of justice. Appellant and the Commissioner were both properly and timely notified of Respondents' intent to submit the deposition of Dr. Weissglass on the Form 58, and this evidence was in existence at the time of the hearing. For these reasons, this submission was properly allowed.

At the hearing, counsel for Respondents noted that the deposition of Dr. Weissglass had already been completed and that they would submit the deposition transcript upon receipt from the court reporter. (Hrg. Tr. Pp. 4-5). There was no surprise or prejudice to Appellant. The Single Commissioner properly stated that the record would be left open solely for the submission of the submission of Dr. Weissglass' deposition. (Hrg. Tr. p. 7, l. 8-11). This deposition transcript was mailed on August 24, 2018, directly by the court reporter to the Commissioner; it was received by the Commission on August 27, 2018. (E-mail Time Stamped 10:16AM dated August 27, 2018).

Based on South Carolina law, this decision is clearly within the purview and discretion of the Single Commissioner. "An administrative or quasi-judicial body is allowed a wide latitude of procedure and not restricted to the strict rule of evidence adhered to in a judicial court." Jacoby v. South Carolina State Board of Naturopathic Examiners, 219 S.C. 66, 90, 64 S.E.2d 138, 149 (1951). In Hallums v. Michelin Tire Corporation, the Single Commissioner allowed the record to be left open to take the deposition of a doctor based on a motion made at the hearing. 308 S.C. 498, 499, 419 S.E.2d 235, 236 (Ct. App. 1992). In affirming the decision of the Commissioner, the South Carolina Court of Appeals cited Brown v. La France Industries:

> We find the single commissioner did not depart from the essential requirements of the law in reopening the case and in allowing the [moving party] the opportunity to present additional testimony. In South Carolina, it is well established that the decision of the trial judge to allow a party to reopen his case will not be reversed unless the opposing party was prejudiced thereby.

286 S.C. 319, 324, 333 S.E.2d 348, 351 (Ct. App. 1985). The Hallums Court noted this was in line with the authority provided by S.C. Code Ann. Regs. 67-613. 308 S.C. at 504, 419 S.E.2d at 239.

Here, Appellant was not prejudiced in any way. Appellant's counsel was timely and properly notified of the intent of Respondents to submit the deposition, the deposition was properly noticed, and Appellant's counsel appeared at the scheduled deposition and cross-examined the

physician. As a result, the transcript was properly submitted and considered by the Single Commissioner.

II. THERE IS SUBSTANTIAL EVIDENCE IN THE RECORD TO SUPPORT A FINDING THAT APPELLANT'S TEMPORARY AGGRAVATION OF HER UNDERLYING LOW BACK CONDITION RESOLVED AS OF OCTOBER 23, 2017, AND ANY SUBSEQUENT FLARE-UPS WERE UNRELATED TO HER WORK ACCIDENT.

In her brief, Appellant specifically attacks several Findings of Fact: #5, #7, #10, #13, #14, #15, #16, #17, #18, #19, #25, #28, #30, #31 #32, #33. However, these attacks can be broken down into three distinct arguments: whether Appellant had returned to baseline after her work accident, whether Appellant's subsequent flare-ups were causally related to her work accident, and whether the appropriate weight was given to the submitted evidence. As such, Respondents' reply is organized accordingly.

Appellant argues that the Commission erred in finding that Appellant did not sustain an aggravation of her pre-existing back condition, but this is a mischaracterization as to what the Commission actually found. The Single Commissioner and the Full Commission found that Appellant's initial work accident *was* a temporary aggravation of her underlying low back condition; however, the Commission further found that Appellant's aggravation had resolved by October 23, 2017, without any permanent disability, and any subsequent flare-ups were not related to her September 7, 2017 work accident. (Full Commission Findings of Fact #16, #18, #27, #28, #32, #33, and Conclusions of Law #2 and #3).

Secondly, the substantial evidence in the record supports a finding that Appellant's aggravation of her preexisting low back condition had resolved as of October 23, 2017, any all following flare-ups were unrelated. 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 Commission did in this matter. The Commission is tasked with finding facts, evaluating the credibility of witnesses, and assigning weight to the evidence. Shealy v. Aiken Cnty., 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000). "Under the APA, this Court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact." Crisp v. SouthCo, Inc., 401 S.C. 627, 639, 738 S.E.2d 835, 841 (2013) (citing S.C. Code Ann. § 1-23-380(A)(5)).

a. The Commission correctly determined that Appellant's work-related injuries had resolved by October 23, 2017.

Appellant was working as a Master Patrol Officer for the City of North Charleston. On September 7, 2017, she was stopped in her vehicle at a red traffic light when she was rear-ended. The accident involved a fairly minor impact with minimal damage to both cars. Appellant injured her low back and neck.

Regarding previous back problems, Appellant indicated that she originally hurt her back in 2006. She ended up having low back surgery at a laser surgery clinic in Florida in 2012. The surgery was at L4-L5. Since that time, she has had intermittent pain and flare-ups. She has seen a chiropractor regularly for adjustments since that surgery for monthly maintenance. (Hrg Tr. p. 40, l. 18 – p. 41, l. 9). Appellant admitted that in 2015 she had a significant flare-up for which she treated with Dr. Shailesh Patel, a pain management doctor, who ordered an MRI scan, performed injections on her low back, gave her medications, and indicated she would require ongoing pain management (including diagnostic films, EMG studies, injections, and medications) to manage her chronic back symptoms. (Def. APA #5); (Hrg. Tr. p. 48, ll. 11-25; p. 49, ll. 1-16). Even after the treatment that she received following the significant flare-up in 2015, she continued receiving chiropractic adjustments every other month and continued having intermittent pain in her back.

(Hrg. Tr. p. 41, l. 21 – p. 42, l. 6). Appellant admitted that she had intermittent back pain with certain activities even before the work accident. (Hrg. Tr. p. 42, ll. 3-6).

After the work injury in September 2017, Appellant was treated conservatively by CCOH. (APA 1, pp. 19-23). Appellant was released from care and to return to full duty work with no restrictions on October 23, 2017. With regard to the work accident that she sustained on September 7, 2017, Appellant admitted that Dr. Weissglass released her from care and to return to full duty work with no restrictions on October 23, 2017. (Hrg. Tr. p. 42, ll. 11-18). Appellant testified at the hearing that she never told Dr. Weissglass that she was back to baseline; she simply told Dr. Weissglass that she was feeling better and that she wanted to go back to full duty work. (Hrg. Tr. p. 42, l. 19 – p. 43, l. 6). However, upon cross examination, she was shown a copy of her deposition transcript where she answered, "... he asked me about a baseline and I told him I was back to the baseline." When confronted with her deposition testimony which was inconsistent with her hearing testimony, Appellant testified that she did not remember using baseline as a word but she did tell Dr. Weissglass that she was feeling better and could go back to work. She further testified that she stated during her previous deposition that she felt like she could go back to work at full duty, and she felt like she was back to her baseline to the point where she could go back to work. She agreed that that was an accurate reflection of her previous testimony. (Hrg. Tr. p. 43, l. 7 – p. 44, l. 4).

Appellant admitted that all of her neck pain had resolved by October 23, 2017, but stated that she was still having pain in her low back with certain activities. However, Appellant admitted that even before the work-related car accident on September 7, 2017, she was occasionally having low back pain depending upon activities. (Hrg. Tr. p. 47, l. 14 – p. 48, l. 2).

On October 5, 2017, the medical reports indicate that the neck pain had completely resolved. (APA 1, p.13). On October 23, 2017, the medical report indicates that Appellant "states

that her neck and low back pain has completely resolved." She was reported as being asymptomatic and back to her baseline. The medical examination revealed that she was totally pain-free with full range of motion. She was released to return to work full duty without restriction with a complete resolution of her low back pain and neck pain. (APA 1, pp. 19-23). Dr. Weissglass completed a Form 14B dated December 11, 2017, which indicated that the Appellant did not have any permanent physical impairment as a result of the work injury, that she did not have any permanent physical restrictions as a result of the injury, and that she did not need any further or future medical treatment as a result of the work injury. (APA 3, p. 51). Additionally, the discharge summary from ATI Physical Therapy dated October 20, 2017, indicates that the Appellant was feeling good, that she was ready to go back to regular duty, and that she was requesting a discharge from care. (APA 4, p. 52). The submitted medical records clearly indicate that the Appellant had returned to her normal baseline by October 23, 2017. Despite a debate over some semantics during the hearing, it is clear that Appellant either told or indicated to the doctor that her symptoms had resolved and that she was back to her normal baseline by October 23, 2017. Further, the greater weight of the evidence indicates that Appellant had returned to her normal baseline by October 23, 2017, following this minor work-related accident.

Appellant admitted that she did not seek any further medical treatment for her back until February 20, 2018, when she saw Dr. Forrest on her own. The intake sheet dated February 13, 2018, indicates that Appellant's symptoms increased about two weeks before with no new incident or injury. (APA 7, p. 90). She further admitted that the appointment with Dr. Forrest was not an appointment to get medical treatment but was instead an independent medical evaluation that was set up by her attorney. (Hrg. Tr. p. 44, ll. 5-20). For over four months after reporting to Dr. Weissglass that she was back to her baseline, Appellant worked full duty with no work restrictions

and stated she was able to complete all the aspects of her job as a police officer. (Hrg. Tr. p. 44, l. 25; p. 45, ll. 1-21). Appellant testified that she sought treatment at HealthFirst when her flare-up started again, but there was no testimony as to when that treatment occurred, nor were any medical records submitted from that facility. (Hrg. Tr. p 48). Appellant admitted that she did not take any medication for her back during that period of time, nor did she seek any medical treatment. (Hrg. Tr. p. 45, ll. 22-25). Appellant stated she was able to perform all of her job functions while working full duty with no restrictions for the City of North Charleston from October 2017 through March 2018. (Hrg. Tr. p. 73, ll. 23-25; p. 74, ll. 1-21). Again, this evidence supports that the work accident resolved by October 23, 2017.

Appellant's own doctor, Dr. Forrest, agreed that by the end of October 2017, within 6 to 7 weeks of the accident, that Appellant had a complete resolution of her pain and symptoms and went back to work. (Dr. Forrest Dep. Tr. p. 10, ll. 9-14). Dr. Forrest went on to testify that Appellant had an aggravation in September 2017 with the work accident, and that temporary aggravation ended in late October when she returned to her normal baseline. (Id. at p. 18, ll. 5-9). The Single Commissioner correctly found in Finding of Fact #30 that Dr. Forrest agreed the Appellant had returned to baseline. At his deposition, Dr. Forrest was asked, "and it looks like by the end of October, so within six or seven weeks... she had had a resolution of her pain and symptoms and was able to go back to normal duty work?" and Dr. Forrest responds "[c]orrect." (Dr. Forrest Dep. Tr. p. 10, ll. 9-13). Furthermore, in Dr. Weissglass' deposition, he reviewed Dr. Forrest's report and stated, "[y]es, we both felt she was at her baseline at that point [referring to October 2017]." (Dr. Weissglass Dep. Tr. p. 10, ll. 19-20).

Similarly, in his deposition, Dr. Weissglass detailed his medical treatment of Appellant following the minor car accident on September 7, 2017. (Dr. Weissglass Dep. Tr. p. 6, ll. 15-18).

He testified that on October 23, 2017, which was 6 to 7 weeks after the motor vehicle accident, that her neck and low back pain had completely resolved, and that her temporary aggravation from the car accident had resolved. (Id. at p. 6, ll. 19-25 – p. 7, ll. 1-11). Dr. Weissglass testified that he released her to go back to work full duty without restrictions and did not give any impairment rating because she had returned to her normal baseline that she had prior to the injury. (Id. at p. 7, ll. 12-24). Dr. Weissglass testified that Appellant would have certainly had some degree of impairment from her previous surgery in 2012, but that he did not give any impairment rating for the flare-up in September 2017 because she had returned to her normal baseline and normal level of functioning. (Id. at p. 7, l. 25 – p. 8, ll. 1-10). Based on the deposition testimony of both treating doctors, it was correct to find that Appellant had returned to baseline as of October 23, 2017.

Every doctor on this claim agreed that the work accident on September 7, 2017, involved a very minor impact with minimal damage. (Dr. Weissglass Dep. Tr. p. 6, ll. 8-14; Dr. Forrest Dep. Tr. p. 9, ll. 17-20). Both Dr. Forrest and Dr. Weissglass agree that the Appellant sustained a temporary aggravation/flare-up which had completely resolved by October 23, 2017. The overwhelming evidence in the record supports that conclusion. Therefore, the substantial evidence in the record supports that Appellant sustained a compensable work accident on September 7, 2017, that resulted in a temporary aggravation of her pre-existing low back condition, and that the temporary aggravation had completely resolved by October 23, 2017.

b. The Commission correctly determined that Appellant's flare-ups after October 23, 2017, were not related to her work accident.

On March 8, 2018, Appellant returned to Dr. Weissglass for a flare-up of her low back pain. She testified that she did not do anything to cause the flare-up and she could not point to anything specific that caused it to happen. (Hrg. Tr. pp. 51-52). The medical records reveal that Appellant was complaining about a flare-up of her low back with pain radiating into the right

buttocks, right thigh, and right lower leg; however, Appellant testified that she recalled it being her left leg but admitted that she had no recollection as to which leg it actually was. (Hrg. Tr. p. 51, ll. 6-25).

Dr. Weissglass further testified that when Appellant came back to him in March 2018, she was reporting a spontaneous flare-up with no cause. (Dr. Weissglass Dep. Tr. p. 9, ll. 14-20). Dr. Weissglass testified that he did not believe that her flare-ups in 2018 were causally related to her work accident in September 2017, but were instead related to her long-standing chronic back problems and were a continuation of her previous flare-ups. (Id. at p. 14, ll. 1-13). He additionally stated that the flare-ups could be a result of activities both at home or at work, or for no reason at all. (Id. at p. 14, ll. 14-17).

According to Dr. Forrest, in December 2017 Appellant had a flare-up for which she did not seek any medical treatment. (Dr. Forrest Dep. Tr. p. 19, ll. 3-11). Dr. Forrest agreed that the Appellant could not describe an incident or injury and that it just happened. (Id. at p. 20, ll. 10-12). Dr. Forrest explained that she then had another flare-up in February 2018 and a third flare-up in April 2018. (Id. at p. 19, ll. 15-20; Id. at p. 22, ll. 1-6). The April 2018 flare-up was prominent and required treatment for several weeks. (Id. at p. 22, ll. 9-15). In looking at the objective findings, Dr. Forrest agreed that there was no discernible difference between the 2012 MRI scan and the 2018 MRI scan after her work injury. (Id. at p. 15, ll. 12-17). He testified that there was no major worsening based upon the MRI scan. (Id. at p. 16, ll. 21-24). With regard to all of these flare-ups, Dr. Forrest admitted that there were no objective signs of any worsening, and his opinions about flare-ups were based upon Appellant's subjective complaints of pain. (Id. at p. 21, ll. 19-24).

The Commissioner correctly found that Appellant's ability to return to work full duty and fully function, the medical records, and Dr. Weissglass' testimony supported a finding that March

8, 2018 flare-up was not causally related to the work injury. The medical evidence supports this because when Appellant reported a flare-up in March 2018 and sought medical treatment, she had been back to her pre-injury baseline for over four months, had had a complete resolution of her symptoms for over four months, and had returned to full duty activities as a police officer and outside of work. She additionally had told every doctor that she saw that she could not explain how the flare-up occurred. All of these factors support that the flare-up in March 2018 is not causally related to her work accident of September 7, 2017, which had completely resolved over four months prior to this subsequent flare-up but was instead another of her long-standing unexplained flare-ups that had occurred for years.

Appellant further argues that Findings of Fact #13 and #14 are mischaracterizations. However, these Findings were pulled directly from hearing testimony. Appellant specifically testified that she did not seek medical treatment between October 23, 2017, and February 20, 2018, and that she had returned to full duty work with no restrictions. (Hrg. Tr. p. 44, l. 21 – p. 45, l. 10). Regarding Finding of Fact #25, the Single Commissioner states that based on Appellant's testimony and the properly submitted exhibit (see argument below), the Appellant's testimony was "somewhat inconsistent." As fact finder, it is their job to weigh the evidence to make conclusions and findings.

Based upon the testimony of the Appellant, the fact that she returned to baseline in October 2017, her ability to return to work full duty and full function for over four months, the submitted medical records, and the deposition testimony of Dr. Weissglass, the substantial evidence in the record supports a finding that Appellant's flare-up in March 2018 is not causally related to her work accident of September 7, 2017. It is very clear that Appellant has been experiencing intermittent pain, intermittent symptoms, aggravations, and flareups of her low back pain with

radiculopathy since her back surgery in 2012 and that some of those symptoms and flareups are due to activities of daily life or happen spontaneously.

c. The Commission correctly weighed the evidence in the record.

In looking at the testimony of Dr. Forrest and Dr. Weissglass, there are conflicting medical opinions in the record regarding causation. Dr. Weissglass clearly indicated that Appellant's flare-ups in 2018 were not causally related to her work accident in September 2017 but were instead related to her long-standing chronic back problems. (Id. at p. 14, ll. 1-13). Despite a lack of objective evidence, Dr. Forrest testified that Appellant's February and subsequent flare-ups were related to her work accident. (Id. at p. 21, ll. 7-10).

Appellant attacks the Single Commissioner's Findings of Fact #16, #18, and #31 due to their reliance on Dr. Weissglass' testimony over Dr. Forrest. However, it is the duty of the Commission to give weight to the testimony as it sees fit. The Single Commissioner personally reviewed the medical records and the deposition testimony of both Dr. Forrest and Dr. Weissglass, and he also considered the other testimony and evidence in the record. Based on his review, the Single Commissioner gave greater weight to the testimony of the treating doctor, Dr. Weissglass, as opposed to the one-time IME doctor. As of March 2018, Dr. Weissglass had seen the Appellant for several visits from September 2017 through March 2018, had seen the resolution of her symptoms, and had seen her in follow-up. At that point, Dr. Forrest had only seen her for a one-time IME. South Carolina law dictates that the existence of any competing or conflicting medical opinions is a matter left to discretion of the Commission. *See* *Randolph v. Fiske-Carter Constr. Co.*, 240 S.C. 182, 125 S.E.2d 267 (1962). Furthermore, the weight to be accorded medical opinion testimony is a matter for the Commission. Id. The Commission clearly indicated that it considered the testimony of both doctors but weighed the testimony of Dr. Weissglass more heavily, and it is

solely within the discretion of the Commission to make this determination. (Full Commission Findings of Fact #15, #17, and #30). In conjunction with the testimony of the Appellant, her history of pre-work accident flare-ups, her ability to return to work full duty, and the medical evidence in the record, weighing all evidence as a whole, there is substantial evidence in the recrd to support that Appellant's temporary aggravation of her condition had resolved and any flare-ups after October 23, 2017, were unrelated.

The Commission fulfilled its obligation to consider and weigh all of the presented evidence to reach a determination as to whether the Appellant's legal burden had been met. The clear language of the Order indicates that all evidence was considered and which evidence was given more or less weight and the reasons therefore.

III. THE COMMISSION CORRECTLY ALLOWED THE SUBMISSION OF NEWSPAPER AND PHOTOGRAPHIC IMPEACHMENT EVIDENCE.

The news article from live5news.com, dated August 7, 2018, was properly admitted by the Hearing Commissioner and the Commission. (Hrg. Tr. pp. 63-68). At the hearing, Appellant specifically testified on direct examination about her ongoing back problems. Appellant stated that simple tasks like doing laundry had become more difficult. (Hrg. Tr. p. 37, ll. 17-21). She explained how her front loader washing machine requires her to "bend down and go at an angle" to get the laundry out of the washer and put it into the dryer. (Hrg. Tr. p. 37, ll. 20-24). She stated that it is easier and more comfortable to sit on the floor to pull the laundry out of the washer. (Hrg. Tr. p. 37, ll. 24-25; p. 38, l. 1). Additionally, Appellant testified that she cannot mow her lawn any longer (Hrg. Tr. p. 60, l. 1), because using a push mower to mow her lawn rendered her unable to move for three (3) days. (Hrg. Tr. p. 38, ll. 2-3). She said her biggest ordeal is picking up her young child from her crib. (Hrg. Tr. p. 38, ll. 3-5). Appellant said she cannot pick her child up out of her

crib unless her daughter stands up because Appellant is unable to bend over and physically pick her up if she's laying down in the crib. (Hrg. Tr. p. 38, ll. 3-9). She further testified that she cannot do activities like weed eating, edging, or picking up things, and that she can only utilize shovels, rakes, or similar tools if she has to. (Hrg. Tr. p. 61, ll. 10-16).

In response to that testimony, on cross-examination, Respondents showed Appellant a newspaper article from live5news.com, dated August 7, 2018, which had a picture of Appellant in her Town of Summerville uniform cleaning out ditches and drains with a rake during recent flooding, and the article details her efforts to clean debris from storm drains with a rake to help with the recent flooding. Appellant was asked several questions about the picture and her activities, which she answered. Appellant did not object at the hearing to any of the questions posed concerning the article or picture (Hrg. Tr. pp.61-62). Appellant only objected to the admission of the physical document.

Appellant first argues that it was improper to submit the article/picture under S.C. Rule of Evidence 608(b). As a procedural matter, the rules of evidence are not applied in South Carolina Workers' Compensation cases. *See* S.C. Code Ann. § 1-23-330 ("Except in proceedings before the Industrial Commission[1] the rules of evidence as applied in civil cases in the court of common pleas shall be followed"). Additionally, "[g]reat liberality is exercised in permitting the introduction of evidence in proceedings under Workmen's Compensation Acts." Ham v. Mullins Lumber Co., 193 S.C. 66, 89, 7 S.E.2d 712, 722 (1940). Further, Rule 608 specifically is not applicable. That section deals with instances of conduct/bad acts used to attack or support a witness' general character for truthfulness or untruthfulness. This section does not deal with cross-examination of a witness as

[1] In May of 1986, the name of the Industrial Commission was changed to the South Carolina Workers' Compensation Commission. South Carolina Workers' Compensation Law Annotated, *Overview to Workers' Compensation in South Carolina*: History (Thomas Reuters 2019).

to specific physical tasks which she claims she cannot do or can do only with great difficulty. The newspaper article in this case was specific cross-examination of a witness as to her previous testimony, not an attack on her general truthfulness or untruthfulness.

The Appellant has also mistakenly argued that the extrinsic evidence rule prohibits the introduction of this article. It does not. Under the extrinsic evidence rule, a cross-examiner may question a witness about a collateral matter, but a cross-examiner is bound by the witness's answer to matters solely affecting credibility. The cross examiner cannot call another witness to refute answers that the witness gave during cross-examination. In this case, the extrinsic evidence rule means that only the Appellant can be questioned about the article, and it would have been improper for Defendants to call another witness and ask about the article.

Appellant next argues that the article/picture should not have been admitted due to unfair prejudice under S.C. Rule of Evidence 403. It is important to note that just because a piece of evidence is harmful to one's case does not mean it is unfairly prejudicial. Furthermore, the decision whether to admit evidence under this rule is again left to the sound discretion of the trial judge, and the decision will only be set aside in extraordinary circumstances where the discretion has been plainly abused. United States v. Simpson, 910 F.2d 154, 157 (4th Cir. 1990). At the hearing, the Single Commissioner weighed the probative versus prejudicial value of the newspaper article and ruled it to be admissible. (Hrg. Tr. p. 67, ll. 23-24). There are no extraordinary circumstances here that would require the decision of the Single Commissioner to be set aside.

Appellant further alleges that the photographic evidence was not submitted timely in accordance with S.C. Regs. 67-611 and 67-612. This is not a correct reading of the regulations. Neither regulation prohibits the introduction of impeachment evidence at a hearing. S.C. Regs. 67-611 and 67-612 simply set the rules for submitting a pre-hearing brief or expert reports.

Impeachment evidence such as the photograph and article introduced by Respondents is not covered by these regulations. Respondents had no way of knowing exactly what the Appellant would say while testifying. As such, the evidence could not have been submitted prior to the hearing because Respondents could not know if they would use the evidence or not. It should be noted that this evidence was not created by Respondents but was actually a published article and photograph written by a local news station on their webpage. It is disingenuous for Appellant to claim surprise at the article since she posed for the picture and was clearly aware of its existence prior to the hearing. This type of evidence was properly admitted to impeach inconsistent prior testimony by Appellant. As a single commissioner is given broad discretion in deciding what evidence may be admitted into the record, the newspaper article and attached photograph were properly admitted at the hearing.

Finally, Respondents assert that even if the article and picture should not have been admitted into evidence, this is harmless error. "In applying the harmless error rule, the court must be able to declare the error had little, if any, likelihood of having changed the result of the trial and the court must be able to declare such belief beyond a reasonable doubt." State v. Watts, 321 S.C. 158, 165, 467 S.E.2d 272, 277 (Ct. App. 1996). Even if the actual documents had not come into evidence, Appellant had already confirmed that it was her in the picture, described her activities, and testified concerning what she was able to do as depicted in the article/picture. No objections were made by Appellant to any of those questions, and that testimony was properly considered. The testimony is what was relied upon by both the Single Commissioner and the Appellate Panel in their orders, not the physical documents; as such, even if the physical documents had not been admitted, the alleged error would have had no effect on the trial result.

IV. THE SUBSTANTIAL EVIDENCE IN THE RECORD SUPPORTS THE FINDING THAT APPELLANT IS NOT ENTITLED TO TEMPORARY COMPENSATION UNDER § 42-9-10.

First, the flareup sustained by Appellant in April 2018 is not related to her minor work accident as fully set forth above. However, even if it was, Appellant would not have been entitled to temporary compensation for the brief period of time that she missed from work.

Appellant sought treatment on her own for a condition that was not work-related with Dr. Forrest in April 2018, received two injections, and was released from care on May 16, 2018. (Hrg. Tr. p. 52, l. 20 – p. 53, l. 3). During that period of time, Appellant testified that she continued working until April 3, 2018, took annual leave from April 4, 2018, through April 23, 2018, used sick leave on April 24, 2018, through April 25, 2018, and took leave without pay from April 26, 2018 through her last day of employment which was May 17, 2018. (Hrg. Tr. p. 53, l. 12 – p. 54, l. 8). Appellant resigned from the City of North Charleston Police Department on May 17, 2018. (Hrg. Tr. p. 54, ll. 9-11). Appellant was forced to take leave due to the fact that she was under light duty work restrictions, but light duty work was not available through the City because they had deemed this flareup as not being work-related.

Despite being on light duty with the City of North Charleston, Appellant went to work shortly thereafter, on May 21st or 22nd of 2018, as a police officer for the Summerville Police Department in a full duty capacity. (Hrg. Tr. p. 37, ll. 9-12; p. 38, ll. 13-15). At the time of the hearing, she was working for the Summerville Police Department full duty without restrictions. (Hrg. Tr. p. 38, ll. 16-25; p. 39, ll. 1-6). Appellant admitted that she was released to return to work full duty on May 16, 2018, which coincidentally happened to be the exact time period where she was quitting her job with the City of North Charleston and going to work for the Town of Summerville. (Hrg. Tr. pp. 57-58).

Appellant admitted under oath that had Dr. Weissglass kept her on full duty work, she would have continued working her normal job as a police officer during the period of time for which she is now claiming temporary disability compensation. (Hrg. Tr., p. 56, ll. 23-25; p. 57, l. 1).

In reviewing the above stated evidence, the Commission properly found that the substantial evidence in the record did not support a finding that Appellant was entitled to temporary total disability compensation. (Finding of Fact #22). In so determining, the Commission relied on the lack of causation between Appellant's work accident and her March 2018 flare-up; Appellant's testimony that she could have been working during that time; and the fact that Appellant turned around and immediately went to work full duty for the City of Summerville. As such, the substantial evidence in the record indicates Appellant is not entitled to temporary total disability compensation under § 42-9-10.

V. THE COMMISSION CORRECTLY GRANTED BOTH MOTIONS TO QUASH.

There were two Motions to Quash filed in this matter, one by Respondents and one by CCOH. Accidentally, as part of a scrivener's error, the Single Commissioner denied Respondents' Motion to Quash when he intended to grant it. This error was realized when CCOH filed a second Motion to Quash, and this Motion was granted. Both motions resulted in the same outcome: Appellant's subpoena was quashed.

The issue as to the Motion to Quash was not argued before the Commission. However, on pages 20 to 21 of the April 12, 2019 Order, the Panel states, "upon review of the Order, we find no error in Quashing the Appellant's Subpoena (in response to a Motion filed by CCOH) based upon the fact Appellant was attempting discovery after the close of the record with no motion to leave the record open or submit additional evidence. Further, CCOH did not have information

responsive to Appellant's subpoena, and we agree with CCOH that Appellant's subpoena was not timely or proper."

In affirming the decision of the Single Commissioner, the Commission notes that the Appellant's subpoena was not timely. Appellant's counsel argues that his subpoena could not have been timely because he did not know about the requested documents until the morning of the hearing. However, if Appellant thought there would have been additional records probative to the case, the proper course of action would have been to make a motion at the hearing to leave the record open for the submission of those documents. This was not done. In fact, the Commissioner closed the record except for the submission of the deposition transcript of Dr. Weissglass. Appellant failed to take any action to leave the record open or to submit additional evidence at the hearing. It was not until after the hearing concluded, and the records was closed, that Appellant issued a subpoena to CCOH dated August 23, 2018, and the document were not due until September 2, 2018.

Appellant argues that the Motions to Quash should have been denied because S.C. Code § 42-17-50 allows additional evidence to be admitted after a hearing. This is incorrect. S.C. Code § 42-17-50 could allow the submission of further evidence on appeal only "*if good grounds be shown therefor*...." (emphasis added). Regulation 67-707 of the South Carolina Workers' Compensation Act provides that when a party seeks to introduce additional and newly discovered evidence, the party must establish that the new evidence (1) is of the same nature and character required for granting a new trial, (2) that the evidence is not cumulative or impeaching but would likely have produced a different result at the first hearing, and (3) that the evidence was not known to the moving party at the time of the first hearing and could not have been secured prior to the first hearing by due diligence. Appellant is unable to meet any of these three requirements. With regard

to the first requirement of Regulation 67-707, the South Carolina Court of Appeals has held that the requirement that the new evidence be "of the same nature as required for the granting of a new trial" means that such evidence must fit the criteria of Rule 60(b)(2) of the South Carolina Rules of Civil Procedure. Fox v. Econolodge, 94-UP-171 (June 22, 1994). The Court of Appeals held that evidence that develops after the trial does not fit the category of newly discovered evidence under Rule 60(b)(2). See also, Morgan v. JPS Automotives, 467 S.E.2d 457 (1996).

As explained above, the Single Commissioner is given broad discretion in deciding what evidence may be admitted into the record. It is impermissible to allow introduction of evidence that was not in existence at the time of the trial.

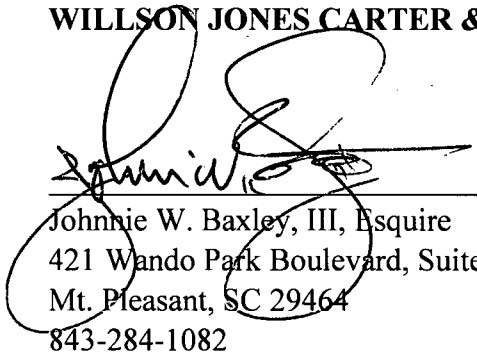
Appellant further argues that Respondents did not have standing to bring a motion to quash because they did not have a right or privilege to the information requested by the subpoena. However, even if Respondents did not have standing to bring the original motion to quash, CCOH did, and the harmless error rule would apply. "In applying the harmless error rule, the court must be able to declare the error had little, if any, likelihood of having changed the result of the trial and the court must be able to declare such belief beyond a reasonable doubt." State v. Watts, 321 S.C. 158, 165, 467 S.E.2d 272, 277 (Ct. App. 1996). Here, if the Respondents' Motion to Quash was granted in error, it is harmless error because CCOH's Motion was properly granted. Granting these motions has the exact same effect: the subpoena was quashed, and the Single Commissioner's assistant rightly points this out in her emails. As a result, the Commission did not err in granting the Motions to Quash submitted by Respondents and by CCOH.

CONCLUSION

Based on the foregoing argument, as well as any other grounds appearing on the record as provided by SCACR 220(c), Respondents request that this Court affirm the Decision and Order of the South Carolina Workers' Compensation Commission.

Respectfully submitted,

WILLSON JONES CARTER & BAXLEY, P.A.



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Date: November 5, 2019

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

R. Michael Campbell, II, Commissioner
T. Scott Beck, Commissioner
Gene McCaskill, Commissioner

W.C.C. FILE NO.: 1713216
Appellate Case No. 2019-000795

Angela Elmer,
Claimant,

Appellant,

v.

City Of North Charleston, Employer and
Companion TPA, Carrier

Respondents.

PROOF OF SERVICE

I do hereby certify that I have served the foregoing **INITIAL BRIEF OF RESPONDENTS** and the **RESPONDENTS' DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL** on the 5th day of November, 2019 to the following by placing a copy thereof in the United States mail, first class, proper postage affixed thereto:

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November 5, 2019

The Honorable Jenny Abbott Kitchings
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Re: Angela Elmer vs. City of North Charleston
WCC File No.: 1713216 DOI: 9/7/2017
Carrier: Companion TPA - Claim No.: 810020000734
WJC&B File No.: 0225.00199
Appellate Case No.: 2019-000795

Dear Ms. Kitchings:

Please find enclosed the following documents for filing in regards to the above-referenced case:

1. 1 copy of the Initial Brief of Respondents;
2. 1 copy of the Respondents' Designation of Matter;
3. 1 copy of the Proof of Service.

With kindest regards,

WILLSON JONES CARTER & BAXLEY, P.A.

Johnnie W. Baxley, III

JWB/ces
Enclosures

cc: Richard C. Alexander, Esq.
Janice Pinckney (via e-mail)

hsh

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