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.

FINAL BRIEF

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STATEMENT OF THE CASE

This matter was before the Full Commission's Appellate Panel (hereinafter "Commission" pursuant to Appellant's Form 30, requesting review of Single Commissioner Wilkerson's (hereinafter "Single Commissioner") October 29, 2018 Decision and Order. This matter was before the Single Commissioner on August 23, 2018 in Sumter, South Carolina pursuant to Appellant's Form 50 and Respondents' Form 51.

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. Following the accident, Appellant received immediate care at Coastal Carolina Occupational Health (hereinafter "CCOH") for neck and low back pain. Respondents provided medical treatment for approximately six (6) or seven (7) weeks with Dr. Barry Weissglass of CCOH to treat the symptoms caused by the work-related motor vehicle accident. Dr. Weissglass released Appellant to full duty on October 23, 2017 at her request.

After her requested release, Appellant experienced several flare-ups of her low back pain approximately monthly. One of the flare-ups occurred in December 2017 and others occurred in January, February, March, and April 2018. Appellant testified to receiving treatment from Health First in January 2018, and she underwent an independent medical examination with Dr. Leonard Forrest of Southeastern Spine Institute on February 20, 2018. Dr. Forrest opined that Appellant's flare-ups were related to the September 7, 2017 work-related accident. Dr. Forrest provided continued treatment until Appellant requested release so she could return to work on May 16, 2018. Between the February 2018 examination by Dr. Forrest and his follow up treatment, Respondents required Appellant to return to CCOH after her March 2018 flare-up. Dr. Weissglass deemed

Appellant's condition work-related and work restrictions were reinstated.

Respondents, with no contradicting evidence or opinion, ignored the authorized treating physician's (Dr. Weissglass) opinion that this was work-related, and his request for an MRI. Respondents denied Appellant any future treatment and, after a short period of light duty, forced her out of work demanding that she seek treatment on her own to be released to full duty and return to work. Appellant sought this treatment with Dr. Forrest who would not release her until May 16, 2018, after injections and tempering of her symptoms. Appellant contends she is owed temporary total disability for the period during which Respondents forced her out of work and would not provide light duty accommodations for her work-related restrictions from the authorized treating physician, as well as reimbursement for out-of-pocket costs for treatment she was compelled to seek independently.

At the Single Commissioner's hearing and on appeal, Appellant took the position that she met her burden of proof establishing that she is entitled to continued treatment for her low back. Appellant took the position that she met her burden of proof under §42-1-160 and §42-15-60, relying on her testimony, a preponderance of the medical evidence, and the independent medical examination and deposition testimony of Dr. Forrest. Appellant further took the position that she met her burden of proof under §42-9-35 that she sustained a permanent aggravation of her preexisting condition based on the opinion of Dr. Forrest following his independent medical examination and later confirmed by Dr. Forrest in his deposition testimony, both of which were provided to a reasonable degree of medical certainty.

At the Single Commissioner's hearing and on appeal, Respondents took the position that they 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. They maintain that the flare-ups after

October 23, 2017 were not causally-related to her accident, but instead, causally-related to her underlying condition for which she experienced flare-ups prior to the work-related accident. Respondents contend Appellant is not entitled to temporary compensation because any time Appellant missed from work in April or early May 2018 was the result of a flare-up from her pre-existing condition, unrelated to her work accident. Finally, Respondents deny Appellant is entitled to any additional medical treatment and that any impairment to Appellant's back was present before the September 7, 2017 accident. They assert that there is no additional impairment from the accident and no additional disability.

The Single Commissioner found Appellant sustained a temporary aggravation of her low back injury that resolved by October 23, 2017, and Appellant's flare-ups after that date were related to her preexisting condition and not the work-related injury. The Single Commissioner found Appellant was not entitled to temporary compensation when Respondents forced her out of work in April 2018 and was not entitled to any permanent disability from her work-related injury. Over Appellant's objections, the Single Commissioner allowed the untimely, late submission of the deposition of Dr. Weisglass after the hearing and submission of a newspaper article picture of Appellant during the hearing. The Single Commissioner also ruled in Respondents' favor concerning a Motion to Quash. The Full Commission upheld all Findings of Fact and Conclusions of Law from the Single Commissioner's Decision and Order.

STANDARD OF REVIEW

The Administrative Procedures Act (APA) establishes the standard for judicial review of decisions of the Workers' Compensation Commission. South Carolina Code Ann. § 1-23-380

South Carolina Code Ann. § 1-23-380 establishes the "substantial evidence" rule as the standard of review for decisions of the Workers' Compensation Commission. *Lark v. Bi-Lo, Inc.*,

276 S.C. 130, 276 S.E.2d 304 (1981). Pursuant to that rule, a reviewing court may reverse or modify a decision of an administrative agency if the findings, inferences, conclusions, or decisions of that agency are clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. Code 1976, § 1–23–380(5)(e). Substantial evidence is defined as:

"Such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. It must be enough to justify, if the trial went to a jury, refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury. This is something less than the weight of the evidence and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 276 S.E.2d 304 (1981) at 135-136, 276 S.E.2d at 307.

Appellate courts are not at liberty to substitute their view of the evidence for that rendered by the Commission. Rather, "[t]he Circuit Court's role is appellate only, and is limited to deciding whether the Commission's decision is not supported by substantial evidence or is controlled by some error of law." *Rogers v. Kunja Knitting Mills Co.*, 312 S.C. 377, 440 S.E.2d 401 (Ct. App. 1994). When reviewing an appeal from the Workers' Compensation Commission, the appellate court may not weigh the evidence or substitute its judgment for that of the Full Commission as to the weight of the evidence and questions of fact. *Therrell v. Jerry's, Inc.*, 370 S.C. 22, 26, 633 S.E.2d 893, 894-895 (2006).

Moreover, "the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Palmetto Alliance, Inc. v. S.C. Pub. Serv. Comm'n*, 282 S.C. 430, 432, 319 S.E.2d 695, 696 (1984). In workers' compensation cases, the Appellate Panel is the ultimate finder of fact. *Shealy v. Aiken*

County, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000). When the evidence is conflicting over a factual issue, the findings of the Appellate Panel are conclusive. *Hargrove v. Titan Textile Co.*, 360 S.C. 276, 290, 599 S.E.2d 604, 611 (Ct. App. 2004). The final determination of witness credibility and the weight to be accorded evidence is reserved for the Appellate Panel. *Bass v. Kenco Group*, 366 S.C. 450, 458, 622 S.E.2d 577, 581 (Ct. App. 2005).

The Court of Appeals may reverse the Workers' Compensation Commission's decision where "substantial rights of the Appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are," inter alia, not supported by substantial evidence or "arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." S.C. Code Ann. § 1-23-380(5)(f). An abuse of the Commission's discretion constitutes grounds for this Court to reverse and remand a case for a hearing de novo. See *Adams v. H.R. Allen, Inc.*, 397 S.C. 652, 659, 726 S.E.2d 9, 13 (Ct. App. 2012) (vacating, remanding, and ordering a de novo hearing).

ARGUMENTS

I. The Commission abused their discretion and erred as a matter of law in allowing the post-hearing submission of Dr. Weissglass' deposition in violation of S.C. Regs. 67-612, 67-613, and 67-215.

S.C. Reg 67-612 requires the non-moving party to provide reports at least ten days prior to the hearing. Failure to provide as required under this section may result in exclusion of such reports from the evidence of the case. Appellant understands the Single Commissioner's discretion to accept such evidence, including depositions. However, subsection (J) MANDATES that "[a]ll available evidence and testimony shall be presented at the scheduled hearing or a party must move for an adjournment according to R. 67-613." Respondents' did not move for a postponement or

adjournment as required under 67-612(J). Because they did not move for a postponement as required, they subsequently violated S.C. Regs. 67-613 and 67-215 by not properly filing and serving a motion in a timely manner.

Appellant's Counsel objected to the post-hearing submission of Dr. Weissglass' deposition but was overruled by the Commissioner "based on the complexity of the case" (R. pp. 138 - 141). As previously mentioned, this hearing was initially set for June 2018, but during the pre-hearing conference, Respondents' moved for postponement specifically for the purposes of deposing Dr. Forrest. Despite also not properly filing this motion in accordance with S.C. Regs. 67-613 and 67-215 prior to that hearing date, the motion was granted and hearing postponed. The Single Commissioner signed an Interim Order on June 18, 2018 wherein it was specifically ordered "[t]he hearing shall be postponed until Defendants receive a response to their Form 27 Subpoena and parties take the deposition of Dr. Forrest." (R. pp. 1-2).

The Single Commissioner's Interim Order contained other findings referring to the resetting of the hearing, which are not pertinent to this appeal. What is pertinent is what was not ordered; it was not ordered that the hearing was postponed for general additional discovery. The hearing was postponed for one reason: Dr. Forrest's deposition. The simple fact is Respondents did not have the evidence to support their case after Dr. Forrest's deposition was completed. Respondents had approximately eleven months from the date of injury until Dr. Forrest's deposition during which they could have procured an opinion from their authorized treating physician, but they failed to exercise that option. As a result, with less than two weeks until the hearing, there was limited time for Respondents to timely procure a competing opinion to refute the medical opinion from Dr. Forrest. However, it is worth noting that there was ample time to comply with S.C. Regs. 67-613 and 67-215, but that was not done.

Despite the foregoing, the Single Commissioner (and subsequently) the Commission overruled Appellant's objections and allowed for the post-hearing submission of Dr. Weissglass' deposition. This ruling clearly prejudiced Appellant because Appellant was not able to direct the Single Commissioner to key portions of the deposition during the hearing, nor was Appellant's Counsel afforded time to properly follow up on new information learned in the deposition (this is discussed in more detail below concerning the Motions to Quash).

II. The Commission erred in finding as fact and concluding as law that Appellant did not meet her burden of proof under §§ 42-1-160, 42-15-60, and 42-9-35 that she sustained an aggravation of her preexisting low back condition as such finding is against the greater weight and preponderance of the substantial evidence in the record and based upon erroneous legal conclusions.

In determining whether a work-related injury is compensable, courts liberally construe the Workers' Compensation Law toward providing coverage and resolve any reasonable doubt in favor of the injured employee. *Whigham v. Jackson Dawson Communications* (S.C. 2014) 410 S.C. 131. 763 S.E.2d 420, rehearing denied; *Douglas v. Spartan Mills, Startex Division* (S.C. 1965) 245 S.C. 265, 140 S.E.2d 173. Proof that workers' compensation claimant sustained an injury may be established by circumstantial evidence and direct evidence where circumstances lead an unprejudiced mind to reasonably infer the injury was caused by the accident. *Tiller v. National Health Care Center of Sumter* (S.C. 1999) 334 S.C. 333, 513 S.E.2d 843. Proof that a claimant sustained an injury and that it arose out of and in the course of his employment may be established by circumstantial as well as by direct evidence, where the circumstances surrounding the occurrence of the injury are such as to lead an unprejudiced mind reasonably to infer that it was caused by accident; the evidence need not negate all other causes of resultant injury in

compensation proceedings. *Holly v. Spartan Grain & Mill Co.*, (1947) 210 S.C. 183, 42 S.E.2d 59.

Appellant alleged an injury to her neck and an aggravation of a preexisting condition in her low back when she was rear-ended in a motor vehicle collision. In the simplest of explanations of this case, Appellant had a low back surgery in 2012 at the L4-5 level. In the five years following her lower back surgery, Appellant sought additional treatment on one occasion in 2015. She sought no additional care for her lower back until after the admitted work-related motor vehicle collision on September 7, 2017. After the motor vehicle collision, she experienced frequent flare-ups of her low back pain on an almost monthly basis following her release from Dr. Weissglass' care on October 23, 2017. These recurrent episodes required additional, new, and more frequent treatment.

Medical Evidence/Testimony

In finding Appellant did not sustain an aggravation of her preexisting low back condition, the Commission erroneously concluded that the medical evidence and Dr. Forrest's testimony did not support compensability. In fact, there was no medical evidence in this case to contradict compensability. This was an admitted accident and injury, and Respondents provided treatment on the date of injury until Appellant was provisionally released to full duty on October 23, 2017 (R. pp. 235-257). It is important to note this release to full duty was at Appellant's request in an effort to return to work because of the stress of her light duty position. Unfortunately, Appellant experienced flare-ups of her back pain in December 2017, January 2018, and February 2018 that kept her out of work. She finally sought treatment in February 2018 on her own at Health First (R. p. 178, lines 5-10; p. 186, lines 18-19).

Around the time of her visit to Health First, Appellant underwent an independent medical

examination on February 20, 2018 with Dr. Leonard Forrest, a board-certified spine specialist, to assess her condition and consider additional treatment options (R. pp. 264-266). Dr. Forrest's examination noted that her symptoms had increased above her baseline. Regarding causation, Dr. Forrest opined, "in December her symptoms worsened in the back and legs, and then worsened further about two weeks ago, without any new incident or injury. To a reasonable degree of medical certainty, Ms. Elmer's current back and lower extremity symptoms were secondary to the aggravation of her underlying lumbar condition caused by the motor vehicle accident of 9/7..." (R. p. 266).

For approximately two weeks after this examination, Appellant suffered continued lower back symptoms, and Respondents required her to return to CCOH for additional treatment. On March 8, 2018, Dr. Weissglass noted that Appellant was having recurrent episodes of flare-ups of her low back pain since he last saw her in October 2017 (R. p. 258). Dr. Weissglass noted on two separate occasions in the medical records from this visit that her current condition was work-related (R. pp. 262-263). Dr. Weissglass placed Appellant under work restrictions and ordered an MRI (Id.). However, Respondents, with no medical evidence to the contrary, declined to provide the suggested treatment, demanded Appellant seek treatment on her own, and required a full duty work release prior to allowing her to return to work. To improve her symptoms and return to work for Respondents, Appellant complied and sought additional care with Dr. Forrest, which included injections and continued work restrictions that kept her out of work until May 16, 2018 (R. pp. 267-282).

On August 6, 2018, Dr. Forrest was deposed by Counsel for Respondents. In his deposition, Dr. Forrest testified Appellant returned to a baseline of symptomology in October 2017 following her work-related motor vehicle collision, which allowed her to attempt to return to work

for Respondents. Dr. Forrest further testified Appellant only remained at her baseline condition for 4-6 weeks before experiencing recurring low back symptoms in December 2017 (R. p. 106; Dr. Forrest Dep. Tr. P. 10, ll. 9-23). Dr. Forrest stated her increased and recurring low back and leg symptoms in December 2017 were directly related to the September 7, 2017 work accident stating that "she aggravated her underlying condition" (9R. pp. 106-107; Dr. Forrest Dep. Tr. P. 11, ll. 9-21; P. 12, ll. 17-20; 13, ll. 8-).

In response to a request for what his opinion is based on, Dr. Forrest noted she had two further recurrences of her symptoms. He opined, "her condition was aggravated by the incident in September 2017 and made more symptomatic, and [she has] had more frequent flare-ups as a result of that. And I do think she's going to require treatment intermittently as a result of that and it's not going to be every three years like it was before" (R. pp. 107-108; Dr. Forrest Dep. Tr. P. 12, l. 13 - P. 14, l. 14).

Dr. Forrest was further questioned and held firm to his opinion that the September 7, 2017 injury was an aggravation of her preexisting condition, and that is where things changed in terms of the frequency of Appellant's flare-ups. Dr. Forrest specifically related the February flare-up to the September 2017 injury/aggravation (R. p. 111; Dr. Forrest Dep. Tr. P. 21, ll. 1-10). He also specifically related Appellant's April flare-up to the September 2017 injury/aggravation, and again, stated that his opinion was the September work-related injury was the cause of the more frequent flare-ups (R. p. 112; Dr. Forrest Dep. Tr. P. 22, ll. 1-21). Dr. Forrest later stated that she was not back to her pre-September 2017 injury baseline because she is having more frequent flare-ups, including radicular/radiating pain. Dr. Forrest testified that based on his examination and experience, and utilizing the AMA Guides 5th Edition, Appellant would be on the low side of Category 2 with an approximate 6% whole-person rating, which equals an 8% regional rating (R.

pp. 114-115; Dr. Forrest Dep. Tr. P. 27, l. 15 – P. 28, l. 5).

Respondents noticed the deposition of Dr. Weissglass, and he sat for his deposition the morning of the hearing. Dr. Weissglass stated that Appellant was released on October 23, 2017 because she was back to her baseline with no permanent impairment (R. p. 123; Dr. Weissglass Dep. Tr. P. 7, ll. 15-24). He testified that he saw her back on March 8, 2018, and Appellant reported multiple flare-ups in the interim (R. p. 124; Dr. Weissglass Dep. Tr. P. 8, l. 23 – P. 9, l. 7). Dr. Weissglass testified that "[a]n individual who's had previous back surgery, the spine in those individuals is a little bit more vulnerable to activities and events that would not necessarily cause a problem or someone who has not had pre-existing problems" (R. pp. 126-127; Dr. Weissglass Dep. Tr. P. 14, l. 22 – P. 15, l. 1). Dr. Weissglass confirmed a minor car accident would constitute an occurrence that someone with a preexisting condition would be more vulnerable to (R. pp. 128-129; Dr. Weissglass Dep. Tr. P. 18, ll. 20 – P. 19, l. 9).

In his testimony, Dr. Weissglass noted that during the March 8, 2018 visit, Appellant was complaining of mid-low back pain radiating to the right buttocks, thigh, back of her knee, and right lower leg, and she had reported recurrent episodes since he last saw her on October 23, 2017 (R. p. 127; p. 258; Dr. Weissglass Dep. Tr. P. 16, ll. 15-25, P. 24). Dr. Weissglass confirmed that after his examination on March 8, 2018, he listed the visit and complaints as work-related, put Appellant on modified duty, gave her a prescription, and ordered an MRI. He stated that Appellant was supposed to have the MRI before following up with him so that he could better understand the underlying anatomy of the back to see if there was some way to explain the flare-up Appellant was having (R. pp. 128-129; Dr. Weissglass Dep. Tr. P. 17, ll. 19 – P. 19, L. 13). Despite needing this information, he rendered an opinion in his deposition (five months after he treated her) that unequivocally found her treatment after October 23, 2017 was not work-related.

Bias of Medical Opinions

This case was initially set for hearing in June 2018, but Respondents' Counsel subpoenaed records from Southeastern Spine Institute attempting to establish bias on the part of Dr. Forrest, which resulted in a postponement. After Respondents' Counsel received a sufficient response, Dr. Forrest was deposed and asked about the data on his participation in independent medical examinations. To say this testimony was enlightening would put it mildly. He confirmed that in the last two years (prior to his deposition), he had only done a total of 215 independent medical examinations (not for one specific firm).

Dr. Forrest was asked how many of his independent medical examinations were for injured persons versus defendants, and he stated in the last two years, they were all for injured persons. He further testified that he previously did defense work for nurse case managers. However, he stated that he shut that down "ironically because [independent medical examinations] would turn into treatment. I want to say that again. I shut it down because they would turn into treatment. I would do the IME for the nurse case manager. . . . Then they would want me to treat. I would go ahead and decide to treat except that I couldn't get the approval to get the stuff done that I wanted to do. . . . And that, over time, was just a frustrating thing. And I just decided not to do that anymore" (R. p. 117; Dr. Forrest Dep. Tr. P. 32, l. 13 – P. 33, l. 13).

Dr. Forrest reiterated that doing the independent medical examinations for injured workers was a small part of his practice (R. p. 117; Dr. Forrest Dep. Tr. P. 33, ll. 20-21). When he was asked to explain how small, he noted that before the deposition he had no idea, but he had gone back and reviewed the data in anticipation of the deposition. He testified that his review of the data showed that independent medical examinations accounted for less than one percent of his practice, and that Workers' Compensation independent medical examinations accounted for only

approximately ten to twenty percent of that less than one percent – one-tenth to two-tenths of one percent of his entire practice (R. pp. 117-118; Dr. Forrest Dep. Tr. P. 34, l. 2 – P. 35, l. 8). Admittedly, Appellant's Counsel had never heard of Dr. Forrest when he requested Southeastern Spine Institute have a specialist perform an independent medical examination, but Dr. Forrest was the first available, so that is who evaluated Appellant. Dr. Forrest does not make a living doing independent medical examinations for injured workers, and his testimony and this data fully supports finding no bias in his medical opinions or treatment of Appellant.

Ironically, this fishing expedition for bias on the part of Dr. Forrest led Appellant to research CCOH and Dr. Weissglass prior to his deposition. We are all aware the Act affords employers/carriers the right to send claimants to whatever doctor they choose. However, the hypocrisy of Respondents to allege Dr. Forrest would be biased is astounding when you look at the website for CCOH and what they advertise. During his deposition, Dr. Weissglass was asked about some of the assertions on his website. While Dr. Forrest's independent medical examination portion of his practice accounts for less than one percent, the CCOH website boasts that they serve over 600 Charleston-area employers (R. p. 130; Dr. Weissglass Dep. Tr. P. 22, l. 24 – P. 23, l. 2). The CCOH website further states that they are committed to providing high-quality occupational medicine **FOR THEIR CLIENTS**. When asked to clarify who their clients were, Dr. Weissglass admitted their clients are the employers and not the injured employee patient (R. pp. 130-131; Dr. Weissglass Dep. Tr. P. 23, ll. 3-18). The CCOH website goes further to vaunt their prowess in helping clients/employers "successfully navigate the workers' compensation process" (R. p. 131; R. p. 132; Dr. Weissglass Dep. Tr. P. 23, ll. 19-21; P. 25, l. 24 – P. 26, l. 6). Why a medical facility or doctor feels the need to help clients/employers navigate the workers' compensation process instead of just providing medical care is beyond me. The CCOH website is replete with

advertisements for helping **THEIR CLIENTS** navigate the complex landscape of incident management and workers' compensation. Dr. Weissglass affirmed that their website notes CCOH understands the needs of today's fast-paced employers, which is why they offer an online portal that allows carriers and employers access to patient medical records (R. pp. 131-132; Dr. Weissglass Dep. Tr. P. 24, l. 9 – P. 26, l. 4).

CCOH and Dr. Weissglass market themselves **TO THEIR CLIENTS**, which are employers and carriers. They market themselves as the place to go for employment-related injuries, so that they can help employers and carriers expedite an injured worker's return to work. They service over 600 employers in the Charleston area. The practice is specifically **FOR THEIR CLIENTS** and helping them "successfully navigate the workers' compensation process." There cannot be much more of a bias than a medical provider in this position. This is before we even discuss the fact that in his August 23, 2018 deposition, Dr. Weissglass completely contradicted his March 8, 2018 medical records wherein he stated her condition was work-related (R. pp. 262-263; R. p. 126; Dr. Weissglass Dep. Tr. P. 14, ll. 1-8).

Appellant Testimony

The Commission and Single Commissioner ignored parts of and/or misconstrued Appellant's hearing testimony, which led to multiple errors not only in the Single Commissioner's "Statement of the Case," but also in the Findings of Fact. For instance, Appellant testified that she occasionally had pain but not the same level as after the work injury. However, her testimony in the Single Commissioner's Decision and Order is written so that it excludes her actual answer that the pain was not the same, which is not an accurate reflection of her testimony (R. pp. 181, line 20 – 182, line 2). Another example of her testimony being misrepresented in the Single Commissioner's "Statement of the Case" is where she admitted she was not taking any medication

after Dr. Weissglass released her and was back to working full duty (R. p. 10). It was omitted that Appellant testified she was still having problems performing her job, and that she was "doing the bare necessity to keep [her] job" (R. p. 205, ll. 10-23). Additionally, the Commission omitted that she was breastfeeding her child, which precluded taking medication (R. p. 179, lines 22-25).

Appellant testified at length about the affect this work-related injury had on her daily activities, and she was asked on cross examination about this as well. She clearly testified that the problems she had with doing laundry, performing yard work, and even picking up her child, which were not a problem prior to this accident, but the Commission ignored that testimony in their findings (R. p. 12; R. p. 193, line 19 – p. 194, line 12). These omissions and mischaracterizations played an enormous role in shaping the narrative of this case and negatively affected Appellant.

Specific Assignment of Error in the Commission's Decision and Order

The Commission erred in Finding of Fact 10 by finding the greater weight of the evidence indicated Appellant returned to her normal baseline as of October 23, 2017 (R. pp. 31-32). As discussed above at length, Dr. Forrest clearly opined that her condition had worsened, as evidenced by the almost monthly flare-ups she experienced since Dr. Weissglass released her. Additionally, Dr. Weissglass noted in his medical records that the March 8, 2018 visit was work-related and put her on modified duty. If this was not work-related and Appellant was back to her baseline as of October 23, 2017, then why did Dr. Weissglass put her on modified duty and order treatment at the direction of Respondents?

In Finding of Fact 15, the Commission stated that "every doctor on this claim agreed" Appellant sustained a temporary aggravation that resolved by October 23, 2017 (R. p. 32). In Finding of Fact 17, they stated her ability to return to work full duty and full function, the medical records, and Dr. Weissglass' testimony supported finding the March 8, 2018 flare-up was not

causally related to the work injury (R. p. 32). This finding is inaccurate with regards to her returning to work full duty with full function, ignores Dr. Forrest's medical records and opinion completely, and ignores Dr. Weissglass' March 8, 2018 medical records that found it was work-related. In Finding of Fact 30, the Commission stated that Dr. Forrest agreed Appellant had returned to baseline on October 23, 2017 and May 16, 2018, and her symptoms were the same as before her work-related accident (R. p. 34). In Finding of Fact 32, he stated the "overwhelming majority of the evidence" supported only a temporary exacerbation and no permanent impairment (R. pp. 34-35).

Dr. Forrest's testimony is discussed in detail above and Appellant would point the Court to that discussion above for support of why these findings are wrong as they pertain to Dr. Forrest, who clearly found Appellant suffered a permanent aggravation of her preexisting condition, and why the overwhelming majority of the medical evidence supports compensability, with only Dr. Weissglass' deposition to the contrary, which directly contradicts his own medical records (R. pp. 106-108; pp. 111-112; pp. 114-115).

In Findings of Fact 16 and 18, the Commission gave greater weight to the testimony of Dr. Weissglass for several reasons. For one, as of March 2018, Dr. Weissglass had seen Appellant for several visits and Dr. Forrest had only seen Appellant for an independent medical examination (R. p. 32). There is no explanation for why March 2018 was the arbitrary cutoff for considering evidence in the record.

In Finding of Fact 19, the Commissione stated Appellant had been back to her baseline for four months before her March 8, 2018 treatment with a complete resolution of her symptoms and the March 2018 flare-up was not causally-related (R. p. 32). In Finding of Fact 31, they gave Dr. Weissglass greater weight because he has "much more experience seeing" Appellant "over a

period of time," and because his testimony "makes more logical sense." The Single Commissioner went further by delving into the Fifth Edition AMA Guides and giving his own interpretation of what the AMA Guides state and why Appellant has no additional impairment (R. p. 34).

Not only are these findings factually inaccurate, but the reasoning (especially in Findings 16 and 18) is flawed and sets a dangerous precedent of forever giving more weight to a doctor simply because they had more visits with a patient in a given period. If that logic was applied in future claims, no second opinion from an orthopedist would ever hold any weight over a primary care doctor who saw the patient first (and presumably more than once). Essentially, it would be pointless to obtain any second opinions unless a claimant established a long history of evaluations and treatment with that physician.

Furthermore, Dr. Weissglass' opinion as of March 8, 2018 was, in fact, that Appellant's condition was work-related (R. pp. 262-263). By the time Dr. Weissglass flip-flopped on his opinion on the day of the hearing, he admitted he had not seen Appellant but once since October 23, 2017 (R. p. 127; Dr. Weissglass Dep. Tr. P. 16, ll. 6-8). By the time Dr. Forrest and Dr. Weissglass gave their opinions in August 2018, Dr. Forrest had not only seen Appellant more recently but also more frequently over the last seven months.

As it pertains to Finding 31, there is no evidence submitted or opinion rendered to support this finding. The Commission discounts the medical opinion of Dr. Forrest regarding medical impairment related to Appellant's spine injury and creates an opinion that simply did not exist and was not set forth by any medical provider.

Appellant is not even sure of the logic for only considering the number of visits with each doctor by March 8, 2018 and not considering (1) the qualifications/specialties of each doctor or (2) the additional visits/treatment Appellant had with Dr. Forrest after March 8, 2018. Appellant

feels this is a clear error, as the Commission created an additional, unfounded criterion for considering medical evidence based on the number of times a doctor has seen a patient by an arbitrary date chosen at random. The Commission chose to operate in a vacuum considering only the evidence that fit the desired result of denying Appellant's claim.

The Single Commissioner's "Statement of the Case" included a multitude of omissions of Appellant's testimony, which led to a series of Findings of Fact that, in turn, were wrong. In Findings of Fact 5 and 7, the Commission noted that Appellant "continued to have intermittent back pain after her 2015 flare-up" (R. p. 31). Appellant testified very clearly on cross examination that after her nerve block in 2015 she had no problems, and her intermittent pain before the work-related injury did not affect her ability to work (R. pp. 175, l. 14 – p. 176, l. 6).

Findings of Fact 13 and 14 similarly are mischaracterizations, as they state she did not seek medical treatment between October 23, 2017 and February 20, 2018, did not take any medication, and worked full duty completing all aspects of her job (R. p. 32). In Finding of Fact 25, the Commission similarly mischaracterized her testimony from the hearing, and they additionally relied on an improperly admitted photograph (discussed in more detail below) to find her testimony regarding daily activities was inconsistent (R. p. 33).

In Finding of Fact 33, they noted a preponderance of the evidence supported finding Appellant's non-work activities contributed to a greater degree to her ongoing flare-ups (R. p. 35). As previously discussed and cited above regarding Appellant's testimony, these findings are all factually inaccurate and misrepresentations of her full testimony during the hearing. Furthermore, no evidence was presented at the hearing to support that her non-work activities contributed to a greater degree than the work-related injury (or contributed at all). To the contrary, Dr. Forrest clearly stated on multiple occasions that the work-related injury was the direct cause of her increase

in frequency of flare-ups. This finding is also inconsistent with Finding of Fact 28 that says it is unclear what causes her symptoms and flare-ups (R. pp. 33-34). If it is unclear, then how can the Commission find non-work activities contributed to a greater degree than her work-related injury, especially when no medical opinion exists to support such a finding?

Appellant met her burden of proof to establish she suffered a work-related injury on September 7, 2017 and subsequently sustained a permanent aggravation of her pre-existing condition based upon a preponderance of the medical evidence, Dr. Forrest's testimony, and her hearing testimony. The preponderance of the evidence, especially the independent medical examination and deposition testimony of Dr. Forrest, supports finding that Appellant sustained a compensable injury to her low back and met her burden under S.C. Code §§ 42-1-160, 42-15-60, and 42-9-35.

III. The Commission erred as a matter of law in affirming the allowance of the late submission of evidence in existence prior to the hearing in violation of South Carolina Rules of Evidence and S.C. Regs. 67-211, 67-611, and 67-612.

During the hearing, Appellant answered on direct examination and was cross-examined regarding her daily activities before and after the work-related injury. The omissions and mischaracterizations of Appellant's testimony have been discussed above in detail. This argument pertains specifically to the untimely submission of a photograph of Appellant holding a rake. In the course of cross examination, Appellant was questioned about her daily activities and asked about doing activities such as lawnmowing, weed eating, etc. Appellant was specifically asked if she was able to utilize "shovels, rakes or anything like that" to which she responded, "[i]f I have to" (R. p. 195, ll. 6-16). Respondent's Counsel then presented what was subsequently marked as "Defendants' Exhibit 3," which is a newspaper photograph of Appellant standing in water holding

a rake on or around August 7, 2018.

Appellant's Counsel objected to this submission initially noting it was not timely R. p. 197, ll. 2-6). At that point, an exchange ensued between the parties and the Single Commissioner regarding the objection. Respondent's Counsel argued the exhibit was "rebuttal credibility evidence" (R. p. 197, ll. 16-17). During the subsequent discussion the Single Commissioner stated that Respondents did not have to submit the exhibit because she admitted it was her, but he still admitted and used the photograph as evidence for denying the claim. After some back and forth, Appellant's Counsel made another request to at least note the objection, to which the Single Commissioner told Appellant's Counsel he could not object (R. p. 199, ll. 21-24).

The Single Commissioner then asked for more clarification of the reason for the objection, and before allowing Appellant's Counsel to put his position on the record, the Single Commissioner allowed Respondents' Counsel to put forth a position FOR Appellant as to why Appellant was objecting. Before Appellant's Counsel was able to put his position on the record, the Single Commissioner stated he was the decider of weight to evidence, in response to Respondents' Counsel's statement. Appellant's Counsel requested again to be able to put his position on the record, at which point he was finally able to lodge his objection to the evidence being prejudicial and not properly impeaching Appellant's testimony. Before Appellant's Counsel could finish lodging his objection, the Single Commissioner interrupted and admonished Counsel for objecting "to everything that doesn't help your case." He went further to say that Appellant's Counsel has only objected to things that do not help his case and has not objected to anything that helps his case. Appellant's Counsel was unable to finish his objection, and based on this exchange, respectfully requested that the objection be noted for the record before moving forward (R. pp. 197, l. 2 – p. 201, l. 25).

As an evidentiary matter, Appellant believes it was improper to admit this evidence under S.C. Rule of Evidence 608(b). This rule states, "[s]pecific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness . . . ."

First, the rule does not allow for proof by extrinsic evidence. The picture proffered by Respondent's Counsel clearly falls in the category of extrinsic evidence. The exception in this rule does allow for the use concerning truthfulness or untruthfulness. Appellant believes Respondents were hoping for an "ah-ha gotcha" moment where Appellant would testify she cannot do any of the activities, including raking, and Respondents would present this picture to contradict her. However, that did not happen; Appellant very clearly stated that she would do the activities she was asked about if she had to. This was not a video showing her wrestling criminals, dead-lifting heavy weights, or even actually raking; it's a photograph of her standing with a rake in her hand. Again, Appellant was very honest and forthright with her testimony explaining the daily activities that she has difficulty with that were not a problem before the work-related injury. She did not testify that she was an invalid incapable of anything. As such, there is nothing to impeach or impugn, as she did not testify untruthfully.

Furthermore, Appellant would object that this photograph should have been excluded on the grounds of unfair prejudice under S.C. Rule of Evidence 403. Although relevant to her testimony regarding her daily activities, Appellant never denied being able to rake. Aside from the photograph not impeaching her testimony, there was no probative value to this evidence, as

she already testified she was capable of raking. Even if the Court were to find some probative value, that value is substantially outweighed by the prejudicial effect in addition to being inadmissible as needless presentation of cumulative evidence. The Single Commissioner's directives specifically pointed to this picture as part of his basis for denying benefits, which shows the photograph improperly prejudiced Appellant (R. p. 434).

Appellant also objected because this evidence was not submitted timely in the pre-hearing brief in accordance with S.C. Regs. 611 and 612. The Regulations require timely submission of all evidence before the hearing. Respondents were presumably in possession of this photograph on or around the time of its publishing on August 7, 2018, but they chose to hold the evidence until the hearing to attempt to catch Appellant lying, which, again, she did not do. The Single Commissioner and Commission both chose to ignore these regulations much like they did with the untimely submission of the deposition of Dr. Weisglass.

IV. The Commission erred as a matter of law in failing to find that the Appellant is entitled to temporary total disability benefits under S.C. Code § 42-9-10.

The preponderance of the medical evidence discussed above shows that Appellant suffered a compensable injury when she had an aggravation of her preexisting condition. To avoid repetition, Appellant refers the Court to Section II concerning the medical evidence supporting compensability. If there was a compensable injury, Appellant should therefore be entitled to temporary total benefits for the period her employer forced her out of work without pay.

Appellant testified during the hearing that after she complained of continued back pain in March, and her employer required her to return to Dr. Weissglass (R. pp. 165, l. 24 – p. 166, l. 6). Appellant went on to testify about the work restrictions Dr. Weissglass placed on her, which

were relayed to her employer. She was initially placed on light duty, and then she was told by Human Resources that her condition was not work-related, despite the authorized treating physician noting it as such. Appellant made several inquiries/attempts to find out who decided that her condition was not work-related or how she could appeal that determination. She was never given an answer other than being told "there was not an appeal, that this is just what happens." Appellant was told she would have to see a doctor on her own to get released back to full duty, and if she did not have that by April 24, 2018, she would have to file for FMLA and would not be offered light duty (R. p. 166, l. 21 – p. 171, l. 8; R. pp. 376-379).

At that time, Appellant returned to Dr. Forrest for additional treatment. However, Dr. Forrest would not release her in April and required additional treatment before he would release her to fully duty, which occurred on May 16, 2018. Because Appellant was under restrictions from the authorized treating physician, and the Employer refused to accommodate those restrictions, Appellant is owed temporary total disability benefits under the Act.

V. The Commission erred as a matter of law in denying and then granting Defendants' Motion to Quash in violation of S.C. Rule of Civ. Pro. 45 and S.C. Code § 42-17-50.

In general, a party does not have standing to bring a motion to quash a subpoena under Rule 45 "unless the party claims some personal right or privilege in the information sought by the subpoena." *Layman v. Junior Players Golf Acad., Inc.*, 314 F.R.D. 379, 385 (D.S.C. 2016). A motion to quash, or for a protective order, should generally be made by the person from whom the documents or things are requested. Here, Respondents did not have any personal right or privilege that would preclude this third party from producing the requested documents. Further, Respondents lacked standing to bring this Motion to Quash.

Section 42-17-50 states that, if an application is made to the Commission within 14 days

from the date when the notice of the award shall be given, the commission shall review the award and, if good grounds be shown therefor, reconsider the evidence, receive further evidence, rehear the parties or their representatives and, if proper, amend the award. Appellant maintains that she has grounds for such an action, which would be made after receiving the subpoenaed documents.

Before the August 23, 2018 hearing (scheduled for 12:00PM in Sumter, SC), Respondents noticed its physician for deposition at 8:00AM in Charleston, SC. The timing and scheduling of the deposition was made by Respondents in this matter. While conducting this deposition, the physician gave testimony and referenced various documents and records pertaining to this case, which were not previously discovered and whose existence was not reasonably known prior to the deposition. Appellant believes these documents would have probative value on the merits of this action, which would provide grounds for review.

As these records would have probative value and given that statute specifically contemplates situations wherein additional evidence may be submitted to the Commission after the hearing date, it is only proper that these subpoenas be executed. The alternative would have the effect of rewarding Respondents for sheltering deponents until such time and place that a subpoena may no longer be served prior to the hearing, and it would increase Appellant's request for continuances and slow the Commission's docket.

Respondents allege that because the record has been closed, and no new information could be submitted, that the subpoena cannot lead to admissible evidence and should be quashed. This argument can only be made tenable by ignoring statutory law directly on point. To cite again the code section above, S.C. Code § 42-17-50 specifically allows for the Commission to "reconsider the evidence" and to "receive further evidence."

"Further evidence," as it is used in the statute, can only be logically interpreted to mean

evidence which is in addition to that which constituted the record prior to the Commission's hearing, meaning that the record is not closed. In the case of *Harbin v. Owens-Coming Fiberglass*, 316 S.C. 423, 429 (S.C. App. 1994), the appellate court noted that introduction of additional evidence to the Commission was allowed by § 42-17-50. This means that the additional information may be presented, which is contradictory to the basis for Respondents' argument, and therefore, their argument must fail.

Regarding the timing of the motion, Appellant would reiterate that the issuance of the subpoena was made immediately upon Appellant's Counsel's return from the hearing, which immediately followed the deposition of the witness whose testimony brought to light new information, which spawned the subpoena. To allow either party to artificially limit discovery by deposition scheduling gamesmanship is neither equitable to the parties nor a reasonable and just application of statutory law.

The next argument made by Respondents was that the subpoena could and should have been submitted prior to the hearing, and that by failure to do so, Appellant is barred from issuing the subpoena after the hearing. Respondents fail to acknowledge that the documents requested within the subpoena were not known of until their physician was deposed on the morning of the hearing. Their physician was known to them on the date of injury, eleven months prior to their noticing his deposition. While an Appellant is expected to utilize due diligence in conducting discovery, he cannot be expected to know the contents of a deposition in advance. The timing of the deposition on the morning of the hearing was made by Respondents, and it would render statutory law moot and reward dilatory and obstructionist deposition practices to allow Respondents to declare the hearing as the stopping date for discovery.

Appellant's subpoena was issued, per Respondents' motion, roughly three hours after the

hearing's conclusion. The subpoena could not have possibly been issued prior to the deposition because the existence of the materials requested was not and could not have been known prior to the deposition. The doctor's deposition was conducted immediately prior to the hearing. It was not possible to have issued the subpoena prior to the hearing. After the hearing, Appellant's Counsel had to return to office to issue the subpoena. Assuming one and one-half hours of driving from the hearing location to Counsel's office, there are, at best, ninety minutes unaccounted for that, in fact, were used only for the drafting of the subpoena. In short, Appellant issued this subpoena at the earliest conceivable time. Discovery rules should be interpreted to require claimants exercise due diligence, not to require claimants to perform the impossible.

Respondents' final argument is that the materials requested in this subpoena cannot be admitted into evidence, and that this is a ground for quashing the subpoena. This argument has been addressed previously herein. This argument is predicated upon the notion that there cannot be any new evidence admitted. This is a false premise, as indicated by the text of § 42-17-50, and any argument predicated upon a false premise, is itself false.

The facts associated with and surrounding these Motions to Quash are, admittedly, quite unbelievable. When this Motion to Quash was initially filed and responded to, the Single Commissioner issued an Order ***denying*** "Claimant's Motion to Quash Defendants' Subpoena to Carolina Center for Occupational Health." Appellant reached out via e-mail to the Single Commissioner's assistant requesting clarification, since the Motion was from the Defendants. The response from the Single Commissioner's assistant was that the Order was corrected to reflect the Respondents had filed the motion. Her e-mail concluded by stating, "[i]n essence, the same outcome occurred with the Commissioner's corrected decision" (R. pp. 442-444).

While I cannot speak for Respondents' Counsel, I can only assume we were under the

same impression that the Motion Order was going to be corrected to simply change the parties listed to reflect Respondents' Motion to Quash was denied rather than Claimant's Motion to Quash, as Appellant never filed a Motion to Quash in this matter. However, the result would remain the same, the Motion to Quash (whoever filed it) was denied. This is the only logical outcome of the Single Commissioner's decision being the same. To find that the Motion to Quash was granted, which, is what actually happened, is the complete opposite of having "[essentially] the same outcome."

Appellant was not initially served the corrected Order from the Single Commissioner, which rather than denying the Motion to Quash as previously indicated, granted Defendants' Motion to Quash. At that time, CCOH hired outside Counsel of their own to respond to the subpoena. CCOH's Counsel then filed a Motion to Quash on their behalf. First and foremost, why would CCOH even need to hire their own counsel to file a Motion to Quash if the Single Commissioner already granted the Motion to Quash? Regardless, CCOH's Counsel filed the Motion to Quash, and Appellant's Counsel filed a response. On this occasion and essentially on the same merits (aside from standing), the Single Commissioner granted the Motion to Quash. Appellant requested an explanation of how the Single Commissioner could reverse course on his prior denial of the Motion to Quash. This was the first time Appellant's Counsel was made aware that the prior Motion by Respondents had actually been granted. At that time, Appellant timely filed a Form 30 to appeal both Motion to Quash decisions (R. pp. 442-444).

CONCLUSION

For the reasons set forth above, Appellant respectfully requests that the Commission's affirmation be reversed with regards to any Findings of Fact and Conclusions of Law concerning compensability of the low back, award of reimbursement for out-of-pocket causally-related medical

treatment, award of future medical care, and award of temporary total disability benefits, and the Court find the preponderance of the evidence supports finding Appellant met her burden of proof establishing compensability under the Act. Alternatively, Appellant requests a reversal of the ruling on the admissibility of Dr. Weissglass' deposition and the newspaper article photo and a remand to the Single Commissioner for re-hearing of the case without this evidence. Additionally, based on the arguments discussed herein, Appellant requests the Court vacate and reverse both Orders on the Motions to Quash and compel CCOH to produce the requested documents.

Respectfully submitted,

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