

**THE STATE OF SOUTH CAROLINA
In the Court of Appeals**

Appellate Case No. 2019-001594

**APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION
COMMISSION APPELLATE PANEL**

WCC File No.: 15117220

Janice McCutcheon, Employee.....Respondent,

v.

Greenwood Mills, Inc., and Greenwood Mills/Self-Insurer, Employer/Carrier.....Appellant.

BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

1. Whether the Appellate Panel's determinations that Respondent sustained compensable injuries to her left hand, arm, shoulder, and psyche must be affirmed because substantial evidence exists in the record to support such conclusions.
2. Whether the Appellate Panel's decision that Respondent is permanently and totally disabled pursuant to section 42-9-10 must be affirmed because substantial evidence exists in the record to support this conclusion.

STATEMENT OF THE CASE

Respondent is a sixty-five year-old woman with a bachelor's degree in nursing from Clemson University. (Comm'r Hrg. at 9:3-6, 21-25) She was employed by Appellant as a plant nurse for twenty-nine years, which is also where her husband works. (Id. at 10:4-6; 23:16-19) Respondent planned to retire upon qualifying for full retirement benefits at age sixty-six. (Id. at 23:12-19) Instead, she resigned in March, 2017, at age sixty-three because of the chronic pain she suffers and the inability to perform her job duties. (Id. at 22:22 – 23:5)

In the almost three decades she worked for Appellant, Respondent never had a workplace injury prior to that which precipitated the case sub judice. (Id. at 10:6-10) Respondent sustained an admitted injury to her left wrist on November 5, 2015, when she stumbled on a set of steps at the front of the Harris Plant. (Id. at 6:13-16; 10:18-22) X-rays revealed an "impacted distal radial fracture with extension . . . to the radiocarpal joint," as well as a "[d]isplaced ulnar styloid fracture." (Resp. APA at 4) Respondent injured her left shoulder, arm, wrist, hand, and fingers in the fall, but initially she and her orthopedist were primarily concerned about the fractures. (Comm'r Hrg. at 10:23 – 11:3; 12:5-11)

The broken bones were treated by closed reduction the day after the accident by Dr. Timms of Lakelands Orthopaedic, and Respondent's arm was splinted. (Resp. APA. at 5) Follow-up x-rays performed two weeks later revealed movement of one of the fractures, and Respondent thereafter underwent surgery on November 30, 2015, for the placement of a plate and screws. (Id. at 6, 17-18) Two and a half months after the operation Dr. Timms, who performed the surgery, remarked that things were "just going extremely, extremely slow[ly] and [that Respondent was] having a lot of problems." (Id. at 10) He suspected "there [was] some component of [reflex sympathetic dystrophy]" and "recommended a pain management consultation and consideration for sympathetic nerve block," but noted Respondent did not want to pursue that treatment course. (Id.) The pain eventually became too much to bear, and on March 9, 2016, Respondent asked Dr. Timms about seeing a neurologist. (Id. at 11) He again expressed a desire to refer her to a pain clinic for nerve blocks, which Respondent was still opposed to, but she ultimately relented to this treatment plan. (Id.) Respondent was thereafter referred by Dr. Timms to Dr. Loudermilk at Piedmont Comprehensive Pain Management Clinic, who saw her on March 21, 2016. (Id. at 27)

At Respondent's initial visit with Dr. Loudermilk, she was provided a document titled "Initial Pain Assessment" which included a two-part questionnaire and human diagram. (Id. at 20, 24-26; Comm'r Hrg. at 13:6-20) Respondent checked the space indicating she had pain in her shoulders on the first part of the questionnaire. (Id. at 13:20 – 14:1; Resp. APA at 24) In answer to the inquiry "Where is your pain?" she wrote: "Left wrist, hand & fingers, & (L) shoulder." (Id. at 25; Comm'r Hrg. at 14:2-7) In response to the question of when her pain began Respondent wrote: "November 5, 2015," and in response to the inquiry whether she had experienced similar problems in the past, Respondent answered simply, "No." (Resp. APA at

25; Comm'r Hrg. at 14:8-12) The fifth question was: "Is the pain related to an on-the-job injury (if yes, date of injury)?" and Respondent answered: "Nov. 5, 2015." (Resp. APA at 25) On the human diagram she marked her left shoulder, left wrist, thumb, knuckles, and fingers as areas of ongoing pain. (Id. at 26; Comm'r Hrg. 14:6 – 15:10)

Dr. Loudermilk ultimately treated Respondent with a series of four stellate ganglion nerve blocks accompanied by ongoing physical therapy. (Resp. APA at 37) He noted on August 17, 2016, that while the reflex sympathetic dystrophy was resolved, Respondent had pain over the knuckles and occasional tingling sensations, which he attributed to "nerve injury from the fracture." (Id. at 39) Dr. Loudermilk resumed Respondent's hydrocodone prescription at that visit, and noted his partner, Dr. Burnette, had performed an impairment rating on July 21st pursuant to his request. (Id.) At that visit "Respondent was given a 5% impairment to the right upper extremity" with the recommendation of "no repetitive wrist flexion or extension, [and] no lifting over 5 pounds with the left hand." (Id.) A slow transition to a full work day was advised if Respondent was to return to work. (Id.)

Dr. Burnette is a physiatrist within Dr. Loudermilk's practice who has taken courses to perform disability evaluations, which Dr. Loudermilk himself does not do. (Id. at 90, p. 12:1-21) As he stated, "...I don't do disability ratings. I leave that up to Dr. Burnette. She knows the numbers. It is obviously very complicated." (Id. at 97, p. 40:10-13) But Dr. Loudermilk took pains to explain that in such cases, Dr. Burnette sees the patient only "one time for one day." (Id. at 97, p. 41:13-14) He noted that while Dr. Burnette "gives recommendations sometimes on return to work. . . . I know my patient better than [Dr. Burnette] does in [the] sense that I have been taking care of her longer." (Id. at 97, p. 40:17-25)

At Respondent's follow-up visit on October 5, 2016, Dr. Loudermilk noted that while she had suffered "severe reflex sympathetic dystrophy," that condition had resolved. (Id. at 40) Because she took "Norco sparingly for pain," due to ongoing neuralgia problems he refilled Respondent's hydrocodone prescription and released her from his care. (Id.) He saw her again, however, on March 9, 2017, when Respondent returned with continuing pain, stiffness, and neuralgia in the left wrist and hand. (Id. at 43) Dr. Loudermilk noted, "She takes occasional Ativan and I plan to refill a small prescription for Ativan to help with anxiety." (Id.) He explained the reflex sympathetic dystrophy (hereinafter "RSD") could return if there was "any further trauma to the left hand or if she has surgery." (Id.) At a follow-up visit two months later, Dr. Loudermilk noted Respondent's continued worries about the RSD reoccurring. (Id. at 44) He performed a surprise urine screening in his office which revealed Respondent "was positive for opioids consistent with her treatment," and subsequently refilled her hydrocodone and Ativan prescriptions. (Id.) At her next visit on August 29, 2017, Dr. Loudermilk prescribed Neurontin to help with the "throbbing pain and . . . stiffness in her left hand." (Id. at 45)

At her follow-up visit on September 21, 2017, Dr. Loudermilk noted Respondent "continue[d] to maintain a high level of anxiety." (Id. at 50) When she complained of continuing pain in her left shoulder at that visit, Dr. Loudermilk commented he had never addressed her shoulder problem, despite the fact she noted shoulder pain on the human diagram at the initial visit. (Id.) He explained, "I have always focused on her left hand as this was where her greatest pain was located and where she manifested [RSD]," but remarked that Respondent asserted she injured her shoulder as well. (Id.) Dr. Loudermilk testified he has

a lot of patients that focus a lot on the main problem, and they don't really talk about some of the other issues because they are so focused on that RSD problem. . . And I think with her visits with me, she got a lot of anxiety. And she is always

asking about the RSD, was it going to return. So everything has been sort of directed towards that hand. And the shoulder has kind of been a secondary issue.

(Id. at 103, p. 64:11-25) He explained that with patients, "as one problem heals, they start to notice other things." (Id. at 94, p. 28:15-16)

Dr. Loudermilk testified if there were no records of prior shoulder problems, it was more likely than not that her workplace injury aggravated her shoulder.¹ (Id. at 98, p. 43:23 – 44:1) He also noted what is clearly apparent: "If she marked that on the intake form it is obviously an issue there. It wasn't marked after the fact. So she obviously had some shoulder issues when she came to see me." (Id. at 98, 44:14-17) In terms of the mechanism of injury, the doctor acknowledged he did not know "if the shoulder was injured when she fell," or "became worse over 18 months because she was using her upper arm to compensate for her wrist and straining her shoulder." (Id. at 94, p. 27:5-9) He explained that after surgery to a hand injury,

you tend to compensate and you use your . . . arm more, you use your shoulder more to make up for the weakness in your hand. If you have to put pressure on it, you are putting it more on your shoulder because you can't use your hand. . . . So there may have been some compensation injuries there as well.

(Id. at 94, p. 29:17-23)

In addition to the ongoing anxiety issues, Dr. Loudermilk determined Respondent was suffering from depression and prescribed Lexapro to address this. (Id. at 50) He refilled Respondent's prescriptions for hydrocodone, Ativan, Neurontin, and Lexapro at her visits on October 17th and December 14th, 2017, and on February 21st, April 19th, June 14th, August 9th, October 4th, November 29th, 2018, as well as on January 24, 2019. (Id. at 51-53, 64, 68-72) As of the December 14, 2017, visit Dr. Loudermilk determined Respondent's left shoulder pain was chronic. (Id. at 52) He described Respondent as having "[c]hronic anxiety and depression" as of the April 19, 2018 visit. (Id. at 64) Significantly, Dr. Loudermilk acknowledged it was common

¹ To be clear, there are no records of Respondent having any prior shoulder injuries or problems.

for a person with a history of anxiety to be made worse by constant pain, and that he believed Respondent's constant pain caused "a worsening of her anxiety and depression." (Id. at 102-03, pp. 61:18 – 62:1)

Despite the medications she takes, Respondent still experiences pain in her left hand, fingers, wrist, and shoulder, which ranges, depending on the day and the specific body part, from a four to seven on a standard pain scale. (Comm'r Hrg. at 16:6 – 17:12) Her medications cause drowsiness and a decreased attention span. (Id. at 17:16-23) She has decreased strength in her left hand and experiences swelling in her left wrist if she overuses it. (Id. at 18:4-12) Respondent's everyday activities are restricted by her shoulder and wrist injuries to such an extent that she still has difficulty fastening and unfastening a seatbelt, or driving over ten miles. (Id. at 19:2-7, 20:2-14) She lacks the ability to perform such simple tasks as picking up coins, wrapping a gift, stirring a pot of food, mopping, sweeping, or vacuuming, and cannot even press the buttons on a microwave with her left hand. (Id. at 19:8-13, 24:22-24, 25:7-9) While Respondent understands she has a five-pound lifting restriction, lifting anything causes increased pain in her shoulder. (Id. at 18:15-24)

While Respondent admitted she suffered with bouts of anxiety prior to her injury in 2015, these did not interfere with her ability to work or perform activities. (Id. at 20:20 – 21:3) She is now socially withdrawn, remains anxious concerning the reflex sympathetic dystrophy, and suffers depression which she attributes to the ongoing issues with pain. (Id. at 21:4-13)

Appellant's witness, Janice Howle, a licensed practical nurse now employed by Appellant, testified the job performed by Respondent primarily involved performing pulmonary function and audio tests, as well as administering first aid as needed. (Id. at 51:10-24) She characterized the job as requiring "a lot of record keeping," as the facility has "[a]round 270"

employees. (Id. at 52:12, 18-20) Ms. Howle acknowledged she used both extremities to perform the breathing tests she was required to administer, and both hands to open and unpack supply boxes "[d]epending on how heavy the product is." (Id. at 57:14-18, 59:19-24) At the time of her testimony, Ms. Howle had been a plant nurse for Appellant a little over two years. (*Compare id.* at 50:7-11 *with id.* at 1) In that time she provided care for a variety of injuries, including "[l]aceration, concussion, falls, sprained ankle, [and sprained] back." (Id. at 61:5-9) She testified she was required to treat injuries "several times a week," and acknowledged both hands would be needed to apply a bandage or ace wrap. (Id. at 61:10-16, 22-23)

On March 7, 2018, Dr. Loudermilk completed questionnaires for Respondent wherein he opined to a reasonable degree of medical certainty, it is more likely than not that: (1) Respondent's left hand, left arm, left shoulder, and left upper extremity injuries are a direct result of her workplace injury on November 5, 2015 (id. at 54-55); (2) Respondent would be restricted in accordance with Dr. Burnette's limitations of "no repetitive flexion or extension of the left wrist and no lifting greater than" five pounds with her left hand (id. at 56); (3) such limitations would become more limiting as Respondent ages (id. at 57); (4) the left arm injury caused aggravation to the left shoulder to such an extent it is "impaired to an equal degree as the left upper extremity" (id. at 58); (5) Respondent will continue to have moderately severe pain which will "make it impossible for her to maintain concentration throughout a normal . . . work day, interfere with her ability to complete tasks," miss work more than twice a month, and would require her to take unscheduled work breaks (id. at 59); (6) Respondent will "be unable to return to her work as a nurse as a result of the injuries suffered in her work related accident" (id. at 60); (7) Respondent will be unable to do any other gainful employment as a result of those same injuries (id. at 61); (8) Respondent will need ongoing pain management treatment, including

doctor visits and medication, for the rest of her life (id. at 62); and (9) Respondent has "permanent severe nerve damage in her left hand." (Id. at 63)

On April 8, 2018, Dr. Robert Brabham, a licensed psychologist with a master's degree in rehabilitation counseling, performed a vocational evaluation upon Respondent. (Id. at 77-86)

He determined:

As noted in multiple records, [Respondent] is unable to maintain any position for more than a brief period of time, less than thirty minutes, and has to frequently change positions. She also is unable to perform any physically strenuous activity. Further, [Respondent] is also unable to handle any type of work that would require close attention to detail, attention, concentration, persistence or pace. *The cumulative effects of pain alone clearly interfere with the ability to maintain gainful employment.*

(Id. at 85) (emphasis added) Dr. Brabham concluded that directly as a result of her workplace injuries, "the only services she could perform are so limited in quality, dependability, or quantity that no reasonable stable market for them exists." (Id. at 86) He found that her limitations eliminated a return to gainful employment as no employer would be able to "tolerate or accommodate" her physical needs and lack of productivity. (Id.)

The single Commissioner found Respondent was permanently and totally disabled pursuant to section 42-9-10, and ordered lump sum payment, payment of all causally related medical expenses, and payment for all future medical care and treatment as recommended by an authorized treating physician. (Comm'r Order at 13) Appellant properly appealed this decision to the Full Commission, which issued its Order on August 20, 2019. The Commission found that in addition to the admitted injury to her left wrist/hand/arm, Respondent sustained compensable "causally-related injuries to her left shoulder and psyche." (Comm. Order at 3, 5-6) Based on Dr. Brabham's vocational evaluation, which the Commission noted was "the only vocational assessment submitted for Commission consideration," and the opinions of Dr. Loudermilk, the

only current authorized treating physician, concerning the problems associated with Respondent's chronic pain and her potential employability, the Commission determined Respondent was permanently and totally disabled. (Id. at 5-6) Accordingly, it affirmed the Single Commissioner's Order in full. (Id. at 6) Appellant now appeals the Commission's Order.

STANDARD OF REVIEW

As accurately noted by Appellant, this appeal is governed by the South Carolina Administrative Procedures Act, which provides a "court may not substitute its judgment for the judgment of the agency as to the weight of evidence on questions of fact." S.C. Code Ann. § 1-23-380(5); Bass v. Kenco, 366 S.C. 450, 622 S.E.2d 577, 580 (Ct. App. 2005) However, a court "may reverse or modify" an agency's decision if its administrative findings are "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." § 1-23-580(5)(e). In other words, "this Court's review is limited to deciding whether the appellate panel's decision is unsupported by substantial evidence." Bass, 622 S.E.2d at 581. "Substantial evidence is . . . evidence that, considering the record as a whole, would allow reasonable minds to reach the conclusion the administrative agency reached in order to justify its action." Dent v. E. Richland Cnty. Pub. Serv. Dist., 422 S.C. 193, 200, 813 S.E.2d 886, 890 (Ct. App. 2018) (quoting Taylor v. S.C. Dep't of Motor Vehicles, 368 S.C. 33, 36, 627 S.E.2d 751, 752 (Ct. App. 2006)).

Likewise, "[t]he Appellate Panel's decision must be affirmed if supported by substantial evidence in the record." Thomas v. 5 Star Transp., 412 S.C. 1, 8, 770 S.E.2d 183 (Ct. App. 2015). It is a hallmark of workers' compensation law that "[w]here there are conflicts in the evidence over a factual issue, the findings of the appellate panel are conclusive." Bass, 622 S.E.2d at 581; *see also* Colonna v. Marlboro Park Hosp., 404 S.C. 537, 547-48, 745 S.E.2d 128,

134 (Ct. App. 2013) (noting "regardless of conflict in the evidence, either of different witnesses or of the same witness, a finding of fact by the Commission is conclusive."); Dozier v. Am. Red Cross, 411 S.C. 274, 288, 768 S.E.2d 222, 229 (Ct. App. 2014) (same); Hall v. Desert Aire, Inc., 376 S.C. 338, 348, 656 S.E.2d 753, 758 (Ct. App. 2007) (when "there are conflicts in the evidence over a factual issue, the findings of the Appellate Panel are conclusive."); Harrison v. Owen Steel Co., 422 S.C. 132, 138, 810 S.E.2d 433, 436 (Ct. App. 2018) (same).

This is because the Appellate Panel is the "ultimate fact finder in workers' compensation cases," and the "final determination of witness credibility and the weight to be accorded evidence is reserved to" it. Bass, 622 S.E.2d at 581; *see also* Thomas, 412 S.C. at 9 ("[I]t is not for this court to balance objective against subjective findings of medical witnesses, or to weigh the testimony of one witness against that of another. That function belongs to the Appellate Panel alone.") (quoting Potter v. Spartanburg Sch. Dist. 7, 395 S.C. 17, 24, 716 S.E.2d 123, 127 (Ct. App. 2011) (alteration in original) (additional internal quotation marks omitted)).

Where reasonable minds can reach different conclusions based on the record, this Honorable Court "must not engage in fact-finding that would disregard the Commission's factual finding on these issues." Nero v. S.C. Dep't of Transp., 427 S.C. 392, 404, 831 S.E.2d 143, 150 (Ct. App. 2019) (quoting Hartzell v. Palmetto Collision, LLC, 415 S.C. 617, 623, 785 S.E.2d 194, 197 (2016)). More pointedly, this Honorable Court "is prohibited from overturning findings of fact of the Appellate Panel, unless there is no reasonable probability the facts could be as related by the witness upon whose testimony the finding was based." Hargrove v. Titan Textile Co., 360 S.C. 276, 290, 599 S.E.2d 604 (Ct. App. 2004). Ultimately, where there is "evidence in the record to support the commission's findings," its decision must be affirmed. Adams v. Texti

Indus., 341 S.C. 401, 404, 535 S.E.2d 124 (2000) (citing Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981)).

ARGUMENT

I. BECAUSE THERE IS SUBSTANTIAL EVIDENCE IN THE RECORD THAT RESPONDENT SUSTAINED INJURIES TO HER LEFT HAND, ARM, SHOULDER, AND PSICHE AS A RESULT OF HER ADMITTED WORKPLACE ACCIDENT, THE COMMISSION'S AWARD PURSUANT TO SECTION 42-9-10 MUST BE AFFIRMED.

Appellant argues that Respondent's background as a nurse compels the conclusion she did not suffer an injury to her shoulder because her training and experience as a healthcare provider dictates she "should know the importance of expressing all of her physical complaints to her health care providers." (App. Br. at 5-6) It is noteworthy this argument was only cursorily raised before the Appellate Panel, (Comm. Hrg. at 18:9-14), and there are no facts in the record which address why Respondent did not complain to her initial treating physician, Dr. Timms, or her physical therapists, about the problems she had with her shoulder. (See App. Br. at 6) Accordingly, it would be entirely speculative to posit the multiple, various reasons why such complaints are not seen. See United States v. McRae, 77 F.2d 88, 89 (4th Cir. 1935) ("A verdict must be based on evidence, not on speculation or conjecture."). Appellant's argument for non-compensability of the shoulder is that "Respondent did not complain of left shoulder pain for twenty-two months following her accident." (App. Br. at 6) This is simply not accurate.

Dr. Timms referred Respondent to Dr. Loudermilk, who first saw her on March 21, 2016. (Resp. APA at 27) At that initial visit, approximately six months out from her November 5, 2015, accident, Respondent checked the space on a two-part questionnaire indicating she had pain in her shoulders. (Comm'r Hrg. at 13:20 – 14:1; Resp. APA at 24) In answer to the inquiry "Where is your pain?" she wrote: "Left wrist, hand & fingers, & (L) shoulder." (Id. at 25; Comm'r Hrg. at 14:2-7) In response to the question of when her pain began Respondent wrote:

"November 5, 2015," and in response to the inquiry whether she had experienced similar problems in the past, Respondent answered simply, "No." (Resp. APA at 25; Comm'r Hrg. at 14:8-12) The fifth question was: "Is the pain related to an on-the-job injury (if yes, date of injury)?" and Respondent answered: "Nov. 5, 2015." (Resp. APA at 25) On the human diagram she marked her left shoulder, left wrist, thumb, knuckles, and fingers as areas of ongoing pain. (Id. at 26; Comm'r Hrg. 14:6 – 15:10) "So, [Respondent] obviously had some shoulder issues when she [went] to see [Dr. Loudermilk]." (Resp. APA at 98, 44:14-17) It is also notable Respondent testified she had shoulder pain throughout the time she was treated by Dr. Timms. (Comm'r Hrg. at 12:12-18)

It is thus clear that Respondent did, in fact, complain about pain in her left shoulder far sooner than twenty-two months following her accident. (*Cf.* App. Br. at 6) As Dr. Loudermilk explained, "as one problem heals, [patients] start to notice other things." (Resp. APA at 94, p. 28:15-16) He noted that patients tend to focus on the major problem with which they are confronted, which at the time of Respondent's initial visits was the RSD issue. (Id. at 103, p. 64:11-25) Thus the shoulder was, for both Respondent and Dr. Loudermilk, "a secondary issue." (Id. at 103, p. 64:24-25)

Pivotaly, Dr. Loudermilk was her authorized treating physician, and opined that in the absence of records which showed prior problems in her shoulder, it was more likely than not that Respondent's workplace injury aggravated her shoulder. (Id. at 98, p. 43:23 – 44:1) In terms of the mechanism of injury, Dr. Loudermilk acknowledged he did not know "if the shoulder was injured when she fell," or simply worsened "because she was using her upper arm to compensate for her wrist and straining her shoulder." (Id. at 94, p. 27:5-9) Regardless, Dr. Loudermilk opined to a reasonable degree of medical certainty that Respondent's left shoulder injury was a

direct result of her workplace injury on November 5, 2015. (Id. at 54, 58) Appellant offered no relevant testimony or medical evidence to refute Dr. Loudermilk's opinion.

While Appellant makes much of the fact that Respondent tried to return to work several times during the course of this process, Appellant ignores the distinction between returning to work full time versus at full duty. (Comm'r Hrg. at 45:5-10) Respondent remained on a limit of lifting no more than five pounds and avoiding repetitive flexion and extension of her wrist during her final attempt to return to work. (Id. at 45:11-16; Resp. APA at 101, p. 55:6-15) Her inability to perform the job duties led her to resign in March, 2017. (Comm'r Hrg. at 23:1-5; 34:15-18)

Regarding her mental health, Respondent admitted she suffered with bouts of anxiety prior to her injury in 2015, but noted these did not interfere with her ability to work or perform activities. (Id. at 20:20 – 21:3) It is true that after experiencing high blood pressure which she attributed to stress, Respondent's family doctor placed her on Lexapro in November, 2013, because Respondent did not want blood pressure medications. (App. APA at 118, 120) It is also accurate that Dr. Loudermilk maintained Respondent on the Ativan she was later provided by her family doctor, and taking "occasionally." (App. APA at 125; Resp. APA at 50) It is further worthy to note that during her time with Dr. Loudermilk Respondent ultimately required Ativan daily. (*See id.* at 53)

In addition to ongoing anxiety issues, Dr. Loudermilk determined on September 21, 2017, that Respondent was suffering from depression and prescribed Lexapro to address this. (Id.) Respondent testified her family doctor never had her on anything for depression. (Comm'r Hrg. at 42:16-19) Yet Dr. Loudermilk diagnosed Respondent as having "[c]hronic anxiety and depression" as of the April 19, 2018 visit. (Id. at 64) Significantly, Dr. Loudermilk explained it was common for a person with a history of anxiety to be made worse by constant pain, and that

he believed Respondent's constant pain caused "a worsening of her anxiety and depression." (Id. at 102-03, pp. 61:18 – 62:1)

Appellant's contention regarding the non-compensability of Respondent's psychological issues is foreclosed by our Supreme Court's opinion in Bass:

[Employer] asserts that Bass's emotional injuries were not a result of his shoulder injury. However, [Employer's] contention is not a legal argument, but a factual one. . . . The opinions of [the doctors] . . . unequivocally link Bass's psychological issues directly to his physical injury. The commission is the finder of fact. Substantial evidence supports the commission's findings.

622 S.E.2d at 585. "When conflicting medical evidence is presented, this [Honorable Court] must not substitute its judgment for that of the fact finder, which in this case [is] the Appellate Panel." Dozier, 411 S.C. at 293, 768 S.E.2d at 232 (citing Mullinax v. Winn-Dixie Stores, Inc., 318 S.C. 431, 435, 458 S.E.2d 76, 78 (Ct. App. 1995)) ("Where the medical evidence conflicts, the findings of fact of the [Appellate Panel] are conclusive.") Here, the Appellate Panel found Respondent sustained a "compensable causally related injury to her left hand, left arm and left shoulder as a result" of her workplace accident, and "a compensable aggravation to her pre-existing psyche/anxiety." (Comm. Order at 5-6)

In short, this Honorable Court "is prohibited from overturning findings of fact of the Appellate Panel, unless there is no reasonable probability the facts could be as related by the witness upon whose testimony the finding was based." Hargrove, 360 S.C. at 290. Considering the record as a whole, Dr. Loudermilk's records and testimony would "allow reasonable minds to reach the" same conclusions reached by the Appellate Panel on the issues of compensability for the left shoulder and mental health conditions. Dent, 422 S.C. at 200, 813 S.E.2d at 890. Therefore, this constitutes "substantial" evidence. *See id.* Accordingly, because substantial evidence exists in the record to support it, the Appellate Panel's decision must be affirmed.

Dozier, 411 S.C. at 293, 768 S.C.2d at 232; *see also* Bass, 622 S.E.2d at 581 (noting "[w]here there are conflicts in the evidence over a factual issue, the findings of the appellate panel are conclusive."); Colonna, 404 S.C. at 547-48, 745 S.E.2d at 134 (noting "regardless of conflict in the evidence, either of different witnesses or of the same witness, a finding of fact by the Commission is conclusive."). To do otherwise would require this Honorable Court to engage in fact-finding, which it is prohibited from doing. Nero, 427 S.C. at 404, 831 S.E.2d at 150.

II. BECAUSE THERE IS SUBSTANTIAL EVIDENCE IN THE RECORD TO SUPPORT THE COMMISSION'S FINDING THAT RESPONDENT IS PERMANENTLY AND TOTALLY DISABLED, THE COMMISSION'S DECISION MUST BE AFFIRMED.

Appellant places a great deal of focus on Dr. Burnette's impairment evaluation conducted on July 21, 2016, which was geared exclusively in terms of Respondent's wrist fracture. (App. Br. at 11) While it is true this visit was a lengthy one, Dr. Burnette met with Respondent only one time. (Comm'r Hrg. 43:7-24) She noted Respondent "appear[ed] to be at maximum medical improvement *in terms of the wrist fracture healing*." (Resp. APA at 75) (emphasis added) She recommended permanent work restrictions of no repetitive flexion or extension and no lifting over five pounds. (Id. at 76) Regarding a return to work, she noted Respondent "will likely need slow transition to full time work hours, possibly increasing to 6 hours per day initially for a period of 3-4 weeks and then similarly gradually increasing to a full 8 hour day over the next two to three months." (Id.)

Dr. Loudermilk agreed that Dr. Burnette was more qualified to render an impairment rating regarding an injury. (Resp. APA at 101, p. 54:10-16) She has taken courses to perform disability evaluations, which Dr. Loudermilk himself does not do. (Id. at 90, p. 12:1-21) As he stated, "...I don't do disability ratings. I leave that up to Dr. Burnette. She knows the numbers. It is obviously very complicated." (Id. at 97, p. 40:10-13)

Yet Dr. Loudermilk explained that Dr. Burnette sees the patient only "one time for one day." (Id. at 97, p. 41:13-14) He noted that while Dr. Burnette "gives recommendations sometimes on return to work. . . . I know my patient better than [Dr. Burnette] does in [the] sense that I have been taking care of her longer." (Id. at 97, p. 40:17-25) He testified that while Dr. Burnette could provide recommendations for work restrictions, those are merely physical restrictions which do not take into account "the emotional aspects" of the patient, nor the patient's medication requirements and how those might interfere with working. (Id. at 101, p. 54:19-24, 56:3-7)

Respondent's initial return to work on a limited duty basis occurred December 27, 2015, after her surgery and extended until she tried increasing her hours according to Dr. Burnette's recommendation. (Comm'r Hrg. at 33:10-20; Resp. APA at 12) She never returned to full duty, though she did return to work. (Comm'r Hrg. at 34:9-11, 45:5-10) Even during that period Respondent remained under Dr. Burnette's physical limitations, and such minor tasks as inputting data into a computer caused pain. (Id. at 46:4-11) Respondent ultimately submitted her letter of resignation in March, 2017, and when asked why she resigned responded, "Because of the chronic pain. I just wasn't able to – I struggled to perform the job duties. I just couldn't complete all the work." (Id. at 23:1-3) However, it is to her credit that she tried. (*See id.* at 23:4-5)

Respondent still experiences pain in her left hand, fingers, wrist, and shoulder, despite the medication she takes every day. (Comm'r Hrg. at 16:6 – 17:12) These cause drowsiness and a decreased attention span. (Id. at 17:16-23) She has decreased strength in her left hand and experiences swelling in her left wrist if she overuses it. (Id. at 18:4-12) Her activities are restricted by her shoulder and wrist injuries to such an extent that she still has difficulty fastening

and unfastening a seatbelt, or driving over ten miles. (Id. at 19:2-7, 20:2-14) Respondent cannot perform such simple tasks as picking up coins, wrapping a gift, stirring a pot of food, mopping, sweeping, or vacuuming, and cannot even press the buttons on a microwave with her left hand. (Id. at 19:8-13, 24:22-24, 25:7-9) While Respondent understands the five-pound lifting restriction Dr. Burnette recommended, in reality lifting anything causes increased pain in her shoulder. (Id. at 18:15-24) Importantly, while Respondent suffered with bouts of anxiety prior to her injury in 2015, these did not interfere with her ability to work or perform activities. (Id. at 20:20 – 21:3) She is now socially withdrawn and anxious, and suffers depression which she attributes to the ongoing issues with pain. (Id. at 21:4-13) Significantly, Dr. Loudermilk agrees with Respondent's assessment that constant pain has caused an increase in Respondent's anxiety and depression. (Resp. APA at 102-03, pp. 61:18 – 62:1)

Appellant's own witness testified the job performed by Respondent required "a lot of record keeping" as the facility has "[a]round 270" employees, (Comm'r Hrg. at 52:12, 18-20), and performing pulmonary function and audio tests, as well as administering first aid as needed. (Id. at 51:10-24) Ms. Howle conceded she used both extremities to perform the breathing tests she was required to administer, and both hands to open and unpack supply boxes depending on the product. (Id. at 57:14-18, 59:19-24) In the two years Ms. Howle served as a plant nurse prior to her testimony, she provided care for a variety of injuries "several times a week," including "[l]aceration, concussion, falls, sprained ankle, [and sprained] back." (Id. at 61:5-16, 22-23) Ms. Howle acknowledged both hands would be needed in these circumstances. (Id. at 61:10-16, 22-23)

On March 7, 2018, Dr. Loudermilk opined to a reasonable degree of medical certainty, it is more likely than not that: (1) Respondent's left hand, left arm, left shoulder, and left upper

extremity injuries are a direct result of her workplace injury on November 5, 2015 (id. at 54-55); (2) Respondent would be restricted in accordance with Dr. Burnette's limitations of "no repetitive flexion or extension of the left wrist and no lifting greater than" five pounds with her left hand (id. at 56); (3) such limitations would become more limiting as Respondent ages (id. at 57); (4) the left arm injury caused aggravation to the left shoulder to such an extent it is "impaired to an equal degree as the left upper extremity" (id. at 58); (5) Respondent will continue to have moderately severe pain which will "make it impossible for her to maintain concentration throughout a normal . . . work day, interfere with her ability to complete tasks," miss work more than twice a month, and would require her to take unscheduled work breaks (id. at 59); (6) Respondent will "be unable to return to her work as a nurse as a result of the injuries suffered in her work related accident" (id. at 60); (7) Respondent will be unable to do any other gainful employment as a result of those same injuries (id. at 61); (8) Respondent will need ongoing pain management treatment, including doctor visits and medication, for the rest of her life (id. at 62); and (9) Respondent has "permanent severe nerve damage in her left hand." (Id. at 63)

Dr. Loudermilk testified Respondent would need ongoing pain medications and doctor visits to treat her condition, and these would need to continue "[h]owever long her pain is a big problem for her." (Id. at 96, p. 35:19 – 36:6) He believes Respondent will develop arthritis in her wrist which will worsen as she ages. (Id. at 96, p. 34:2-4) Dr. Loudermilk's opinion was that "she has chronic pain in her wrist and she [was] 64-years old. So I think she is a liability to go back to any type of work. I can't see anyone even wanting to hire her." (Id. at 97, p. 39:8-11) He noted that "in terms of sending someone back to work or not, Dr. Burnett[e] doesn't do that. That falls back on me. I have got to use all the information I have at my disposal to determine whether someone is going to be able to go back to work." (Id. at 38:24 – 39:4)

Thereafter, Dr. Brabham performed a vocational evaluation upon Respondent on April 8, 2018. (Id. at 77) He found Respondent was unable to maintain any position for more than thirty minutes or perform any strenuous activity, and could not handle "any type of work that would require close attention to detail, attention, concentration, persistence or pace." (Id. at 85) He also determined that the "cumulative effects of pain alone clearly interfere with the ability to maintain gainful employment." (Id.) Dr. Brabham concluded that directly as a result of her workplace injuries, "the only services she could perform are so limited in quality, dependability, or quantity that no reasonable stable market for them exists." (Id. at 86) He found that her limitations eliminated a return to gainful employment as no employer would be able to "tolerate or accommodate" her physical needs and lack of productivity. (Id.) The Commission accurately noted this was "the only vocational assessment submitted" for consideration. (Comm. Order at 4, ¶ 10)

Appellant focuses exclusively upon when Dr. Timms found Respondent to be at MMI and Dr. Burnette's impairment rating, concluding "the Commission disregarded this objective medical evidence and found her to be totally disabled." (App. Br. at 13) Yet this is exactly what the Commission is entitled to do when "the record as a whole[] would allow reasonable minds to reach the conclusion [it] reached." Dent, 422 S.C. at 200, 813 S.E.2d at 890. "Where there are conflicts in the evidence over a factual issue, the findings of the appellate panel are conclusive." Bass, 622 S.E.2d at 581; *see also* Colonna, 404 S.C. at 547-48, 745 S.E.2d at 134 (noting "regardless of conflict in the evidence, either of different witnesses or of the same witness, a finding of fact by the Commission is conclusive."); Dozier, 411 S.C. at 288, 768 S.E.2d at 229 (same); Hall, 376 S.C. at 348, 656 S.E.2d at 758 (when "there are conflicts in the evidence over a factual issue, the findings of the Appellate Panel are conclusive."); Harrison, 422 S.C. at 138,

810 S.E.2d at 436 (same). As the "ultimate fact finder in workers' compensation cases," the "final determination of witness credibility and the weight to be accorded evidence is reserved to" the Commission. Bass, 622 S.E.2d at 581.

Appellant further contends the "Commission seems to have placed greater weight on the opinions of Dr. Eric Loudermilk and Robert Brabham, Ph.D." (App. Br. at 13) In fact, the Commission explicitly stated it was giving "great weight" to the uncontradicted opinions of Dr. Loudermilk and Dr. Brabham. (Commn. Order at 5, ¶¶ 14 & 15) The important point, however, is it is completely within the province of the Appellate Panel to do exactly that. As previously noted, "it is not for this [Honorable C]ourt to balance objective against subjective findings of medical witnesses, or to weigh the testimony of one witness against that of another. That function belongs to the Appellate Panel alone." Thomas, 412 S.C. at 9 (quoting Potter, 395 S.C. at 24, 716 S.E.2d at 127). Regardless of whether reasonable minds can reach different conclusions based on the record as a whole, this Honorable Court is prohibited from engaging "in fact-finding that would disregard the Commission's factual finding on these issues." Nero, 427 S.C. at 404, 831 S.E.2d at 150. Thus, when the Appellate Panel examines the questionnaires completed by Dr. Loudermilk in light of his deposition testimony and records, as well as the vocational evaluation by Dr. Brabham, and gives the opinions offered therein credence, this Honorable Court cannot overturn such findings of fact. *See* Hargrove, 360 S.C. at 290. As explained in Adams, "[t]he substantial evidence test 'need not and must not be either judicial factfinding or a substitution of judicial judgment for agency judgment.'" 341 S.C. at 404 (quoting Lark, 276 S.C. at 307).

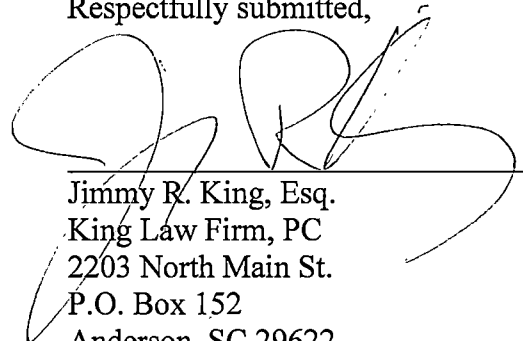
Appellant cites Dozier for the principle that a nurse with a five percent impairment rating to both hands due to carpal tunnel syndrome was not permanently and totally disabled, as the

Commission found "work existed in the economy to accommodate her restrictions." (App. Br. at 16) As it was required to do, in Dozier this Honorable Court "deferred to the Appellate Panel's findings of fact." (Id. at 17) In the case sub judice, the same conclusion is compelled because there is "evidence in the record to support the [C]ommission's findings," and its decision that Respondent is permanently and totally disabled pursuant to section 42-9-10 must therefore be affirmed. Adams, 341 S.C. at 404.

CONCLUSION

Because there is abundant and substantial evidence supporting the Commission's determinations Respondent sustained compensable injuries to her left hand, arm, shoulder, and psyche, and that she is thereby permanently and totally disabled, the Commission's Order must be AFFIRMED.

Respectfully submitted,



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(864) 225-9155
Attorney for Respondent

This 15 day of January, 2020.

**THE STATE OF SOUTH CAROLINA
In the Court of Appeals**

Appellate Case No. 2019-001594

**APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION
COMMISSION APPELLATE PANEL**

WCC File No.: 15117220

Janice McCutcheon, Employee.....Respondent,

v.

Greenwood Mills, Inc., and Greenwood Mills/Self-Insurer, Employer/Carrier.....Appellant.

PROOF OF SERVICE

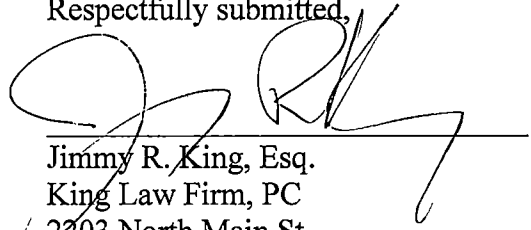
I, Jimmy R. King, attorney for Respondent, do hereby certify that I have served Respondent's Initial Brief and Designation of Matter to be Included in the Record on Appeal, along with this Proof of Service, upon Appellant's attorney by placing a copy of each in the United States mail, with sufficient postage affixed thereto, and addressed as follows:

Roy R. Hemphill, Esq.
McDonald Patrick Poston
Hemphill & Roper, LLC
414 Main Street
P.O. Box 1547
Greenwood, SC 29646

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SC Court of Appeals

(Signature page follows.)

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'J.R. King', is written over a horizontal line.

Jimmy R. King, Esq.

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(864) 225-9155

Attorney for Respondent

This 15 day of January, 2020.

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Attorney and Counselor at Law

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January 15, 2020

Via UPS Overnight Mail

Honorable Jenny Abbott Kitchings
Court of Appeals Clerk of Court
1220 Senate Street
Columbia, South Carolina 29201

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JAN 17 2020

SC Court of Appeals

Re: Janice McCutheon, Respondent v. Greenwood Mills, Inc. and Greenwood Mills/Self-Insurer, Employer/Carrier, Appellant
Appellate Case No. 2019-001594

Dear Ms. Kitchings:

Enclosed please find an original and a copy of the Respondent's Initial Brief in the above appeal from the worker's Compensation Commission. I am also enclosing an original and a copy of Respondent's Designation of Matters to be included on appeal. I kindly request that you file the original and return a clocked-in copy to me in the envelope provided.

By copy of this correspondence to the Appellant's attorney, Roy R. Hemphill, Esq., I am herewith serving a copy of Respondent's Initial Brief and Designation of Matters to be included on appeal upon him as evidenced by the attached Proof of Service.

If you have any questions, please do not hesitate to let me know.

Yours truly,

KING LAW FIRM, P.C.


Jimmy R. King

JRK/jk

Enclosures

cc. Roy R. Hemphill, Esq.

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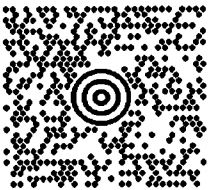

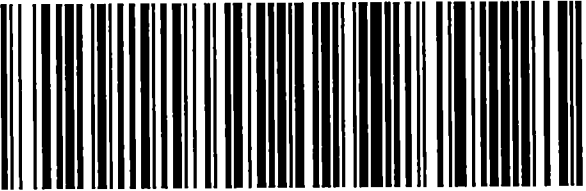

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