APPELLATE PANEL

DECISION AND ORDER

OF THE

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

WCC FILE NO. 1014489

DIANE FLEHER,	EMPLOYEE CLAIMANT/APPELLANT
vs.	
DOLPHIN COVE MARINA,	EMPLOYER,
AND	
CAROLINA CASUALTY INSURANCE CO.,	CARRIER, DEFENDANTS/RESPONDENTS

Appellate Panel Review held in Columbia, South Carolina
upon notices timely and properly served
upon all parties of interest.

Appellate Panel Decision and Order filed

1-31, 2013

AFFIRMS IN FULL

APPEARANCES:

Claimant represented by Paul D.G. Ribeiro, Esquire
of Wigger Law Firm,
North Charleston, South Carolina.

Defendants represented by Lynnley D. Ross, Esquire of Willson Jones Carter & Baxley, P.A., Mount Pleasant, South Carolina.

PROCEDURAL HISTORY

The procedural history of this case is rather long but relevant to the issues before the Panel, so it will be recited herein. The Claimant herself filed a Form 12A on October 13, 2010, the day after the alleged work injury. See Commission's file. On July 18, 2011, the Claimant's attorney filed a Form 50 requesting a hearing and alleging an injury to Claimant's "brain and nervous system." Id. On August 15, 2011, the Employer/Carrier denied the case via a timely filed Form 51. Id. A hearing was set for September 27, 2011, to determine issues set on the Forms 50 and 51. Id. On September 7, 2011, the Claimant withdrew her request for a hearing. Id.

On December 2, 2011, three months after the Claimant withdrew her Form 50 and over a year after the alleged work injury, Defendants filed a Petition for Hearing to determine whether Claimant sustained a compensable injury. Id. On that date, December 2, 2011, Defendants also filed a Motion to Compel MUSC to produce medical records. Id. On December 13, 2011, the Commission served a Notice of Hearing, setting the case for adjudication on December 21, 2011 "to determine issues in the Motion." Id.

On December 14, 2011, the Claimant filed a Motion for Continuance, asserting that the Claimant's assigned counsel had changed and that "the new attorney has not had a chance to do necessary things in the file that will be prejudicial to the Claimant's case should it go forward on the scheduled docket." Id. An informal telephone conference was held on December 15, 2011 with the then-Jurisdictional Commissioner, Commissioner Wilkerson. Id. On December 22, 2011, Commissioner Wilkerson executed an Order compelling MUSC to produce medical records for the Claimant. Id. Via correspondence from Commissioner Wilkerson's office dated January 9, 2012, it was determined that Commissioner Wilkerson ruled only on the Motion to Compel MUSC and that the Defendant's Petition for Hearing remained pending. Id.

A hearing was set for January 31, 2012 to "determine the issues in the Motion." Id. For this hearing, Defendants timely filed a Form 58 outlining their position regarding the request for a merits hearing. Id. Via the Form 58, the Employer/Carrier argued that the case involved a denied mental/mental injury, which is necessarily a very fact-specific inquiry. Id. The Defendants indicated that there were five people in the room at the time of the alleged incident. Id. Two of the people were elderly and one had already moved out of state. Id. The Defendants argued that prejudice was present in further delay of the claim because the witnesses may be lost. Id. Further, the Defendants asserted that the facts of the case and the testimony of the witnesses would not change with time. Id. Thus, there was no prejudice to the Claimant in proceeding with the case, but there may be significant harm to the Defendants, should the case be delayed. Id. Finally, the Defendants argued that pursuant to § 42-17-20 and relevant caselaw, the Defendants can request a hearing at any point fourteen days after the employer has knowledge of the injury. Id. The Claimant did not file a Form 58 or any APA submissions for the January 31, 2012 hearing. Id.

The January 31, 2012 hearing was canceled in favor of an informal telephone conference, which occurred on February 7. Id. At the February 7, 2012 telephonic hearing, the Defendants argued consistently with Defendants Form 58 and further asserted that the Claimant continued to seek treatment with unauthorized providers, which caused additional prejudice to Defendants should the case be found compensable, as the Act vests the right to control medical treatment with the Defendants. Id. Finally, Defendants argued that the Claimant would certainly request TTD and that the Defendants were extremely prejudiced in that exposure for TTD was accruing with the Defendants having no control over the medical aspect of the claim. Id.

In response, the Claimant asserted that the Workers' Compensation Act allowed her a two year time period to develop her claim. Id. Claimant asserted that her claim was "not yet ready"

although it "would be soon." Id. After hearing arguments of Counsel, the Commissioner ordered that a hearing take place pursuant to Regulation 67-601, which provides that "the Commission may, on its own Motion, order a hearing." Id. As an administrative matter, the Commissioner retroactively granted the Motion for Continuance, effective December 13, 2011, as no Order had yet been rendered on that Motion, which had clearly been granted. Id. A hearing was set for March 1, 2012.

At the hearing, the Claimant alleged an entitlement to workers' compensation benefits for the December 12, 2010 incident. Tr. 5-6. In addition to medical treatment, she requested TTD from October 12, 2010 to December 1, 2010, as well as from April 26, 2011 to the date of the hearing and continuing. Id. The Claimant acknowledged that she was on a pre-planned vacation to the Bahamas between December 1, 2010 and April 26, 2011 and did not allege an entitlement to TTD for that period of time. Tr. 18-20. She alleged an average weekly wage of $800, which resulted in a compensation rate of $532.80. Tr. 6. The Claimant did not object to going forward with a merits hearing on March 1, 2012. Tr. 5, 6, 110.

The Defendants denied compensability of the claim in its entirety. Tr. 6. The Defendants asserted that the events of October 12, 2010, did not occur as alleged by the Claimant. Id. Further, even if the events did occur as the Claimant alleged, the events still failed to rise to the level of unusual or extraordinary as required by the Workers' Compensation Act. Id. The Defendants alleged that the Claimant had an average weekly wage of $555.69, which resulted in a compensation rate of $370.40. Id. Defendants also asserted that any TTD, if owed, should only be paid from August 15, 2011 and should only extend until October 19, 2011 due to Claimant's non-compliance with her treatment after October 19, 2011. Tr. 6-7. Lastly, the Defendants asserted that the Claimant's entire claim was barred by *res judicata*. Tr. 7-8. The Defendants argued that after

the October 12, 2010 incident, the parties appeared in Magistrate's Court to determine issues related to a warrant issued by the Claimant against the owner of the Marina. Tr. 7-8. This matter was dismissed by the Magistrate's Court. Id. Thus, the Defendants asserted that the doctrine of *res judicata* applied and the claim should be dismissed by the Commission. Id. Commissioner Beck ruled that the Magistrate Court's decision had no bearing on the workers' compensation claim and declined to apply the doctrine of *res judicata*. Tr. 8.

On July 25, 2012, the Hearing Commissioner issued a Decision and Order in which he denied Claimant's assertions and "specifically and emphatically" found that the Claimant's mental injuries did not rise to the level of extraordinary and unusual as required by the Workers' Compensation Act. See Commission's File. The Commissioner also found that any medical evidence ostensibly establishing medical causation was moot, in light of the fact that the events of October 12, 2010 did not occur as claimed by the Claimant. Further, the Hearing Commissioner assessed hearing costs in the amount of $1,014.86. Id.

On August 6, 2012, the Claimant filed a Form 30, Application for Review. In his Brief to the Appellate Panel, the Claimant submits the following issues presented:

1. **Did the Hearing Commissioner err in asserting jurisdiction to hear the claim on the merits, even though no Form 50 nor Form 21 was properly before the Commission?**

2. **Did the Hearing Commissioner err in ordering the Claimant to pay the costs of the hearing, even though the Commissioner ordered the Claimant to appear at the hearing, on his own motion, and over the Claimant's objection?**

3. **Did the Hearing Commissioner err in finding that the Claimant's injuries were not compensable because her employment conditions were not extraordinary and unusual, even though the Claimant's supervisor physically and verbally assaulted the Claimant after she refused to file a fraudulent insurance claim at the supervisor's request?**

All proffered testimony has been taken. Such, together with all documentary evidence,

and oral argument, has been delivered to the individual members of the Appellate Panel and has since been under careful consideration.

STANDARD OF REVIEW

In an Appellate Review, the Appellate Panel shall, pursuant to S.C. Code Ann. §42-17-50, review the award, weigh the evidence as presented at the hearing and, if good grounds be shown therefore, make its findings of facts and reach its own conclusions of law consistent or inconsistent with those of the Hearing Commissioner. *See Green v. Raybestos-Manhattan, Inc.*, 250 S.C. 58, 156 S.E.2d 318 (1967); *see also Lowe v. An-Can Transport Services, Inc.*, 283 S.C. 534, 324 S.E.2d 87 (Ct. App. 1984).

STATEMENT OF THE FACTS

1. Claimant's Testimony

As outlined thoroughly in the Order, pages 8-11, the Claimant alleges that she became aware of some vandalism to a trailer on the Marina property on October 10 and that her half-brother, David Race, instructed her to file an insurance claim, but she refused, as she believed that Marina employees were responsible for the damage. See also Tr. 30-32. After that date, the Claimant felt that she was "the enemy" for refusing to file the insurance claim, although she testified to no problems or difficulty with Mr. Race or any other employee the next day, October 11. Tr. 34.

On the morning of the alleged accident, the Claimant began texting Portia, a new bartender, about the work schedule. Tr. 34. Then, according to the Claimant, David Race approached her and accused her of causing "hate and discontent" in the restaurant. Tr. 36. David Race then went into a meeting with David Ackerman, Tom Blocker, and Mike Sage. Tr. 36. The Claimant went to the meeting and, according to the Claimant, politely asked David Ackerman if he said that she

was causing hate and discontent. Tr. 36-37. When he said no, the Claimant asked another employee, Annie, who said no, and the Claimant returned to the meeting. Id. At that point, according to the Claimant she simply asked who said that she was causing hate and discontent when, unprovoked, David Race jumped up, shoving, yelling, and cursing at her. Tr. 37-38. She claimed that David Race "shoved me three times. Boom, boom, boom." Tr. 38. She claimed that David Race yelled at her, while shoving her, and told her to "get the fuck out of [his] office." Tr. 37. She claimed that he also said that he was going to "make [her] life such a living hell each and every day that [the Claimant was] going to feel like you've been kicked to the curb at the end of the day." Tr. 38. She then left work and went to the police station to file a police report. Tr. 38-39.

II. Defense Witness Testimony

David Race testified and confirmed that the trailer was vandalized by two Marina employees but explained that he asked the Claimant to file an insurance claim *before* he knew that the Marina employees were the vandals. Tr. 79. Mr. Race testified that the vandals paid for the damage and that no insurance claim was filed. Tr. 85-86.

With regard to the events on October 12, Mr. Race explained that David Ackerman was resigning from the Marina "due to Diane's interference" and that the new bartender had also complained about the Claimant's interference with the Marina restaurant. Tr. 81-83. Mr. Race testified that he instructed the Claimant to not involve herself with the restaurant any more, then immediately went into the meeting in question. Tr. 84. Mr. Race then testified that the Claimant began hollering, asserting that Mr. Race was a liar, and was making "wild statements and accusations." Tr. 84-85. Mr. Race testified that he instructed the Claimant to leave and she refused, so he physically pushed her out the door, one time. Tr. 79-80. Mr. Race testified that he

did not have a security guard at the Marina so he felt it his responsibility to remove someone who comes into his office uninvited and refuses to leave. Tr. 81.

David Ackerman was next to testify. He testified that the Claimant caused "constant drama" and that she would "start problems where there didn't need to be problems." Tr. 90. Mr. Ackerman confirmed the testimony of David Race with regard to the incident on October 12. Tr. 91-92. In short, he confirmed that the Claimant was yelling about someone talking about her (claiming that she was starting trouble), that Mr. Race asked her to leave several times, and that the Claimant refused. Id., APA 95. Mr. Ackerman did not specifically recall whether Mr. Race pushed the Claimant or whether she left on her own, but "certainly the encounter did not involve any type of distance" traveled. Tr. 93.

Tom Blocker testified next. Mr. Blocker again confirmed that the Claimant entered the meeting, "created a scene," and "disrupted the meeting." Tr. 99. Mr. Blocker also confirmed that the Claimant was yelling about someone saying that she was "causing hate and discontent" in the restaurant. Mr. Blocker confirmed that Mr. Race told her several times to leave but she refused. Then, Mr. Race went by the door and pushed her by the shoulders with both hands, but only until she was outside the door. Tr. 99-100.

Mike Sage was the last person to testify. He also confirmed that the Claimant entered the meeting to find out "why everybody was saying that she was causing hate and discontent up in the restaurant." Tr. 105. Mr. Sage testified that the Claimant would not leave and that David Race told her three times to leave, but she refused. He testified Mr. Race then pushed her by the shoulders out the door, maybe twice, but he was not sure. Tr. 107. Mr. Race was clear that she was pushed "just enough to get her out the door." Tr. 108.

III. Medical Evidence

The Claimant claims a litany of complaints resulting from this alleged injury, including fecal incontinence, a facial tic, and aggravation of her pre-existing lupus and fibromyalgia. Tr. 5. Indeed, she has introduced some medical records which ostensibly establish medical causation. See APA 1, 17, 74. Claimant alleges that these medical records demonstrate the extent of her injury and provide the requisite medical causation. In contrast, the defense asserts that these records are based on the Claimant's version of events, a version which is affirmatively disputed by every single person that witnessed or was involved in the encounter. As a result, the defense argues the Commissioner was correct to give little weight to the medical records relied upon by the Claimant.

Along with all the medical records in evidence, the Panel has considered APA 1, a letter from the Claimant's psychologist, which says that the Claimant's current psychological impairments are related to the assault she experienced at work. However, APA 1 also says that David Race pushed her three to four times, all while verbally abusing the Claimant and being physically aggressive, which is inconsistent with the testimony of the Defendants' witnesses.

The Panel also specifically notes APA 17, which states that the Claimant's stress-related physical problems are exacerbated by her mental health condition. This submission is signed by the Claimant's psychologist, the same one who signed APA 1. APA 17 is also signed by Dr. Guille, the Claimant's psychiatrist. Thus, the Panel turns to the evidence demonstrating Dr. Guille's impression of the events of October 12, 2010. As evidenced by APA 53, Dr. Guille believed that the Claimant's "brother became agitated and angry and physically pushed her three times."

Additionally, the Panel notes APA 74, from the Claimant's family MD, which states that

the Claimant has PTSD but does not provide a cause. It is undisputed that the Claimant suffered from a number of medical problems prior to her work injury. See APA 117, dated July 13, 2010, only a few months prior to the work injury, which shows that the Claimant "has a history of neurogenic syncope, cutaneous lupus, hypertension, hyperlipidemia, hypothyroidism, obesity, osteoarthritis, depression, and an anxiety disorder." APA 74, which the Claimant asserts provides causation for PTSD, does not indicate the cause of the Claimant's PTSD or whether it was caused by or aggravated by anything that occurred on October 12, 2010.

With regard to the fecal incontinence, the Claimant claimed an utter inability to control her bowels. Tr. 15. The Claimant treated with Dr. Smith (psychologist) twenty two (22) times and did not mention fecal incontinence, although she did mention one episode of diarrhea. (See page 24 of the Order which shows specific dates and APA pages, and APA 31). She also treated with Dr. Guille five times (May 9, 2011 - APA 53; July 15, 2011 - APA 35; August 4, 2011 – APA 29; September 7, 2011 – APA 20, October 5, 2011 – APA 6) and did not mention any type of fecal incontinence. The Claimant also saw her family physician, Dr. Oliverio, on June 2, 2011 (APA 85), June 23, 2011 (APA 83), and July 15, 2011 (APA 80) and mentioned nothing about fecal incontinence. She also called two additional times to complain of other problems – but not of fecal incontinence. (APA 79, 82). She mentioned rectal spasms one time to Dr. Bumgartner, a neurologist, but did not complain of any type of incontinence to him. APA 81.

Additional records submitted by the Claimant include the May 26, 2011 report of Dr. Klatchko, a pulmonologist, which re-states the Claimant's statement to him that she had been diagnosed with PTSD. APA 83. However, there is no evidence that Dr. Klatchko rendered this diagnosis, as opposed to simply reporting what had been told to him by the Claimant, nor is there evidence that he would be qualified to render a PTSD diagnosis. The November 1, 2010 note of

Dr. Roane states that the Claimant has been through a stressful event. APA 86. The January 31, 2012 note from Jean Hutchinson, a vocational evaluator, indicates that the Claimant suffered an assault in her workplace, where the Claimant's brother "shouted obscenities at her, threatened her, and began shoving and pushing her." APA 89-90. The Social Security Disability Determination indicates that the Claimant has significant difficulties, including depression, difficulty concentrating, rectal spasms, and rectal incontinence. APA 109. The records indicate that "many of the conditions are really a continuation of what has been going on for a long time" but that "since the assault happened, there is much worsening depression with suicidal thoughts." Id.

The Claimant asserts that these records are sufficient to support a finding of compensability of the Claimant's mental/mental injuries. The defense asserts that the records that rely on the Claimant's version of events are not supported by the testimony and should be disregarded. The defense further asserts that certain records are simply re-statements by her physicians (or the Social Security Disability determinator) of statements made by the Claimant, not independent diagnoses from qualified medical providers.

DECISION/ANALYSIS

1. The Commission Properly Proceeded with a Merits Hearing on March 1, 2012.

a. The Commission Has Jurisdiction to Set a Merits Hearing Pursuant to Regulation 67-601.

Regulation 67-601 provides that "The Commission may, on its own motion, order a hearing" once "a conflict arises." Citing no statute, caselaw, or even a treatise, the Claimant makes a conclusory argument that the Hearing Commissioner erred in asserting jurisdiction pursuant to Regulation 67-601.

It is well-established that " [t]he cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581

(2000). "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature." Id. (quotation omitted). Thus, we must follow the plain and unambiguous language in a statute and have "no right to impose another meaning." Id.

It cannot reasonably be argued that the words "the Commission may, on its own motion, order a hearing" once "a conflict arises" mean anything other than the Commission may order a hearing once a conflict arises. The Panel finds that Regulation 67-601 provides a mechanism for the Commission to order that a merits hearing proceed once a conflict has arisen.

It cannot be argued that in a denied mental/mental claim no conflict had arisen. The pleadings themselves are evidence of a conflict, as the claimant, in such a case, alleges an entitlement to benefits under the Act, and the defendants deny both the claimant's entitlement to benefits and also the facts alleged by the claimant. Here, the Claimant alleged that she was "injured when she was physically assaulted by her employer" and the Defendants denied the Claimant suffered a compensable injury. See Forms 50 and 51. Therefore, the Panel finds as a fact that a conflict had clearly arisen in this claim. The Panel further finds as a fact that the Hearing Commissioner properly asserted jurisdiction over this claim pursuant to Regulation 67-601.

b. The Claimant Either Affirmatively Waived Any Objection to Going Forward on March 1, 2012, or Any Objection Was Not Preserved For Review.

At the March 1, 2012 hearing, counsel for the Claimant failed to make an objection to going forward with a merits hearing. The Claimant's counsel was specifically asked "Are there any objections to APAs, jurisdiction, venue, or any other matter?" Tr. 5. The response was "No, Your Honor." Id. After the Commissioner outlined the Claimant's position on the record – with no mention of any objection to going forward – the Commissioner asked again "Anything in

addition to that with regard to the Claimant's position, sir?" Tr. 6. The response was, again, "No, Your Honor." Id. The witness testimony then proceeded. At the end of the hearing, counsel for the Claimant was specifically asked, "Anything else?" Tr. 110. The response was "No, sir." Id. No objection was lodged by the Claimant, on the record, to going forward on March 1, 2012. Therefore, any objection to personal jurisdiction, notice, venue, or any similar issue was waived.

In the alternative, the Panel specifically finds that any objection of the Claimant to going forward on March 1, 2012 was not preserved for review due to the Claimant's failure to raise the issue and obtain a ruling thereon. *See* Poch v. Bayshore Concrete Prods., 386 S.C. 13, 686 S.E.2d 689 (Ct. App. 2009).

c. Subject Matter Jurisdiction Was Present at the March 1, 2012 Hearing.

The only "jurisdictional issue" which cannot be waived is subject matter jurisdiction. "Subject matter jurisdiction is the power to hear and determine cases of the general class to which the proceedings in question belong." Majors v. S.C. Sec. Comm'n, 373 S.C. 153, 159, 644 S.E.2d 710, 713 (2007). "The jurisdiction of a court over the subject matter of a proceeding is determined by the Constitution, the laws of the state, and is fundamental." Peterson v. Peterson, 333 S.C. 538, 547, 510 S.E.2d 426, 431 (Ct.App.1998). The General Assembly has vested the South Carolina Workers' Compensation Commission with exclusive original jurisdiction over an employee's work-related injuries. Poch v. Bayshore Concrete Prods., 386 S.C. 13, 686 S.E.2d 689 (Ct. App. 2009).

"The Workers' Compensation Act provides the exclusive remedy against an employer for an employee's work-related accident or injury." Posey v. Proper Mold & Engineering, 378 S.C. 10, 661 S.E.2d 395 (Ct. App. 2008) (citing Edens v. Bellini, 359 S.C. at 441, 597 S.E.2d at 867

and Fuller v. Blanchard, 358 S.C. 536, 541, 595 S.E.2d 831, 833 (2004). See also Strickland v. Galloway, 348 S.C. 644, 646, 560 S.E.2d 448, 449 (Ct.App.2002) ("In circumstances in which the South Carolina Workers' Compensation Act covers an employee's work-related accident, the Act provides the exclusive remedy against the employer.").

At no point was subject matter jurisdiction an issue. Via the Form 50, the Claimant alleged that the Claimant and the employer were subject to the Workers' Compensation Act and that the employer/employee relationship existed. See Commission's file. Via the Defendants' Form 51, the Defendants agreed that the parties were subject to the Workers' Compensation Act and that the Claimant was an employee on the date of accident. Id. The Claimant testified that she was an employee of Dolphin Cove Marina at the time of her alleged injury. Tr. 9-11. She testified that she suffered a mental injury occurring as part of her job at Dolphin Cove Marina. Thus, the Workers' Compensation Commission was vested with exclusive original jurisdiction to adjudicate a claim for an injury occurring at work.

As subject matter jurisdiction was present, and any other objection to going forward was waived and/or not preserved for review, the Panel finds that the Commissioner correctly proceeded with a merits hearing on March 1, 2012.

2. The Panel Finds that The Claimant Did Not Carry Her Burden of Proving She Suffered a Compensable Mental/Mental Injury.

After extensively considering and carefully weighing the evidence, the Panel agrees with the Hearing Commissioner that the March 12, 2010 incident did not occur as testified to by the Claimant. The Panel gives great weight to the testimony of David Race, David Ackerman, Thomas Blocker, and Mike Sage. The Panel gives little weight to the testimony of the Claimant.

In support of this decision, the Panel notes that the Claimant agreed that the Defense called to the stand everyone who witnessed (or heard) or could have witnessed (or heard) the events of

March 12, 2010. Tr. 53-54. As outlined above, each and every witness to the event testified that the Claimant interrupted a meeting, began yelling, and would not leave the meeting, despite being asked to do so. Tr. 84-85, 91-93, 99-100, 106-107. Each and very witness to the event, besides the Claimant, testified that David Race asked the Claimant to leave, but she refused. Tr. 84-85, 91-93, 99-100, 106-107. Each and every witness testified that David Race simply pushed the Claimant outside the door when she refused to leave and that he did not shove her three times down the hallway. Tr. 84-85, 91-93, 99-100, 106-107. Further, not one of the witnesses corroborated the Claimant's story of being told by David Race that he would "make her life a living hell" or that she would feel like she had "been kicked to the curb." Tr. 84-85, 91-93, 99-100, 106-107.

With regard to the precipitating event, this Panel finds that the event that began the dispute was the allegations that the Claimant was "causing hate and discontent" in the restaurant, and not any allegations of vandalism. At the hearing, the Claimant testified that she asked at the meeting who had been saying that she was causing hate and discontent. Tr. 36-38. David Ackerman testified that he left his job because of the Claimant's interference in the restaurant. Tr. 90. David Race testified that the current restaurant manager also complained of the Claimant's interference in the restaurant. Tr. 83. David Ackerman testified that part of what the Claimant was yelling at the meeting was that someone was "saying that she was starting trouble. . . ." Tr. 91. Tom Blocker testified that the Claimant was yelling, not about an insurance claim, but about the allegations of "having creating [sic] hate and discontent at the café." Tr. 99. Mike Sage testified that the Claimant interrupted the meeting and "wanted to know why everybody was saying that she was causing hate and discontent in the restaurant." Tr. 105.

Considering that the greater weight of the evidence supports a finding that the events of October 12, 2010, occurred as testified to by David Race, David Ackerman, Tom Blocker, and

Mike Sage, then this Panel must determine whether those facts as presented arise to the level of "unusual or extraordinary circumstances of employment."

The evidence is clear that it was not unusual or extraordinary for the Claimant and Mr. Race to touch. As stated, they are half-siblings. APA 1. The Claimant testified that she cleaned Mr. Race's catheter after he had a surgery. Tr. 41-42. The Claimant also admitted under cross-examination that David Race has touched her before, given her hugs, helped her walk over uneven terrain, etc. Tr. 55-56.

Further, the evidence is clear that the Claimant has caused trouble in the restaurant for years, as evidenced by the testimony of David Ackerman, who quit his job at the restaurant due to the Claimant's interference and the testimony of David Race, who indicated that the current bar manager complained of the Claimant's interference. Tr. 90, 83. Thus, it is not unusual or extraordinary for the Claimant to be accused of causing trouble in the restaurant.

Although multiple witnesses indicated that David Race did tell the Claimant to get the "hell" out of his office, the evidence is clear that it is not unusual for David Race to curse from time to time at the Marina. Each witness, including the Claimant, agreed that David Race does curse at work from time to time. Tr. 84-85, 91-93, 99-100, 106-107.

Finally, this Panel, like the Hearing Commissioner, finds that the Claimant's claim involved normal employer/employee relations, specifically the Claimant being instructed by her supervisor to limit her involvement in the restaurant. In fact, the Claimant agreed that, immediately prior to the meeting in question, David Race talked with her about allegations that she was causing hate and discontent in the restaurant. Tr. 36. David Race testified that he told the Claimant that "she would no longer be doing any of the activity up there as far as the bar is concerned." Tr. 83. The Panel finds that the precipitating event to the March 12, 2010 encounter

was David Race's instruction to the Claimant regarding the scope of her employment as applied to her involvement in the restaurant.

The Panel further finds that this instruction did not occur in an unusual or extraordinary manner. . The Claimant testified that David Race approached a window in the Claimant's office and instructed her to stop texting Portia. Tr. 35. He then indicated that the Claimant caused hate and discontent in the restaurant recently. Id. There is no testimony that this interaction was performed in an unusual or extraordinary manner or that anyone could even overhear the conversation.

Based on the above, the Panel agrees with the Hearing Commissioner and finds that the Claimant did not suffer a compensable mental-mental injury because what happened on October 12, 2010 is not compensable under the Act.

3. **The Panel Finds that the Medical Evidence Submitted is Moot in Light of The Finding That The Claimant Did Not Demonstrate that She Was Subjected to Unusual or Extraordinary Circumstances of Employment.**

The law is clear that a Claimant must prove two prongs in a "mental/mental" claim. The first is that she was subjected to unusual or extraordinary circumstances of employment; the second is that the unusual or extraordinary circumstances of employment caused psychological injury. See Frame v. Resort Services Inc., 357 S.C. 520, 593 S.E.2d 491 (Ct. App. 2004). Frame states specifically that

> In order for [a claimant] to recover workers compensation benefits, he must prove both: (1) that he was exposed to unusual and extraordinary conditions in his employment; and (2) that these unusual and extraordinary conditions were the proximate cause of his mental breakdown.

In this case, the Claimant fell well short of sustaining her burden as to the first prong. Thus, the Panel does not need to even consider any type of medical evidence. The Claimant's claim necessarily fails.

4. The Panel Finds that, Even if The Medical Evidence Were Not Moot, That It is Unworthy of Credence Based on the Additional Evidence in the Record.

a. Medical Evidence

The Claimant initially presented to MUSC indicating that she suffered "a history of 'verbal abuse' by her brother in the workplace that apparently consisted primarily of vulgar speech and every demeaning remarks about work performance." Claimant's APA 72. The Claimant described the October 12, 2010 incident as involving "her brother's yelling at her and shoving her down the hall." Id. The Claimant described the incident as "my boss is also my brother (78 years old) has been verbally abusing me all the time, and he also started shoving me down the hall yesterday, made a lot of threats and now I'm having to deal with pressing charges on my brother issues." Claimant's APA 66. The Claimant indicated that this incident reminded her of several incidents of extreme distress from her past, including physical violence between her and her first husband. Claimant's APA 72. The Claimant complained of "incessant crying, couldn't catch my breath/hyperventilating, also 25 years ago I was a DV victim, and this incident has triggered feelings regarding that, anxiety, and fear." Claimant's APA 67. Therapy was recommended. Claimant's APA 73.

The Claimant attended counseling/therapy sessions with Dr. Smith (psychologist) on November 3, 2010 (Claimant's APA 62), November 23, 2010 (Claimant's APA 60), April 26, 2011 (Claimant's APA 58), May 3, 2011 (Claimant's APA 56), May 10, 2011 (Claimant's APA 51), May 20, 2011 (Claimant's APA 49), May 25, 2011 (Claimant's APA 46), June 7, 2011 (Claimant's APA 44), June 23, 2011 (Claimant's APA 42), July 5, 2011 (Claimant's APA 40), July 12, 2011 (Claimant's APA 38), July 20, 2011 (Claimant's APA 33), August 4, 2011 (Claimant's APA 31), August 9, 2011 (Claimant's APA 27), August 16, 2011 (Claimant's APA 25), August 23, 2011 (Claimant's APA 23), September 9, 2011 (Claimant's APA 18), September

15, 2011 (Claimant's APA 15), September 21, 2011 (Claimant's APA 13-14), October 5, 2011 (Claimant's APA 6-7), October 14, 2011 (Claimant's APA 10-11), and October 19, 2011 (Claimant's APA 9, 12). The Claimant was not seen again by Dr. Smith after October 19, 2011. At no point in any of these evaluations did the Claimant mention fecal incontinence. While she mentioned one episode of diarrhea (Claimant's APA 31), there is no indication that the diarrhea complaint is related in any way to the October 12, 2010 incident. On two occasions she mentioned a muscle spasm in her face. Claimant's APA 46, 23. Otherwise, no complaint was lodged regarding a facial tic.

On May 9, 2011, the Claimant underwent a more comprehensive examination by a medical physician, Dr. Guille (psychiatrist). Claimant's APA 53-55. She again indicated that, on October 12, 2010, her brother "became agitated and angry and physically pushed her three times." Claimant's APA 53. Since that time, she claimed she was "not able to hold it together," was "overwhelmed by everything," and was "unable to function." Id. She complained of tearfulness and excessive fatigue which preceded the incident but was worse afterwards. Id. She complained of additional problems, including shakes, difficulty sleeping, poor concentration, etc. but again there was no indication of any fecal incontinence. Also, Dr. Guille noted that "there is no current evidence of lupus flare." Claimant's APA 55. Dr. Guille indicated that the Claimant's mood and energy would benefit from reinstating CPAP for obstructive sleep apnea. Id. As indicated above, the Claimant conceded that fecal incontinence is a important symptom which, allegedly, had an significant effect on her life. Yet, she does not mention it whatsoever to Dr. Guille at this visit.

The Claimant was seen again by Dr. Guille on July 13, 2011. Claimant's APA 35-37. The Claimant complained only of "improvement in mood, concentration, sleep and anxiety" although she was continuing to complain of fatigue, sleep disturbance, poor concentration, low mood, and

being easily tearful. Claimant's APA 36. Again, there is no mention of facial tics or fecal incontinence. The Claimant's next visit with Dr. Guille on August 4, 2011 shows that the Claimant continued to complain of psychological symptoms but, again, no mention of facial tics or fecal incontinence. Claimant's APA 29-30. She was seen by Dr. Guille again on September 7, 2011, again complaining of psychological problems but no mention of fecal incontinence or a facial tic. Claimant's APA 20-22.

On September 8, 2011, Drs. Guille and Smith prepared a joint letter to the Social Security Administration indicating that the Claimant is unable to work and that she cannot return to work until her symptoms improve significantly. On October 5, 2011, Dr. Guille prepared a letter indicating that the Claimant's "animals accompanying her is necessary to her mental health treatment." Claimant's APA 8.

The Claimant's final appointment with Dr. Guille was October 5, 2011. She was noted to have a relatively stable mood and more positive feelings which she attributed to her husband, her friends, and her upcoming move to Puerto Rico. Claimant's APA 4.

Notably, via letter dated February 16, 2012, Dr. Smith (psychologist) states that the Claimant reported to him that Mr. Race pushed her 3-4 times, all while verbally abusing her. Claimant's APA 1. The Claimant also "reported numerous instances of verbal abuse (yelling, making demeaning remarks in front of other) by her half-brother in the past." Id. However, the Claimant reported that the October 12, 2010 injury was the first and only time he had been "physically aggressive with her." Id. Dr. Smith indicated that the Claimant's history of being a victim of domestic violence made her uniquely and especially vulnerable to psychological harm related to the incident at work with her half-brother. Id. The Claimant claimed to him that she had significant problems with mood (depression and anxiety), concentration, and her physical health

which she believes were due to the October 12, 2010 injury. Id. Dr. Smith states that, within a reasonable degree of professional certainty, the Claimant's current psychological impairments are indeed causally related to the assault she experienced at her place of work (ie being berated and shoved by her half-brother). Id. Dr. Smith indicates that if not for this incident, the Claimant would not be experiencing the degree and severity of the psychological and physical symptoms for which she is currently suffering. Id. Dr. Smith simply states the Claimant's medical condition, in turn, exacerbate the emotional distress that the Claimant experiences. Claimant's APA 2. Dr. Smith indicated that the Claimant is unable to return to work and that she cannot return to work "without significant improvement." Id. Dr. Smith indicated that "without ongoing medical and psychological intervention, these problems are very unlikely to resolve." Id.

The Claimant also treated with Dr. Oliverio (internal medicine). See Claimant's APA #2. Dr. Oliverio wrote the Claimant out of work from October 12, 2010 to October 18 2010. Claimant's APA 78. He then wrote her out again until October 22, 2010. Claimant's APA 77. However, Employer/Carrier's APA 91 shows that the Claimant actively solicited the work note, calling and asking for a work excuse extension. Notably, the Claimant was complaining of muscle spasms in her back, so it is reasonable that the work excuse extension was granted for back pain, which is not a part of this claim. See Employer/Carrier's APA 91. Then, on October 22, 2010, he wrote her out of work for an additional two (2) weeks. Claimant's APA 76. Finally, he wrote her out of work from November 5, 2010 until November 19, 2010. Claimant's APA 75. The Claimant visited Dr. Oliverio on June 2, 2011 complaining of a rash on the parts of her body exposed to the sun. Employer/Carrier's APA 85. While she complained of "a difficult time emotionally," no other complaints were noted. Id. She was seen again on June 23, 2011 complaining of back pain, exacerbated by trying to get in shape by exercising. Employer/Carrier's APA 83. Other than the

rash mentioned above, there were no other complaints. Id. On July 11, 2011, the Claimant called to complain of a sore throat and also to check on medical records which were supposed to be sent to disability. Employer/Carrier's APA 82. On July 15, 2011, the Claimant visited Dr. Oliverio to complain for right sided flank and abdominal discomfort. She was referred for a CT of the abdomen and pelvis, but no other complaints were noted. Employer/Carrier's APA 80. Via questionnaire dated July 21, 2011, Dr. Oliverio diagnosed the Claimant with Post-Traumatic Stress Disorder and recommended additional psychiatric care. Claimant's APA 74. He indicated that the Claimant had an obvious work-related limitation in function due to her mental condition. Claimant's APA 74.

The Claimant has also treated with Dr. Bumgartner, neurologist, to whom she did mention her alleged "rectal spasm" but did not mention fecal incontinence. Claimant's APA 81. Considering the Claimant's allegation that the rectal spasms and fecal incontinence were caused by stress, it does not make sense to the Panel that the Claimant would not mention it to her psychologist or her psychiatrist, with whom she had an ongoing treatment relationship, but she did mention it to Dr. Bumgartner, whom she apparently saw only one time. It also does not make sense to the Panel that the Claimant complained of rectal spasms to Dr. Bumgartner on September 27, 2011, but she did not mention this complaint to Dr. Smith (psychologist) on her visits on September 21, 2011 or October 5, 2011, nor did she mention this complaint to Dr. Guille (psychiatrist) on her September 7, 2011 or October 5, 2011 evaluations.

She was seen by Dr. Klatchko (pulmonologist) on May 26, 2011. The Claimant indicated to Dr. Klatchko that she has a history of nighttime awakening and difficulty falling asleep, which predated her alleged work injury. Claimant's APA 83. Notably, Dr. Klatchko indicates that the Claimant is "euthymic" which the Panel understands to mean a non-depressed, reasonably positive

mood. Claimant's APA 84. There was no indication of a facial tic or rectal spasm. Id. The Claimant visited Dr. Klatchko again on July 7, 2011, where her test results were noted to be "consistent with sleep onset and maintenance insomnia." Employer/Carrier's APA 96. She was also complaining of back pain and was scheduled for an MRI. Id. While she indicated a psychiatric history of anxiety, depression, and PTSD, the Claimant lodged no psychological complaints at that visit. Id. The Claimant last visited Dr. Klatchko on August 4, 2011 where she again complained of neurogenic syncope while in the spirometry room. Employer/Carrier's APA 94. The Claimant was given the choice of being taken home by her family versus being admitted to the emergency room. Id. The Claimant chose to be admitted to the ER. Id. The ER records were introduced which show the Claimant's statements to the ER that her physician overreacted and that she had been dealing with these symptoms for years. Employer/Carrier's APA 110. Despite specifically choosing to go to the ER, the Claimant told the Emergency Room that her physician instructed her to go to the ER. Contrast Employer/Carrier's APA 94 with 110. Once at the ER, the Claimant stated that she did not need to be admitted and that she declined to speak with a hospitalist to discuss admission. Employer/Carrier's APA 111. It is not clear to the Panel why she chose to go to the ER when Dr. Klatchko offered to simply permit a family member to take her home.

The Claimant has also seen Dr. Roane (rheumatologist). She saw Dr. Roane on September 10, 2010, which pre-dated the October 12, 2010 incident. At that visit, the Claimant complained of problems resulting from her lupus. Claimant's APA 87. She also complained of migraines, aching all over, and neurological symptoms such as word finding and memory. Id. Dr. Rhoane's records reveal that the Claimant was on Levothyroxine, Cymbalta, Wellbutrin, Tramadol, Restoril, Clonazepam, Nexium, Meoprolol, prednisone, Hydrocodone, and Maxalt. Id. The Claimant was

seen by Dr. Roane again on November 1, 2010 where she indicated that the October 12, 2010 incident "has left her somewhat traumatized." Claimant's APA 86. Interestingly, on this date, *after* the October 12, 2010 incident, the Claimant felt "that her lupus is under better control." Claimant's APA 86. The Claimant also saw Dr. Roane on August 15, 2011, where she did not make any complaint of a facial tic, rectal spasms, or fecal incontinence. Employer/Carrier's APA 77-78.

The Claimant was evaluation from a vocational standpoint by Jean Hutchinson. Claimant's APA #6. It is not clear whether Ms. Hutchinson ever met the Claimant, as her report indicates simply that she reviewed the case file. Claimant's APA 89. There is no indication of the results of an interview with the Claimant, not even a telephone interview. See Claimant's APA #6. Ms. Hutchinson's report indicates that the Claimant was physically assaulted, and that her brother/supervisor shouted obscenities at her, that he threatened her, and that he began shoving and pushing her. Claimant's APA 90. Ms. Hutchinson concludes that the Claimant is unable to return to work at the Marina and at any job which she held in the past. Claimant's APA 93. Ms. Hutchinson further concludes that the Claimant is unable to return to work even at a sedentary level and thus cannot engage in substantial gainful work activity. Claimant's APA 93.

The Claimant also introduced into evidence a Disability Determination Explanation as APA #12. To the disability determinator, she made multiple complaints, including rectal spasms and incontinence. Claimant's APA 109. She alleged a worsening to her pre-existing depression and suicidal thoughts since the October 12, 2010 injury. Claimant's APA 109. She claimed an inability to work as of October 12, 2010. Claimant's APA 108. The disability determinator specifically stated that the Claimant's subjective statements are only "partially credible" and that, while her conditions "could reasonably be expected to produce pain, difficulty walking &

functional limitations, but not to the degree as described by the clmt." Claimant's APA 119. Her symptoms were only "somewhat consistent" with the objective evidence. Id.

The Claimant's application for disability was entered into evidence as Claimant's APA #13. The undersigned notes that the Claimant indicated that "in all honesty, I was beginning to work less and less at my last job because if I did not feel good, I would stay home or clock out and lay on a couch until I felt better (my brother was pretty understanding about my lupus and fibromyalgia). But the episode where he 'exploded' and assaulted me broke my heart, broke my will – it caused such an emotional and stressful effect that I have 'gone downhill' ever since. I doubt I will ever be what I used to be." Claimant's APA 133.

The Claimant was also evaluated by Dr. Hanger, who diagnosed her with neurocardiogenic syncope. Employer/Carrier's APA 114. Although the note is undated, a handwritten intake form was submitted with it, dated August 8, 2011. Employer/Carrier's APA 115. Via the handwritten note, the Claimant fails to mention anything about a facial tic, rectal spasms, or fecal incontinence. Id. The Claimant indicates, however, that she spends 30 to 45 minute per day on the treadmill, when possible. Employer/Carrier's APA 116.

Medical records were also introduced from the Claimant's family physician in Knoxville, where she lived before she moved to Charleston. Employer/Carrier's APA #7. They reveal the Claimant had ongoing problems with anxiety, depression, lupus, and other issues. Id.

b. The Medical Evidence Fails to Provide the Requisite Medical Causation Pursuant to Section 42-1-160

Section 42-1-160 requires that mental injuries arising out of and in the course of employment unaccompanied by physical injuries are not compensable unless the Claimant establishes "the medical causation between the stress, mental injury, or mental illness, and the stressful employment conditions by medical evidence."

In this case, the Claimant's treating physicians have rendered their diagnoses and treatment plans based solely on the Claimant's version of the events of October 12, 2010. See APA 1, 72, 53, 2, et seq. The Panel specifically and emphatically finds that the events of October 12, 2010 did not occur as indicated by the Claimant. As outlined herein (with citations to the record throughout this opinion, including Tr. 84-85, 91-93, 99-100, 106-107), the Panel finds that the Claimant was the verbal and physical instigator of the incident. The Panel further finds that David Race approached the Claimant at her desk and instructed her in the scope of her employment which is to not involve herself in the operations of the Marina restaurant. The Panel further finds that this instruction was not given in an unusual or extraordinary manner. The Panel also finds that the Claimant interrupted a meeting, to which she was not invited, and began yelling and cursing. The Panel finds that David Race asked the Claimant numerous times to leave, but she refused. Finally, David Race approached the Claimant, which caused her to "buck up" at his approach. The Panel finds that, once he reached her, he placed his hands upon her shoulders and pushed her out of his office, with a minimal amount of force, only sufficient to move her outside the threshold of the door. The Panel finds that David Race did not tell her to get the "fuck" out of his office, that he did not tell her that he would "make her life a living hell," and did not tell her that "she would fell as if she had been kicked to the curb every day."

There is no medical evidence or report that establishes that the facts as found by the Panel caused any type of mental injury or aggravated the Claimant's pre-existing conditions. Thus, the Claimant has failed to carry her burden of proof pursuant to Section 42-1-160.

In addition, the Claimant has failed to prove medical causation, as the medical records she did produce do not support her claim. As indicated above, the Claimant claims to suffer from fecal incontinence, but attended twenty-two (22) counseling/therapy sessions with Dr. Smith and never

once mentioned fecal incontinence. The Claimant also never complained of fecal incontinence to Dr. Guille, Dr. Oliverio, or Dr. Klatchko. While the Claimant did mention it to Dr. Bumgartner, the Panel chooses to disregard those statements of the Claimant. This decision to disregard is based on the fact that the Claimant complained of rectal spasms to Dr. Bumgartner on 9/27/11 but did not mention it to Dr. Smith on 9/21 or 10/5, nor did she mention it to Dr. Guille on 9/7 or 10/5. There is no explanation in the record of why she would mention these alleged rectal spasms and/or fecal incontinence – caused by mental stress and anguish - to a neurologist, with whom she was treating for neck pain and numbness in her hands. APA 81. The Panel, in its authority as Finder of Fact, chooses to disregard the Claimant's testimony with regard to fecal incontinence as it is not supported by the medical records in evidence.

The Claimant further complains of a facial tic resulting from the October 12, 2010 incident. Again, the Claimant attended twenty-two (22) counseling sessions with Dr. Smith and never once mentioned a facial tic. To be sure, she mentioned a muscle spasm in her face on two occasions. Claimant's APA 46, 23. However, the Claimant never introduced any evidence or explained in any way whether a facial tic is the same as a muscle spasm. The Panel gives greater weight to the multiple medical records which fail to support the Claimant's claims, over that of the Claimant.

5. The Panel Affirms the Decision of the Hearing Commissioner to Assess Hearing Costs.

The law permits the Commission to order a party to pay hearing costs under certain circumstances. Specifically "if the Commission or any court before whom any proceedings are brought under this Title shall determine that such proceedings have been brought...without reasonable grounds, it may assess the whole cost of the proceedings upon the party who has brought...them." SC Workers' Compensation Law Ann., § 42-1-80. The Hearing Commissioner found that the proceedings were brought "without reasonable grounds" and

assessed hearing costs against the Claimant.

The Claimant first argues that the Hearing Commissioner erred by disregarding relevant evidence in making his finding, specifically including a letter from the State of South Carolina, Office of the Governor, State Office of Victim Assistance, dated May 25, 2011, which states:

> "Your claim meets the eligibility criteria established by state law. However, because the incident occurred while you were on the job, your claim with Worker's Compensation would have to be resolved with a final conclusion before the claim can be forward to the Processing Services Department for payment consideration. After your claim has been resolved with Worker's Compensation and there are still compensable expenses, please provide this agency with the documentation from Worker's compensation. We will be glad to consider your bills at that time. Because the State Office of Victim Assistance is the payer of last resort, you must ensure that all bills have been filed with your Worker's Compensation carrier before submitting them to this office."

The Claimant asserts that since she believed that she was required to resolve her claim within the Workers' Compensation system, the Hearing Commissioner should not have found that the claim was prosecuted without reasonable grounds. However, the Claimant cites no testimony in the record that the May 25, 2011 letter from the State Office of Victim Assistance had anything to do with her decision to bring a workers' compensation claim. Indeed, the Claimant filed a Form 12A on October 13, 2010, the day after the accident. The filing of the Form 12A clearly demonstrates that the Claimant considered herself to be injured as a result of an occurrence related to her work and that the Claimant desired to submit a First Report of Injury for her "mental stress" with "no physical injury."

The Claimant's second argument against the assessment of hearing costs is that the Hearing Commissioner should not have ordered the Claimant to pay the hearing costs for a hearing which the Commissioner ordered himself pursuant to Regulation 67-601.

The Panel notes that the Claimant continuously took the position that this case was compensable and that she was going to pursue it. See the March 26, 2012 Administrative Order.

Further, the Claimant did not object on the record to the hearing going forward. Tr. 6.

Despite the overwhelming evidence disputing her claim, the Claimant insisted on pursuing this claim, and because of the overwhelming evidence disputing her version of events, the Hearing Commissioner assessed hearing costs. At no point throughout the hearing or on appeal has the Claimant alleged that, if she were given more time, then she would have obtained additional, supporting evidence for her claim, which would provide a legitimate basis for her to have pursued this claim. She demonstrated no prejudice in going forward at the March 1, 2012 hearing as opposed to any other day. She has alleged no evidence that would be different and no avenue of cross-examination that, had she been given more time, would have given credence to her claim. Thus, whether the Commission waited until the Claimant requested a hearing, or set a hearing on its own Motion, the evidence submitted by the Claimant would be the same, and it would utterly fail to support any type of award.

The Panel agrees with the Hearing Commissioner that this case was prosecuted "without reasonable grounds." The Panel is also "at an utter loss to understand why this claim was ever filed" and agrees with the assessment of hearing costs.

FINDINGS OF FACT

After a thorough review of the evidence, including the hearing testimony, and medical evidence, exhibits, and other documentary evidence submitted by the respective parties pursuant to the Administrative Procedures Act, the Commission File in this matter, and arguments of counsel, the Appellate Panel finds as a fact:

1. That the parties are subject to the Workers' Compensation Act, as the Claimant was employed with the Marina and the incident of October 12, 2010 occurred in the course and scope of her employment.

2. That greater weight should be given to the testimony of the defendant's witnesses, over the testimony of the Claimant.
3. We specifically and emphatically find that the Claimant's employment conditions were not extraordinary and unusual in comparison to the normal conditions of said employment, and her request for benefits is denied.
4. As a result of finding of fact #3, any causation established by medical evidence is rendered moot.
5. As outlined above and below, even if any medical causation were not rendered moot, the medical evidence nevertheless fails to satisfy the standards of Section 42-1-160.
6. As the Panel has found Claimant's mental injury is not compensable, her claims for aggravation to her lupus, fibromyalgia, and two facial tics are not compensable as they allegedly emanate from her mental claim.
7. As the Panel is at an utter loss to understand why this claim was ever filed, hearing costs of $1,014.86 are assessed to the Claimant as we find this case was prosecuted without reasonable grounds. This finding is an affirmation of the Hearing Commissioner's assessment of hearing costs, not separate assessment of $1,014.86.
8. That the claimant's average weekly wages is $555.69, which results in a compensation rate of $370.48. We base this finding on the Form 20 filed by the Employer. The Claimant introduced no documentary evidence to support a deviation from the figures shown by the Form 20. We decline to use the Claimant's testimony that she earned $19 per hour for work during the week, and $20 per hour on the weekend, to calculate her compensation rate. The Claimant was not clear in her testimony about how many hours she worked, and she also admitted to taking lengthy and extensive vacations. Plus, work at the Marina is

seasonal, so we give greater weight to the figures on the Form 20.

9. That the Claimant was the aggressor in the October 12, 2010 incident. This finding is based on the testimony of David Race, Tom Blocker, David Ackerman, and Mike Sage, to which I give great weight.

10. The Panel notes that David Race testified that as he approached the Claimant, she "buckle[d] up." Tr. 84-85. Tom Blocker testified that, as David Race approached the Claimant, she "bulled up to him and got right in his face." Tr. 99-100. Mike Sage testified that, as the Claimant was approached by David Race, the Claimant "invaded his space and came into him a little bit." Tr. 107. Although David Ackerman did not testify to any physically aggressive actions on the Claimant's part, the Panel specifically finds that the Claimant "bucked up" when approached by David Race and instigated the physical touching between the Claimant and David Race.

11. That the Claimant was also the "instigator" of the event, in a non-physical sense.

12. That that the Claimant interrupted a business meeting between David Race, Tom Blocker, David Ackerman, and Mike Sage, a meeting to which she was not invited. This finding is based on the testimony of David Race, Tom Blocker, David Ackerman, and Mike Sage, to which we give great weight.

13. That the Claimant was loud, screaming, yelling, and making accusations when she interrupted this meeting. This finding is based on the testimony of David Race, Tom Blocker, David Ackerman, and Mike Sage, to which we give great weight.

14. That David Race instructed the Claimant numerous times to leave his office, which she ignored. This finding is based on the testimony of David Race, Tom Blocker, David Ackerman, and Mike Sage, to which we give great weight.

15. That David Race placed his hands on the Claimant's shoulders to guide her out of his office because she would not leave. This finding is based on the testimony of David Race, Tom Blocker, David Ackerman, and Mike Sage, to which we give great weight.

16. That, in the process of "guiding" the Claimant out of his office, David Race placed pressure on the Claimant's shoulders to move her but that the pressure constituted only a mild amount of force.

17. That David Race did not shove the Claimant three times down the hallway. This finding is based on the testimony of David Race, Tom Blocker, David Ackerman, and Mike Sage, to which we give great weight.

18. That David Race did not tell the Claimant that she would feel like she was being kicked to the curb every day and also that he did not tell her that he would make her life a living hell. This finding is based on the testimony of David Race, Tom Blocker, David Ackerman, and Mike Sage, to which we give great weight.

19. That the basis of the altercation did not involve Dickie's trailer or any request of the Claimant to file an insurance claim for damage to the trailer. This finding is based on the testimony of the Claimant and David Race, who both indicated that the immediately precipitating event was an allegation that she was "causing hate and discontent" in the restaurant.

20. That the basis of the altercation was the Claimant's unauthorized involvement in the restaurant. We base this finding on the testimony of David Ackerman (who resigned due to the Claimant's interference), the testimony of David Race (that the new bar manager, Portia, threatened to resign based on the Claimant's interference), and the testimony of the Claimant (that the immediately precipitating event was an allegation that she was causing

"hate and discontent" in the restaurant).

21. That the October 12, 2010 incident involved normal employer/employee relations. We find that the Claimant was being instructed by her supervisor, David Race, to limit her involvement in the Marina, which is an issue relating to the scope of her employment. In the process of that normal employer disciplinary action (and/or demotion), the Claimant became agitated.

22. We find that David Race's instruction to the Claimant to avoid the restaurant, given at her desk prior to the meeting in question, was not performed in an extraordinary or unusual manner. The Claimant testified that David Race approached a window in the Claimant's office and instructed her to stop texting Portia. Tr. 35. He then indicated that the Claimant caused hate and discontent in the restaurant recently. Id. There is no testimony that this interaction was performed in an unusual or extraordinary manner or that anyone could overhear the conversation.

23. That David Race's removal of the Claimant from the meeting in question was also not conducted in an extraordinary or unusual manner. David Race asked the Claimant multiple times to leave his office, to which she only became more belligerent. Mr. Race was forced to leave his desk, approach the door, and physically guide the Claimant out of his office. We find that these actions were not taken in an extraordinary or unusual manner. We further find that David Race instructed the Claimant to punch out and go home and that they would discuss the issue the next day. That action was also not performed in an unusual or extraordinary manner.

24. That David Race is in charge of the marina. This finding is based on the testimony of David Race, Tom Blocker, David Ackerman, and Mike Sage, to which we give great

weight.

25. That David Race often curses while at the Marina and, thus, cursing is not unusual or extraordinary. This finding is based on the testimony of David Race, Tom Blocker, David Ackerman, and Mike Sage, to which we give great weight. Notably, the Claimant admitted that Mr. Race often curses while at the Marina.

26. That David Race often yells while at the Marina and, thus, that yelling is not unusual or extraordinary. This finding is based on the testimony of David Race, Tom Blocker, David Ackerman, and Mike Sage, to which we give great weight. Notably, the Claimant admitted multiple times that Mr. Race often yells while at the Marina.

27. That David Race often tells people what to do while at the Marina. This finding is based on the testimony of David Race, Tom Blocker, David Ackerman, and Mike Sage, to which we give great weight. Notably, the Claimant admitted that Mr. Race often tells people what to do while at the Marina.

28. That there is nothing unusual or extraordinary in the fact that, on October 12, 2012, David Race cursed, yelled, and told the Claimant what to do (ie, to get out of his office).

29. That Mr. Race touched the Claimant on the shoulders on October 12, 2010 but that touch was not unusual or extraordinary. It was not unusual or extraordinary for numerous reasons, including but not limited to because Mr. Race is the Claimant's brother and they touch from time to time. Indeed, the Claimant testified that she cleaned his catheter after his surgery, so clearly Mr. Race and the Claimant have touched each other. Further, it is not unusual or extraordinary because it is the action that the Claimant should have expected after standing in the doorway, berating those involved, and refusing to move or to leave.

30. The Panel give little weight to the Claimant's version of events occurring on October 12,

2010.

31. The Panel gives greater weight to the version of events testified to by David Race, David Ackerman, Tom Blocker, and Mike Sage.

32. The Panel affirms the Hearing Commissioner's finding with regard to the Claimant's physical size as compared to David Race and Tom Blocker, which is: I also note the Claimant's physical size, 5'8" and 200 pounds. See Employer/Carrier's APA 161. I note that David Race is approximately 80 years old and in poor health. I note that Tom Blocker is also of advanced age and requires use of a cane. I do not reasonably believe that the Claimant felt herself to be in danger from Mr. Race.

33. The Panel affirms the Hearing Commission's finding with regard to the informal demonstrations performed at the hearing, which is: I give little weight to the informal demonstrations performed at the hearing. I give greater weight to the spoken testimony of the witnesses.

34. The Panel affirms the Hearing Commission's finding with regard to the presentation and affect of the Claimant, which is: I find that the Claimant appeared at the hearing with an extremely emotional presentation. The Claimant cried on multiple occasions and even had to leave the room at least once to take a break from her testimony.

35. The Panel affirms the Hearing Commissioner's finding with regard to the compensability of the Claimant's testimony alone, which is: I find that, even if I were to believe the Claimant's testimony in its entirety, and discount completely the testimony of the defendants' witnesses, the story recounted by the Claimant nevertheless fails to qualify as usual or extraordinary conditions of employment.

36. That the medical evidence fails to support the Claimant's allegations that she suffered a

facial tic. While two instances of a facial tic were noted in her medical records, we find that the Claimant's complaints of a tic were exaggerated, as there is no reasonable explanation for her failure to report the alleged facial tic to her physicians during the course of her treatment.

37. That the medical evidence fails to support the Claimant's allegations that she suffered from rectal spasms and fecal incontinence. We base this finding on the fact that, despite her extensive psychological treatment, the Claimant made no complaints of rectal spasms or incontinence to Dr. Smith or Dr. Guille, save for one notation of diarrhea.

38. The Panel specifically finds that the one complaint of diarrhea in the medical records is different than the Claimant's complaint of an inability to control her bowels. See Tr. 15.

39. That the medical evidence fails to support the Claimant's allegations of an aggravation to her lupus and fibromyalgia. We are cognizant of certain records, including the February 16, 2012 letter from Dr. Smith, which ostensibly establishes causation. However, we find that his opinion was based on the Claimant's version of events, which is not true. Therefore, any causation stemming from that version of events must necessarily fail.

40. That any and all medical evidence introduced into evidence and based on the Claimant's version of events is unworthy of credence and fails to satisfy the Claimant's burden of proof pursuant to §41-1-160.

41. As we find that the Claimant's mental injury is not compensable, however, any medical evidence supporting her claim is rendered moot.

42. That the Claimant was noncompliant with treatment based on her failure to continue her medical treatment with MUSC after October 19, 2011.

43. That, even if the case were found to be compensable, the Claimant would not be entitled to

TTD after October 19, 2011.

44. The Panel specifically and emphatically finds that there is no reasonable basis for the Claimant to have brought this claim. We are cognizant that the claim was activated pursuant to a Petition for Hearing filed by the Employer/Carrier. We are also cognizant that the hearing was set pursuant to Regulation 67-601, not any pleading of the Claimant. However, the Claimant indicated at a telephone conference that she intended on pursuing her claim. The Claimant could have dismissed her case with prejudice at any time, but she did not do so. She prosecuted her claim, despite the fact that there was no legal or factual basis for doing so, and it is for that reason that we affirm the Hearing Commissioner's assessment of hearing costs in the amount of $1,014.86, this sum being the of the cost of a hearing.

45. The Panel, like the Hearing Commissioner, is at an utter loss to why this claim was not only prosecuted, but later appealed to this Panel. The Claimant, at no point throughout the hearing or on appeal has alleged that if she were given more time she would have obtained additional, supporting evidence for her claim, which would provide a legitimate basis for her to have pursued this claim. She demonstrated no prejudice on appeal in the claim going forward at the March 1, 2012 hearing as opposed to any other day. She also has alleged no evidence that would be different and no avenue of cross-examination that, had she been given more time, would have given credence to her claim. Therefore, this Panel affirms the Hearing Commissioner's award of hearing costs in the amount of $1,014.86. It is only after vigorous discussion that this Panel chooses not to asses a penalty against the Claimant for filing an appeal without merit.

46. The Panel finds that the counsel for the Claimant failed to make an objection to going

forward on March 1, 2012. Therefore, any objection to personal jurisdiction, notice, venue, or any similar issue was affirmatively waived.

47. In the alternative to Finding of Fact #46, the Panel also finds that the Claimant failed to preserve for review any objection to going forward on March 1, 2012, as no objection is noted in the Record.

48. The Panel finds that the Hearing Commissioner properly asserted subject matter jurisdiction over this claim since the Workers' Compensation Commission is vested with exclusive original jurisdiction to adjudicate a claim for an injury occurring at work, and it is undisputed that this claim involves an injury arising out of and occurring the course and scope of the Claimant's employment.

49. A conflict had arisen between the parties prior to the Commissioner's decision to set a hearing pursuant to Regulation 67-601. This finding is based on the pleadings and allegations of the parties.

CONCLUSIONS OF LAW

In view of those Findings of Fact, and as provided in the South Carolina Code of Law, WE, THE APPELLATE PANEL, AFFIRM THE CONCLUSIONS OF LAW OF THE SINGLE COMMISSIONER AS IF FULLY SET FORTH HEREIN AND FURTHER CONCLUDE THE FOLLOWING AS MATTERS OF LAW:

1. Pursuant to Posey v. Proper Mold & Engineering, 378 S.C. 10, 661 S.E.2d 395 (Ct. App. 2008), the Workers' Compensation Act provides the exclusive remedy against an employer for an employee's work-related accident or injury.

2. Pursuant to Creech v. South Carolina Wildlife and Marine Resources Dep't, 328 S.C.

24, 491 S.E.2d 571 (1997), an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.

3. Pursuant to Regulation 67-601, the Hearing Commissioner properly asserted jurisdiction over this claim on its own motion because a conflict had arisen.

Based upon the foregoing Findings of Fact and Conclusions of Law,

IT IS HEREBY ORDERED Commissioner Beck's Decision and Order dated July 25, 2012, is affirmed, and all statements and findings are adopted as if fully set forth here. Commissioner's Beck's decision shall remain in effect. Further, the above additional Findings of Fact and Conclusions of Law are hereby Adopted.

AND IT IS SO ORDERED.

Avery B. Wilkerson, Commissioner

Gene McCaskill, Commissioner

Derrick L. Williams, Commissioner

CERTIFICATE OF SERVICE

This is to certify the undersigned has this date served this order in the above entitled action upon all parties to this cause by sending an electronic copy hereof by electronic mail addressed to the attorney or attorneys for said parties or by depositing a copy hereof, postage paid, in the United States mail addressed to any unrepresented party.

By Valerie Deller on January 31, 2013