THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Gene McCaskill, Commissioner
Avery B. Wilkerson, Jr., Commissioner
R. Michael Campbell, II, Commissioner

W.C.C. FILE NO.: 1215681

APPELLATE CASE NO.: 2018-000359

Vickie Rummage, Employee, ...Appellant,

vs.

BGF Industries, Employer, and Great American Alliance Insurance Co., Carrier, ...Respondents.

FINAL BRIEF OF APPELLANT

Andrew N. Safran, Esquire
Post Office Box 12089
Columbia, South Carolina 29211
803-256-6689

Attorney for Appellant

December 17, 2018
Columbia, South Carolina

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STATEMENT OF ISSUES ON APPEAL

1) Did the Appellate Panel/Commission err in failing to find Ms. Rummage had adequately proven the consequences of her admittedly compensable May 18, 2012 physical injuries had aggravated a preexisting psychological condition when: (a) the Legislature has determined establishment of a compensable aggravation must be founded upon "medical evidence"; (b) she satisfied this burden of proof through introduction of multiple expert opinions "stated to a reasonable degree of medical certainty" as prescribed by the provisions of S.C. Code Ann. Section 42-9-35 (2015); (c) Respondents, who were similarly obliged to meet this standard of proof, did not controvert these corroborative medical opinions through either "expert opinion or testimony stated to a reasonable degree of medical certainty"; (d) the record is consequently devoid of any competent evidence rebutting the multiple medical expert opinions validating the aggravation of her preexisting psychological condition; and (e) the only reasonable inference which may be gleaned from the evidence contained in the hearing record verifies her entitlement to treatment of this aggravated psychological condition?

2) Did the Appellate Panel/Commission err in actually denying the compensability of Ms. Rummage's aggravated psychological condition when this adjudication process: (a) was the product of non-medical factors (i.e. personal/lay observations of the single commissioner), as opposed to the legally mandated process requiring resolution of this medically complex issue through the use of "expert opinion or testimony stated to a reasonable degree of medical certainty" in compliance with S.C. Code Ann. Section 42-9-35 (2015); (b) is clearly premised upon an impermissible medical opinion generated by the single commissioner, rather than the competent medical evidence required by Section 42-9-35; (c) arbitrarily/capriciously

circumvents the explicit provisions of Section 42-9-35; and (d) constitutes an unlawful procedure per S.C. Code Ann. Section 1-23-380 (A)(5)(Supp. 2017)?

3) Did the Appellate Panel/Commission err in admitting an Order stemming from a prior unrelated workers' compensation proceeding into evidence for the purpose of impeachment when the Supreme Court has ruled the use of extrinsic evidence to challenge an individual's credibility constitutes reversible error?

STATEMENT OF THE CASE

This is an appeal from the February 1, 2018 Order of the South Carolina Workers' Compensation Commission's Appellate Panel, which concluded Appellant, Vicky Rummage: (a) had "failed to prove an aggravation of her pre-existing psychological condition" in the fashion prescribed by S.C. Code Ann. Section 42-9-35 (2015); and (b) was not entitled to receive "medical treatment and compensation benefits due to an alleged aggravation of her pre-existing psychological condition . . . ."

On May 18, 2012, Ms. Rummage sustained compensable injuries when she fell backwards, striking her head against a doffing machine with sufficient force to produce a laceration that was closed (through use of glue) on site. Although she continued to work following this trauma, Ms. Rummage developed symptoms involving her head, neck and upper back that prompted a May 30, 2012 referral to the company physician (Dr. John F. McLeod, III) who "suspected some element of concussion." (See, Record on Appeal, p. 394). This physician similarly noted the presence of continued " . . . [t]enderness over the posterior scalp with mild edema over the si[t]e . . . of previous laceration" in conjunction with continued headaches, which he again characterized as the "suspected" residual "concussion", during a June 6, 2012 follow-up visit. (Id.).

During the ensuing weeks, Dr. Fred D. McQueen, Jr. **(her long time primary care physician)**: (a) prescribed Fioricet for "severe headaches since the fall"; while (b) endorsing obtaining a neurological assessment, which was subsequently performed per Respondents' authorization on September 5, 2012. (See, Record on Appeal, p. 371).

After examining her on that date, Dr. Jeff Benjamin, an authorized neurologist affiliated with Grand Strand Specialty Associates, advised examination revealed "typical symptoms of

closed-head injury." (See, Record on Appeal, p. 385). In fact, this physician's final (November 14, 2012) note confirmed his belief her constellation of symptoms were reflective of **"Traumatic Brain Injury"**. (See, Record on Appeal, p. 391).

Ms. Rummage was then directed by Respondents to Dr. Daniel L. Collins, a physiatrist, who likewise identified post-concussive symptoms, for which he recommended speech therapy. (See, Record on Appeal, p. 246). During the early stages of his treatment, Dr. Collins was also informed of depressive symptoms, **as well as the fact Ms. Rummage had used psychotropic medication "in the past" for pre-accident depression**. (See, Record on Appeal, p. 249).

In this connection, it is **undisputed** Ms. Rummage had a long history of depression/anxiety, for which she: (a) was prescribed several psychotropic medications by Dr. McQueen over an extended period of time; but (b) never received either psychological/psychiatric assessment or treatment. Ms. Rummage likewise **did not contest** the fact she did not recall all details of her medication use while under Dr. McQueen's care during her December 9, 2013 deposition. (See, Record on Appeal, p. 437).

Given the relevance of Ms. Rummage's pre-injury medical history, including the use of psychotropic medication, to identifying the source of documented post-injury depression, Dr. McQueen, the medical expert who was most familiar with both her pre and post-injury conditions, was requested to address this issue. Significantly, pursuant to questionnaire responses dated March 13, 2014, this physician, **who had served as her physician for approximately 14 years prior to the May 18, 2012 accident**, confirmed; (a) "Ms. Rummage's current headaches are most probably the product of a post-concussive syndrome, as opposed to the tension headaches for which . . . [he] provided treatment prior to the May 18, 2012 trauma"; (b) "the nature/intensity of Ms. Rummage's psychological disturbance **have also increased** in a

manner consistent with post-concussive syndrome"; (c) "**each of these components has been materially aggravated by the consequences of Ms. Rummage's May 18, 2012 work related fall**"; and (d) the **treatment modalities** he had provided for the "depression and headaches **prior** to her May 18, 2012 work related fall . . . allow[ed] Ms. Rummage to remain employed. . . ." (See, Record on Appeal, pp. 380 - 382).

As Dr. Collins had recommended not only psychological evaluation, but also neuropsychological testing, for which no authorization was tendered, the undersigned ultimately (May 15, 2014) directed Ms. Rummage to Dr. Tora L. Brawley, a neuropsychologist, who: (a) noted the presence of psychological stressors that included not only the consequences of her compensable accident, but also family issues (e.g., "her son attempting suicide this past November"); (b) indicated Ms. Rummage **acknowledged having "a prior history of depression"**; (c) found she exhibited "severely impaired speed and accuracy . . . of attention and concentration"; (d) administered the "Test of Memory Malingering", which "did not indicate malingering of cognitive symptoms"; (e) nonetheless believed "her psychiatric symptoms were significantly interfering with cognition and therefore invalidating the test results", to the extent neuropsychological testing was discontinued; (f) recommended psychiatric evaluation in conjunction with counseling for these symptoms; and (g) concluded that " . . . [w]hile Ms. Rummage does have a **previous history of depression**, it is clear that her symptoms worsened significantly following the accident and should be aggressively treated . . . [at] this time . . . [, while reiterating] . . . [f]ormal assessment of effort did not reveal attempts to malinger." (See, Record on Appeal, pp. 341 - 342).

During the course of her November 10, 2015 deposition, Dr. Brawley, a seasoned neuropsychologist who had served on the University of South Carolina School of Medicine's

faculty for many year, verified: (a) "Mr. Safran . . . told me he wanted me to . . . see if she was legit . . . to make sure that . . . [Ms. Rummage] was legitimate with her complaints" (See, Record on Appeal, pp. 233, 235 and 237); (b) her review of "a lot of . . . medical records" indicating Ms. Rummage's **use of antidepressants for "quite a while"** (See, Record on Appeal, pp. 234 and 237); (c) her awareness Ms. Rummage had encountered "lots of stressors . . . throughout her life" (See, Record on Appeal, p. 234); (d) the Test of Memory Malingering was administered "to look and see if she was giving the effort because it was clear she just wasn't - - her cognition was significantly slowed at that time and she was severely impaired on those couple of short tests that I gave her at the beginning" (See, Record on Appeal, p. 235); (e) **Ms. Rummage "passed the test of Memory Malingering . . . [,] a formal assessment that looks at effort"** (See, Record on Appeal, pp. 235 - 236); and (f) " . . . [h]ad Ms. Rummage not passed the malingering test, . . . [she] would . . . have said so" (actually recalling a prior incidence where one of Mr. Safran's clients "didn't pass the malingering test" (See, Record on Appeal, pp. 237 and 242).

Ms. Rummage was next referred by Respondents to Dr. Thomas Gualtieri, a psychiatrist, who opined her symptoms were not related to the May 18, 2012 trauma and indicative of malingering. As the undersigned had serious doubts as to this physician's objectivity, to the extent he had initially contested the referral, he felt an independent psychiatric evaluation was warranted.

Consequently, on April 27, 2015 Ms. Rummage underwent forensic psychiatric evaluation by Dr. Amanda B. Salas, who: (a) **reviewed extensive records** from several facilities, **including McQueen Medical Center** (See, Record on Appeal, p. 326); (b) recognized her **prior history of depression**, noting **these ". . . [m]edical records document history of treatment with" Prozac, Lexapro, Wellbutrin XL, Cymbalta, Elavil, Serzone, Desryl and Ambien**

(See, Record on Appeal, p. 328); (c) **further referenced her prior use of anti-anxiety medications (Ativan and Xanax)** (Id.); (d) identified the presence of various depressive symptoms, as well as clinical evidence of this condition (See, Record on Appeal, pp. 328 - 330); (e) confirmed **"to a reasonable degree of medical certainty, . . . Ms. Rummage meets the diagnostic criteria for major depressive disorder"** (See, Record on Appeal, p. 332); (f) indicated ". . . **[a]lthough she has a history of depressive mood symptoms, her past documented** and reported depressive episodes have not risen to the level of severity she is currently experiencing" (Id.); (g) the current Major Depressive Disorder "is most likely related to her work injury" (Id.); (h) "Ms. Rummage is not at maximum medical improvement in regards to her mood symptoms and memory impairment" (See, Record on Appeal, p. 333); and (i) treatment of this aggravated depressive condition was required. (Id.)

Inspection of Dr. Salas' report also identified various flaws in Dr. Gualtieri's methodology and conclusions, to wit: (a) reference in the report to **an evaluation date (December 11, 2014), which was four months prior to her actual visit in April, 2015** (Id.); (b) test selection bias, noting **his use of "the Pediatric Neurocognitive Test, a test designed for a pediatric population," rather than adults** (See, Record on Appeal, p. 331); (c) his administration of/reliance upon "the Neuropsych Questionnaire (NPQ) . . . [,] an internet-based computerized symptom checklist developed by Dr. Gualtieri **himself . . . [which b]y his own publication, . . . 'was not developed as a diagnostic test'"** (Id.); (d) conflicting descriptions of Ms. Rummage" (noted his report states "she appeared his/her stated age"; characterizing her as "pleasant, well related, cooperative and compliant", while concluding, without explanation, she exhibited a "non-credible clinical presentation, with dramatic inconsistency") (See, Record on Appeal, pp. 330 and 467); (e) failure "to acknowledge or offer explanation as to why he

dismissed" psychomotor retardation, which "is typical of severe depression . . . from being a valid part of his assessment and interpretation" (See, Record on Appeal, p. 332); and (f) "his report stands out in **such a divergent perspective** in comparison to the other available records, that it leaves me perplexed as to how one is to find any validity in his offered opinion", which conflicts with the assessments of multiple medical providers (Drs. McQueen, Benjamin and Collins) (Id.).

Dr. Brawley **similarly questioned the propriety/reliability of Dr. Gualtieri's testing process and conclusions**, explaining: (a) ". . . [i]t is unclear who administered and interpreted these tests. This should be done only by a qualified psychologist, or by a trained psychometrician under the supervision of a qualified psychologist" (recalling this physician's report simply bore his signature, while noting the participation of a physician's assistant); (b) "review of the raw data . . . [raises] concerns about the accuracy of scoring and interpretation, (identifying, as an example, that the scoring and interpretation in connection with a test involving Ms. Rummage's copying of "complex figure **were both incorrect**"; "simply because someone cannot recall any details on a delayed recall does not render the test 'invalid'"; use of the "pediatric neurocognitive test" on a 55 year old is "curious"; (c) the inconsistency of his **ignoring the fact Ms. Rummage's clinical presentation was consistent with Major Depressive Disorder, "the number one diagnostic consideration listed in the interpretive report . . . [o]n the Personality Assessment Inventory administered by his office"**; and (d) the arbitrariness of his acknowledging the "sedating" effects of Ms. Rummage's medications, yet ignoring their impact on her clinical presentation. (See, Record on Appeal, p. 343 - 345).

Significantly, after being provided with copies of the various reports generated by Drs. Gualtieri, Salas and Brawley, Dr. Collins, who evaluated Ms. Rummage on numerous occasions

over a two year period, concluded: (a) Ms. Rummage had "**never exhibited any evidence of malingering, symptom magnification or secondary gain**"; (b) she "has consistently exhibited clinical evidence of depression and anxiety throughout [his] . . . period of treatment"; (c) "Drs. Salas' and Brawley's observations/opinions/conclusions as to the legitimacy of Ms. Rummage's presentation, the source of her psychological/psychiatric symptoms and current treatment needs are consistent with . . . [his] own"; (d) "**Ms. Rummage's current psychological/psychiatric symptoms most probably result from the aggravation of her preexisting depression/anxiety by the consequences of her May 18, 2012 compensable accident**; (e) she "requires treatment of the nature identified by Drs. Salas and Brawley"; (f) Ms. Rummage has not reached the point of maximum medical improvement "relative to her psychological/psychiatric injury components"; (g) "Drs. Salas' and Brawley's opinions as to Ms. Rummage's rather serious need for psychological/psychiatric care are consistent with [his] . . . repeated recommendations for authorization of this treatment"; and (h) her receipt of this psychological/psychiatric treatment is reasonable, medically necessary and geared toward lessening the ultimate period of disability produced by the consequences of her May 18, 2012 compensable accident, including the causally relates psychological/psychiatric injury component identified by these evaluators. . . ." (See, Record on Appeal, pp. 321 - 325).

Ms. Rummage was also evaluated on two occasions by Dr. Donna Schwartz-Watts (Maddox), a forensic psychiatrist, who: (a) **unquestionably reviewed medical records dating back to 1991, clearly noting her receipt of "extensive treatment with Dr. McQueen pre-injury"** (See, Record on Appeal, pp. 346 - 347); (b) **certainly referenced the fact psychotropic medication was being provided by Dr. McQueen prior to the May 18, 2012 head injury** (See, Record on Appeal, p. 347); (c) identified various symptoms that were consistent with

depression, as well as the fact she was engaging in strategies to assist her cognitive function" (identifying "Luminous, crosswords and . . . Candy Crush") (See, Record on Appeal, p. 348) ; (d) "**found no evidence that Ms. Rummage was exaggerating or feigning symptoms**" (Id.); (e) **concluded, to a reasonable degree of medical certainty, that Ms. Rummage "had a pre-existing history of depression which was worsened by her work-related injury"** (See, Record on Appeal, p. 349); and (f) recommended psychiatric treatment (including medication management) in conjunction with psychotherapy for the "Major Depression" resulting from the aggravating effects of her May 18, 2012 compensable accident. (Id.).

After reevaluating Ms. Rummage in the fall of 2016, Drs. Salas and Schwartz-Watts (Maddox) conferred/reiterated, **to a reasonable degree of medical certainty**, Ms. Rummage had **not "exhibited any evidence of malingering, symptom magnification or secondary gain during [their] . . . evaluations"** (See, Record on Appeal, pp. 338 and 354); (b) " continues to exhibit symptoms reflective of Major Depression and cognitive impairment" (See, Record on Appeal, pp. 339 and 355); (c) is experiencing **"major depression and cognitive impairment . . . [that] most probably result from the consequences (direct cause and/or aggravation) of her May 18, 2012 compensable accident"** (Id.); and (d) "requires treatment of nature identified in [their] respective reports . . . ." (Id.).

These forensic psychiatrists likewise agreed: (a) Ms. Rummage's receipt of psychological/psychiatric treatment modalities of the nature they had recommended **"is reasonable, medically necessary and geared toward lessening the ultimate period of disability produced the consequences of her May 18, 2012 compensable accident"** (b) their respective opinions were also consistent with Dr. Brawley's observations/opinions/conclusions as **the legitimacy of Ms. Rummage's presentation, the source of her**

psychological/psychiatric symptoms and cognitive impairments, as well as her current treatment needs; and (c) the nature/degree of Ms. Rummage's causally related Major Depression and cognitive impairment most probably prohibits her from currently engaging in/sustaining any form of work activities. (Id.).

During the course of a November 7, 2016 hearing before the single commissioner, Ms. Rummage: (a) **did not "deny . . . [having] struggled with depression" prior to May 18, 2012** (See, Record on Appeal, p. 164); (b) **acknowledged not only receipt of medication for this condition through Dr. McQueen, but also the fact she continued to utilize these medications leading up to her May 18, 2012 accident** (See, Record on Appeal, p. 165); (c) also identified headaches as a pre-accident symptom (See, Record on Appeal, p. 169); (d) recalled the presence of nausea associated with her pre-injury headaches (See, Record on Appeal, p. 170); (e) admitted her post-accident headaches were improved through Botox injection (See, Record on Appeal, p. 173); (f) **never attempted to hide her pre-injury depression or use of psychotropic medication from her medical examiners** (See, Record on Appeal, pp. 182 - 183); (g) **clearly acknowledged the presence of "other stressors involving family members before this accident"** (See, Record on Appeal, p. 218); (h) agreed her use of psychotropic medication dated back to at least 2005 (See, Record on Appeal, pp. 194 - 195); and (i) **repeatedly/consistently accepted, as fact, the content of prior medical records if/when she could not remember particular detail of her lengthy pre-injury medical history**. (See, Record on Appeal, pp. 196 – 200, 213, 216 and 221).

In this regard, Respondents also sought to introduce a March 5, 2008 Order issued in connection with a prior workers' compensation claim for the purpose of impeachment. While the undersigned, relying upon the South Carolina Supreme Court's decision in Mizell v. Glover,

351 S.C. 392, 370 S.E. 2d 176 (2012), objected to inclusion of this document, the single commissioner overruled the objection, allowing entry of this extrinsic evidence into the hearing record.

ARGUMENTS

I. THE APPELLATE PANEL/COMMISSION ERRED IN FAILING TO FIND MS. RUMMAGE HAD ADEQUATELY PROVEN THE CONSEQUENCES OF HER ADMITTEDLY COMPENSABLE MAY 18, 2012 PHYSICAL INJURIES AGGRAVATED A PREEXISTING PSYCHOLOGICAL CONDITION BECAUSE: (A) THE LEGISLATURE HAS DETERMINED ESTABLISHMENT OF A COMPENSABLE AGGRAVATION MUST BE FOUNDED UPON "MEDICAL EVIDENCE"; (B) SHE SATISFIED THIS BURDEN OF PROOF THROUGH INTRODUCTION OF MULTIPLE EXPERT OPINIONS "STATED TO A REASONABLE DEGREE OF MEDICAL CERTAINTY" AS PRESCRIBED BY THE PROVISIONS OF S.C. CODE ANN. SECTION 42-9-35 (2015); (C) WHILE RESPONDENTS WERE SIMILARLY OBLIGED TO MEET THIS STANDARD OF PROOF, THEY DID NOT CONTROVERT THESE CORROBORATIVE MEDICAL OPINIONS THROUGH EITHER "EXPERT OPINION OR TESTIMONY STATED TO A REASONABLE DEGREE OF MEDICAL CERTAINTY"; (D) THE RECORD IS CONSEQUENTLY DEVOID OF ANY COMPETENT EVIDENCE REBUTTING THE MULTIPLE MEDICAL EXPERT OPINIONS VERIFYING THE AGGRAVATION OF HER PREEXISTING PSYCHOLOGICAL CONDITION; AND (E) THE ONLY REASONABLE INFERENCE WHICH MAY BE GLEANED FROM THE EVIDENCE CONTAINED IN THE HEARING RECORD ESTABLIHSES HER ENTITLEMENT TO TREATMENT OF THIS AGGRAVATED PSYCHOLOGICAL CONDITION.

S.C. Code Ann. Section 1-23-380 (Supp. 2017), which governs judicial review in this context, provides in pertinent part:

. . .

> (5) The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are:
>
> (a) in violation of constitutional or statutory provisions;

(b) in excess of statutory authority;

(c) made upon unlawful procedure;

(d) affected by other error of law; [or] . . .

(e) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. (Emphasis added).

A. THE APPELLATE PANEL'S/COMMISSION'S FAILURE TO REQUIRE COMPLIANCE WITH SECTION 42-9-35 CONSTITUTES LEGAL ERROR.

Section 42-9-35 prescribes that: (a) aggravation of a preexisting condition "shall [be] . . . established by a preponderance of the evidence, including medical evidence"; and (b) " 'medical evidence' means expert opinion or testimony stated to a reasonable degree of medical certainty".

As previously recognized by the Supreme Court (when analyzing another portion of the 2007 Amendment to Title 42), this statutory language: (a) "expressly creates an additional heightened standard" for establishing a compensable aggravation of a preexisting condition; and (b) "requires 'medical evidence,' in the form of 'expert opinion or testimony . . . [to be] stated to a reasonable degree of medical certainty.'" Michau v. Georgetown County ex rel. South Carolina Counties Workers Compensation Trust, 396 S.C. 589, 723 S.E. 2d 805, 807 (2012). See also, Hartzell v. Palmetto Collision, LLC, 419 S.C. 87, 796 S.E. 2d 145, 149-150 (Ct. App. 2016) (recognition of heightened standard of proof established by requirement of medical evidence to a reasonable degree of medical certainty). Section 42-9-35 similarly: (a) does not differentiate between the need for "opinion or testimony" when confirming, as opposed to denying, the aggravation of a preexisting condition; and (b) is equally applicable to medical "opinion" verifying the aggravation of a preexisting condition by compensable injury

consequences, as well as to medical "opinion" denying this aggravation. Michau, 723 S.E. 2d at 808.

In this instance, Respondents "specifically sought out Dr. [Gualtieri] . . . to evaluate . . . [Ms. Rummage] and issue a medical 'opinion' to decide the compensability of [her] . . . claim." (Id.) In view of this fact, Dr. Gualtieri's reports: (a) can only be characterized as an "opinion or testimony" that must be "stated to a reasonable degree of medical certainty"; and (b) do not constitute "competent evidence" to support a denial of the aggravated psychological/psychiatric condition validated by no less than five experts. Michau, 723 S.E. 2d at 808-809. See also, Section 42-9-35 (C).

Consequently, the Appellate Panel's/Commission's attempt to circumvent the specific requirements of Section 42-9-35 is necessarily "null and void." Bazzle v. Huff, 319 S.C. 443, 462 S.E. 2d 273, 274 (1995) (Commission's attempts to require submission/approval of attorney fees prior to effective date of empowering regulation "exceeded their statutory authority and thus were null and void"); Responsible Economic Development v. South Carolina Department of Health and Environmental Control, 371 S.C. 547, 641 S.E. 2d 425, 428 (2007) (action taken by administrative agency outside its statutory authority "is null and void").

B. THE COMPETENT EVIDENCE OF RECORD UNEQUIVOCALLY ESTABLISHES MS. RUMMAGE SATISFIED THE REQUIREMENTS OF SECTION 42-9-35 AS A MATTER OF LAW.

The Appellate Panel's/Commission's factual findings "may not be based upon surmise, conjecture or speculation, but must be founded on evidence of sufficient substance to afford a reasonable basis for it." Glover v. Rhett Jackson Company of Bush River Road, 274 S.C. 644, 267 S.E. 2d 77, 80 (1980); Mullinax v. Winn-Dixie Stores, Inc., 318 S.C. 431, 458 S.E. 2d 76, 82 (Ct. App. 1995). Where "there is no evidence to support the finding of fact made by

the Commission this court . . . has the power to reverse" the administrative agency's determination. Sanders v. Richardson, 251 S.C 325, 162 S.E. 2d 257, 259 (1968); Hutson v. South Carolina State Ports Authority, 399 S.C. 381, 732 S.E. 2d 500, 504 (2012).

It is also axiomatic that while "the Commission is the fact finding body, where the evidence gives rise to but one reasonable inference the question becomes one of law for the court to decide." Kinsey v. Champion American Service Center, 268 S.C. 177, 232 S.E. 2d 720, 722 (1977); Moore v. Family Service of Charleston, 269 S.C. 275, 237 S.E. 2d 84, 86 (1977). See also, Springs Industries, Inc. v. South Carolina Second Injury Fund, 296 S.C. 359, 272 S.E. 2d 915, 917 (Ct. App. 1988); Carolinas Recycling Group v. South Carolina Second Injury Fund, 398 S.C. 480, 730 S.E. 2d 324, 327 (Ct. App. 2012).

As previously noted, Ms. Rummage submitted medical evidence containing confirmatory opinions relative to the causal relationship of her current psychological/psychiatric distress to the aggravating effects of her May 18, 2012 compensable accident from four physician experts, as well as a seasoned neuropsychologist. These medical opinions were offered by not only two forensic psychiatrists, but also: (a) Dr. McQueen, who possessed a unique awareness of Ms. Rummage's extensive pre-accident treatment course; and (b) Dr. Collins, Respondents' designated physician, who personally assessed her on essentially a monthly basis for three years.

Consistent with the requirements of Section 42-9-35, each of Ms. Rummage's physician experts verified, "to a reasonable degree of medical certainty", the consequences of her admittedly compensable physical injuries had aggravated the preexisting psychological condition. Given this fact, as well as the absence of any competent contradictory medical opinion or testimony, Ms. Rummage respectfully submits: (a) the Appellate Panel's/Commission's determination she "failed to prove an aggravation of her preexisting

psychological condition" is devoid of evidentiary basis; (b) absent the requisite "expert opinion or testimony stated to a reasonable degree of medical certainty", this denial is clearly the product of "surmise, conjecture [and] . . . speculation", rather than "founded on . . . [competent] evidence"; (c) the "only evidence in the record shows that . . . [her preexisting psychological condition] was . . . aggravated by" the consequences of her compensable injury; (d) the only reasonable inference arising from the record unequivocally establishes she has satisfied the requirements of Section 42-9-35; and (e) her current psychological/psychiatric symptoms are "related to the accident as a matter of law." Mullinax, 445 S.E. 2d at 82.

II. THE APPELLATE PANEL/COMMISSION ERRED IN DENYING THE COMPENSABILITY OF MS. RUMMAGE'S AGGRAVATED PSYCHOLOGICAL/PSYCHIATRIC CONDITION BECAUSE THIS ADJUDICATION PROCESS: (A) WAS THE PRODUCT OF NON-MEDICAL FACTORS (I.E. PERSONAL/LAY OBSERVATIONS OF THE SINGLE COMMISSIONER), AS OPPOSED TO THE LEGALLY MANDATED PROCESS OF RESOLVING THIS MEDICALLY COMPLEX ISSUE IN ACCORDANCE WITH "EXPERT OPINION OR TESTIMONY STATED TO A REASONABLE DEGREE OF MEDICAL CERTAINTY" AS REQUIRED BY S.C. CODE ANN. SECTION 42-9-35 (2015); (B) IS CLEARLY PREMISED UPON AN IMPERMISSIBLE MEDICAL OPINION GENERATED BY THE SINGLE COMMISSIONER, RATHER THAN THE COMPETENT MEDICAL EVIDENCE IN COMPLIANCE WITH THE PLAIN TERMS OF SECTION 42-9-35; (C) ARBITRARILY/CAPRICIOUSLY CIRCUMVENTS THE EXPLICIT PROVISIONS OF THIS STATUTE; AND (D) CONSTITUTES AN UNLAWFUL PROCEDURE PER S.C. CODE ANN. SECTION 1-23-380 (A)(5)(SUPP. 2017).

The plain language of Section 42-9-35 undoubtedly reflects a legislative recognition of the complexity incidental to assessing the aggravating impact of covered injuries. To ensure the accurate disposition of these claims, the Legislature has statutorily reserved the focal issue (i.e. physical or psychological/psychiatric aggravation) to medical experts. Given this well expressed intent, the Appellate Panel's/Commission's inquiry: (a) is necessarily dependent on the presence of "medical evidence" in the form of "expert opinion or testimony stated to a reasonable degree of medical certainty"; and (b) includes resolution of any conflicts between these required expert

opinions. However, the terms of Section 42-9-35 neither contemplate nor authorize substitution of lay impressions for "expert opinion or testimony".

In view of the parameters established by the Legislature, the Appellate Panel/Commission was obliged to: (a) accurately analyze the "expert opinion" addressing the aggravating effects of her admittedly compensable physical injuries on the preexisting psychological condition; (b) limit its consideration to only those opinions which met the statutorily mandated standard of proof; and (c) follow the medical evidence to a conclusion consistent with the statutory proof requirements.

Unfortunately, rather than adhering to this logical algorithm, the Appellate Panel/Commission endorsed/adopted the converse mode of assessment employed by the single commissioner, which was substantially premised upon misconstruction of fact and departure from governing law. In this regard, while the Appellate Panel/Commission effectively dismissed the opinions of Dr. Salas based on the notion she was somehow unaware of Ms. Rummage's prior medical history, its presumption is "plainly wrong", as this forensic psychiatrist: (a) acknowledged reviewing extensive records from several facilities, including those generated by Dr. McQueen during his lengthy period of pre-injury treatment; (b) identified the various psychotropic medications referenced in these prior medical records; and (c) rendered her opinion with full knowledge of Ms. Rummage's prior treatment history. (See, Lewis v. L.B. Dynasty, Inc., 419 S.C. 515, 799 S.E. 2d 304, 305 (2017) (See also, Record on Appeal, pp. 326 - 340).

Additionally, notwithstanding similarly specious attempts to dismiss the other corroborative "expert" opinions, inspection of the evidentiary record actually reveals: (a) Dr. Collins (long time authorized treater) had reviewed records reflecting Ms. Rummage's pre-injury medical history prior to offering opinions which reject the notion of malingering/symptom

magnification/secondary gain and confirm "the aggravation of her preexisting depression/anxiety by the consequences of her May 18, 2012 compensable accident" (See, Record on Appeal, p. 324); (b) Dr. Schwartz-Watts (Maddox) also validated this aggravation after reviewing extensive records (including those generated by Dr. McQueen from March 7, 1991 - May 14, 2012) (See, Record on Appeal, pp. 350 - 353); (c) Dr. McQueen, who was acutely aware of Ms. Rummage's pre-injury psychological status, likewise acknowledged the aggravation of this preexisting condition (See, Record on Appeal, pp. 380 - 382); and (d) Dr Brawley explained a material aspect of her assessment involved gauging the legitimacy of Ms. Rummage's subjective complaints and presentation in the context of her prior medical history. (See, Record on Appeal, pp. 341 - 345).

Review of the Appellate Panel's/Commission's Order, as well as the Appellate Panel hearing transcript, further confirms: (a) an obvious awareness the evidentiary record contains no competent "medical opinions" sufficient to support the single commissioner's determination; (b) a legally untenable belief adoption of the single commissioner's personal impressions somehow cures this deficiency; and (c) the denial of Ms. Rummage's claim is erroneously premised upon "the medical opinion of the single commissioner, adopted by the Commission." Burnette v. City of Greenville, 401 S.C. 417, 737 S.E. 2d 200, 207 (Ct. App. 2012).

Given these facts, Ms. Rummage respectfully submits the Appellate Panel's/Commission's February 1, 2018 ruling: (a) reflects an arbitrary/capricious circumvention of the legislatively mandated need for "expert opinion or testimony stated to a reasonable degree of medical certainty"; and (b) is clearly the product of an "unlawful procedure" within the meaning of Section 1-23-380 (A)(5).

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III. THE APPELLATE PANEL/COMMISSION ERRED IN ADMITTING AN ORDER STEMMING FROM A PRIOR UNRELATED WORKERS' COMPENSATION PROCEEDING INTO EVIDENCE FOR THE PURPOSE OF IMPEACHMENT BECAUSE THE SUPREME COURT HAS RULED THE USE OF EXTRINSIC EVIDENCE TO CHALLENGE AN INDIVIDUAL'S CREDIBILITY CONSTITUTES REVERSIBLE ERROR.

In Mizell, the Supreme Court held an individual's credibility could not be challenged/attacked through the introduction of extrinsic evidence, including judicial factual findings from a prior proceeding. In this regard, the Court recognized the "obvious prejudicial effect that credibility assessments of witnesses by judges have on subsequent" fact finders. Mizell, 570 S.E. 2d at 182. Recognizing this negative impact, the Court determined admission of extrinsic evidence for this purpose "constituted reversible error." (Id.).

While the Appellate Panel's February 1, 2018 Order states the findings entered in connection with the prior related claim were "not consider[ed] . . .", it then indicates testimony relative to this previous claim "is untrue and evasive". While Ms. Rummage was questioned as to this prior claim, her testimony yielded no substantive information. In view of this fact, the associated characterization of untruthfulness was likely attributable to the prior Order, through oral argument surrounding its admission or otherwise. Based upon Mizell, the introduction of this intrinsic evidence warrants reversal.

CONCLUSION

After sustaining the compensable head trauma on May 18, 2012, Ms. Rummage developed increased psychological/psychiatric symptoms that the physician most intimately familiar with her pre-injury status attributed to the aggravation of her preexisting condition. This development was subsequently confirmed by two forensic psychiatrists, who expressed their opinions "to a reasonable degree of medical certainty" in accordance with Section 42-9-35. The

aggravating impact of her trauma was likewise verified, in the legally mandated fashion, by Respondents' designated treating physician, whose initial concerns as to Ms. Rummage's veracity were substantially rehabilitated during his three year course of care, to the extent Dr. Collins ultimately acknowledged the absence of "malingering, symptom magnification or secondary gain", as well as "the legitimacy of Ms. Rummage's presentation".

While Respondents sought to rebut these opinions through the reports of another psychiatrist, this evidence: (a) did not comply with the basic requirement of Section 42-9-35, as the contrary opinions were not "stated to a reasonable degree of medical certainty"; and (b) was peppered with materially inconsistencies that would lead even a jaded mind to question their objectivity, legitimacy or reliability. They likewise introduced (over objection) extrinsic evidence which was not only inadmissible in the current context, but also proved to be prejudicial.

Despite Ms. Rummage's identification of legal error that invalidated the single commissioner's rejection of her aggravation claim, a contention specifically acknowledged in its February 1, 2018 Order, the Appellate Panel/Commission affirmed an underlying ruling that: (a) clearly violated the explicit terms of Section 42-9-35; (b) exceeded its statutory authority; and (c) rendered the prior ruling null and void. This legal error was compounded by an: (a) arbitrary/capricious denial that can only be premised upon the Appellate Panel's/Commission's adoption a medical opinion generated by the single commissioner: and (b) apparent inability to discern the prejudicial impact of extrinsic impeachment evidence recognized by Mizell.

Although Ms. Rummage, consistent with her hearing testimony, acknowledges her prior medical history, the competent evidence nonetheless establishes the consequences of her May 18, 2012 compensable accident have aggravated this preexisting psychological condition. As

this conclusion constitutes the only reasonable inference that may be gleaned from the evidence contained in the hearing record, she respectfully requests the Court to: (a) determine she has satisfied Section 42-9-35 as a matter of law; and (b) require the Appellate Panel/Commission to provide treatment in accordance with Drs. Schwartz-Watts' (Maddox's), Salas' and Collins' opinions/recommendations.

Respectfully submitted,

Andrew N. Safran, Esquire
Post Office Box 12089
Columbia, South Carolina 29211
(803) 256-6689

Attorney for Appellant

December 17, 2018
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Gene McCaskill, Commissioner
Avery B. Wilkerson, Jr., Commissioner
R. Michael Campbell, II, Commissioner

W.C.C. FILE NO.: 1215681

APPELLATE CASE NO.: 2018-000359

Vickie Rummage, Employee, ...Appellant,

vs.

BGF Industries, Employer, and Great American Alliance Insurance Co., Carrier, ...Respondents.

CERTIFICATE OF SERVICE

I, Paula F. Bregovi, Paralegal for Andrew N. Safran, Esquire, Attorney for Appellant, do hereby certify that on the 17th day of December, 2018, I caused to be filed, via hand delivery, the original and fourteen (14) copies of Appellant's Final Brief with the Clerk of the South Carolina Court of Appeals. One (1) copy of the Appellant's Final Brief was furnished to counsel for Respondents via first class mail at the following address:

Michael A. Farry, Esquire
Horton, Drawdy, Ward, Mullinax & Farry, P.A.
307 Pettigru Street
Greenville, South Carolina 29601

Paula F. Bregovi

Paula F. Bregovi
Post Office Box 12089
Columbia, South Carolina 29211
(803) 256-6689

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Brief complies with Rule 211(b), SCACR.

Andrew N. Safran, Esquire
Post office Box 12089
Columbia, South Carolina 29211
(803) 256-6689

Attorney for Respondent

December 17, 2018
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