

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM SOUTH CAROLINA  
WORKERS' COMPENSATION COMMISSION

Honorable Avery B. Wilkerson, Jr., Honorable T. Scott Beck  
and Commissioner Gene McCaskill  
Commissioners for the Appellate Panel

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Appellate Case No. 2020-000715  
Trial Court Case No. 1720042

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**RECEIVED**  
SEP 11 2020  
SC Court of Appeals

Denitra D. Brooks, Employee, Appellant,

v.

Amazon, Employer, and American Zurich Insurance Co.,  
Insurance Carrier, Respondents.

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**INITIAL BRIEF OF APPELLANT**

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II. BECAUSE THE FINDING IS CLEARLY ERRONEOUS IN VIEW OF THE RELIABLE, PROBATIVE AND SUBSTANTIAL EVIDENCE ON THE WHOLE RECORD, THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION ERRED IN FINDING THAT APPELLANT DID NOT SUSTAIN AN INJURY BY ACCIDENT, ARISING OUT OF AND IN THE COURSE OF HER EMPLOYMENT TO HER NECK.

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## STATEMENT OF ISSUES ON APPEAL

1. DID THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION ERR IN FINDING THAT APPELLANT DID NOT SUSTAIN AN INJURY BY ACCIDENT, ARISING OUT OF AND IN THE COURSE OF HER EMPLOYMENT TO HER LOWER BACK?
2. DID THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION ERR IN FINDING THAT APPELLANT DID NOT SUSTAIN AN INJURY BY ACCIDENT, ARISING OUT OF AND IN THE COURSE OF HER EMPLOYMENT TO HER NECK?

## STATEMENT OF THE CASE

On December 3, 2017 Appellant had an accident in the course and scope of her employment with Employer while she was moving boxes. Respondents admit that Appellant injured her right shoulder. Appellant also alleged that she injured her neck and low back in the accident which Respondents deny. The Single Commissioner found that Appellant suffered an admitted injury to the right shoulder but did not suffer a compensable injury to the neck or low back. The SC Workers' Compensation Commission affirmed the findings of the Single Commissioner. This is an appeal of the order of the SC Workers' Compensation Commission filed April 9, 2020.

## STANDARD OF REVIEW

Judicial review of a final decision in a contested case of the SC Workers' Compensation Commission is governed by S.C. Code Ann. § 1-23-380. This statute provides, in pertinent part:

**§ 1-23-380. Judicial review upon exhaustion of administrative remedies.**

A party who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review pursuant to this article and Article 1. This section does not limit utilization of or the scope of judicial review available under other means of review, redress, relief, or trial de novo provided by law. A preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy. Except as otherwise provided by law, an appeal is to the court of appeals.

(5) The court may not substitute its judgment for the judgment 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 the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) affected by other error of law;
- (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Pursuant to the APA, this court's review is limited to deciding whether the Appellate Panel's decision is unsupported by substantial evidence or is controlled by some error of law. *Grant v. Grant Textiles*, 372 S.C. 196, 200, 641 S.E.2d 869, 871 (2007); *Gibson*, 338 S.C. at 516, 526 S.E.2d at 728. "Any review of the Appellate Panel's factual findings is governed by the substantial evidence standard." *Lockridge v. Santens of Am., Inc.*, 344 S.C. 511, 515, 544 S.E.2d 842, 844 (Ct.App.2001). The Appellate Panel's decision must be affirmed if supported by substantial evidence in the record. *Shuler v. Gregory Elec.*, 366 S.C. 435, 440, 622 S.E.2d 569, 571 (Ct.App.2005) (citing *Sharpe v. Case Produce, Inc.*, 336 S.C. 154, 160, 519 S.E.2d 102, 105 (1999)). It is not within the reviewing court's province to reverse findings of the Appellate Panel which are supported by substantial evidence. *Frame v. Resort Servs., Inc.*, 357 S.C. 520, 528, 593 S.E.2d 491, 495 (Ct.App.2004); \*\*758 *Broughton v. South of the Border*, 336 S.C. 488, 496, 520 S.E.2d 634, 637 (Ct.App.1999). The findings of an administrative agency are presumed correct and will be set aside only if unsupported by substantial evidence. *Kenco Group*, 366 S.C. at 458, 622 S.E.2d at 581; *Frame*, 357 S.C. at 528, 593 S.E.2d at 495; *Broughton*, 336 S.C. at 496, 520 S.E.2d at 637.67

Substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the \*348 administrative agency reached in order to justify its action. *Pratt v. Morris Roofing, Inc.*, 357 S.C. 619, 594 S.E.2d 272 (2004); *Jones v. Georgia-Pacific Corp.*, 355 S.C. 413, 586 S.E.2d 111 (2003).

Substantial evidence is something less than the weight of the evidence. *Office of Regulatory Staff v. S.C. Pub. Serv. Comm'n*, 374 S.C. 46, 647 S.E.2d 223 (2007). The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence. *Sharpe*, 336 S.C. at 160, 519 S.E.2d at 105; *Smith v. NCCI Inc.*, 369 S.C. 236, 247, 631 S.E.2d 268, 274 (Ct.App.2006); *DuRant v. S.C. Dep't of Health & Envtl. Control*, 361 S.C. 416, 420, 604 S.E.2d 704, 707 (Ct.App.2004). *Hall v. Desert Aire, Inc.*, 376 S.C. 338, 347-48, 656 S.E.2d 753, 757-58 (Ct. App. 2007)

### FACTS

On December 3, 2017, the Appellant was injured in an admitted work accident when she was moving boxes. Respondents admit that Claimant injured her right shoulder but deny that Appellant injured her neck and back. Appellant received medical treatment provided by Respondents from Palmetto HealthWorks, Dr. Earl B. McFadden, Dr. Michael W. Peelle and the Pain Center.

### ARGUMENTS

- I. **BECAUSE THE FINDING IS CLEARLY ERRONEOUS IN VIEW OF THE RELIABLE, PROBATIVE AND SUBSTANTIAL EVIDENCE ON THE WHOLE RECORD, THE SOUTH CAROLINA WORKERS' COMMISSION ERRED IN FINDING THAT APPELLANT DID NOT SUSTAIN AN INJURY BY ACCIDENT, ARISING OUT OF AND IN THE COURSE OF HER EMPLOYMENT TO HER LOWER BACK.**

The SC Workers' Compensation Commission finding that Appellant did not sustain an injury to her lower back is clearly erroneous in view of the reliable, probative and substantial evidence on the whole record, and should be reversed.

The Commission erroneously based its decision solely on the deposition testimony of Dr. Peelle, Appellants authorized treating physician, wherein Dr. Peelle testified that Appellant did not suffer an injury to the lower back. Appellant submits that this testimony is unpersuasive and is not the substantial evidence in view of Dr. Peelle's medical records which show that despite his testimony, prior to the deposition he diagnosed Appellant with a back strain and referred her to physical therapy. Incredibly, when confronted with this evidence of his prior diagnosis and treatment, he testified that he was not changing his opinion stated in his record of June 28, 2018 that Appellant had a lower back strain and needed physical therapy, although he was of the opinion that she did not suffer an injury at all at the time of his deposition.

In essence, Dr. Peelle believed upon examination that Appellant suffered a back strain and needed physical therapy, then strangely opined that she did not suffer any injury, and then testified that he was not rescinding his assessment in the medical records that Appellant had a back strain. Dr. Peelle's opinions in this case are conflicting, lack credibility and should not be dispositive of whether Claimant suffered an injury to her back. The Commission erred in that it did not give proper weight to the evidence contained in the medical records but relied solely on the opinions that Dr. Peelle gave in his deposition, which was contradictory and unreliable.

The Commission incorrectly interpreted and construed Dr. Peelle's opinions and testimony in that Dr. Peelle's opinions and testimony, along with other evidence, actually establishes that Appellant suffered an injury by accident, arising out of and in the course and scope of her employment to her lower back.

Appellant submits that the record is replete with evidence that Appellant sustained an injury to her back as a result of the work-related accident, and this evidence is actually the greater weight of the evidence. Beginning December 7, 2017 at Appellant's very first medical examination and again on December 12, 2017, Appellant complained of back pain when examined at Palmetto Health-Healthworks (APA No. 1 and APA No. 5). This is important because the Commission traditionally places great emphasis on a Claimant's initial complaints in determining whether a Claimant suffered an injury to a particular body part.

Dr. Peelle actually diagnosed Appellant with a back strain and referred her to physical therapy, on June 28, 2018.(APA No. 32). Moreover, and although expert opinion on causation is not required under the circumstances of this case, Dr. Peelle testified that Appellant may not have had a definable injury at the time of the accident, her low back strain may have occurred because of inactivity (Peelle Deposition, P. 31, L 13 - L 25, P. 32, L 1 - L 18). Since the inactivity referred to by Dr. Peelle was due to inactivity related to Appellant's admitted shoulder injury, he does relate the back pain to the admitted accident and, therefore, the Commission erred in finding that Appellant did not suffer an injury to the back.

**II. BECAUSE THE FINDING IS CLEARLY ERRONEOUS IN VIEW OF THE RELIABLE, PROBATIVE AND SUBSTANTIAL EVIDENCE ON THE WHOLE RECORD, THE SOUTH CAROLINA WORKERS' COMMISSION ERRED IN FINDING THAT APPELLANT DID NOT SUSTAIN AN INJURY BY ACCIDENT, ARISING OUT OF AND IN THE COURSE OF HER EMPLOYMENT TO HER NECK.**

Much like the lower back, the Commission erroneously based its decision denying that Appellant suffered an injury to the neck solely on the deposition testimony of Dr. Peelle, Appellants authorized treating physician. As argued above herein, Appellant submits that this testimony is unpersuasive and is not the substantial evidence in view of Dr. Peelle's medical records which show that despite his testimony, prior to the deposition he diagnosed Appellant with a neck strain. Appellant also complained of neck pain on her initial examination at HealthWorks.

On July 13, 2018 Dr. Peelle diagnosed Appellant with strain of neck muscle (APA No. 37) and on July 16, 2018 Dr. Peelle indicated on the SC Workers' Compensation Form 14B that Appellant sustained a cervical strain (APA No. 39). Contradicting these assessments in his medical records, Dr. Peelle at deposition testified that Appellant did not suffer an injury to the neck but, in his opinion, the pain in the neck was coming from the shoulder (Peelle Deposition, P. 24, L 23 - P. 25, L 2), which is an admitted body part. Dr. Peelle likewise testified that he believed Appellant's neck pain was the result of recovery from shoulder surgery and the fact that she wore a sling for a while (Peelle Deposition, P. 15, L 6 - L 11).

Just like his contradictory testimony on the lower back, Dr. Peelle's testimony on the neck is contradictory, unpersuasive and is not the substantial evidence in view of Dr.

Peelle's medical records which show that despite his testimony, prior to the deposition he diagnosed Appellant with a neck strain.

Based on the above, Appellant submits that in view of the reliable, probative and substantial evidence on the whole record, the SC Workers' Compensation Commission erred in concluding that Appellant did not sustain an injury to her neck.

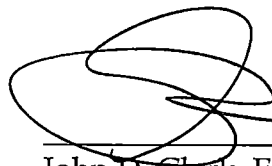
The SC Workers' Compensation Commission's finding that appellant did not suffer an injury to her neck is an error of law and clearly erroneous in view of the reliable, probative and substantial evidence on the whole record.

#### CONCLUSION

For the reasons stated, this Court should reverse the decision of the South Carolina Workers' Compensation Commission and find that Appellant suffered a compensable injury to the neck and back.

September 8, 2020

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM SOUTH CAROLINA  
WORKERS' COMPENSATION COMMISSION

Honorable Avery B. Wilkerson, Jr., Honorable T. Scott Beck  
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Appellate Case No. 2020-000715  
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SEP 11 2020

Denitra D. Brooks, Employee, Appellant

**SC Court of Appeals**

v.

Amazon, Employer, and American Zurich Insurance Co.,  
Insurance Carrier, Respondents.

**PROOF OF SERVICE**

I certify that I have served the Appellant's Initial Brief and Designation of Matter to Be Included in the Record of Appeal on Respondents by depositing a copy of it in the United States Mail, postage prepaid, on September 8, 2020, addressed to their attorneys of record, Christopher C. Mingledorff, Esquire and Michael Patterson, Esquire of Mingledorff & Patterson, 260 Seven Farm Drive, Suite B, Charleston, South Carolina 29492.

September 8, 2020



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September 8, 2020

The Honorable Jenny Abbott Kitchings  
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Re: Denitra Brooks, Employee/Claimant v. Amazon.com, DEDC, LLC,  
Employer and American Zurich Insurance Co., Insurance Carrier  
Appellate Case No. 2020-000715

Dear Ms. Kitchings:

Enclosed please find Appellant's Initial Brief and Designation of Matter to be Included in the Record on Appeal along with Proof of Service in referenced to the above matter.

By copy of this correspondence, I am serving Counsel for Respondents with a copy of same.

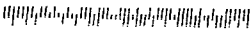
If you have any questions or concerns, please do not hesitate to contact me.

A handwritten signature in black ink, appearing to read 'John D. Clark', written over a horizontal line.

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