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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE WORKERS' COMPENSATION COMMISSION
Gene McCaskill, Commissioner

W.C.C. 0816749

Alexander Michau,.....Respondent,

v.

Georgetown County and
S.C. Association of Counties WC Trust,.....Appellants.

RETURN TO MOTION TO DISMISS APPEAL

The Appellants, Georgetown County and the South Carolina Counties Workers' Compensation Trust, filed a Notice of Appeal of the South Carolina Workers' Compensation Commission's January 28, 2013 Decision and Order with the Court of Appeals on February 15, 2013. The Appellants respectfully contend that they properly and timely served their Notice of Appeal and otherwise met all requirements for perfecting the appeal under the Administrative Procedures Act and the Appellate Court Rules. As such, the Appellants respectfully contend that the Court of Appeals has jurisdiction over this appeal and request that the Respondent's Motion to Dismiss be denied.

It is well-settled that the "South Carolina Administrative Procedure Act (APA) governs appeals from the decisions of the Commission." Swilling v. Pride Masonry of Gaffney, 401 S.C. 178, 183, 736 S.E.2d 672, 675 (Ct. App. 2012) (citing S.C. Code Ann. § 1–23–380 (Supp.2011); other citations omitted). According to the plain terms of S.C. Code Ann. § 1-23-380 (1),

> "Proceedings for review are instituted by serving and filing notice of appeal as provided in the South Carolina Appellate Court Rules within thirty days after the final decision of the agency..."

The Appellants respectfully contend that their Notice of Appeal complies with all of the requirements of the Appellate Court Rules, in accordance with § 1-23-380(1), which include requirements as to service, filing, content, and form.

The Respondent admits that he was actually served with the Notice of Appeal "on or about February 15, 2013," which is less than thirty days after the Commission issued its final Decision and Order. (Motion to Dismiss, p.1, para.1). Therefore, the Appellants submit that the Notice of Appeal was timely and properly served in accordance with Rule 203(b)(6), S.C.A.C.R and S.C. Code Ann. § 1-23-380(1).

The Appellants also filed the Notice of Appeal with the Clerk of the Court of Appeals on February 15, 2013. The Notice of Appeal filed with the Court of Appeals was accompanied by a proof of service showing the Notice was served on the Respondent and the South Carolina Workers' Compensation Commission, a copy of the Decision and Order to be challenged on appeal, and the appropriate filing fee. The Court of Appeals acknowledged receipt of the Notice of Appeal by correspondence dated February 25,

2013. Therefore, the Appellants submit that the Notice of Appeal was properly filed in accordance with Rule 203(d)((2), S.C.A.C.R. and S.C. Code Ann. § 1-23-380(1).

The Notice of Appeal filed by the Appellants contains the name of the administrative agency from which the appeal was taken ("The South Carolina Workers' Compensation Commission"), the name of the administrative officer who issued the order ("Gene McCaskill, Commissioner"), as well as the docket number from the agency ("W.C.C. 0816749"). The Notice of Appeal contains the date of the decision from which the appeal is taken ("January 28, 2013") and the date upon which the Appellants received the decision ("January 29, 2013"). The Notice of Appeal also contains the name of the party taking the appeal ("Georgetown County and the S.C. Counties WC Trust"). Lastly, the Notice of Appeal contains and the names, mailing addresses, and telephone numbers of all attorneys of record and the name of the parties represented by each. Therefore, the Appellants respectfully submit that the Notice of Appeal fully complies with the content requirements of Rule 203(e)(2)(A)-(E), S.C.A.C.R..

Rule 203(e), S.C.A.C.R. further requires that the "notice of appeal **shall** be substantially in the form designated in the Appendix to these Rules." (emphasis added). Of course, the term "shall" means the action is mandatory. *See* Wigfall v. Tideland Utils., Inc., 354 S.C. 100, 580 S.E.2d 100 (2003); Charleston County Parents for Pub. Schools, Inc. v. Moseley, 343 S.C. 509, 541 S.E.2d 533 (2001). In accordance with this mandate, the Notice of Appeal filed by the Appellants is substantially in the form designated in Form 6, Appendix C of the Appellate Court Rules. Therefore, the Appellants contend that the Notice of Appeal fully satisfies the form requirements of Rule 203(e), S.C.A.C.R.

Despite the Appellant's full compliance with the Administrative Procedures Act and the Appellate Court Rules, the Respondent argues that the Court of Appeals should dismiss the present appeal because the Notice of Appeal "contains no statement, of any kind, putting the Court or Respondent on notice of the grounds for the appeal or alleged errors of law." (Motion to Dismiss p.1, para.3). However, neither the Administrative Procedures Act, nor the Appellate Court Rules, require that the Appellants place the Court or the Respondent "on notice of the grounds for appeal" at the time the Notice of Appeal is filed and served. In fact, a simple review of Appendix C to the Appellate Court Rules reveals that a statement of issues on appeal should not be included in the Notice of Appeal.

Instead, the Appellate Court Rules provide that, thirty days after receipt of the hearing transcript, the Appellants must include a "statement of each of the issues presented for review" in the Initial Brief. Rule 208(b)(1)(B), S.C.A.C.R.. At the time the Initial Brief is filed by in accordance with Rule 208, the Respondent and the Court will be fully apprised of the issues on appeal. The Appellants respectfully contend that their good faith adherence to the Appellate Court Rules in accordance with the Administrative Procedures Act should not result in a dismissal of the appeal. *See* Rule 260(a), S.C.A.C.R. ("Whenever it appears that an appellant or a petitioner has failed to comply with the requirements of **these Rules**, the clerk shall issue an order of dismissal..." (emphasis added).

The Respondent's Motion further alleges that the Court of Appeals lacks appellate jurisdiction. The Court's appellate jurisdiction is conferred by S.C. Code Ann. § 42-8-200, which states that "the court has jurisdiction over any case in which an appeal is

taken from ... the final decision of the Workers' Compensation Commission." The Appellants respectfully submit that because an appeal was properly taken from the final decision of the Workers' Compensation Commission in accordance with the Administrative Procedures Act and the Appellate Court Rules, the Court of Appeals has appellate jurisdiction as a matter of law.

Ostensibly in support of his Motion to Dismiss, the Appellant relies on case law interpreting a prior version of the Administrative Procedures Act, specifically S.C. Code Ann. § 1-23-380. Prior to 2006, S.C. Code Ann. § 1-23-380 required that appeals from administrative agencies were to be taken to the Circuit Court and "instituted by filing a petition." Because there was no rule requiring the issues on appeal to be briefed, the courts interpreted the term "petition," as used in the prior version of § 1-23-380, to require "a distinct and specific statement of the rulings complained of." Smith v. S.C. Dept. of Social Services, 284 S.C. 469, 471, 327 S.E.2d 348, 349 (1985). Otherwise, the courts reasoned, the petitioner would place the court

> "in a situation in which it must review a large volume of written material with absolutely no guidance as to where to look for errors. This court must 'grope in the dark' in order to identify errors which in actuality may not exist. Such a predicament has often been deplored by our State's highest court and used by that tribunal as a basis for the dismissal of an appeal [pursuant to Supreme Court Rule 4]." Id.

Under the old Supreme Court Rule 4, appeals were brought before the Supreme Court on exceptions and each exception was required to contain a complete assignment of error. Rules of Practice in the Supreme Court of South Carolina, Rule 4, § 1 and §6;

Town of Ridgeland v. Cleland, 284 S.C. 277, 278, 325 S.E.2d 587, 588 (Ct.App.1985). Of course, former Supreme Court Rule 4 was eliminated in 1977 and under the present Appellate Court Rules, the parties and the reviewing court receive notice of the issues on appeal through the appellate briefs. *See* Rule 208(a)(3), S.C.A.C.R.; I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 417, 526 S.E.2d 716, 722 (2000). Furthermore, S.C. Code Ann. § 1-23-380 no longer requires a "petition" be filed in circuit court, instead the applicable version of the statute requires "[p]roceedings for review are instituted by serving and filing notice of appeal as provided in the South Carolina Appellate Court Rules."

In this case, neither the Respondent, nor the Court of Appeals, will be forced to "grope in the dark" to determine the issues on appeal, instead the issues will be exposed to the full light of day via the Appellants' Brief. Therefore, to the extent that the Respondent relies on Solomon v. W.B. Easton, Inc., 307 S.C. 518, 415 S.E.2d 841 (1992) (holding that the circuit court must dismiss an appeal if the petition for review does not comply with a prior version of the Administrative Procedures Act) or Pringle v. Builders Transport, 298 S.C. 494, 381 S.E.2d 731 (1989) (holding that where provisions of the Administrative Procedures Act and the Workers' Compensation Act conflict, the APA controls) in support of his argument that the Court of Appeals lacks appellate jurisdiction in this case, his reliance on these cases is misplaced. Neither the statutes at issue, nor the rationale applied in Solomon or Pringle are applicable to the present case.

Not only do the applicable versions of the Administrative Procedures Act and the Appellate Court Rules not require the Appellants to file exceptions or a petition in order for the Court of Appeals to obtain appellate jurisdiction, the Appellants are unaware of

any case in which an appeal has been dismissed for want of jurisdiction under the current law simply because the issues on appeal are not listed on the Notice of Appeal. While S.C. Code Ann. § 42-17-60 does state that "[n]otice of appeal must state the grounds of the appeal or the alleged errors of law," our courts have repeatedly held that S.C. Code Ann. § 1-23-380 governs appeals from the Workers' Compensation Commission and actually controls over the provisions of § 42-17-60. Pringle v. Builders Transport, 298 S.C. 494, 381 S.E.2d 731 (1989) (holding that the appeals provision of the APA, § 1-23-380, is controlling over the appeals provision of the Workers' Compensation Act, § 42-17-60). That controlling statute, § 1-23-380, mandates that the Appellants file a "notice of appeal as provided in the South Carolina Appellate Court Rules," which not only do not require that the Notice of Appeal list the issues on appeal, but seem to suggest that it would be improper to include such extraneous information. The Respondents contend that they have satisfied the requirements of the controlling statute by filing a "notice of appeal as provided in the South Carolina Appellate Court Rules."

Given that appeals from the Workers' Compensation Commission have heretofore been governed by S.C. Code Ann. § 1-23-380, not S.C. Code § 42-17-60, and given the inconsistency between the notice requirements of those two statutes and the Appellate Court Rules, the Appellants respectfully submit that any error in failing to list the grounds for appeal on the Notice should be considered harmless and clerical in nature, and; therefore, should not affect the Court's appellate jurisdiction or destroy the appeal. *See* Moody v. Dickinson, 54 S.C. 526, 32 S.E. 563 (1899) (holding that the court may properly allow an appellant to correct a clerical error in his notice of appeal where there is no prejudice to the respondent).

Furthermore, the Respondent did not suffer any prejudice as a result of the Appellant's alleged omission. Given the stringency of the briefing process by which the Respondent will be made fully aware of the issues on appeal prior to preparing any response, the Appellants respectfully submit that the Respondent could not have been prejudiced in any way by the fact that the form and content of the Appellants' Notice of Appeal merely complied with the Appellate Court Rules and the Administrative Procedures Act, as opposed to S.C. Code Ann. § 42-17-60.

In addition, it appears that S.C. Code Ann. § 42-17-60's continued reference to "grounds for appeal" is a mere vestige from the prior procedure (by which appeals were taken to the Circuit Court)[1] and no longer serves any meaningful purpose. Therefore, the Appellants respectfully request that the Court of Appeals reject the Respondent's effort to take advantage of a harmless clerical error by which he was in no way prejudiced or mislead and further request that the Motion to Dismiss be denied.[2] *See* Charleston Lumber Co., Inc. v. Miller Housing Corp., 318 S.C. 471, 458 S.E.2d 431, 436 (Ct. App. 1995) (holding that a non-prejudicial clerical error, such as failing to list all of the cases subject to the appeal, does not warrant dismissal of an appeal); *see also* State v. Scott, 351 S.C. 584, 571 S.E.2d 700 (2002) (holding that failing to properly identify the court from which the appeal is taken on the notice was a non-prejudicial clerical error that did not warrant dismissal of the appeal); and Miles v. Miles, 303 S.C. 33, 36, 397 S.E.2d 790,

[1] The 2007 amendment to S.C. Code Ann. § 42-17-60 merely substituted the words "Court of Appeals" for "Circuit Court."

[2] In the alternative, the Appellants respectfully request leave of Court to amend the Notice of Appeal to include a statement of the issues on appeal.

792 (Ct.App.1990) (holding that "[t]his Court has long recognized an overriding rule which says 'whatever doesn't make any difference, doesn't matter.'") (citations omitted).

Furthermore, the Respondent, himself, failed to state his own grounds for appeal when he filed his Notice of Appeal from the Commission's original order with the Court of Appeals on September 10, 2009.[3] (*See Attached* Exhibit #1). Assuming *arguendo* that a reviewing court lacks appellate jurisdiction as a matter of law where the notice of Appeal does not state the grounds for appeal, then the Supreme Court's Order of February 1, 2012 (*see attached* Exhibit #2) and the subsequent orders of the Commission on remand must be considered null and void for want of jurisdiction. State v. Guthrie, 352 S.C. 103, 107, 572 S.E.2d 309, 312 (Ct.App.2002) (holding that "[t]he acts of a court with respect to a matter as to which it has no jurisdiction are void."); *see also* Plante v. State, 315 S.C. 562, 563 446 S.E.2d 437 (1994) (holding "it is axiomatic that the parties cannot confer jurisdiction by consent."). Therefore, should the Court of Appeals agree with the Respondents' argument and conclude that it does not have jurisdiction over the present appeal, it must also find that neither the Court of Appeals, nor the Supreme Court had jurisdiction over the Respondent's prior appeal in this case. As a result, the Workers' Compensation Commission's September 9, 2009 Decision and Order is final and binding as to all issues of fact and law. (*See attached* Exhibit #3).

For the reasons set forth herein above, the Appellants, Georgetown County and the South Carolina Counties Workers' Compensation Trust, respectfully request that the Respondent's Motion to Dismiss be denied by the Court of Appeals or, if necessary, that

[3] The Respondent never amended his September 10, 2009 Notice of Appeal to include any grounds for appeal or alleged errors of law.

the Appellants be granted leave of court to amend the Notice of Appeal. In the alternative, should the Court of Appeals conclude that appellate courts lack jurisdiction where a Notice of Appeal does not include a statement of the issues on appeal, the Respondents respectfully request that the Court declare that the Workers' Compensation Commission's September 9, 2009 Decision and Order is conclusive and binding and the Supreme Court's Order of February 1, 2012, and those of the Workers' Compensation Commission on remand, are void for want of jurisdiction.

Respectfully submitted,

Kirsten L. Barr

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March 21, 2013

EXHIBIT #1

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Case Number: WCC 0816749

Andrea C. Roche, David W. Huffstetler, and Avery B. Wilkerson, Commissioners

Alexander Michau, Appellant,

v.

Georgetown County, Employer and
S.C. Counties Workers Compensation Trust, Carrier, Respondents.

NOTICE OF APPEAL

Alexander Michau appeals the Decision and Order of the Appellate Panel, South Carolina Workers Compensation Commission, Andrea C. Roche, T. Scott Beck, and Avery B. Wilkerson, Commissioners, dated September 9, 2009. Appellant received a copy of the Decision and Order on September 10, 2009.

September 10, 2009

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EXHIBIT #2

The South Carolina Court of Appeals

TANYA A. GEE
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

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May 9, 2011

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Re: Michau, Alexander v. Georgetown County

Dear Counsel:

The Court of Appeals has decided to request certification of this case by the Supreme Court. The case will be held in abeyance pending the Supreme Court's decision. You will receive notice when a decision has been made on certification.

Very truly yours,

V. Claire Allen

DEPUTY CLERK

The Supreme Court of South Carolina

Alexander Michau, Employee,
Claimant, Appellant,

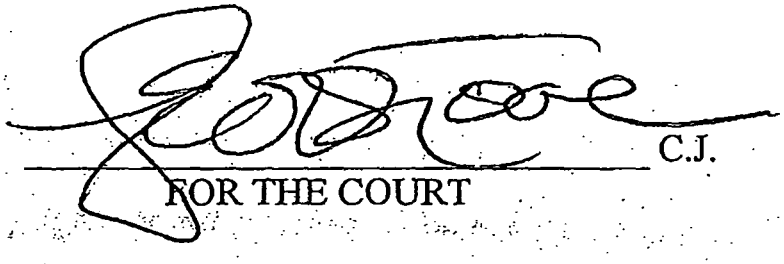
v.

Georgetown County, Self-
Insured Employer, Through,
S.C. Counties Workers
Compensation Trust,
Defendants, Respondents.

ORDER

Pursuant to Rule 204(b) of the South Carolina Appellate Court Rules, this appeal is hereby certified for review by the South Carolina Supreme Court. Upon receipt of this order, the Court of Appeals is hereby directed to forward the case file, all records and briefs and any exhibits on file to this Court.

IT IS SO ORDERED.



C.J.

FOR THE COURT

Columbia, South Carolina
May 31, 2011

cc: Raymond C. Fischer, Esquire
William Stuart Duncan, Esquire
Jamie C. Guerrero, Esquire
Kirsten L. Barr, Esquire
The Honorable Tanya Gee

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Alexander Michau, Employee,
Claimant, Appellant,

v.

Georgetown County, Self-Insured Employer, through, South Carolina Counties Workers Compensation Trust,
Defendants, Respondents.

Appeal from the South Carolina
Workers Compensation Commission

Opinion No. 27064
Heard October 6, 2011 – Re-filed February 1, 2012

REVERSED AND REMANDED

Raymond C. Fischer and William Stuart Duncan, both of Georgetown, for Appellant.

Kirsten L. Barr and Jamie C. Guerrero, both of Mt. Pleasant, for Respondents.

CHIEF JUSTICE TOAL: Appellant, Alexander Michau (Employee), appeals a ruling by the Appellate Panel of the South Carolina Workers' Compensation Commission (Commission) denying Employee's claim for repetitive trauma injuries to his shoulders. Specifically, Employee challenges the Commission's interpretation and application of section 42-1-172 of the South Carolina Code. Because the Commission erred in admitting a medical opinion that was not stated to a reasonable degree of medical certainty, as required under section 42-1-172, we reverse and remand.

FACTS/ PROCEDURAL HISTORY

Employee alleges he sustained a compensable repetitive trauma injury to both of his shoulders on September 29, 2008, and reported it to his supervisor that same day. Prior to this date, Employee did not report any work-related problems with his arms to Georgetown County (Employer) although he sought outside treatment. Employee seeks reimbursement for medical expenses and an award of temporary total disability benefits.

Employee is in his sixties and has twice worked for Employer. When he returned to work for Employer in 1988, he was initially employed as a truck driver, but eventually switched to operating a motor grader, a device used to grade and smooth dirt and gravel on roads. Employee usually worked ten hours per day, spending about eight hours actually operating the motor grader.

Employee testified he operated two types of motor graders during his tenure with Employer. The original motor graders had manual levers while newer models were equipped with hydraulics. After Employer purchased the newer model, Employee operated it for approximately three years without any incident, admitting that "it was a good machine."[1] Employee did not file a workers' compensation claim until he began operating the new, non-vibrating machine, but he testified that the old machine did vibrate.

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[1] Employee elaborated further, "I mean, it was good. I mean, I had a steering wheel that, that I pulled to me, and I had my levers on each side. It was right there. I mean, it was just—it was just easy as—almost as eating ice cream."

In 1997, Employee first sought medical treatment with Dr. Benjamin Lawless for problems relating to his arms and shoulders. Dr. Lawless's medical reports indicate that Employee complained of arthritis-related symptoms involving pain and swelling in his hands and redness in his joints.[2] In August 2005, Dr. Lawless referred Employee for a total body bone scan, which also found evidence of rheumatoid arthritis. Consequently, he referred Employee to a rheumatologist, Dr. Mitch Twinning, who examined Employee on May 24, 2006, and diagnosed him with rheumatoid arthritis. Employee continued treatment with Dr. Lawless for this disease until June 2006.

On December 1, 2006, Dr. Michael Bohan, an orthopaedic specialist, began treating Employee and reported that x-ray data of the left shoulder "show[ed] rather significant degenerative arthritis of the glenohumeral joint as well as the AC joint." Employee eventually underwent surgery on his left shoulder, and on November 21, 2008, Dr. Bohan issued a letter to Employee's attorney stating:

> I do believe *within a reasonable degree of medical certainty* that these repetitive work activities over the years of his shoulders [sic] have resulted in his severe osteoarthritis of both shoulders.

(emphasis added).

Seeking independent verification of Employee's claim, Employer engaged Dr. Chris Tountas, a specialist in the treatment of arthritis, to perform a medical evaluation of Employee. Dr. Tountas opined:

> Based on the history, physical examination, objective findings, and review of available records, it is my *opinion* that [Employee] has had a long history of arthritis involving multiple joints with

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[2] In June 2001, Employee complained of arthritic symptoms in his arms, and Dr. Lawless's medical report indicates he suspected Employee suffered from carpal tunnel syndrome. In July and November 2001, Employee followed up with Dr. Lawless, again complaining of pain in his arms and hands.

> diagnosis of rheumatoid arthritis . . . . There is no indication from the job description or his employment that would relate any of his shoulder problems to his work driving a road grader. In my opinion this is a natural progression of a preexisting condition. The preexisting condition in my opinion would ultimately result in a need for treatment and the recent surgery.

(emphasis added).

The Commission denied Employee's claim on the grounds that "the greater weight of the medical evidence reflects [Employee's] upper extremity and shoulder problems are related to pre-existing osteoarthritis and/or rheumatoid arthritis and not caused or aggravated by his employment with Georgetown County." In reaching this conclusion, the Commission considered all of the medical evidence including Dr. Tountas's report. Employee disputes the admissibility of Dr. Tountas's report under South Carolina Code section 42-1-172 because it was not stated "to a reasonable degree of medical certainty." Employee argues that without this evidence, the remaining competent evidence would support Employee's claim of sustaining a compensable repetitive trauma injury.

ISSUES

I. Whether section 42-1-172(C) governs the admissibility of evidence in a workers' compensation claim.

II. Whether the Commission properly construed and applied section 42-1-172 in admitting Dr. Tountas's statement.

STANDARD OF REVIEW

The South Carolina Administrative Procedure Act (APA) governs appeals from the decisions of the Commission. S.C. Code Ann. § 1-23-380 (Supp. 2010); *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 134–35, 276 S.E.2d 304, 306 (1981). Under the APA, an appellate court may not substitute its judgment

for that of the Commission as to the weight of the evidence on questions of fact, but it may reverse when the decision is affected by an error of law. S.C. Code Ann. § 1-23-380(5).

ANALYSIS

I. Admissibility of Evidence under section 42-1-172

Employer contends that South Carolina Code section 42-1-172 does not govern the admissibility of evidence in a workers' compensation claim involving a repetitive trauma injury. S.C. Code Ann. § 42-1-172 (Supp. 2010). We disagree.

Specifically, Employer argues that admissibility of evidence in this case is governed *solely* by section 1-23-330, which provides that "in contested cases . . . [i]rrelevant, immaterial or unduly repetitious evidence shall be excluded." S.C. Code Ann. § 1-23-330 (2005). However, Employer cites no supporting authority for this interpretation.

In our view, section 1-23-330 establishes a minimum standard that applies generally, but not exclusively. On the other hand, section 42-1-172(C) expressly creates an additional heightened standard for repetitive trauma injury cases. Specifically, it requires "medical evidence," in the form of "expert opinion or testimony [to be] stated to a reasonable degree of medical certainty." S.C. Code Ann. § 42-1-172(C). Indeed, section 42-1-172(C) commands that the "[c]ompensability of a repetitive trauma injury must be determined *only* under the provisions of this statute." *Id.* (emphasis added); *see also Murphy v. Corning*, 393 S.C. 77, 84, 710 S.E.2d 454, 458 (Ct. App. 2011) ("[T]he compensability of a repetitive trauma injury must be determined by the Commission under the provisions of [section] 42-1-172 . . . . [and] the Commission erred by failing to address [section] 42-1-172.").

Thus, in repetitive trauma injury cases such as this, section 42-1-172 governs the admissibility of medical evidence.

II. Commission's Construction and Application of section 42-1-172

Employee argues that the Commission incorrectly construed section 42-1-172 by admitting Dr. Tountas's medical evidence, as it was not stated "to a reasonable degree of medical certainty."[3] We agree.

Section 42-1-172 provides:

> An injury is not considered a compensable repetitive trauma injury unless a commissioner makes a specific finding of fact by a preponderance of the evidence of a causal connection that is established by medical evidence . . . . As used in this section, "medical evidence" means expert opinion or testimony stated to a reasonable degree of medical certainty, documents, records, or other material that is offered by a licensed and qualified medical physician.

S.C. Code Ann. § 42-1-172.

The plain reading of the statute requires that "opinion or testimony" must be "stated to a reasonable degree of medical certainty." *Id.* In contrast, "documents, records, or other material" is not similarly modified. *Id.* As this Court has recognized, the "use of the word 'or' in a statute 'is a disjunctive particle that marks an alternative.'" *K & A Acquisition Group, LLC v. Island Pointe, LLC*, 383 S.C. 563, 580, 682 S.E.2d 252, 261 (2009). Here, the legislature intentionally used "or" after a series of commas to expand the definition of "medical evidence" beyond "opinion or testimony." S.C. Code

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[3] Specifically, the Commission concluded:

> Subsection (C) merely defines what medical evidence is necessary to establish causation of a repetitive trauma claim. This provision of the Act could not have been intended to require every medical report submitted by the parties be stated within a reasonable degree of medical certainty.

Ann. § 42-1-172. This Court has said that words should be given "their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation." *State v. Sweat*, 386 S.C. 339, 350, 688 S.E.2d 569, 575 (2010) (citation omitted). Because the statute does not require that "documents, records, or other material" be "stated to a reasonable degree of medical certainty," we will not expand its plain meaning or interpolate this requirement.[4] *Id.*

Consequently, we must address whether Dr. Tountas's statement constitutes an "opinion or testimony" that must be "stated to a reasonable degree of medical certainty." S.C. Code Ann. § 42-1-172. Employer contends that Dr. Tountas's letter represents "documents, records, or other material" that need not be stated to a reasonable degree of medical certainty. The Commission agreed with Employer and pointed out that a contrary interpretation and application of the statute would require this Court to ignore eleven years of Employee's prior medical history and reports merely because they do not contain the magic phrase "within a reasonable degree of medical certainty." We note that Employee does not challenge the other admitted medical evidence, and therefore the only issue we decide here is the admissibility of Dr. Tountas's statement.

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[4] Legislative history also supports this interpretation of section 42-1-172. Had the General Assembly intended to require "documents, records, or other material" be "stated to a reasonable degree of medical certainty," it would have left the April 4, 2007 amended and adopted Senate version of this section intact. This version unambiguously provides:

> As used in this title, "medical evidence" means expert opinion, expert testimony, documents, or other material that is offered or stated to a reasonable degree of medical certainty by a licensed health care provider.

S. 332, reprinted in 4 Senate Journal, South Carolina Regular Session, 2007, at 1662. However, the legislature did not adopt this language.

While we recognize that medical "records" will often also contain physicians' opinions, in this instance, Dr. Tountas was not Employee's treating physician, and Employer specially sought out Dr. Tountas to evaluate Employee and issue a medical "opinion" to decide the compensability of Employee's claim. Under these facts, Dr. Tountas's letter does not constitute "documents, records, or other material," but is an "opinion or testimony" that must be "stated to a reasonable degree of medical certainty." *Id.* § 42-1-172. We stress, however, that our opinion is a narrow one limited to medical evidence given by expert opinion or testimony as provided for in section 42-1-172 and the facts of this case. *See id.* ("*As used in this section*, 'medical evidence' means . . . .") (emphasis added).

In the alternative, it has also been argued that if Dr. Tountas's statement constitutes an "opinion or testimony," the requirement of section 42-1-172 applies only to claimants and not defendants. The statutory language makes no such distinction, so we decline to adopt this forced construction. *See Sweat*, 386 S.C. at 350, 688 S.E.2d at 575 (finding words should be given "their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation.") (citation omitted).

Thus, we reverse the Commission's decision to admit Dr. Tountas's medical opinion.

CONCLUSION

For the foregoing reasons, we reverse and remand the case to the Commission to decide whether the remaining competent evidence supports Employee's claim of sustaining a compensable, repetitive trauma injury.

REVERSED AND REMANDED.

PLEICONES, BEATTY, KITTREDGE and HEARN, JJ., concur.

EXHIBIT #3

APPELLATE PANEL
DECISION AND ORDER
OF THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
W.C.C. FILE NO. 0816749

ALEXANDER MICHAU,	EMPLOYEE, CLAIMANT/APPELLANT,
-V-	
GEORGETOWN COUNTY,	SELF-INSURED EMPLOYER,
THROUGH,	
S.C. COUNTIES WORKERS COMPENSATION TRUST,	DEFENDANTS/RESPONDENTS.

AFFIRMED

Appellate Panel Review held in Columbia, South Carolina on July 28, 2009 per Notices timely and properly served on all parties of interest.

Appellate Panel Decision and Order filed

_____, 2009

APPEARANCES:

Claimant/Appellant represented by William S. Duncan Esquire, of Georgetown, South Carolina.

Defendants/Respondents represented by Jamie C. Guerrero, Esquire, of Charleston, South Carolina.

STATEMENT OF THE CASE

This matter is before the South Carolina Workers' Compensation Commission's Appellate Panel pursuant to the Employee/Claimant's appeal of the Decision and Order filed by Commissioner T. Scott Beck. This matter was heard by Commissioner Beck on January 22, 2009, pursuant to the Claimant's Form 50. On April 24, 2009, Commissioner Beck issued the following Order:

> IT IS, THEREFORE, HEREBY ORDERED that the Claimant failed to meet his burden of proving a compensable repetitive trauma injury or injury by accident arising out of and occurring in the course of his employment with Georgetown County on or about September 29, 2008.
>
> IT IS FURTHER ORDERED that the Defendants shall not be liable for any benefits under the Act in relation to the September 29, 2008 claim.
>
> IT IS FURTHER ORDERED that the Claimant's claim for benefits in relation to the September 29, 2008 claim is denied and dismissed with prejudice.
>
> IT IS SO ORDERED!

Within the statutory period, the Claimant filed an Application for Review in the case setting forth his reasons, copies of which were furnished to all interested parties prior to oral argument presented before the Appellate Panel on July 28, 2009. All proffered testimony has been taken. Such, together with all documentary evidence, has been delivered by oral argument to the individual members of the Appellate Panel and has since been under study and consideration.

By appeal, the Claimant submits the following

1. The commissioner committed error in Finding of Fact No. 18 when he allowed the opinion of Dr. Tountas which was not rendered "to a reasonable degree of medical certainty" as required by §42-1-172(C) and §42-1-160(G).

2. The commissioner committed error in Finding of Fact No. 19 when he found Claimant's conditions were not the result of work related repetitive trauma, which is against the greater weight of the evidence.

3. The commissioner erred in Finding of Fact No. 20 when he overruled Claimant's objection to the opinion of Dr. Tountas, which was not in compliance with §42-1- 160(G) and §42-1-172(C).

4. The commissioner committed error in Finding of Fact No. 20 when he determined the requirement to state medical opinions, "to a reasonable degree of medical certainty" applies only to medical evidence submitted by the Claimant and not the Defendant.

5. The commissioner erred in Conclusion of Law No. 3 when he concluded the Claimant failed to carry his burden of proof, which is against the greater weight of the evidence and the law.

6. The commissioner erred in Conclusion of Law No. 4 when he overruled Claimant's objection to Defendant's APA #8, which was in contradiction of §42-1-160(G) and §42-1-172(C).

7. The commissioner erred in Conclusion of Law No. 5 and 6 when he concluded the Claimant did not sustain a compensable work-related injury, which is against the greater weight of the facts and provisions of the law, such being against the greater weight of the evidence.

8. The commissioner erred in Conclusion of Law No. 5 when he concluded Defendant's were not liable for any of Claimant's medical treatment or care, which was agianst the greater weight of the evidence and the law.

9. The commissioner erred when he concluded in Conclusion of Law No. 6, Defendants have no liability for Claimant's temporary disability compensation, which is against the greater weight of the evidence and the law.

10. The commissioner erred when he ordered that Claimant failed to meet his burden of proof.

11. The commissioner erred when he ordered Defendants were not liable for any benefits claimed by Claimant.

12. The commissioner erred when he denied Claimant's claim and dismissed the case with prejudice.

STANDARD OF REVIEW

In an Appellate Review, the Panel, shall, pursuant to S.C. Code Ann. §42-17-50, review the Award, weigh the evidence as presented at the initial hearing and, if good grounds be shown therefore, make its own Findings of Fact and reach its own Conclusions of Law Consistent with or inconsistent with those of the Hearing Commissioner.

CONCLUSION

After careful review in the instant case, the Commission, by unanimous vote, hereby Affirms the Hearing Commissioner's April 29, 2009 Decision and Order in its entirety and adopts the Hearing Commissioner's Findings of Fact and Conclusions of Law into the an order of the Commission.

FINDINGS OF FACT

1. All parties to this proceeding are subject to and bound by the terms and provisions of the South Carolina Workers' Compensation Act.

2. The Panel finds that the Claimant has been continuously employed by Georgetown County since 1988. During this time, the Claimant drove a truck and operated a motor grader.

3. The Claimant is credible.

4. The Claimant operated two different types of motor graders. The newer motor graders, which the Claimant was operating around the time of his alleged injury, admittedly did not cause any vibrations and the Claimant did not have any difficulty operating these machines. He further testified during his deposition, "yea the mach – it was like an air seat. I mean, you know, I didn't have – I mean, it was good. I mean, I had a steering wheel that, that I pulled to me, and I

had my levers on each side. It was right there. I mean, it was just – it was just as easy as – almost as eating ice cream or something. You know, it was just – wasn't no – it wasn't no work – I mean, there was no problem, no work – no physical, you know."

5. The Panel finds that the greater weight of the evidence reflects the Claimant reported to work on September 29, 2008, despite Defendants' APA # 7 pp. 45-55.

6. The medical records reflect the Claimant began experiencing problems with his arms in 1997 and sought treatment with Dr. Lawless for these problems for many years.

7. In July 2005, the Claimant began complaining of pain in his upper extremities and shoulders and returned to Dr. Lawless. At that time, a bone scan and subsequent follow-up appointments led to the diagnosis of rheumatoid arthritis in his upper extremities.

8. The Claimant was subsequently referred to Dr. Twining, a rheumatologist, for rheumatoid arthritis related symptoms in his upper extremities and shoulders.

9. Because the Claimant continued to experience arthritic symptoms in his arms and shoulders, the medical records reflect he was ultimately referred to Dr. Bohan on December 1, 2006. Importantly, the report from the first visit indicates, "he tells me that recently he has been diagnosed with what sounds like fairly significant arthritis throughout his body. Apparently, he did see a rheumatologist and apparently medication was recommended, but he declined this." The greater weight of the medical evidence reflects the Claimant did not relate his symptoms to his job at that time.

10. The medical records further reflect the Claimant continued to treat with Dr. Bohan throughout all of 2007. On March 16, 2007, Dr. Bohan recommended surgery on the Claimant's left shoulder in March 2007, which the report indicates the Claimant was not interested in.

11. On November 16, 2007, Dr. Bohan recommended a total shoulder replacement on the left shoulder. At that time, the report indicates the Claimant continues to have pain in the left shoulder and that prior radiographs had revealed severe glunohumeral arthritis.

12. The medical records reflect that on April 15, 2008, the Claimant began complaining of pain in the right shoulder as well, and was ultimately diagnosed with bilateral shoulder degenerative joint disease. According to the report, Dr. Bohan recommended surgery to both the left and right shoulders.

13. By report dated May 16, 2008, Dr. Bohan noted the Claimant had severe osteoarthritis of the left and right shoulders. Dr. Bohan again recommended surgery.

14. On November 19, 2008, the Claimant underwent surgery on his left shoulder with Dr. Bohan. By letter dated November 21, 2008, Dr. Bohan, for the first time, issued a letter to the Claimant's attorney indicating that within a reasonable degree of medical certainty the Claimant's work activities over the years resulted in his severe osteoarthritis of both shoulders. The greater weight of the medical evidence reflects Dr. Bohan had treated the Claimant for almost two full years before rendering this opinion. During this time, the Claimant never reported a work related injury to Georgetown County or requested medical treatment for his symptoms.

15. On January 6, 2009, the Defendants referred the Claimant to Dr. Tountas for an independent medical evaluation. When evaluated by Dr. Tountas, the Claimant did not report any history of a direct trauma to his shoulders.

16. According to the report, Dr. Tountas reviewed the Claimant's medical records from Dr. Twining, Waccamaw Medical Center, Georgetown Health Group, and Dr. Bohan in conjunction with his physical examination. Based on the history, physical examination, objective findings, and

review of the records, Dr. Tountas determined the Claimant has had a long history of arthritis involving multiple joints with the diagnosis of rheumatoid arthritis.

17. Dr. Tountas further found the there was no indication the Claimant's upper-extremity symptoms were related to his work driving a motor grader and were the natural progression of his pre-existing condition.

18. After reviewing the medical records completely, the Panel finds Dr. Tountas' opinion at Defendants' APA 57-59 compelling on this matter. Specifically, the greater weight of the evidence in the record reflects the Claimant suffers from a long history of arthritis that eventually culminated in the need for surgery.

19. The greater weight of the medical evidence reflects the Claimant's upper extremity and shoulder problems are related to pre-existing osteoarthritis and/or rheumatoid arthritis and were not caused or aggravated by his employment with Georgetown County. Accordingly, the Claimant did not meet his burden of proving a compensable repetitive trauma injury or injury by accident arising out of and occurring in the course of his employment with Georgetown County.

20. The Claimant's objection to Defendants' APA #8 pp. 56-59 (Dr. Tountas' report) is overruled. S.C. Code Ann. § 42-1-172 requires a Claimant to establish a causal connection between the repetitive activities that occurred during his employment and the resulting injury by submitting medical evidence that establishes the causal link. Subsection (C) merely defines what medical evidence is necessary to establish causation of a repetitive trauma claim. This provision of the Act could not have been intended to require every medical report submitted by the parties be stated within a reasonable degree of medical certainty. Rather, this is intended to apply to the medical evidence submitted to try to prove a compensable repetitive trauma claim. To read that provision otherwise would basically render each and every other medical report leading up to the causation

opinion inadmissible because none of them would contain the phrase "within a reasonable degree of medical certainty."

CONCLUSIONS OF LAW

1. Under section 42-1-130, the Claimant was a covered Employee at the time in question and under Section 42-1-140, the Employer was a covered Employer.

2. Under S.C. Code Ann. § 42-1-40, the Claimant's average weekly wage is $731.53, with a corresponding compensation rate of $487.71.

3. Under S.C. Code Ann. § 42-1-160 and § 42-1-172, the Claimant did not meet his burden of proving a compensable repetitive trauma injury or injury by accident arising out of and occurring in the course of his employment with Georgetown County.

4. Under S.C. Code Ann. § 42-1-172, the Claimant's objection to Defendants' APA #8 pp. 56-59 is overruled.

5. Under S.C. Code Ann. § 42-15-60, the Defendants are not liable for any medical treatment or care, as the Claimant did not sustain a compensable work-related injury.

6. Under S.C. Code Ann. § 42-9-10 and § 42-9-20, the Defendants shall have no liability for temporary disability compensation, as the Claimant did not sustain a compensable work-related injury.

ORDER

IT IS, THEREFORE, HEREBY ORDERED that the Claimant failed to meet his burden of proving a compensable repetitive trauma injury or injury by accident arising out of and occurring in the course of his employment with Georgetown County on or about September 29, 2008;

IT IS FURTHER ORDERED that the Defendants shall not be liable for any benefits under the Act in relation to the September 29, 2008 claim;

IT IS FURTHER ORDERED that the Claimant's claim for benefits in relation to the September 29, 2008 claim is denied and dismissed with prejudice;

IT IS SO ORDERED!

S.C. WORKERS' COMPENSATION COMMISSION

FULL AFFIRMATION

Andrea C. Roche, Commissioner

WE CONCUR:

David W. Huffstetler, Commissioner

Avery B. Wilkerson, Jr., Commissioner

CERTIFICATE OF SERVICE

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

This 9th day of Sept 2009

By Valerie D Deller

Administrative Assistant to the Commissioner

William S. Duncan

Jamie C. Guerrero

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
Gene McCaskill, Commissioner

W.C.C. 0816749

Alexander Michau,.....Respondent,

v.

Georgetown County and
S.C. Association of Counties WC Trust,.....Appellants.

PROOF OF SERVICE

The undersigned hereby certifies that the above-named Respondent, Alexander Michau, was served with a copy of the attached Return to Motion to Dismiss Appeal this 21st day of March 2013, by depositing a copy of the same in the United States Mail, first class postage prepaid, addressed to his counsel of record, as follows:

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