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SC Court of Appeals

**THE STATE OF SOUTH CAROLINA**
**IN THE COURT OF APPEALS**

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

**Appellate Panel Decision**

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**Appellate Case No. 2018-000359**

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Vickie Rummage, Employee, ............................................................Appellant,

v.

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

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# RESPONDENTS' RETURN TO APPELLANT'S PETITION FOR REHEARING

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## INTRODUCTION

Appellant Vickie Rummage ("Appellant") raises four issues in her Petition for Rehearing: (1) whether Appellant did, in fact, properly preserve the issue of admissibility of Dr. Gaultieri's expert report; (2) whether the single commissioner's admission of the prior commission order was clearly erroneous; (3) whether Appellant met her burden of proof; and (4) whether Respondents' lack of a cross appeal on the Full Commission's inclusion of Appellant's *Michau* argument—raised for the first time during oral argument before the Full Commission's hearing on the appeal from the Single Commission—means Respondents cannot contest this issue on appeal.

For all the reasons outlined below, as well as the reasons argued in Respondents' final brief and adopted by the Court, Appellant's Petition for Rehearing should be denied.

## STANDARD OF REVIEW FOR PETITION FOR REHEARING

Rule 221(a) requires that a petition for rehearing "state with particularity the points supposed to have been overlooked or misapprehended by the court." In this case, Appellant has not raised any new points that were overlooked or misapprehended by the court, but rather Appellant simply attempts to relitigate the same issues raised and already decided by the court.

## ARGUMENTS

### I. Appellant failed to preserve for appeal the issue of whether Dr. Gautieri's report constitutes "medical evidence" if it did not include the phrase "to a reasonable degree of medical certainty."

As this Court has already noted, Appellant failed to raise the *Michau* objection at trial or in her Form 30 (Grounds for Appeal). Appellant's failure to raise this objection at any point prior to the appellate oral argument before the Full Commission is a fatal error and indicates a clear failure to preserve this issue for appeal. "Only issues raised to the [Appellate Panel] within the application for review of the single commissioner's order are preserved for review." *Hilton v.*

*Flakeboard Am. Ltd.*, 418 S.C. 245, 249, 791 S.E.2d 719, 722 (2016). This reality is perhaps why Appellant's argument is consumed with *not* addressing this fundamental question; instead, Appellant argues that raising the objection to the Full Commission for the first time is sufficient, despite Appellant's failure to cite to any legal support for this claim. This argument does not comply with Rule 221(a), as the court has not overlooked or misapprehended this argument. Rather, Appellant simply disagrees with it.

There is no question that Dr. Gaultieri's expert report was admitted into evidence without any objection by Appellant. Further, there is no question that Appellant failed to raise any objections to Dr. Gaultieri's report on the grounds that it did not include the language, "to a reasonable degree of medical certainty." And there is no question that Appellant's counsel did not raise any objections to the report on that basis until midway through oral argument before the appellate panel of the Full Commission.

Ultimately, however, even if Appellant had preserved this issue for appeal, Dr. Gaultieri's report still constitutes competent medical evidence. Dr. Gaultieri's report, which was submitted at the Single Commission hearing, was clear and unequivocal in its findings. Dr. Gaultieri met with Appellant for several hours, reviewed her extensive medical records, and performed multiple tests. (R. pp. 467-477). Dr. Gaultieri determined, without equivocation, that Appellant "demonstrated a non-credible clinical presentation, with dramatic inconsistencies." (R. pp. 467). He found "clear evidence of symptom exaggeration." (*Id.*). He also found that Appellant was at maximum medical improvement, and that despite Appellant's claims, there was "no evidence that [Appellant] had a head injury . . ." (*Id.*). Given Dr. Gaultieri's nearly fifty years of experience in this field; his status as a board-certified member of the American Board of Psychiatry & Neurology; and his extensive review of Appellant's case, it is clear that his report and opinion was stated to a reasonable degree

of medical certainty. Therefore, Dr. Gaultieri's report, in conjunction with Appellant's non-credible testimony at the hearing, provide ample grounds to support the Single Commissioner's decision to deny Appellant's claim. Appellant's position on this ground should be denied.

## II. The admission of the prior commissioner's report could not have reasonably affected the result of the trial, as the Record is replete with other equivalent testimony about Appellant's lack of credibility.

Appellant herself cites to *Means v. Gates*, where the Court of Appeals notes that other equivalent testimony being produced renders the introduction of the offending evidence as harmless error. 348 S.C. 161, 170 (Ct. App. 2001). In this case, the Court has already noted that "other substantial evidence in the record supports the single commissioner's credibility determination." The Court describes at length the various aspects of Appellant's lack of credibility:

> [T]he record is not without substantial evidence that Claimant lacked credibility, even in the absence of Commissioner Lyndon's order. In particular, in her deposition, Claimant denied some relatively major prior issues entirely. For example, she denied any real neck problems or dizziness prior to the accident even though she had complained of both many times according to Dr. McQueen's notes and had undergone a CT scan prior to her injury for "headaches and dizziness." She characterized her depression as manageable and somewhat episodic although Dr. McQueen and/or his nurse practitioner characterized it as chronic and major at different times. Claimant appeared to downplay the frequency and intensity of prior headaches in spite of McQueen's notes indicating she suffered from tension headaches, sinus headaches, and later, migraine headaches. With respect to medications, Claimant frequently indicated she did not remember whether she was taking a particular medication at a given time, although she did not deny taking medicines generally. Her greatest misleading statement as to specific medications was that she was only taking "something for blood pressure" at the time of her fall when the records reveal she had been taking Percocet and Xanax consistently for many years and other medications with frequency. The record also demonstrated two occasions in which Claimant had been dishonest with providers regarding the filling of her pain medications. The single commissioner also relied on her lay observations of Claimant's demeanor.

*Appellant v. GBF Industries*, --- S.E.2d ----2021 WL 1997116 *9. The Court found substantial evidence in the Record to support the Full Commission's finding as to Appellant's lack of credibility, and this Court was correct in finding that the prior order's introduction was harmless

error. This reality further addresses Appellant's third argument as well, where Appellant argues that she met her burden of proof.

Ultimately, Appellant has not raised any issues on this point that this Court has misapprehended or overlooked, and the second and third arguments in her Petition should be denied.

## III. Appellant attempts to improperly raise a wholly new argument—that Respondents needed to file a cross appeal solely over the Full Commission's inclusion of the *Michau* argument—in her Petition for the first time, which is not timely.

Appellant's final basis for her Petition is that Respondents failed to appeal the Full Commission's reference of the *Michau* argument in the final order, and that such failure means that the issue was, in fact, preserved for appeal. As an initial matter, Appellant is raising this particular argument for the first time in this Petition. Rule 221(a) states that the Petitioner is only to raise issues that the Court may have overlooked or misapprehended. Appellant simply has never raised this argument before filing this Petition for Rehearing. On that basis alone, this argument should be dismissed.

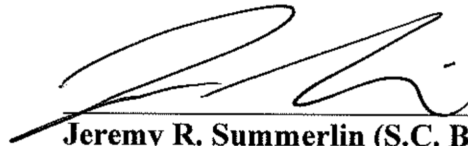
Secondly, this argument is essentially the same as the argument Appellant has raised above, which is that raising the issue with the Full Commission for the first time satisfies the law's requirements that the issue be raised at trial and on the appeal to the Full Commission. Respondents have addressed this issue above and incorporates those arguments here. The law requires Appellant to have raised its objections under *Michau* at trial and in the notice and grounds for appeal to the Full Commission, which Appellant failed to do. The Full Commission's mention of *Michau* in the final order does not cure Appellant's failure to preserve.

## CONCLUSION

This Court did not overlook or misapprehend any of Appellant's arguments in the original appellate decision. The Order of the appellate panel of the Full Commission is supported by reliable and probative evidence in the Record. Appellant's Petition for Rehearing should be denied.

Respectfully submitted,

**Horton Law Firm, P.A.**



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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

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**Vickie Rummage, Employee, ........................................................ Appellant,**

**vs.**

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

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## CERTIFICATE OF SERVICE

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I certify that I have served the Return to Appellant's Petition for Rehearing on Andrew N. Safran, attorney for Appellant, by depositing a copy of it in the United States Mail, first class, postage prepaid, on August 23, 2021, addressed to:

Andrew N. Safran
Attorney at Law
P.O. Box 12089
Columbia, SC 29211

and via email to: msa6631@aol.com

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August 23, 2021

VIA EMAIL

ctappfilings@sccourts.org
Honorable Jenny Abbott Kitchings
Clerk, S.C. Court of Appeals
P.O. Box 11629
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Re: Vickie Rummage v. BGF Industries and Great American Alliance Insurance Co.
Appellate Case No.: 2018-000359
Opinion No.: 5822

Dear Ms. Kitchings:

I am enclosing Respondent's Return to Appellant's Petition for Rehearing, which I am filing on behalf of Defendants. By copy of this letter to Andrew Safran, I am serving a copy of this Return on him.

If you have any questions or concerns, please feel free to contact me.

Respectfully,

HORTON LAW FIRM, P.A.

Jeremy R. Summerlin

MAF/lc
Enclosure

cc: Andrew N. Safran (via email and U.S. Mail)

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