

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA WORKERS' COMPENSATION
COMMISSION

ORDER OF THE APPELLATE PANEL

WCC FILE NO.: 0922700

Tina Mayers,

Appellant,

v.

Amick Farms,

and

Chubb Group of Insurance Companies,

Respondents.

INITIAL BRIEF OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF ISSUES ON APPEAL	1
STATEMENT OF THE CASE.....	2
STATEMENT OF FACTS	4
STANDARD OF REVIEW	6
ARGUMENT	8
I. Appellant Tina Mayers Failed to Meet her Burden of Proving a Repetitive Trauma Injury Pursuant to S.C. Code Ann. § 42-1-172	
A. Ms. Mayers Was Diagnosed With Carpal Tunnel Syndrome Prior to November 2009.....	8
B. Dr. Charles D. Gray’s Opinion Does Not Establish a Direct Casual Relationship Between the Work and the Alleged Injury.....	11
CONCLUSION.....	14

TABLE OF AUTHORITIES

Cases

<u>Broughton v. S. of the Border</u> , 336 S.C. 488, 520 S.E.2d 634 (Ct. App. 1999).....	7
<u>Burse v. S.C. Dep’t of Health & Env’tl. Control</u> , 360 S.C. 135, 141, 600 S.E.2d 80, 84 (Ct. App. 2004).....	6
<u>Corbin v. Kohler Co.</u> , 351 S.C. 613, 571 S.E.2d 92 (Ct. App. 2002).....	6, 7
<u>Dukes v. Rural Metro. Corp.</u> , 356 S.C. 107, 587 S.E.2d 687 (2003)	7
<u>DuRant v. S.C. Dep’t of Health & Env’tl. Control</u> , 361 S.C. 416, 604 S.E.2d 704 (Ct. App. 2004).....	7
<u>Ellis v. Spartan Mills</u> , 276 S.C. 216, 277 S.E.2d 590 (1981)	7
<u>Etheredge v. Monsanto Co.</u> , 349 S.C. 451, 562 S.E.2d 679 (Ct. App. 2002).....	7
<u>Fesmire v. Digh</u> , 385 S.C. 296, 312, 683 S.E.2d 803, 812 (Ct. App. 2009).....	9
<u>Former v. Butler</u> , 319 S.C. 275, 276 n.1, 460 S.E.2d 425, 426 n.1 (Ct. App. 1995).....	13
<u>Frame v. Resort Servs., Inc.</u> , 357 S.C. 520, 593 S.E.2d 491 (Ct. App. 2004).....	6, 7, 10
<u>Gibson v. Spartanburg Sch. Dist. No. 3</u> , 338 S.C. 510, 517, 526 S.E.2d 725, 728–29 (Ct. App. 2000).....	6, 7
<u>Grant v. Grant Textiles</u> , 361 S.C. 188, 603 S.E.2d 858 (Ct. App. 2004).....	6
<u>Hall v. Desert Aire, Inc.</u> , 376 S.C. 338, 349, 656 S.E.2d 753, 759 (Ct. App. 2007)	8
<u>Hargrove v. Titan Textile Co.</u> , 360 S.C. 276, 599 S.E.2d 604 (Ct. App. 2004).....	6, 7
<u>Herndon v. Morgan Mills, Inc.</u> , 246 S.C. 201, 209, 143 S.E.2d 376, 380-81 (1965).....	13
<u>Hoxit v. Michelin Tire Corp.</u> , 304 S.C. 461, 465, 405 S.E.2d 407, 409 (1991)	7
<u>Hunter v. Patrick Constr. Co.</u> , 289 S.C. 46, 344 S.E.2d 613 (1986)	7
<u>Jennings v. Chambers Dev. Co.</u> , 335 S.C. 249, 516 S.E.2d 453 (Ct. App. 1999)	8
<u>Jones v. Georgia–Pacific Corp.</u> , 355 S.C. 413, 586 S.E.2d 111 (2003)	7
<u>Liberty Mut. Ins. Co. v. S.C. Second Injury Fund</u> , 363 S.C. 612, 619, 611 S.E.2d 297, 300 (Ct. App. 2005)	6
<u>Parsons v. Georgetown Steel</u> , 318 S.C. 63, 456 S.E.2d 366 (1995)	7
<u>Pratt v. Morris Roofing, Inc.</u> , 357 S.C. 619, 594 S.E.2d 272 (2004).....	6
<u>Sharpe v. Case Produce, Inc.</u> , 336 S.C. 154, 519 S.E.2d 102 (1999)	7
<u>Shealy v. Aiken Cnty.</u> , 341 S.C. 448, 535 S.E.2d 438 (2000).....	7
<u>Shelby v. Algernon Blair, Inc.</u> , 250 S.C. 106, 110, 156 S.E.2d 646, 648 (1967).....	10
<u>Stone v. Traylor Bros., Inc.</u> , 360 S.C. 271, 600 S.E.2d 551 (Ct. App. 2004).....	6

Statutes

S.C. Code Ann. § 1–23–380(A)(6)(d)	7
S.C. Code Ann. § 1–23–380(A)(6)(e).....	7
S.C. Code Ann. § 42-1-172.....	2, 3, 9, 15
S.C. Code Ann. § 42-1-172(B)	9
S.C. Code Ann. § 42-1-172(C)	12
S.C. Code Ann. § 42-1-172(D)	9, 12, 15

Rules

Rule 208, SCACR..... 13
Rule 210, SCACR..... 13

STATEMENT OF ISSUES ON APPEAL

1. Did the Workers' Compensation Commission properly find that Appellant Tina Mayers failed to meet her burden of proving a repetitive trauma injury pursuant to S.C. Code Ann. § 42-1-172?

STATEMENT OF THE CASE

Appellant Tina Mayers filed a Form 50 on January 9, 2012, seeking compensability for repetitive trauma injuries to the bilateral upper extremities in the form of carpal tunnel syndrome, which allegedly occurred on November 1, 2009. (Form 50). Respondents OSI Group, LLC/Amick Farms and Federal Insurance Co. (collectively, hereinafter, "OSI Group") denied the claim on the grounds that: (1) Ms. Mayers failed to establish a repetitive trauma injury pursuant to S.C. Code Ann. § 42-1-172 for lack of medical causation; (2) Ms. Mayers failed to prove a direct causal relationship between the work and carpal tunnel syndrome; and (3) the claim was barred by the statute of limitations. (Form 51).

A hearing was held on April 10, 2012, before the Honorable Gene McCaskill. (Tr. of Proceedings, dated Apr. 10, 2012). On July 9, 2012, Commissioner McCaskill issued an Order, finding the claim was barred by the statute of limitations. (Order, dated Jul. 9, 2012). Both parties appealed. Ms. Mayers argued the Hearing Commissioner erred in denying the claim based on the statute of limitations. OSI Group also appealed, arguing the hearing commissioner erred in admitting medical evidence over OSI Group's objection, and also, alternative grounds supported a denial. Specifically, OSI Group argued that (1) Ms. Mayers failed to show a direct causal relationship between the work activities and carpal tunnel syndrome as required by § 42-1-172; and (2) Ms. Mayers failed to satisfy medical causation pursuant to § 42-1-172.

A hearing before the Full Commission was held on November 14, 2012. (Tr. of Proceedings, dated Nov. 14, 2012). On February 5, 2013, the Full Commission issued an Order affirming in part and reversing in part the Order of the Single Commissioner. (Order, dated Feb. 5, 2013). The Full Commission affirmed the denial on the alternative ground that Ms. Mayers failed to satisfy the compensability requirements of § 42-1-172, and reversed the finding that the

claim was barred by the statute of limitations. (Id.). Ms. Mayers filed a Notice of Appeal on February 26, 2013.

STATEMENT OF FACTS

This appeal arises out of a workers' compensation claim, in which Ms. Mayers alleged she suffered a repetitive trauma injury to the bilateral upper extremities in the form of carpal tunnel syndrome as a result of her work at OSI Group. (Form 50).

Ms. Mayers was hired with OSI Group on July 9, 2009, where she worked in the tray-pack department, packing trays of chicken breasts, legs, wings, and thighs. (Tr. of Proceedings, dated Apr. 10, 2012, 9:3-5, 11:1-7).¹ She contends she first experienced problems with her hands less than four months later, on November 1, 2009. (Id. at 10:8-10, 20:23-21:14).

On November 18, 2009, Ms. Mayers presented to Self Regional Hospital with right wrist pain, weakness, and altered sensation. (APA p. 20). Records from the November 18 visit indicate Ms. Mayers had experienced these symptoms previously, for years off and on, and reported that splints had helped in the past. (Id.); see also (APA p. 23). Two separate records from that visit, the initial history completed by a registered nurse and the emergency physician record completed by a medical doctor, note a past history of carpal tunnel syndrome. (APA pp. 20, 23).

Medical records from prior hospital visits reveal Ms. Mayers had previously received treatment for similar symptoms on a number of occasions. On May 2, 1997, Ms. Mayers reported to Self Memorial Hospital, complaining of right wrist and shoulder problems, with nocturnal throbbing. (APA p. 37). She reported she had started a new job at Greenwood Mop and Broom that required her to do a lot of pulling from an overhead position, as well as gripping. (Id.). She was diagnosed with an overuse injury, prescribed a wrist splint, and put on light duty with no repetitive gripping or pulling activities with the right arm. (APA p. 32). On January 28, 2008,

¹ Prior to her job with OSI Group, Ms. Mayers worked as a certified nursing assistant. (Tr. of Proceedings, dated Apr. 10, 2012, 9:10-16). This work involved lifting residents into beds, shower chairs, and similar such activities. See (Id. 9:17-24).

Ms. Mayers presented to Newberry County Memorial Hospital, complaining of pain and swelling in her left arm. (APA pp. 42, 44). She reported working as a certified nursing assistant and doing a lot of lifting. (APA p. 42).²

After the November 2009 hospital visit, Ms. Mayers continued to work through 2009 and 2010. (Tr. of Proceedings, dated Apr. 10, 2012, 15:7-10). During 2010, she sought medical treatment for her hands “every now and then.” (Id. at 16:1-4). On January 6, 2011, Ms. Mayers reported to her family doctor that she was “having difficulty with her carpal tunnel.” (APA p. 2). On May 20, 2011, Nurse Practitioner John C. Wates noted Ms. Mayers had come in for a re-check needing a statement for her lawyer regarding work. (APA p. 4). She reported trouble with carpal tunnel since she had been working for OSI Group since the middle of 2010. (Id.). Wates prepared a letter, dated May 24, 2011, opining Ms. Mayers had carpal tunnel syndrome and that “[r]epetitive movement *may be* a contributing factor.” (APA p. 5 (emphasis added)).

On May 12, 2011, Ms. Mayers saw Dr. Charles D. Gray, an orthopaedist. (APA p. 12). She gave a history of severe bilateral hand pain and numbness since February or March. (Id.). Despite Ms. Mayers’ prior issues as documented in the medical records dated May 2, 1997, January 28, 2008, and November 18, 2009, Ms. Mayers reported she had no prior problems with her wrist and hands. Compare (APA pp. 20, 23, 32, 37, 42, 44), with (APA p. 12). Thereafter, on April 2, 2012, Dr. Gray drafted a letter to Ms. Mayers’ attorney, opining her carpal tunnel syndrome was a result of working at OSI Group. (APA p. 17).

² At the hearing, Ms. Mayers denied reporting a history of carpal tunnel syndrome and further denied having prior issues with her right wrist. (Tr. of Proceedings, dated Apr. 10, 2012, 21:21-22:2, 22:6-25, 23:1-2, 24:22-25:2).

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act (“APA”) establishes the standard for judicial review of decisions of the Workers’ Compensation Commission. Liberty Mut. Ins. Co. v. S.C. Second Injury Fund, 363 S.C. 612, 619, 611 S.E.2d 297, 300 (Ct. App. 2005) (citing Hargrove v. Titan Textile Co., 360 S.C. 276, 599 S.E.2d 604 (Ct. App. 2004)). A reviewing court may reverse or modify a decision of an agency if the findings, inferences, conclusions, or decisions of that agency are “clearly erroneous in view of the reliable, probative and substantial evidence on the whole record.” Id. (quoting S.C. Code Ann. § 1–23–380(A)(6)(e); Bursey v. S.C. Dep’t of Health & Envtl. Control, 360 S.C. 135, 141, 600 S.E.2d 80, 84 (Ct. App. 2004)). 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 may reverse where the decision is affected by an error of law. S.C. Code Ann. § 1–23–380(A)(6)(d); Stone v. Traylor Bros., Inc., 360 S.C. 271, 600 S.E.2d 551 (Ct. App. 2004); Frame v. Resort Servs., Inc., 357 S.C. 520, 593 S.E.2d 491 (Ct. App. 2004).

The substantial evidence rule of the APA governs the standard of review in a workers’ compensation decision. Frame, 357 S.C. 520, 593 S.E.2d 491; Corbin v. Kohler Co., 351 S.C. 613, 571 S.E.2d 92 (Ct. App. 2002). An appellate court’s review is limited to deciding whether the commission’s decision is unsupported by substantial evidence or is controlled by some error of law. See Grant v. Grant Textiles, 361 S.C. 188, 603 S.E.2d 858 (Ct. App. 2004); Gibson v. Spartanburg Sch. Dist. No. 3, 338 S.C. 510, 517, 526 S.E.2d 725, 728–29 (Ct. App. 2000). 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 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); Etheredge v. Monsanto Co., 349 S.C. 451, 562 S.E.2d 679 (Ct. App. 2002); Broughton v. S. of the Border, 336 S.C. 488, 520 S.E.2d 634 (Ct. App. 1999).

In workers' compensation cases, the Appellate Panel of the Workers' Compensation Commission is the ultimate fact finder. Hunter v. Patrick Constr. Co., 289 S.C. 46, 344 S.E.2d 613 (1986). It is not the task of the appellate court to weigh the evidence as found by the Appellate Panel. Ellis v. Spartan Mills, 276 S.C. 216, 277 S.E.2d 590 (1981). "The final determination of witness credibility and the weight to be accorded evidence is reserved to the Appellate Panel." Frame, 357 S.C. at 528, 593 S.E.2d at 495 (citing Shealy v. Aiken Cnty., 341 S.C. 448, 535 S.E.2d 438 (2000)); see also Parsons v. Georgetown Steel, 318 S.C. 63, 456 S.E.2d 366 (1995); Gibson, 338 S.C. at 517, 526 S.E.2d at 729. The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence. Dukes v. Rural Metro. Corp., 356 S.C. 107, 587 S.E.2d 687 (2003); Sharpe v. Case Produce, Inc., 336 S.C. 154, 519 S.E.2d 102 (1999); DuRant v. S.C. Dep't of Health & Env'tl. Control, 361 S.C. 416, 604 S.E.2d 704 (Ct. App. 2004); Corbin, 351 S.C. 613, 571 S.E.2d 92. Where there are conflicts in the evidence over a factual issue, the findings of the appellate panel are conclusive. Hoxit v. Michelin Tire Corp., 304 S.C. 461, 465, 405 S.E.2d 407, 409 (1991); Hargrove, 360 S.C. at 290, 599 S.E.2d at 611; Etheredge, 349 S.C. at 455, 562 S.E.2d at 681.

ARGUMENT

I. Appellant Tina Mayers Failed to Meet Her Burden of Proving a Repetitive Trauma Injury Pursuant to S.C. Code Ann. § 42-1-172

A claimant has the burden of proving facts sufficient to allow recovery under the Workers' Compensation Act. Hall v. Desert Aire, Inc., 376 S.C. 338, 349, 656 S.E.2d 753, 759 (Ct. App. 2007); Jennings v. Chambers Dev. Co., 335 S.C. 249, 516 S.E.2d 453 (Ct. App. 1999) (“The claimant has the burden of proving facts that will bring the injury within the workers’ compensation law, and such award must not be based on surmise, conjecture or speculation.”). In order to prove a compensable repetitive trauma injury, a claimant must demonstrate a “direct causal relationship between the condition under which the work is performed and the injury.” S.C. Code Ann. § 42-1-172(D); see also S.C. Code Ann. § 42-1-172(B). Appellant Tina Mayers contends she suffered a compensable repetitive trauma injury pursuant to S.C. Code Ann. § 42-1-172 as a result of her employment with OSI Group. Ms. Mayers’ argument, however, is based on a faulty opinion and fails to address substantial evidence indicating Ms. Mayers’ alleged repetitive trauma injuries predate her employment with OSI Group. See (Order, dated Feb. 5, 2013, pp. 8-10). Accordingly, as recognized by the Full Commission, Ms. Mayers has failed to demonstrate a direct causal relationship between the condition under which her work with OSI Group was performed and her alleged injury.

A. Ms. Mayers Was Diagnosed With Carpal Tunnel Syndrome Prior to November 2009

The Full Commission’s finding of fact that Ms. Mayers “was diagnosed with carpal tunnel syndrome prior to November 1, 2009” is amply supported by medical evidence. See (Order, dated Feb. 5, 2013, p. 8). On November 18, 2009, Ms. Mayers presented to Self Regional Hospital with right wrist pain, weakness, and altered sensation. (APA p. 20). Records from the November 18 visit indicate Ms. Mayers had experienced these symptoms previously, for years

off and on, and reported that splints had helped in the past. (Id.); see also (APA p. 23). Two separate records from that visit, the initial history completed by a registered nurse and the emergency physician record completed by a medical doctor, note a past history of carpal tunnel syndrome. (APA pp. 20, 23).

Medical records from prior hospital visits also support a finding of prior carpal tunnel syndrome. On May 2, 1997, Ms. Mayers reported to Self Memorial Hospital, complaining of right wrist and shoulder problems, with nocturnal throbbing. (APA p. 37). She reported she had started a new job at Greenwood Mop and Broom that required her to do a lot of pulling from an overhead position, as well as gripping. (Id.). She was diagnosed with an overuse injury, prescribed a wrist splint, and put on light duty with no repetitive gripping or pulling activities with the right arm. (APA p. 32). On January 28, 2008, Ms. Mayers presented to Newberry County Memorial Hospital, complaining of pain and swelling in her left arm. (APA pp. 42, 44). She reported working as a certified nursing assistant and doing a lot of lifting. (APA p. 42). These records establish prior wrist problems and lend credence to the reports of prior carpal tunnel syndrome.

Ms. Mayers attempts to refute the aforementioned medical evidence by noting she denied reporting a prior history of carpal tunnel syndrome, and arguing OSI Group presented no statements or testimony disputing Ms. Mayers' denial. When confronted with documented evidence indicating she had made statements about prior carpal tunnel syndrome and repetitive arm injuries, Ms. Mayers offered no explanation for why the statements were in her medical records. (Tr. of Proceedings, dated Apr. 10, 2012, 20:23-25:23); see (Order, dated Feb. 5, 2013, p. 8). As is evident from the Order of the Full Commission, Ms. Mayers' self-serving testimony is not probative. See Fesmire v. Digh, 385 S.C. 296, 312, 683 S.E.2d 803, 812 (Ct. App. 2009)

(characterizing self-serving testimony as “questionable evidence”); see also Frame, 357 S.C. at 528, 593 S.E.2d at 495 (“The final determination of witness credibility and the weight to be accorded evidence is reserved to the Appellate Panel.”).

Now, in an apparent attempt to cure her prior failure to explain the notations in her medical records regarding a history of carpal tunnel syndrome, Ms. Mayers opines that the references to prior carpal tunnel syndrome in the November 18 medical records “can be explain[ed] [*sic*] simply by the staff review of Ms. M[a]yers’ [*sic*] prior medical history that was on file at the Self Memorial Hospital [in] [*sic*] which there is no prior diagnose[is] [*sic*] of bilateral carpal tunnel syndrome.” Such an assertion is merely speculative, and is supported no testimony or documentary evidence. See Shelby v. Algernon Blair, Inc., 250 S.C. 106, 110, 156 S.E.2d 646, 648 (1967) (“[A] claimant has the burden of proving the facts essential to his right to compensation, and an award may not be based upon conjecture or speculative.”). Moreover, Ms. Mayers’ argument provides no support for her position, but instead, bolsters Amick Farm’s position that Ms. Mayers was diagnosed with carpal tunnel syndrome prior to November 2009. Ms. Mayers has offered no reason why, even with a medical history on file, Self Memorial Hospital staff would document a prior history of carpal tunnel syndrome absent evidence of such prior diagnosis. Thus, as is apparent from the Order of the Full Commission, the medical evidence, even in light of Ms. Mayers denial of prior carpal tunnel syndrome, constitutes substantial evidence that Ms. Mayers was diagnosed with carpal tunnel syndrome prior to November 2009.

In short, based on the totality of the evidence, the Full Commission correctly found Ms. Mayers was diagnosed with carpal tunnel syndrome prior to November 1, 2009. Because Ms. Mayers already had carpal tunnel syndrome, the work activities at her job with OSI Group could

not have been the direct cause of the condition. Accordingly, the Full Commission properly denied the claim as Ms. Mayers failed to prove the work was a direct cause of her alleged condition.

B. Dr. Charles D. Gray's Opinion Does Not Establish a Direct Causal Relationship Between the Work and the Alleged Injury

“A ‘repetitive trauma injury’ is considered to arise out of employment only if it is established by medical evidence that there is a direct causal relationship between the condition under which the work is performed and the injury.” S.C. Code Ann. § 42-1-172(D). “[M]edical 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(C).

The only evidence Ms. Mayers offers which purports to relate Plaintiff’s alleged condition with her employment at OSI Group is the opinion from Dr. Charles D. Gray, M.D. See (APA p. 17). Dr. Gray’s opinion, however, falls short.

Dr. Gray’s records indicate Ms. Mayers concealed her prior wrist and arm problems from him. See (APA p. 12 (Under “History,” Dr. Gray noted, “She has had no prior problems with her wrist and hands.”)); (APA p. 17 (“Tina Mayers was evaluated on 5/12/2011 for bilateral carpal tunnel syndrome. At that time, she related working at Amick Farms where she had to repetitively use her hands in a very cold environment. *Since doing that*, she has developed symptoms of carpal tunnel...)) (emphasis added)). This is not surprising, given that Ms. Mayers also attempted to conceal these prior problems at the hearing before the Single Commissioner:

Q: And you reported at that [November 2009] visit a past history of carpal tunnel syndrome, didn’t you?

A: Oh, no, I did not.

Q: You didn’t report trouble with this for years off and on?

A: No.

...

Q: You didn't report that splints had helped with this in the past?

A: No.

Q: Didn't you also have trouble with problems with your right wrist in 1997 when you worked on a manufacturing line?

A: No.

...

Q: You didn't go to the emergency room complaining of problems with your right wrist from pulling and gripping eight hours a day?

A: No.

Q: And you weren't diagnosed with an overuse injury to your right wrist?

A: No.

Q: And you weren't prescribed a cock-up splint for your wrist?

A: No.

A: And you weren't put on light duty in 1997?

Q: No.

(Tr. of Proceedings, dated Apr. 10, 2012, 21:22-22:2, 22:6-12, 22:16-23:2). As discussed *supra*, Ms. Mayers' medical records contain repeated references to prior problems with her hands and wrists, prior diagnoses of carpal tunnel syndrome, and prior treatment with a cock-up splint, the typical treatment for carpal tunnel syndrome. See (APA pp. 20, 23, 32, 37, 42, 44). As the Full Commission stated in its findings of fact, "[the] incorrect history provided by [Ms. Mayers] to Dr. Gray is fatal and is too insignificant to overlook." (Order, dated Feb. 5, 2013, p. 9). Accordingly, the Full Commission correctly found that Dr. Gray's opinion does not establish a

direct causal relationship between the condition under which the work was performed and the injury. See (id.).

Ms. Mayers argues, in a *res ipsa loquitur* manner, that the alleged injury must result from her employment with OSI Group, because her previous decade-long employment as a certified nursing assistant required no repetitive hand use. Ms Mayers cites to no evidence in the record supporting this assertion. See Rule 208(b)(4), SCACR (“The brief shall contain references to the transcript, pleadings, orders, exhibits, or other materials which may properly be included in the Record on Appeal...to support the salient facts alleged.”); Rule 210(h), SCACR (“Except as provided by Rule 212 and Rule 208(b)(1)(C) and (2), the appellate court will not consider any fact which does not appear in the Record on Appeal.”); Forner v. Butler, 319 S.C. 275, 276 n.1, 460 S.E.2d 425, 426 n.1 (Ct. App. 1995) (If a party “consider[s] a fact relevant and worthy of mention in the brief, [the party] should...includ[e] matter in the record to support that factual assertion.”); see also Herndon v. Morgan Mills, Inc., 246 S.C. 201, 209, 143 S.E.2d 376, 380-81 (1965) (“The difficulty in proving a fact in a compensation case does not relieve the party on whom the burden rests of proving it, and does not shift the burden to the other party.”). Regardless, as discussed *supra*, the evidence in the record indicates Ms. Mayers’ prior employment did require movement which could contribute to carpal tunnel syndrome. See (APA p. 42 (“[S]he is a [CNA] and does a lot of lifting.”)); see also (APA pp. 32, 37 (Ms. Mayers reported she had started a new job at Greenwood Mop and Broom that required her to do a lot of pulling from an overhead position, as well as gripping. She was diagnosed with an overuse injury and placed in a right wrist cock-up splint for seven days.)).

Ms. Mayers also claims she had no repetitive trauma type injuries in her prior employment, presenting to the hospital only once at which point she was diagnosed with bursitis

of the left shoulder. Again, the medical evidence indicates otherwise. See (APA pp. 32, 37 (Ms. Mayers reported she had started a new job at Greenwood Mop and Broom that required her to do a lot of pulling from an overhead position, as well as gripping. She was diagnosed with an overuse injury and placed in a right wrist cock-up splint for seven days.)); (APA p. 42 (“[S]he is a [CNA] and does a lot of lifting.”)). Thus, as the Full Commission correctly found, Dr. Gray’s causation opinion “is faulty because it is based on an erroneous history from [Ms. Mayers] that she had no prior problems with her wrist and hands.” (Order, dated Feb. 5, 2013, p. 9).


In conclusion, pursuant to S.C. Code Ann. § 42-1-172(D), Ms. Mayers must establish “by *medical evidence* that there is a *direct* causal relationship between the condition under which the work is performed and the injury.” (Emphasis added). Here, “Dr. Gray’s statement of causation is erroneously premised in that it is based upon [Ms. Mayers’] statement to Dr. Gray that she had no prior carpal tunnel syndrome problems. This incorrect history provided by [Ms. Mayers] to Dr. Gray is fatal and is too significant to overlook.” (Order, dated Feb. 5, 2013, pp. 8-9). Accordingly, the Full Commission properly found that Ms. Mayers failed to satisfy her burden to prove a repetitive trauma injury pursuant to the Workers’ Compensation Act.

CONCLUSION

Thus, for the foregoing reasons, Respondents OSI Group, LLC/Amick Farms and Federal Insurance Co. respectfully request this Court affirm the decision of the Full Commission and find that Appellant Tina Mayers failed to meet her burden to establish a repetitive trauma injury pursuant to S.C. Code Ann. § 42-1-172.

[Signature Page to Follow]

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THE STATE OF SOUTH CAROLINA
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PROOF OF SERVICE

I hereby certify that I served Respondent's Initial Brief upon counsel of record, by placing a copy in the United States mail, postage prepaid, to Charles E. Johnson, Esquire, Charles E. Johnson, P.A. 1332 Main Street, Suite 65, Columbia, SC 29201, on April 25, 2013.

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[SIGNATURE PAGE TO FOLLOW]

Respectfully submitted

COLLINS & LACY, P.C.

By:

A handwritten signature in cursive script, appearing to read "Claude Prevost, for", is written over a horizontal line.

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**PROOF OF SERVICE – RESPONDENT'S
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