Reply To
HELEN F. HISER
Direct Dial: (843) 576-2930
helen.hiser@mgclaw.com

RECEIVED
Jan 20 2022
SC Court of Appeals

January 20, 2022

VIA S.C. COURTS E-FILING
The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RE: Doretta Butler v. Illinois Tool Works and American Zurich Insurance Company c/o Broadspire
Date of Accident: April 13, 2012
WCC File No.: 1221499
Our File No.: 20149.14118
Claim No.: 186548843
Appeal No.: 2017-001535

Dear Ms. Kitchings:

Pursuant to Rule 208(b)(7), SCACR, Respondents Illinois Tool Works and American Zurich Insurance Company c/o Broadspire write in response to Appellant Doretta Butler's January 19, 2022 letter submitting this Court's decision in *Brooks v. Benore Logistics Systems Inc.*, Op. No. 5891 (filed January 19. 2022) (Shearouse Adv. Sh. No. 3 at 40), as supplemental authority. At the outset, Appellant fails to provide "a reference either to the page of the brief or to an issue to which the citations pertain," Jean Hoefer Toal, et al., *Appellate Practice in South Carolina* 217 (South Carolina Bar 2d ed. 2002), but, instead, refers to the entire legal argument in her Brief ("pages 10-22"), and the majority of argument in her Reply Brief ("pages 13-22"), necessitating a longer than normal response from Respondents. Neither the facts nor the Commission Decision in this case bear any resemblance to the facts and decision in *Brooks*. As such, it does not support Appellant's position.

In particular, here, unlike in *Brooks*, substantial medical evidence shows that Appellant treated for months without indicating to any provider that her complaints were related to her job. Unlike in *Brooks*, here the Commission did not apply a two-step analysis but, instead, concluded that "as to a repetitive injury, we must determine whether there [is] enough evidence in the record to tip the scale in the claimant's favor," noting that "there is little testimony as to the repetitive nature of the job." (R. p. 40 ¶¶ 25, 28). Indeed, Appellant's counsel stated on the record that, although she had pled a repetitive trauma injury as an alternate theory of her case, "[w]e do believe it is better characterized as an injury by accident, **as the evidence will show that this is not a repetitive type of job** …" (R. p. 395, lines 3-13) (emphasis added). Quite simply,

even Appellant does not believe this to be a viable or legitimate repetitive trauma injury case.

In *Brooks*, unlike here, the treating physician's opinion stated that "the repetitive activities of [the claimant's] job … most probably cause[d]" the claimant's injuries, and then listed the various repetitive activities. Here, in contrast, Dr. Mazoue's check-the-box opinion does not reference any repetitive activities or describe the alleged repetitive nature of Appellant's job in connection with her injury. Simply saying that her "injury is most likely related to her activities as an [sic] laminator," (R. p. 172), is insufficient to fulfill the requirement for "a specific finding of fact by a preponderance of the evidence of a causal connection that is established by medical evidence between the repetitive activities that occurred while the employee was engaged in the regular duties of [her] employment and the injury." S.C. Code Ann. § 42-1-172.

To the extent Appellant suggests *Brooks* supports her argument that she proved a compensable injury by accident because Dr. Mazoue's check-the-box opinion is the only medical evidence of causation (or lack thereof) in the record, she is incorrect. First, Dr. Mazoue's opinion is problematic in that it is not supported by his treatment notes (R. pp. 134-171, in particular p. 146 ("[p]ain began April 10, 2012 **no known MOI** …") (emphasis added)), admittedly came following a meeting with Appellant's counsel, and Dr. Mazoue himself could not identify what records or information served as the basis of his opinion. Second, unlike in *Brooks* where the employer apparently relied on an ergonomic report as its main defense, here there is ample medical evidence, defined in Section 42-1-172 to include not only "expert opinion or testimony stated to a reasonable degree of medical certainty," but also "documents, records, or other material that is offered by a licensed and qualified medial physician," demonstrating a lack of causal connection. As the Commission correctly noted, "there are several indications throughout the record that [Appellant's] injury is not job-related. (APA pp. 1, 13, 30, 35, 40, 68, 70, 62, 85, 254, 270)." *See* Brief of Respondents pp. 4-15, 23-26, 28-30; *see also* R. pp. 57-66, 72-80, 89-90, 93-96, 99-104, 128-129, 118-121, 131-171, 303-308.

In summary, this Court's decision in *Brooks* does not advance Appellant's position because it was based on substantially different facts and legal arguments.

Very truly yours,

Helen F. Hiser

cc: Stephen B. Samuels, Esquire (via email)