THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Appellate Case No. 2021-000585

Ana Rodriguez Galvan, Employee, — Respondent,

v.

Griffin Stafford North Charleston, Employer; Accident Fund General Insurance Company c/o Accident Fund Insurance Company of America, Hartford Accident & Indemnity Co., and Employers Preferred Insurance Company, Carriers, — Defendants.

of whom Griffin Stafford North Charleston, Employer, and Employers Preferred Insurance Company, Carrier, are the Appellants,

and Accident Fund General Insurance Company c/o Accident Fund Insurance Company of America and Hartford Accident & Indemnity Co. are Respondents.

FINAL BRIEF OF RESPONDENT ANA RODRIGUEZ GALVAN

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STATEMENT OF THE CASE

This workers' compensation claim arises from an admitted injury Respondent Ana Rodriguez Galvan ("Claimant") suffered from an accident on October 9, 2015, while she was cleaning a hotel bathroom in her employment with Appellant Griffin Stafford North Charleston ("Employer"). A hearing was held before the Honorable Commissioner T. Scott Beck on April 23, 2019, on Claimant's Form 50 and the Form 51 filed by each of the defendants. (R. p. 1) Claimant requested an award of medical treatment, specifically shoulder surgery, and requested the issue of permanency be held in abeyance pending the outcome of the shoulder surgery. (R. p. 65)

On August 20, 2019, Commissioner Beck issued his Decision and Order. (R. p. 1) Commissioner Beck found Claimant had not reached maximum medical improvement, needed further medical treatment to her shoulder, and that Appellant Employers Preferred Insurance Company ("Preferred Insurance") is responsible for Claimant's treatment. (R. p. 11–15) Commissioner Beck released the other insurance carriers for Employer from any responsibility for the claim. (R. p. 13)

On August 30, 2019, Appellants filed a Form 30 requesting appellate review of Commissioner Beck's decision before the Appellate Panel of the South Carolina Workers' Compensation Commission (the "Commission"). (R. p. 689) The Commission heard arguments and issued a Decision and Order dated May 4, 2021, which affirmed Commissioner Beck's Decision and Order in full. (R. p. 16) On May 28, 2021, Appellants noticed this appeal.

STATEMENT OF FACTS

On October 9, 2015, Claimant slipped and fell while cleaning a hotel bathroom in her employment as a housekeeper for Employer. (R. pp. 33 & 739, lines 10–25) Claimant fell on her

right side and injured her right shoulder, among other injuries. (R. pp. 33 & 739, lines 10–18) As the result of the fall, Claimant experienced pain in her shoulder and upper arm, as well as pain in her neck. (R. p. 739, lines 11–20)

Employer's insurance carrier at the time of the accident was Appellant Preferred Insurance. Appellants—Employer and Preferred Insurance—admitted the injury, and Claimant underwent treatment. Dr. James McCoy performed surgery on Claimant's right shoulder in February of 2016. (R. pp. 34 & 740, lines 4–8) Claimant then completed physical therapy, but despite the surgery and therapy, she continued to experience pain in the same areas. (R. p. 740, line 21–p. 741, line 10 & p. 751, lines 4–10) On September 28, 2016, Dr. McCoy concluded Claimant had reached maximum medical improvement and released her from treatment. (R. p. 34) Claimant was unable to work for three months while undergoing treatment, and after Dr. McCoy released her, she returned to work in a light-duty capacity. (R. pp. 34 & 741, lines 11–18)

Upon returning to work, Claimant was promoted to a housekeeping supervisor position. (R. p. 742, lines 7–14) As a housekeeping supervisor, Claimant checked rooms cleaned by the housekeepers. (R. p. 743, lines 2–23) The only physical tasks Claimant's job required were opening three small drawers and occasionally folding small towels. (R. p. 743, line 20–p.745, line 17) Claimant used her left arm to perform those tasks, as well as any other task that required using an arm. (R. p. 745, line 18–p. 746, line 6)

In September of 2017, Claimant returned to Dr. McCoy for further treatment, complaining of pain in her shoulder and arm. (R. p. 34 & p. 432, line 18–p. 433, line 13) Dr. McCoy performed an MRI on Claimant, concluded she has a torn rotator cuff on the same tendon as her original shoulder surgery, and recommended she undergo an additional shoulder surgery. (R. p. 34 & p.432, line 18–p. 436, line 3) Appellant refused to provide the requested medical treatment on the

basis the treatment did not result from the October 9, 2015 injury, and Claimant filed a Form 50 for a hearing on her request for treatment. (R. p. 791) Thereafter, Claimant moved to add as parties the two subsequent carriers for Employer—Respondents Accident Fund General Insurance Company ("Accident Fund") and Hartford Accident & Indemnity Co. ("Hartford"). (R. pp. 42 & 65) The Commission granted those motions. (R. pp. 39 & 40)

Claimant later filed a second Form 50 for a hearing on her request for additional medical treatment. (R. p. 69) In addition to indicating Claimant needs "additional medical examination and treatment," Claimant's Form 50 stated that a determination of her permanent disability was premature at that time. (R. p. 69) Claimant then submitted her Pre-Hearing Brief in which she stated: "Claimant requests the record be left open to submit additional medical records/opinions pursuant to *Morgan v. JPS Auto.*, 321 S.C. 201, 467 S.E.2d 457 (Ct. App. 1996)." (R. p. 80)

On April 23, 2019, a hearing was held before the Commissioner Beck on Claimant's Form 50 and the Form 51 filed by each of the insurers. (R. p. 723) At the hearing, Claimant offered the testimony and records of Dr. McCoy and two other doctors who evaluated Claimant—Dr. Richard Friedman and Dr. George Pappas—in addition to Claimant's testimony, as evidence establishing that Claimant's current need for surgery is the continuation and recurrence of her October 9, 2015 injury and not a new injury. (R. p. 729, lines 13–23)

At the hearing, Commissioner Beck stated that Claimant asked to have the issue of the permanency of her injury held in abeyance pending further treatment. (R. p. 728, lines 11–15) No party objected to Claimant's request to hold the issue of permanency in abeyance.

Claimant testified at the hearing regarding her employment and injury. She testified that while employed as a hotel housekeeper, she suffered an accidental work injury when she slipped on water on the floor while walking out of a hotel bathroom. (R. p. 739, lines 8–25) Dr. McCoy

performed a surgery on her right shoulder in February of 2016, and she returned to work after the surgery and physical therapy, but she testified she continued to experience the same pain after the surgery and therapy. (R. p. 740, line 4–p.741, line 6) Upon returning to work, she did not have any new injuries, and she used her uninjured left arm to perform work tasks. (R. p. 745, line 18–p. 746, line 9)

In addition to Claimant's testimony, the parties offered into evidence various medical records from Claimant's treatment providers, Claimant's deposition testimony, the deposition testimony of Dr. McCoy, and the deposition testimony of Employer's representative. Claimant also offered into evidence at the hearing a supplemental report from Dr. Pappas. (R. p. 727) Appellants objected to the admission of Dr. Pappas' supplemental report on the basis the submission was untimely in violation of Regulation 67-612 of the South Carolina Code of Regulations and not admissible under *Morgan v. JPS Automotives* because Claimant did not identify the record that was prepared but not timely submitted. (R. p. 727, lines 5–16) Commissioner Beck offered Appellants the opportunity to continue the hearing so that Appellant could depose Dr. Pappas. Appellants declined the opportunity, and Commissioner Beck overruled the objection. (R. p. 727, lines 21–24)

Claimant's counsel requested at the hearing that Dr. Pappas be designated as Claimant's authorized treating physician. (R. p. 735) Appellants' counsel did not object to this request, nor did Appellants' counsel offer any argument in opposition to Dr. Pappas being named as Claimant's authorized treating physician. In response to the request Appellants' counsel merely informed Commissioner Beck that Dr. McCoy is no longer performing surgeries. (R. p. 735, line 23–p. 736, line 4)

On August 20, 2019, Commissioner Beck entered an order finding that while Dr. McCoy released Claimant at maximum medical improvement ("MMI") after her 2016 surgery, Claimant returned to Dr. McCoy for further treatment in September of 2017, and Dr. McCoy found Claimant needed another surgery on her right shoulder. (R. p. 12) Commissioner Beck found Claimant's need for a second shoulder surgery "is not the results [sic] of Post Injury Repetitive Trauma nor Acute Intervening Injury." (R. p. 12) Commissioner Beck found "[b]ased upon the greater weight of the credible evidence, to include, the Claimant's testimony, opinions of Dr. Pappas and opinions of Dr. McCoy" that "Claimant's current condition emanates from her original injury of October 9, 2015." (R. p. 12) The Order accordingly found that Preferred Insurance "is responsible for [the] ongoing medical care for Claimant's right shoulder recommended by Dr. Pappas and Dr. McCoy." (R. p. 13) Additionally, the Order designated Dr. Pappas as Claimant's Authorized Treating Physician. (R. p. 13)

Appellants appealed Commissioner Beck's decision to the Commission, and the Commission affirmed Commissioner's Beck's Decision and Order "in its entirety." (R. p. 33) The Commission found Appellants failed to meet their burden to prove that Claimant sustained a new injury breaking the chain of causation between her October 9, 2015 injury and her present need for surgery. (R. p. 32) The Commission found the evidence supported the finding that Claimant's present pain and need for surgery "emanate from her original work accident." (R. p. 32) The Commission also found Dr. Pappas' supplemental report was properly admitted into evidence both because Appellants were provided an opportunity to depose Dr. Pappas before proceeding with the hearing, and because the supplemental report was submitted "in line with the analysis in the [*Morgan v. JPS Automotives*] case." (R. p. 32) Finally, the Commission found that because Dr.

Pappas had a plan for treating Claimant and "is in a position to take over her treatment," there was no error in designating him as Claimant's authorized treating physician. (R. p. 33)

STANDARD OF REVIEW

The Administrative Procedures Act governs the Court's review of Commission decisions. *Shealy v. Aiken Cnty.*, 341 S.C. 448, 454, 535 S.E.2d 438, 442 (2000). The Court can reverse or modify the Commission's decision only if the decision is affected by an error of law, is "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record," or is arbitrary, capricious, or an abuse of discretion. S.C. Code Ann. § 1-23-380(5). "In workers' compensation cases the Full Commission is the ultimate fact finder," and therefore, the "final determination of witness credibility and the weight to be accorded the evidence is reserved to the Full Commission," and the Court does not weigh the evidence. *Shealy*, 341 S.C. at 454, 535 S.E.2d at 442.

ARGUMENT

I. THE COMMISSION CORRECTLY HELD THAT THE SURGERY CLAIMANT NEEDS IS THE RESULT OF THE CONTINUATION AND RECURRENCE OF HER OCTOBER 9, 2015 INJURY.[1]

While Appellants restate their argument in numerous forms, reduced to its essence, Appellants' argument is that the Commission failed to properly weigh the evidence as to whether Claimant's second rotator cuff surgery is the result of her October 9, 2015 injury or is a new injury. Appellants acknowledge as much, arguing the Commission "should have placed more weight on

[1] Here, Claimant addresses Appellants' arguments 1 and 1.a., which appear to correlate with Appellants' Issues on Appeal 1, 3, and 4. Appellants' Statement of Issues on Appeal and arguments do not correspond. Appellants' arguments 1, 1.a, and 1.c are all arguments that the Commission improperly weighed the evidence in concluding Claimant's need for surgery results from the continuation and recurrence of the October 9, 2015 injury.

the opinion of Dr. McCoy . . . ." (Apps.' Br. 19.) Weighing the evidence is a function of the Commission, and appellate courts do not conduct a de novo review of the evidence.

Appellants do not contend the Commission applied the wrong legal standard in addressing the issue, do not contend there is any error of law in the Commission's decision, and do not contend the Commission's decision is arbitrary, capricious, or an abuse of discretion. The parties agree that the *Geathers v. 3V, Inc.*, 371 S.C. 570, 641 S.E.2d 29 (2007) decision states the applicable legal standard, and the Commission applied the *Geathers* standard. Therefore, because Appellants' argument is only that the evidence does not support the Commission's decision, Appellants' argument is constrained by the substantial evidence standard of review applicable here, and the Commission's decision must be affirmed unless "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." S.C. Code Ann. § 1-23-380(5). The Commission's decision is supported by ample evidence in the record, and therefore, the Commission's decision that Claimant's need for shoulder surgery is the result of the continuation and recurrence of her October 9, 2015 injury must be affirmed.

Adopting the last injurious exposure rule as the standard for determining which insurer is responsible for a claimant's injury, the *Geathers* decision explains that the insurer covering the risk at the time of the most recent injury bearing a causal relation to the disability bears full liability for that injury, but "if the second injury is merely a recurrence of the first injury, then the insurer on the risk at the time of the original injury remains liable for the second." *Geathers*, 371 S.C. at 578, 641 S.E.2d at 33. Under *Geathers*, here the Commission had to determine whether the second shoulder surgery Claimant needs results from a new injury or is the continuation and recurrence of the October 9, 2015 injury.

Appellants first attempt to assert the Commission "erred in failing to apply the analysis from *Geathers* and *Gordon*." (Apps.' Br. 17.) However, review of Appellants' argument makes clear that this is not a claimed error of law, but rather is merely a claim that the Commission arrived at the wrong result because the evidence does not support the Commission's conclusion. Appellants argue the Commission found Appellants are "responsible for treating the aggravation of the right shoulder injury despite the evidence supporting that that [sic] the Claimant had a worsening of her condition after reaching MMI." (Apps.' Br. 17.) The first part of that argument is incorrect. Nowhere did the Commission find a party responsible for treating the "aggravation" of the October 9, 2015 injury. The Commission's Order never mentions aggravation and rather, found that Claimant's need for further medical treatment "emanates from her original injury of October 9, 2015." (R. p. 36) The remainder of that argument is the contention that the Commission failed to properly weigh the evidence—that the Commission arrived at a result "despite the evidence" to the contrary. The Court need not, and should not, wade into weighing the evidence as Appellants request. Rather, because Appellants' argument is nothing more than an argument that the Commission did not properly weigh the evidence, the Court's review is limited to determining whether there is substantial evidence supporting the Commission's conclusions.

The record contains ample evidence supporting the Commission's decision. The evidence the Commission relied on and which supports the Commission's findings include Claimant's testimony and the opinions of Dr. McCoy and Dr. Pappas. (R. p. 34) At the hearing before Commissioner Beck, Claimant testified she had not had any new injury since her October 9, 2015 injury. (R. p. 746, lines 7–9) Claimant also testified that she used her uninjured left arm to perform her work and avoided using her injured right arm to perform work tasks. (R. p. 745, line 18–p. 746, line 6)

Dr. McCoy stated in his report from his March 29, 2018 evaluation of Claimant: "We think she is probably looking at a new surgery on her right shoulder. . . . We think to a reasonable degree of medical certainty that this situation is directly related to her work injury from 2015." (R. p. 664) Dr. McCoy testified in his deposition that Claimant would not "be where she is right now if it hadn't been for the original work-related injury." (R. p. 449, lines 7–9) While Dr. McCoy also expressed a belief that Claimant's present tendon tear and need for further treatment result from a new injury to her shoulder, he testified that this belief was solely speculation and he could not identify any evidence that would establish her need for further treatment is the result of a new injury rather than the continuation of her October 9, 2015 injury. (R. p. 443, line 24–p. 444, line 24) Asked whether Claimant would still need the second surgery if she had never fallen at work in October on 2015, Dr. McCoy answered: "I don't think so." (R. p. 448, lines 6–10)

Dr. Pappas stated in his report from a February 15, 2019 evaluation of Claimant:

> [Claimant's] history, physical exam and imaging are consistent with right shoulder subacromial impingement and bursitis in the setting of possible failed rotator cuff repair. . . . The patient has clearly not achieved maximum medical improvement (MMI). At this point I would recommend [arthrograms] to determine whether she has a residual rotator cuff tear . . . . If the XR and CT arthrogram confirms rotator cuff tearing, I would recommend revision rotator cuff repair surgery.

(R. p. 798) In a supplement to his February 25, 2019 evaluation report, Dr. Pappas wrote:

> "As I stated in my report, [Claimant] has not reached maximum medical improvement for her shoulder symptoms. . . . It is my opinion to a reasonable degree of medical certainty, more likely than not, that [Claimant's] current shoulder symptoms are due to her original injury or, alternatively, result from a continuum following the surgery that was necessitated by the original injury because her rotator cuff tear was incompletely addressed during surgery."

(R. p. 206)

Dr. McCoy's deposition testimony supports Dr. Pappas' conclusions. Dr. McCoy testified that when he performed surgery on Claimant in 2016, she had a full thickness tendon tear that he

repaired, and she also had partial tears that he did not repair. (R. p. 424, line 18–p. 425, line 17) Dr. McCoy testified that partial tendon tears can later tear more and develop into a full thickness tear. (R. p. 426, lines 3–11) Dr. McCoy testified that the location of the tear he identified on Claimant's MRI in December of 2017 and which necessitates her further treatment was in the same location as partial thickness tendon tears shown on Claimant's MRI in November of 2015. (R. p. 434, line 14–p. 435, line 15)

Therefore, the Commission had substantial evidence in the record supporting its conclusion that the second shoulder surgery Claimant needs is the result of her October 9, 2015 injury. While Appellants point to other evidence in the record which purportedly would allow the Commission to reach the opposite conclusion, the issue before this Court is not whether there is any evidence supporting Appellants' position. *See Palmetto All., Inc. v. S.C. Pub. Serv. Comm'n*, 282 S.C. 430, 432, 319 S.E.2d 695, 696 (1984) ("[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence."). Rather, the issue before the Court is only whether there is substantial evidence in the record supporting the Commission's decision, and the testimony and opinions of Claimant, Dr. McCoy, and Dr. Pappas provide that substantial evidence. Accordingly, the Commission's decision should be affirmed.

II. THE COMMISSION DID NOT ERR IN HOLDING THAT APPELLANTS ARE RESPONSIBLE FOR FURTHER MEDICAL TREATMENT FOR CLAIMANT.[2]

Appellants assert the Commission erred "by failing to address whether the Appellants are liable for providing any future medical treatment" for Claimant's October 9, 2015 injury. Appellants' argument fails for a host of reasons. First, the Commission did address whether Appellants are responsible for Claimant's future medical treatment. The Commission ordered that Preferred Insurance "is responsible for the ongoing medical care of the Claimant's right shoulder recommended by Dr. Pappas and Dr. McCoy." (R. p. 36)

Second, Appellants appear to argue that because Dr. McConnell and Dr. McCoy at one point opined that injections and medication were the only anticipated future medical treatment for Claimant's injury, that Appellants cannot be responsible for any medical treatment other than injections and medication. (Apps.' Br. 21.) That argument was never raised to or ruled upon by the Commission, and therefore, the argument is not preserved for the Court's review. *See Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011).

Third, even were the argument properly preserved for the Court's review, the argument is conclusory and therefore abandoned. Appellants cite to no law supporting their position that a doctor's opinion at one point in time as to potential future medical treatment somehow limits the employer's responsibility for any other future medical treatment. Because Appellants fail to identify any law supporting their position, the argument should be rejected as conclusory.

Finally, Appellants presumably assert the argument in a conclusory manner because there is no law in South Carolina supporting their position. South Carolina law is clear that, as ordered by the Commission, a carrier is responsible for medical treatment necessary to cure or relieve a

[2] Claimant addresses here Appellants' argument I.c.

covered work injury. S.C. Code Ann. § 42-15-60(A); *see also Munn v. Nucor Steel*, 336 S.C. 28, 30–32, 518 S.E.2d 289, 290 (Ct. App. 1999) (holding that employer is required to furnish treatment necessitated by work injury). There is nothing in South Carolina's workers' compensation laws that provides that where a physician determines that only certain treatments will be necessary in the future, that physician's determination bars the Commission from concluding other treatments are necessary. Rather, "Section 42-15-60 specifically vest the authority to award additional benefits in the 'judgment of the Commission.'" *Dodge v. Bruccoli, Clark, Layman, Inc.*, 334 S.C. 574, 584, 514 S.E.2d 593, 598 (Ct. App. 1999) (quoting S.C. Code Ann. § 42-15-60). That Appellants' position is contrary to South Carolina law is further shown by the numerous decisions concluding the Commission can order medical treatment even where doctors state the treatment is not necessary. *See, e.g., Hall v. United Rentals, Inc.*, 371 S.C. 69, 85, 636 S.E.2d 876, 885 (Ct. App. 2006) (holding the Commission did not err in ordering an employer to pay for medical treatment where the employer's authorized provider opined the treatment was not necessary and that the claimant had reached maximum medical improvement); *Adkins v. Georgia-Pacific Corp.*, 350 S.C. 34, 564 S.E.2d 339 (Ct. App. 2002) (affirming the Commission's order requiring an employer to pay for additional medical treatment despite the claimant having reached maximum medical improvement).

Therefore, because Appellants' argument that the Commission failed to address whether Appellants remain liable for Claimant's future medical treatment misstates the Commission's ruling, is not preserved for appellate review, is a conclusory argument, and is contrary to South Carolina law, the argument should be rejected.

III. THE COMMISSION DID NOT ERR IN NOT RULING ON PERMANENT DISABILITY BENEFITS BECAUSE THAT ISSUE WAS NOT RAISED TO THE COMMISSION AND NOT PRESERVED FOR APPELLATE REVIEW.[3]

Appellants contend the Commission erred in not ruling on Claimant's permanent disability benefits, but Appellants did not raise this issue to Commissioner Beck, and therefore, the issue is not preserved for appellate review. For an issue to be preserved for appellate review, the issue must be raised to and ruled upon by the trial judge. *Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011) ("At a minimum, issue preservation requires that an issue be raised to and ruled upon by the trial judge."). For workers' compensation claims, the "trial judge" is the single commissioner, and an issue is not preserved for appellate review unless raised to and ruled upon by the single commissioner. *See Rummage v. BGF Indus.*, Op. No. 5822 (Ct. App. Sept. 22, 2021) (Howard Adv. Sh. No. 33 at 64–66) (holding the claimant had not preserved an issue where she raised it for the first time before the Commission's Appellate Panel).

Here, Appellants did not raise the permanency issue to Commissioner Beck. At the hearing, Commissioner Beck stated that Claimant "wishes to hold the issue of compensability to the neck in abeyance pending the surgical outcome of the right shoulder and ask that permanency under any scenario be held in abeyance in this matter as well." (R. p. 728) Appellants did not object to Claimant's request that permanency be held in abeyance. Therefore, Appellants failed to preserve the issue of permanency for appellate review.

Furthermore, the Commission ruling on permanency would have been improper at this procedural posture. A claimant is entitled to additional workers' compensation benefits beyond the costs of treatment where the work injury leaves the claimant disabled. *See* S.C. Code Ann. §§

[3] Claimant addresses here Appellants' argument I.b. which appears to also be Appellants' issue 2 in Appellants' Statement of Issues on Appeal.

42-9-20 & -30; *Johnson v. Beauty Unlimited Landscape Co.*, 379 S.C. 403, 408, 665 S.E.2d 656, 659 (Ct. App. 2008). When treatment restores the claimant to her pre-injury condition, the claimant is not disabled. *Johnson*, 379 S.C. at 408, 665 S.E.2d at 659. Therefore, a permanency determination cannot be made until the claimant completes corrective treatment and reaches maximum medical improvement.

Here, the Commission found Claimant needs a second surgery and has not reached MMI. The Commission cannot determine whether Claimant has a permanent disability until Claimant has had the recommended surgery and reached MMI. Therefore, Appellants seeking a permanency determination at this juncture is premature and improper, and even were the issue preserved, the Commission did not err in not making a permanency determination.

IV. THE COMMISSION DID NOT ERR IN ADMITTING THE SUPPLEMENTAL REPORT OF DR. PAPPAS BOTH BECAUSE APPELLANTS OFFERED NO ARGUMENT IN OPPOSITION TO THE COMMISSION'S BASIS FOR ADMITTING THE REPORT AND BECAUSE THE REPORT WAS ADMISSIBLE UNDER *MORGAN v. JPS AUTOMOTIVES.*

Appellants contend the Commission erred in affirming the admission of Dr. Pappas' supplemental report, but Appellants waived the issue below and have now abandoned the argument by failing to identify any purported error in the Commission's ruling on the issue. Furthermore, even were the issue properly before the Court, the Commission did not err in admitting the supplemental report of Dr. Pappas, and at worst, the admission of Dr. Pappas' report would be harmless error.

First, Appellants waived the issue of the admissibility of Dr. Pappas report because at the hearing before Commissioner Beck, Appellants objected to the admission of Dr. Pappas' supplemental report, and in response, Commissioner Beck offered to continue the hearing to provide Appellants the opportunity to depose Dr. Pappas. (R. pp. 4–5, 12, & 727, lines 5–24)

Appellants declined the opportunity to continue the hearing to a later date and depose Dr. Pappas, yet now contend the admission of Dr. Pappas' supplemental report was improper. The purpose of Regulation 67-612's requirement that evidentiary submissions be made in advance of hearings must be to provide parties an opportunity to review the evidence and conduct any further discovery necessary to assess the evidence. Here, Appellants were offered that opportunity but waived it. Appellants cannot be offered the relief they request, decline that relief, and then claim the failure to receive that relief was error. Appellants were afforded the relief they requested and waived any issue regarding the admissibility of Dr. Pappas' supplemental report.

Second, the Commissioner admitted Dr. Pappas' supplemental report over Appellants' objection on the following grounds: "[Preferred Insurance's] objection to the questionnaire of Dr. Pappas is overruled as I afforded [Preferred Insurance] the opportunity to depose Dr. Pappas before proceeding with the hearing and they declined." (R. p. 12) Appellants' brief to the Commission fails to make any argument that Commissioner Beck erred in finding that Appellants being offered and declining the opportunity to continue the hearing and depose Dr. Pappas was a sufficient basis for overruling Appellants' objection to the admission of the supplemental report. Similarly, Appellants' brief to the Court does not assert any error in the Commission's ruling that Appellants being afforded the opportunity to continue the hearing and depose Dr. Pappas was a legally sufficient basis for overruling Appellants' objection. Having failed to assert any error in the Commission's basis for affirming the denial of the objection, Appellants abandoned this issue. *See Biales v. Young*, 315 S.C. 166, 168, 432 S.E.2d 484, 484 (1993) (holding that a failure to argue there was an error in the alternative basis for a trial court's ruling was an abandonment of the issue and precluded appellate review of the issue); *Harris v. Campbell*, 293 S.C. 85, 87, 358 S.E.2d 719, 720 (Ct. App. 1987) (holding the appellants failed to raise an issue for appellate review where the

appellants objected to the admission of evidence as hearsay but on appeal failed to argue there was any error in the trial judge ruling that the evidence was admissible under exceptions to the hearsay rule).

Even if the issue were not waived, the issue had been preserved, and the Commission's ruling that the report was admissible because Appellants declined to continue the hearing and depose Dr. Pappas was erroneous, all of which are not the case, the Commission still properly admitted the report under *Morgan v. JPS Automotives*. In *Morgan*, the claimant stated in her pre-hearing brief that she was being evaluated by a vocational expert, that the examination and subsequent report were scheduled for shortly after the hearing date, and that she requested the hearing be adjourned with the record left open for the submission of the vocational expert's materials. 321 S.C. 201, 203, 467 S.E.2d 457, 459 (Ct. App. 1996). Applying Regulation 67-613 of the South Carolina Code of Regulations, the Court held the Commissioner should have adjourned the hearing for the submission of additional evidence. *Id.* at 203–04, 467 S.E.2d at 459. The Court rejected the employer's argument that adjournment was not permitted under Regulation 67-613 because the expert had not yet evaluated the claimant, finding "the fact that [the expert] had evaluated [the claimant's] records sufficient to conclude the evidence was in existence at the time of the hearing." *Id.*

Here, the supplemental report of Dr. Pappas falls squarely within the situations in which Regulation 67-613 and the *Morgan* decision permit a hearing to be adjourned and the record left open. Unlike the admissible evidence in *Morgan* which had not yet been prepared by the expert, much less submitted in advance of the hearing, here it is undisputed that the supplemental report of Dr. Pappas was submitted in advance of the hearing. Therefore, the report was in existence and identified prior to the hearing. The only remaining requirement for the supplemental report to be

admissible under Regulation 67-613 and *Morgan* is that it have been "necessary for the decision." S.C. Code Ann. Regs. 67-613(C)(1); *Morgan*, 321 S.C. 203–04, 467 S.E.2d at 459. Appellants presented no argument before the Commissioner or the Commission and do not present any argument to this Court as to why Dr. Pappas' supplemental report would not be necessary to the decision.

Furthermore, the admissibility of the supplemental report was an issue within Commissioner Beck's discretion. *See Trotter v. Trane Coil Facility*, 393 S.C. 637, 645, 714 S.E.2d 289, 293 (2011); *Risher v. S.C. Dep't of Health & Enviro. Control*, 393 S.C. 198, 206, 712 S.E.2d 428, 432 (2011). Commissioner Beck's determination that the supplemental report was necessary to the decision is supported by the evidence in the record and was within Commissioner Beck's discretion. Dr. Pappas' supplemental report presents evidence on whether the injury necessitating Claimant's second shoulder surgery was a new injury or the recurrence and continuation of her October 9, 2015 injury. While not "necessary" in the strictest sense of that term because other evidence in the record supports the Commission's decision that the injury was a recurrence and continuation of the original injury, the supplemental report is "necessary" in that it is needed as support for the Commission's decision. *See* New Oxford American Dictionary 1171 (3rd ed. 2010) (defining "necessary" as meaning "needed" in addition to the stricter meanings of "required" and "essential").

Finally, even were there any error in the admission of Dr. Pappas' supplemental report, the error would be harmless error. *See Muir v. C.R. Bard, Inc.*, 336 S.C. 266, 299, 519 S.E.2d 583, 600 (Ct. App. 1999) (finding the admission of a doctor's report could not warrant reversal because it was harmless error). Where improperly admitted evidence is cumulative of other evidence in the record, the admission of the improper evidence is harmless error. *Id.* Here, Dr. Pappas'

supplemental report is cumulative of the other evidence in the record supporting a finding that Claimant's tendon tear necessitating a second shoulder surgery is a recurrence and continuation of her October 9, 2015 injury, including Dr. Pappas' medical exam notes, Dr. McCoy's exam notes and testimony, and Claimant's testimony. Dr. Pappas' exam notes state that Claimant "has clearly not achieved" MMI, has a "possible failed rotator cuff repair," and needs additional tests to determine whether she has "a residual rotator cuff tear." (R. p. 798) The failure to reach MMI, the failure of a rotator cuff repair, and a residual rotator cuff tear are all consistent with a continuation and recurrence of Claimant's original injury and inconsistent with a new injury.

Similarly, Dr. McCoy stated in his report from a March 29, 2018 evaluation of Claimant: "We think she is probably looking at a new surgery on her right shoulder. . . . We think to a reasonable degree of medical certainty that this situation is directly related to her work injury from 2015." (R. p. 664) Dr. McCoy testified in his deposition that Claimant would not "be where she is right now if it hadn't been for the original work-related injury." (R. p. 449, lines 7–9)

Claimant testified that she did not suffer any new injury to her shoulder. (R. p. 745, line 18–p. 746, line 9) She also testified that she could not have suffered a new injury to her shoulder because she had not been using that arm. (R. p. 745, line 18–p. 746, line 9)

Therefore, even if the Commission did not have Dr. Pappas' supplemental report in the record, the notes of Dr. Pappas and Dr. McCoy and the testimony of Dr. McCoy and Claimant would result in there still being substantial evidence in the record supporting the Commission's decision that Claimant's need for further treatment results from the recurrence and continuation of her October 9, 2015 injury. Accordingly, any error in the admission of Dr. Pappas' supplemental report would be harmless error.

In conclusion, the Court should affirm the Commission on the issue of the admission of Dr. Pappas' supplemental report because Appellants waived the issue, because Appellants abandoned the issue by not asserting there was any error in the Commission's basis for admitting the report, because the report is admissible under *Morgan v. JPS Automotives*, and because any error was harmless error.

V. THE COMMISSION DID NOT ERR IN DESIGNATING DR. PAPPAS AS THE TREATING PHYSICIAN BECAUSE APPELLANTS DID NOT PRESERVE THE ISSUE, BECAUSE APPELLANTS' ARGUMENT IS CONCLUSORY, AND BECAUSE THE COMMISSION DID NOT ABUSE ITS DISCRETION.

Appellants' contention that the Commission erred in designating Dr. Pappas as Claimant's new authorized treating physician should be rejected for any of several reasons. First, the issue is not preserved for appellate review. For an appellate court to review an issue, the issue "must have been raised to and ruled upon by the trial court." *Staubes v. City of Folly Beach*, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000). When the issue was raised to Commissioner Beck, Appellants did not object to Dr. Pappas being named the new treating physician and offered no argument on the issue. Accordingly, the Court should reject Appellants' arguments on this issue as unpreserved.

Second, even were the issue preserved, Appellants' argument is conclusory and should be rejected as such. For an asserted error to be properly before this Court, the appellant must provide arguments and supporting authority, and an assertion lacking such arguments and authority is a conclusory assertion that has been abandoned by the appellant. *See, e.g.*, *First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) ("Appellant fails to provide arguments or supporting authority for his assertion. Thus, he is deemed to have abandoned this issue."); *Mulherin-Howell v. Cobb*, 362 S.C. 588, 600, 608 S.E.2d 587, 593–94 (Ct. App. 2005) ("Initially, we note Council failed to cite any supporting authority for this position. Further, all arguments made are merely conclusory assertions. Concomitantly, the Council abandoned the issue on appeal

and it need not be addressed by this court."). Here, Appellants do not cite any authority in relation to this issue, do not identify any standard applicable to the Commission's decision, and do not identify any purported error in the Commission's designation of Dr. Pappas as the treating physician. Rather, Appellants merely assert their belief that a different doctor would be a better treating physician. Accordingly, Appellants' contention that the Commission erred in selecting Dr. Pappas as the treating physician should be rejected as conclusory.

Finally, even were Appellants' argument on the designation of Dr. Pappas preserved for appellate review and not conclusory, the argument should be rejected because good cause existed for the decision, and the Commission did not abuse its discretion in naming Dr. Pappas. While an employer has the right to select the physician who will provide a claimant with medical care, where the Commission finds "good cause," the Commission can order that a different physician serve as the claimant's attending physician. S.C. Code Ann. § 42-15-60; *see also Gattis v. Murrells Inlet VFW No. 10420*, 353 S.C. 100, 114, 576 S.E.2d 191, 198 (Ct. App. 2003) ("The full commission is afforded much discretion under Section 42-15-60. Where it deems it necessary, the commission may override an employer's choice of medical provider . . . ."). By requiring only "good cause," the decision is within the Commission's discretion. *See Martin v. Rapid Plumbing*, 369 S.C. 278, 292, 631 S.E.2d 547, 555 (Ct. App. 2006) ("The appellate panel is afforded discretion to order medical treatment under section 42-15-60 when a controversy [over the treating physician] arises."); *Gattis*, 353 S.C. at 114, 576 S.E.2d at 198. The decision being within the Commission's discretion and subject to only the "good cause" standard result in an abuse of discretion standard of review on appeal. *See, e.g., Richardson v. P.V., Inc.*, 383 S.C. 610, 616, 682 S.E.2d 263, 266 (2009) ("The standard for granting relief from an entry of default is good cause . . . . The decision whether to set aside an entry of default . . . lies solely within the sound discretion of the trial judge

and will not be disturbed on appeal absent a clear showing of an abuse of that discretion."). The Commission abuses its discretion and good cause does not exist only where the decision is controlled by an error of law or lacks evidentiary support. *See, e.g.*, *Stokes-Craven Holding Corp. v. Robinson*, 416 S.C. 517, 536, 787 S.E.2d 485, 495 (2016) ("An abuse of discretion occurs when the trial court's order is controlled by an error of law or when there is no evidentiary support for the trial court's factual conclusions.").

Here, the Commission did not abuse its broad discretion to name a treating physician. There has been no assertion that the Commission's decision to designate Dr. Pappas was controlled by any error of law. There also is significant evidence supporting the Commission's decision to designate Dr. Pappas. At the hearing before Commissioner Beck, Claimant's counsel asked that Dr. Pappas be named as her authorized treating physician, and in response Appellants' counsel stated that Claimant's former treating physician, Dr. McCoy, is no longer performing surgeries. (R. p. 736, lines 5–6) The good cause supporting the Commission's designation of Dr. Pappas includes: (1) Dr. McCoy was no longer performing surgeries and therefore could not perform the surgical treatment Claimant needs; (2) Claimant requested Dr. Pappas be her treating physician, (3) Appellant did not object to Dr. Pappas being designated as the treating physician; (4) Appellant did not assert that any other doctor would be more appropriate; and (5) Dr. Pappas evaluated Claimant and developed a treatment plan for her. Therefore, while Appellants' challenge to the Commission designating Dr. Pappas as the treating physician should be rejected because the issue is unpreserved and because Appellants' argument is conclusory, even were the issue preserved and supported by arguments and cited authority, the Court should hold that the Commission did not abuse its discretion in designating Dr. Pappas.

CONCLUSION

For the reasons set forth herein, the Commission did not commit any error of law or abuse of discretion and the Commission's decision is supported by substantial evidence in the record. Accordingly, Respondent Ana Rodriguez Galvan respectfully requests the Court affirm the Commission's decision below.

Respectfully submitted,

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January 19, 2022
Summerville, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Appellate Case No. 2021-000585

Ana Rodriguez Galvan, Employee, — Respondent,

v.

Griffin Stafford North Charleston, Employer; Accident Fund General Insurance Company c/o Accident Fund Insurance Company of America, Hartford Accident & Indemnity Co., and Employers Preferred Insurance Company, Carriers, — Defendants.

of whom Griffin Stafford North Charleston, Employer, and Employers Preferred Insurance Company, Carrier, are the Appellants,

and Accident Fund General Insurance Company c/o Accident Fund Insurance Company of America and Hartford Accident & Indemnity Co. are Respondents.

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the Final Brief of Respondent Ana Rodriguez Galvan complies with Rule 211(b) of the SC Appellate Court Rules.

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January 19, 2022
Summerville, South Carolina