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S.C. SUPREME COURT

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

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

**Gene McCaskill, Commissioner
Avery B. Wilkerson, Jr., Commissioner
R. Michael Campbell, II, Commissioner**

**WCC File No.: 1215681
Ct. App. Op. No. 5822
Field May 19, 2021; Substituted September 22, 2021
Appellate Case No. 2022-000003**

Vickie Rummage, Employee,Petitioner,

v.

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

RETURN TO PETITION FOR WRIT OF CERTIORARI

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Respondents BGF Industries and Great American Alliance Insurance Company (hereinafter “Respondents”) oppose the Petition for Writ of Certiorari filed by Petitioner Vickie Rummage (“Petitioner”). The listed reasons set forth in Rule 242(b), SCACR, do not support the issuance of the writ in this case. The case at bar does not involve any novel questions of law. There was no dissenting opinion in the Court of Appeals. The decision of the Court of Appeals does not directly conflict with a prior decision of the Supreme Court. And this case does not directly involve any substantial constitutional or federal issues. This case is a routine worker’s compensation case where the Commission denied certain medical treatment to Petitioner based on substantial, reliable, and probative evidence in the Record. Petitioner continues to receive worker’s compensation benefits. There are no special or important reasons justifying this Court exercising its sound judicial discretion by granting the writ. In fact, at no point anywhere in her Petition for Writ of Certiorari does Petitioner even once list these elements or make any arguments as to how her case meets one or more of these elements.

Accordingly, Respondents respectfully request that this court deny Petitioner’s Petition for Writ of Certiorari.

COUNTER-STATEMENT OF THE CASE

Petitioner suffered an admitted workplace injury on May 18, 2012. She filed a worker’s compensation claim and received treatment for her injury. On November 7, 2016, a hearing was held before the Single Commissioner on Petitioner’s subsequent allegations that the workplace injury had aggravated her pre-existing psychological condition. Petitioner also sought additional treatment with a specialist for these alleged aggravated conditions.

After hearing testimony and reviewing all relevant documents and medical records, the Single Commissioner issued a Decision and Order on March 14, 2017, finding that Petitioner had failed to prove a “compensable aggravation of her pre-existing psychological condition” and that

Petitioner was “not entitled to any workers’ compensation benefits for any medical treatment for her psychological condition.” The Single Commissioner also noted that Petitioner lacked all credibility in every aspect of her testimony. Petitioner has continued to received her weekly worker’s compensation check, and Respondents have continued to authorize causally-related medical treatment.

On March 28, 2017, Petitioner appealed the March 14, 2017 Decision and Order of the Single Commissioner, listing fifty-seven grounds for appeal. (Petitioner’s Form 30). On September 18, 2017, after briefing by the parties, the Full Commission heard oral argument on Petitioner’s appeal.

The Full Commission issued its Decision and Order on February 2, 2018, fully upholding the Single Commissioner’s March 14, 2017 Decision and Order, and finding that Petitioner failed to prove a compensable aggravation of her pre-existing psychological condition.

Petitioner served her notice appeal to the South Carolina Court of Appeals on February 28, 2018.

The Court of Appeals unanimously affirmed the Commission’s Order by published decision, Opinion No. 5822, filed May 19, 2021. Petitioner filed a Petition for Rehearing on June 18, 2021, which the Court of Appeals denied on September 22, 2021, although the Court did substitute a new order with some minor changes.¹ Petitioner filed a Petition for Rehearing on the substituted order on October 22, 2021, which was denied on December 2, 2021.

Petitioner filed this Petition on January 4, 2022.

¹ The only change between the two Orders appears to be the deletion of a discussion about South Carolina Rule of Evidence 608(b) regarding the admissibility of the a prior order at the hearing, with the Court of Appeals noting in the final substituted order that the Rules of Evidence are not controlling in worker’s compensation cases, and thus that discussion was removed in the substituted order.

ARGUMENTS

I. Petitioner failed to preserve for appeal the issue of whether the report of Respondents' IME doctor constitutes "medical evidence" if it did not include the phrase "to a reasonable degree of medical certainty."

Petitioner argues that Dr. Thomas Gaultieri's IME report, submitted by Respondents at the Single Commissioner hearing, does not sufficiently controvert Petitioner's own experts because Dr. Gaultieri did not state his opinions to a reasonable degree of medical certainty under S.C. Code § 42-9-35. Petitioner cites *Michau v. Georgetown County ex rel. South Carolina Counties Workers Compensation Trust*, 396 S.C. 589 (2012), in support of her arguments on this point. Petitioner contends that she provided "competent evidence" in the form of expert witnesses to support her claim, but that Respondents' expert report from Dr. Gaultieri does not constitute competent evidence because it does not include the words, "to a reasonable degree of medical certainty."

However, while Respondents submitted Dr. Gaultieri's report at the Single Commissioner hearing in 2016, Petitioner did not object to the admissibility of that report at the hearing on the basis that she now raises under the *Michau* case, or on any other basis, in fact. And, after the Single Commissioner issued an order, Petitioner failed to raise this issue in any of the fifty-seven grounds for appeal that she provided to the Full Commission. (*See* R. pp. 11-28; Full Commission Order, February 1, 2018, pp. 11-28). In fact, Petitioner mentions Dr. Gaultieri's report only once in her grounds for appeal, in the thirtieth ground for appeal. (R. p. 19; *Id.* at p. 19). In that section, Petitioner attacks Dr. Gaultieri's report on the following bases: (1) that Dr. Gaultieri allegedly created his report prior to meeting Petitioner; (2) that he used his own diagnostic tests when evaluating Petitioner; (3) that Dr. Gaultieri's forty years in his field does not render him qualified to evaluate neuropsychological test data; and (4) that Dr. Gaultieri's findings do not line up with Petitioner's experts. (R. p. 19; *Id.* at p. 19). Nowhere in the grounds for appeal does Petitioner

argue that Dr. Gualtieri's findings are not competent medical evidence because the report lacks the phrase "to a reasonable degree of medical certainty."

Petitioner failed to mention that argument and the *Michau* case at any point in this case until the parties' oral arguments in front of the Full Commission. Petitioner even provided a brief prior to oral arguments that failed to mention this argument or the *Michau* case. Respondents' counsel's first knowledge of Petitioner's argument on this point came when Petitioner's counsel provided him with a copy of the *Michau* case in the midst of oral argument. (R. pp. 127-128; Full Commission Transcript of Oral Argument, p. 8-9).

Respondents were given no notice of this new ground for appeal prior to oral arguments at the Full Commission. Petitioner failed to preserve this argument for appeal. This Court has already held that "[a]n issue not raised in the application for review is not preserved for the full commission's consideration. General exceptions that fail to specifically assign the grounds for error are insufficient to preserve an issue." *Clark v. Aiken Cty. Gov't*, 366 S.C. 102, 108, 620 S.E.2d 99, 102 (Ct. App. 2005) (internal citations omitted). "The findings of fact and law by the hearing commissioner become and are the law of the case, unless within the scope of the Petitioner's exception to the full commission. . . ." *Green v. City of Columbia*, 311 S.C. 78, 80, 427 S.E.2d 685 (Ct. App. 1993). "Only issues within the application for review under S.C. Code Ann. § 42-17-50 (1976) are preserved for appeal to the commission." *Brunson v. Am. Koyo Bearings*, 367 S.C. 161, 165-66, 623 S.E.2d 870, 872 (Ct. App. 2005).

The South Carolina Supreme Court has explained that the policy reasons behind this requirement of specificity ensure that "the opposite party may know what questions are to be raised in the appellate court and **may not be subjected to the danger of having new questions sprung at or just before the hearing.**" *Jones v. Anderson Cotton Mills*, 205 S.C. 247, 31 S.E.2d 447, 450

(1944) (emphasis added). Petitioner did, in fact, spring new questions on Respondents' counsel at the Full Commission hearing, and ultimately failed to raise this issue at the appropriate time, which would have been in the grounds of appeal in Petitioner's Form 30. Therefore, Petitioner's arguments on the competency of Dr. Gualtieri's report were not preserved for appeal and should not be considered.

Ultimately, however, even if Petitioner had preserved this issue for appeal, Dr. Gualtieri's report still constitutes competent medical evidence stated to a reasonable degree of medical certainty. Dr. Gualtieri's report, which was submitted at the Single Commission hearing, was clear and unequivocal in its findings. Dr. Gualtieri met with Petitioner for several hours, reviewed her extensive medical records, and performed multiple tests. (R. pp. 467-477; Respondent's APA #20, page 265-75). Dr. Gualtieri determined, without equivocation, that Petitioner "demonstrated a non-credible clinical presentation, with dramatic inconsistencies." (R. p. 467; *Id.* at 265). He found "clear evidence of symptom exaggeration." (R. p. 467; *Id.*). He also found that Petitioner was at maximum medical improvement, and that despite Petitioner's claims, there was "no evidence that [Petitioner] had a head injury . . ." (R. p. 467; *Id.*). Given Dr. Gualtieri'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 Petitioner's case, it is clear that his report and opinion, in conjunction with Petitioner's non-credible testimony at the hearing, provide ample grounds to support the Commission's decision to deny Petitioner's claim for additional medical treatment for psychological injury.

In her Petition for Writ of Certiorari, Petitioner does not establish or even allege any special or important reasons why the opinion of the Court of Appeals on this issue warrants this Court's review.

II. Petitioner failed to meet her burden of proof, and therefore, the Full Commission’s denial of her claim for aggravation of prior medical condition should be upheld.

A. Petitioner’s own lack of any credibility undermines any information she provided to her own doctors or to the Single Commissioner at the hearing.

The Full Commission, in adopting and affirming the Single Commissioner’s findings, found that that Petitioner was “**not remotely credible**,” a conclusion that the Single Commissioner based on her observations of the Petitioner at the final hearing, “the inconsistencies in her delivery of her testimony, her evasiveness, and on her very ‘selective’ memory at the hearing and at her deposition” (R. p. 58; Single Commission Order, p. 13) (emphasis added). The Single Commissioner determined that Petitioner was “wily and manipulative,” a key determination by the factfinder that must guide this entire appeal. (R. p. 59; Single Commission Order, p. 14).

Although the Full Commission is the ultimate factfinder in workers’ compensation cases, “[i]t is logical for the [Appellate Panel], which [does] not have the benefit of observing the witnesses, to give weight to the Hearing Commissioner’s opinion.” *Fishburne v. ATI Sys. Int’l*, 384 S.C. 76, 90, 681 S.E.2d 595, 602 (Ct. App. 2009). It is “within the single commissioner’s discretion, and ultimately that of the Appellate Panel, to assess the witnesses’ credibility and weigh their testimony in reaching a decision.” *Brunson v. Am. Koyo Bearings*, 395 S.C. 450, 459, 718 S.E.2d 755, 760 (Ct. App. 2011). (“Because the single commissioner had the benefit of observing [the Petitioner] before reaching her decision, we cannot say the Appellate Panel and the circuit court erred in adopting the single commissioner’s finding on this issue.”). Moreover, unlike the blind adherence to expert witnesses that Petitioner demands in her brief, “[t]he Appellate Panel is not bound by the opinion of medical experts” *Sanders v. MeadWestvaco Corp.*, 371 S.C. 284, 292, 638 S.E.2d 66, 70 (Ct. App. 2006). Of course, the question remains whether Single Commissioner’s determination was based on “other competent evidence in the record.” *Burnette*

v. *City of Greenville*, 401 S.C. at 427-28, 737 S.E.2d at 206.

The Single Commissioner did not pull her determination out of the ether. Instead, she based her conclusions on the following evidence, among other things:

- Petitioner's longstanding chronic depression and anxiety disorders, which predated her May 2012 accident (R. p. 59; Single Commission Order, p. 14, ¶ 8);
- Petitioner's selective memory when it came to her pre-accident symptoms and treatment, including medications she had been prescribed just a few days or months prior to the accident (R. pp. 60, 64, 66, 67; *Id.* at pp. 15, 19, 21, 22, ¶¶ 8, 20, 22);
- Petitioner's longstanding chronic migraines and sinus headaches, which predated her May 2012 accident (R. p. 61; *Id.* at p. 16, ¶ 11);
- Petitioner's longstanding sleep difficulties, which predated her May 2012 accident (R. p. 62; *Id.* at p. 16, ¶ 14);
- The expert opinion of Dr. Gualtieri (R. p. 63; *Id.* at p. 18, ¶ 19);
- Petitioner's longstanding situation stressors that caused her depression and anxiety for many years prior to the accident (R. pp. 64-65; *Id.* at p. 19-20, ¶ 21);
- Petitioner's dishonesty with Dr. Collins in failing to inform him of her extensive pre-existing chronic pain, anxiety, depression, and trouble sleeping (and accompanying medication for treatment) (R. p. 67; *Id.* at p. 22, ¶ 23); and
- Petitioner's selective memory and selective disclosure of prior medical history with a series of doctors that she hired to evaluate her (R. pp. 68-69; *Id.* at p. 23-24, ¶¶ 24-27).

Again, as factfinder, the Single Commissioner had access to valuable information that the expert witnesses proffered by Petitioner did not. The Single Commissioner was able to directly

observe Petitioner's demeanor when she testified, especially when Petitioner was cross-examined about her pre-existing conditions. The Single Commissioner also had access to a transcript of Petitioner's testimony at her deposition and could compare Petitioner's responses at her deposition and the hearing to what Petitioner told her various doctors in the years leading up to the final hearing. Based on this holistic view, the Single Commissioner weighed all the evidence and made her findings of facts and conclusions.

In *Fishburne v. ATI System International*, the court of appeals noted that "[t]he reliability of the documents and [the Petitioner's] statements were matters of credibility for the Appellate Panel, which, in upholding the Single Commissioner's order, discounted [Petitioner's] credibility because **she exaggerated her symptoms and made inconsistent statements at the hearing and to her treating physicians.**" 384 S.C. 76, 90, 681 S.E.2d 595, 602 (Ct. App. 2009) (emphasis added). The Petitioner's "inconsistent statements[]" caused the Single Commissioner to question [the Petitioner's] credibility. Therefore, substantial evidence supports the Appellate Panel's decision that [the Petitioner's] testimony was not credible." *Id.* In this case, the hearing commissioner, in her extensive and detailed findings of fact, described the multitude of inconsistent statements that Petitioner made to her various doctors, as well as to the hearing commissioner herself. That, taken in hand with the hearing commissioner's finding that Petitioner lacked credibility in her presentation at the hearing, provides ample evidence that Petitioner lacks credibility in key matters. And, since the nature of her alleged condition depends solely on self-reporting, Petitioner's lack of credibility casts a shadow over her entire case.

- B. The Single Commissioner relied upon ample medical evidence in the record in concluding that Petitioner had failed to meet her burden of proof under S.C. Code § 42-9-35 and that Petitioner's claims for aggravation of prior medical condition should be denied.

The Single Commissioner found that Petitioner's propensity for prevarication tainted any

self-reporting of symptoms that she provided to her own doctors. (R. p. 43; Full Commission Order, p. 43, ¶ 36). The Petitioner pays lip service to the Single Commissioner's discretion as factfinder to determine the credibility of witnesses, but otherwise is simply incredulous that the Full Commission would fail to find for Petitioner. Yet the legal standard is clear that the Single Commissioner does not have to accept the medical opinion of Petitioner's expert simply because the Petitioner presents such testimony at a hearing. If that were the standard, we would not need factfinders at all. The Court of Appeals firmly states that, "[a]lthough medical evidence 'is entitled to great respect,' the Commission is not bound by the opinions of medical experts and may disregard medical evidence in favor of other competent evidence in the record." *Burnette v. City of Greenville*, 401 S.C. 417, 427–28, 737 S.E.2d 200, 206 (Ct. App. 2012), citing *Potter v. Spartanburg Sch. Dist. 7*, 395 S.C. 17, 23, 716 S.E.2d 123, 126 (Ct. App. 2011). "[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." *Palmetto Alliance, Inc. v. S.C. Pub. Serv. Comm'n*, 282 S.C. 430, 432, 319 S.E.2d 695, 696 (1984). The ultimate question for this Court is whether the Commission's determination that her review of the extensive medical evidence, including Dr. Gualtieri's report, along with the Petitioner's overall lack of credibility, provided "competent evidence in the record" to support the Full Commission's decision. It clearly did.

Petitioner's alleged symptoms, because they are neurological in nature, are different from a broken arm or injured spine. The difference is that a broken arm can be objectively determined through an x-ray or visual observation. Petitioner's symptoms, such as feeling depressed or suffering from memory loss, are purely subjective and cannot be objectively observed by medical providers. The doctors that Petitioner saw had to rely solely on the Petitioner's word that she was

suffering from depression, or headaches, or memory loss, or sleep issues. Thus, Petitioner's case rises and falls on her credibility and honesty. Importantly, the Single Commissioner found that Petitioner was "**not remotely credible**," a conclusion that the hearing commissioner based on her observations of the Petitioner at the hearing, "the inconsistencies in her delivery of her testimony, her evasiveness, and on her very 'selective' memory at the hearing and at her deposition" (R. p. 58; Single Commission Order, p. 13) (emphasis added). The Single Commissioner determined that Petitioner was "wily and manipulative," a key determination by the factfinder that must guide this entire appeal. (R. p. 59; Single Commission Order, p. 14).

Ultimately, the Court of Appeals "review[s] the Commission's factual findings of whether an Appellant is entitled to compensation for aggravation of a pre-existing condition under the substantial evidence standard of review." *Murphy v. Owens Corning*, 393 S.C. 77, 86, 710 S.E.2d 454, 458 (Ct. App. 2011). In this case, the Commission's Order is predicated on a plethora of competent and substantial evidence to support the Order's holding, and the Court of Appeals unanimously affirmed the Commission's Order. Therefore, the Order should be affirmed.

In her Petition for Writ of Certiorari, Petitioner does not establish or even allege any special or important reasons why the opinion of the Court of Appeals on this issue warrants this Court's review

III. The prior workers' comp Order was not admitted for that commissioner's opinion of Petitioner's credibility, but rather was admitted to establish that Petitioner's testimony in the current case—that she had little recollection of her previous worker's comp claim—was further evidence of her selective memory and lack of credibility.

Petitioner argues that the Single Commissioner erred in admitting a prior hearing commissioner's order into evidence, because the Commissioner in that prior case had found Petitioner to lack all credibility in that hearing as well. However, as a review of the hearing transcript reveals, Respondents' counsel was not entering the prior order into evidence to show

that Petitioner had been deemed without credibility in the prior hearing. Rather, Respondents' counsel was illustrating yet another example of Petitioner's convenient lapses in memory of events that happen to undermine her case, as well as Petitioner's well-established propensity for prevarication.

At her deposition in the present case, Petitioner admitted that she'd had a prior worker's compensation case for an accident in 2007. (R. p. 430; Petitioner's Dep., p. 11). However, when asked in 2013 whether her prior case had gone to a hearing, Petitioner said she didn't remember. (R. p. 430; *Id.* at 12). Of course, her case *had* gone to a hearing, and Petitioner had testified at that hearing extensively, as did many other witnesses. (R. pp. 478-500; APA # 23). When asked at her deposition in 2013 whether she'd ever had her deposition taken before, she denied it. (R. p. 428; Petitioner's Dep., p. 4). Of course, her deposition *had* been taken before and had been entered as an exhibit at her prior hearing. (R. p. 479; APA # 23, p. 313). When asked at her deposition in 2013 whether she'd had an attorney for her 2007 claim, she affirmatively stated that she did not have a lawyer. (R. p. 430; Petitioner's Dep., p. 12). Of course, she *did* have a lawyer, Steven Haymond of Harris & Graves, for her 2007 claim, who represented her at trial. (R. p. 478; APA # 23, p. 312).

Respondents did not argue that Petitioner's credibility in the prior worker's compensation claim was evidence that she lacked credibility in the instant case. Rather, a review of the hearing transcript reveals that Respondents' counsel was clearly using the prior order for the sole purpose of impeaching Petitioner's credibility on her answers to questions about whether she'd had a hearing on her prior case, whether she'd ever had her deposition taken before, and whether she'd had a lawyer in the previous case. (R. pp. 201-205; Single Commission Hearing Tr. pp. 58-62). Respondents' counsel made no arguments that the Commissioner's determination of credibility in

the prior hearing should be used as a basis for finding that Petitioner was not credible in the present case. Rather, Respondents' counsel was able to demonstrate that Petitioner could not be trusted to tell the truth on even simple matters, such as having a lawyer in a prior case. Ultimately, the Single Commissioner notes that she used the prior Commissioner's order simply to compare with Petitioner's testimony at her deposition in the present case, and the Single Commissioner found that "Petitioner's sworn deposition testimony—regarding her prior workers' compensation claim—is untrue and evasive." (R. p. 71; Single Commissioner Order, p. 26).

Far from being reversible error, Petitioner's argument on this point simply further supports the Full Commission's conclusions: Petitioner has a penchant for prevarication, which further shreds her credibility in this case. The Court of Appeals determined any error in admitting the prior order of the Commission was harmless.

In her Petition for Writ of Certiorari, Petitioner does not establish or even allege any special or important reasons why the opinion of the Court of Appeals on this issue warrants this Court's review.

CONCLUSION

Based upon the foregoing, Respondents respectfully oppose the Petition for Writ of Certiorari filed by the Petitioner Vickie Rummage. The Order of the appellate panel of the Full Commission and the Court of Appeals are consistent with existing law and there are no special or important reasons justifying the issuance of a writ of certiorari. Therefore, the Petition for Writ of Certiorari should be denied.

[signature and date on the following page]

Respectfully submitted,

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