THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE SOUTH CAROLINA WORKER'S COMPENSATION COMMISSION

CASE NO. 2013-000413

RUBENIA B. HAMMOND, ... APPELLANT,

v.

AIKEN REGIONAL MEDICAL CENTER., ... EMPLOYER,

AND

ACE AMERICAN INSURANCE COMPANY C/O
SEDGWICK CLAIMS MANAGEMENT SERVICES, INC.,
ARE THE..... RESPONDENTS.

INITIAL BRIEF OF RESPONDENTS

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STATEMENT OF THE CASE

On November 10, 2008, Claimant/Appellant Rubenia Hammond fell as she was carrying files, sustaining a work-related accident arising out of and in the course of her employment as an administrative assistant. She sustained injuries to her neck, back, and right hip. Consent Order (Sept. 9, 2011). Claimant reached maximum medical improvement of her hip injury on December 7, 2009, and her neck injury on July 18, 2011. APA, p. 224; Downey Dep. p. 13, lines 18-23. On February 10, 2012, Claimant filed a Form 50 request for a hearing to enter an appropriate award of permanent disability benefits. APA, p. 284. Claimant alleged that she sustained compensable injuries to her back, neck, right hip, right shoulder and right arm. *Id.* She sought an award of total and permanent disability based alternatively on total loss of earning capacity from disabling injuries to multiple scheduled members per S.C. Code Ann. § 42-9-10, or a greater than 50% loss of use of the back per S.C. Code Ann. § 42-9-30(21). Claimant's Brief to Commission, p. 11 (Nov. 12, 2012). Claimant also sought life-time causally-related medical treatment pursuant to *Dodge v. Bruccolli, Clark, Layman, Inc.*, 334 S.C. 574, 514 S.E.2d 593 (Ct. App. 1999), including surgery. *Id.* at p. 13.

A hearing was held before Single Commissioner Melody James on May 3, 2012. Decision and Order, p. 1 (Aug. 13, 2012). Based upon the substantial evidence presented, the Single Commissioner found Claimant sustained injuries to her back, neck and right hip. *Id.* at p. 10. The Single Commissioner rejected categorization of Claimant's right shoulder and right arm as additional injured members; instead, the Single Commissioner took into account Claimant's right shoulder and right arm pain as radicular symptoms arising from her neck injury. *Id.* at p. 12. The Single Commissioner

concluded that Claimant suffered a thirty percent loss of use of her spine, thereby rejecting Claimant's assertion of total disability based upon S.C. Code Ann. § 42-9-30(21). *Id.* Further, the Single Commissioner concluded that substantial evidence did not support Claimant's assertion of total disability pursuant to S.C. Code Ann. § 42-9-10. *Id.* Claimant was unable to meet her burden of proving a total loss of earning capacity as a result of her injuries. *Id.*

By Order dated August 13, 2012, Claimant was awarded 90 weeks of permanent partial disability benefits due to a 30% permanent partial disability to her spine, and 39.2 weeks of permanent partial disability benefits due to a 14% permanent partial disability to her right hip. Decision and Order, p. 12 (August 13, 2012). Additionally, Claimant was awarded future causally-related medical treatment in the form of NSAID, pain management and trigger point injections. *Id.* Subsequently, Claimant filed a Form 30, request for Commission review, and a hearing before an Appellate Panel of the Workers' Compensation Commission ("Commission") was conducted on December 18, 2012. Form 30, Request for Commission Review (August 21, 2012); Decision and Order, p. 1 (Jan. 13, 2013). By Order dated January 31, 2013, the Commission upheld all of the Single Commissioner's findings of fact and conclusions of law. *Id.* at p. 15. Claimant timely appealed to this Court.

STATEMENT OF THE FACTS

Claimant Rubenia B. Hammond was employed with Respondent Aiken Regional Medical Center as an administrative assistant on the date of her work-related accident. Hr'g Tr. p. 9 lines 22-25 (May 3, 2012). On November 10, 2008, Claimant fell at work as she was walking through a doorway carrying an armful of charts and was taken to the emergency room complaining of pain in her hip. H'rg Tr., p. 10, line 9 – p. 11, line 11 (May 3, 2012). X-rays of her hip taken at the hospital showed no fractures or dislocations. APA, p. 155. Her hip was normally aligned with no significant soft tissue abnormality. *Id.*

Thereafter, she received treatment from orthopedist Dr. Holford and pain management specialist Dr. Daniel of the Carolina Musculoskeletal Institute. APA, pp. 58-62. Claimant complained of pain in her right hip, and neck pain radiating to her shoulders. APA, p. 105. Dr. Holford noted minimal degenerative changes of her right hip. APA, p. 105. A CT scan of Claimant's pelvis performed on December 9, 2008 showed no fractures but indicated moderate degenerative changes in the right sacroiliac joint. APA, p. 102. Dr. Holford observed normal reflexes, normal lower extremity strength, and normal range of motion in both hips. APA, p. 62. On September 26, 2011, Dr. Holford ordered a lumbar MRI which revealed mild degenerative disc and facet joint disease. APA, p. 59-60. She received pain medication and epidural steroid injections. APA, p. 83, 105.

A functional capacity evaluation ("FCE") was performed on December 3, 2009. APA, p. 103. Musculoskeletal strength tests applied as part of the FCE showed a rating of 4 out of 5 in Claimant's right shoulder, 5 out of 5 in her right elbow, 5 out of 5 in her

right wrist, and 5 out of 5 in her right thumb and fingers. APA, p. 228. In comparison, Claimant's left arm received a strength rating of 5 out of 5 for her left shoulder, elbow, wrist, thumb and fingers. APA, p. 229. Claimant's range of motion test indicated that Claimant's right and left shoulder, elbow, forearm, wrist, thumb and fingers were all within the functional limit. APA, p. 230. An upper extremity endurance test of both right and left arms yielded a rating of "continuous" and "meets job demands" for repetitive grasping, fingering, torqueing, linear reaching and above-shoulder reaching. APA, p. 231. The FCE concluded that Claimant was physically capable of meeting the demands of an administrative assistant position, with the accommodation of alternating sitting, standing and walking as her back pain dictates. *Id.* She reached maximum medical improvement of her right hip on December 7, 2009 with an impairment rating of 5% to the whole person. APA, p. 224.

From 2009 onward, she also received care from Dr. Downey of the Royal Pain Center. APA, p. 54. Dr. Downey continued injections of pain medication and referred her to physical therapy. APA, p. 54, 159, 161. On May 13, 2010, Dr. Downey's physical examination noted muscular weakness in the right arm. APA, p. 46. However, on this same day, an electro diagnostic study ("EMG") of nerves in her arms showed normal distal onset latency, normal amplitude and normal conduction velocity. APA, p. 46. Certain muscles on Claimant's upper right extremity showed increased insertional activity. *Id.* Based on this EMG, Dr. Downey diagnosed Claimant with cervical radiculopathy on the right side of her neck with evidence of reinnervation activity. APA, p. 46; Downey Dep. p. 7, line 16 – p. 8, line 5. "Reinnervation" is defined as "restoration of nerve control of a paralyzed muscle or organ by means of the regrowth of nerve fibers,

either spontaneously or after anastomosis." The American Heritage Medical Dictionary (Houghton Mifflin 2007) *available at* http://medical-dictionary.thefreedictionary.com/reinnervation. She reached maximum medical improvement of her neck injury on July 26, 2011. Downey Dep. p. 13, lines 18-23. Claimant was assigned an impairment rating of 42% impairment of her cervical spine, which translated to 15% to her whole person as a result of her neck injury. APA, p. 218. Dr. Downey testified that Claimant "doesn't have a condition that would be amenable to surgical intervention." Downey Dep. p. 9, lines 10-15.

On February 7, 2012, Dr. Downey opined, based upon a reasonable degree of medical certainty, that Claimant was able to sit for two hours during an entire eight-hour day, stand for two hours during an entire eight-hour day, and walk for two hours during an entire eight-hour day. APA, pp. 12-13. Dr. Downey indicated that she was able to frequently lift or carry up to five pounds, and occasionally lift or carry up to 10 pounds. APA, p. 13. Claimant was able to occasionally bend, kneel and twist. *Id.*

Before the Single Commissioner, when asked to identify where she was experiencing pain, Claimant testified that she has pain in her back and neck. H'rg Tr. p. 11, line 1 – p. 13, line 4 (May 3, 2012). She described the pain in her neck as radiating down her right arm. H'rg Tr. p. 18, lines 3-4 (May 3, 2012). Although she described how her back pain affected her ability to sit for long periods, bend over, perform household chores, and how checking emails on her computer bothered her neck, she did not testify about what if any affect pain radiating from her neck had on her daily life. H'rg Tr. p. 18, line 9 – p. 20, line 6 (May 3, 2012). Claimant testified as to her own belief as to loss of use of her back, but she said nothing about any loss of use of her right

shoulder or arm. H'rg Tr. p. 23, line 25 – p. 24, line 4 (May 3, 2012).

Prior to Claimant's work-related accident, she applied to receive social security retirement benefits. H'rg Tr. p. 26, lines 12-24; p. 47, lines 2-7, lines 17-20 (May 3, 2012). Upon giving notice to Respondent in 2008 that she planned to retire, Respondent asked her to stay until the end of the year. H'rg Tr. p. 22, line 24 – p. 25, line 10 (May 3, 2012). Prior to leaving the employment of Defendants in April 2009, the Defendants extended an offer of employment to her within the restrictions placed upon the Claimant by Dr. Holford. H'rg Tr. p. 27, lines 4-20 (May 3, 2012). The job would have allowed her to alternate between sitting and standing. H'rg Tr. p. 42, line 25 – p. 44, line 10 (May 3, 2012). The Claimant rejected Defendants' offer of employment. Hr'g Tr. p. 27, lines 16-22, p. 45 lines 4-12 (May 3, 2012).

In February 2012, Claimant underwent a Vocational Evaluation by vocational specialist Mr. Leonard, pursuant to the request of the Claimant's attorney. APA, p. 1. Mr. Leonard's evaluation did not include any objective testing of Claimant's physical capabilities. APA, p. 1-11. Instead, Mr. Leonard relied upon Dr. Downey's assessment that Claimant was physically capable of frequently lifting or carrying up to five pounds, occasionally lifting or carrying up to 10 pounds, and occasionally bending, kneeling and twisting. APA, p. 6, p. 12-13. Mr. Leonard stated that "globally, Dr. Downey set forth a functional profile most consistent with 'modified-sedentary' designation." APA, p. 6. He noted that Claimant "did not put forth a concerted effort" on the educational achievement and intelligence tests he administered and thus "advised caution with regard to the application of such scores." APA, p. 7.

Mr. Leonard concluded that Claimant retained "a physio-vocational profile that

falls just short of the expected standards of full-time competitive employment." APA, p. 8. Although he acknowledged the possibility that Claimant is capable of re-entering the work force, he did not evaluate the existing job market for available positions she could perform within her skill set and physical limitations. *Id.* Instead, Mr. Leonard speculated that "it would be very difficult to envision such activities beyond the bounds of 'quality, dependability, and quantity.'" APA, p. 8. Mr. Leonard's report did not mention the fact that Respondent had made an offer of employment to Claimant in April 2009. APA, p. 1-11. Claimant stated that she did not remember informing Mr. Leonard that she received this offer. Hr'g Tr. p. 40 line 22 – p. 41, line 9 (May 3, 2012).

With regards to Claimant's need for future medical treatment, Dr. Downey stated that the Claimant would only need future medical treatment in the form of Cymbalta. Downey Dep., p. 14, line 16 – p. 15, line 7. Dr. Downey testified that Claimant would not need surgery for the Claimant's cervical degenerative disc disease and/or lumbar degenerative disc disease. Downey Dep., p. 9, lines 10-15. Finally, the report prepared by Mr. Leonard states that Claimant is not a candidate for any type of surgery – spinal, orthopedic, or otherwise. APA, p. 4.

Claimant has not worked since leaving her employment with Respondent, and is currently receiving Social Security Retirement Benefits. Hr'g Tr. p. 29, lines 6-15, p. 40, line 12, p. 44, line 23 – p. 45, line 3 (May 3, 2012).

STANDARD OF REVIEW

Judicial review of a Workers' Compensation Commission decision is directed by the substantial evidence rule of the Administrative Procedures Act, S.C. Code Ann. § 1-23-380(A)(5). *Gray v. Club Group, Ltd.*, 339 S.C. 173, 180, 528 S.E.2d 435, 439 (Ct. App. 2000); *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981). The Commission is the ultimate fact finder in workers' compensation cases. *Ross v. American Red Cross*, 298 S.C. 490, 492, 381 S.E.2d 728, 729 (1989). A reviewing court should affirm the decision of the Commission unless it is clearly erroneous in view of the substantial evidence of the whole record. *Lark*, 276 S.C. at 136, 276 S.E.2d at 307. "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 same conclusion the administrative agency reached in order to justify its action." *Etheredge v. Monsanto Co.*, 349 S.C. 451, 456, 562 S.E.2d 679, 681-82 (Ct. App. 2002). The findings of the Commission are presumed to be correct and can be set aside only if unsupported by substantial evidence. *McGuffin v. Schlumberger-Sangamo*, 307 S.C. 184, 185, 414 S.E.2d 162, 163 (1992).

The reviewing court may not substitute its own judgment for that of the Commission as to the weight of the evidence on a question of fact, but may reverse if the decision is affected by errors of law. S.C. Code Ann. § 1-23-380(A)(5); *Etheridge v. Monsanto Co.*, 349 S.C. 451, 455, 562 S.E.2d 679, 681 (Ct. App. 2002). "Where there are conflicts in the evidence over a factual issue, the findings of the Commission are conclusive." *Id.*

ARGUMENT

I. THE COMMISSION COMMITTED NO ERROR IN FINDING NO COMPENSABLE INJURY TO CLAIMANT'S RIGHT SHOULDER AND RIGHT ARM.

The question of whether Claimant sustained an injury is a question of fact. *Therrell v. Jerry's Inc.*, 370 S.C. 22, 26, 633 S.E.2d 893, 895 (2006). In its findings of fact, the Commission found that "Claimant did not sustain injuries to the right shoulder and right arm arising out of and occurring in the course and scope of her employment with Defendants on November 10, 2008." Appellate Panel Decision and Order, p. 10 (Jan. 31, 2013). However, the Commission "considered the effect from the Claimant's neck injury and radicular symptoms in [its] award of permanent disability benefits to the spine." *Id.* at pp. 11-12. Thus, the Commission's finding of a thirty percent (30%) impairment to Claimant's back reflected Claimant's radiating neck pain.

Claimant argues that the Commission erred by failing to find that her right shoulder and arm were additional injuries separate from her neck injury. The Claimant has the burden of proving her case by a preponderance of the evidence. *Frady v. Pacific Mills*, 231 S.C. 601, 607, 99 S.E.2d 398, 401 (1957). An award "may not be based upon conjecture or speculation." *Shealy v. Algernon Blair, Inc.*, 250 S.C. 106, 110, 156 S.E.2d 646, 648 (1967). Findings of fact can be reversed only if the determination was clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. S.C. Code Ann. § 1-23-380(5)(d), (e); *Burnette v. City of Greenville*, 401 S.C. 417, 426, 737 S.E.2d 200, 205 (Ct. App. 2012). Here, Claimant failed to prove a compensable injury to her right shoulder and arm.

At the time of her injury in 2008, Claimant complained of injury to her hip. No mention was made about injury to her right shoulder or arm. Approximately a year after

her injury, a FCE was conducted, which showed little to no loss of use of any of her upper extremities. APA, p. 225-231. Strength tests of Claimants upper extremities showed only a slight difference in strength between her right and left arms. APA, p. 228-229. Claimant's range of motion test indicated that Claimant's right and left shoulder were all within the functional limit. APA, p. 230. An upper extremity endurance test of both right and left arms yielded a rating of "continuous" and "meets job demands" for repetitive grasping, fingering, torqueing, linear reaching and above-shoulder reaching. APA, p. 231.

Dr. Downey diagnosed Claimant with cervical radiculopathy and arthritis in the neck. Downey Dep. p. 5, lines 3-4. Although Dr. Downey indicated that Claimant's cervical radiculopathy "affected the use of [her] right shoulder and arm in that she continues to experience radiating pain into her right shoulder and right arm," he said nothing about whether such affect caused loss of use. *See Roper v. Kimbrell's of Greenville*, 231 S.C. 453, 99 S.E.2d 52 (1957) (discussing compensable injury as a loss of use or capacity). No impairment rating of Claimant's right shoulder and arm was entered into evidence. *See Therrell v. Jerry's Inc.*, 370 S.C. 22, 30, 633 S.E.2d 893, 897 (2006) (holding that Claimant's failure to submit an impairment rating of her arm precludes an award of disability under § 42-1-30). Even with her cervical radiculopathy, Dr. Downey concluded that Claimant could nonetheless frequently lift or carry 5 pounds and occasionally lift or carry 10 pounds. APA, p. 13. A FCE conducted in 2009 showed Claimant's shoulder movements rated at 4 out of 5. APA, p. 228. Due to her cervical radiculopathy, Dr. Downey assigned an impairment of 15% to Claimant's whole body. APA, p. 218, Downey Dep. p. 9, line 16 – p. 11, line 5. On May 3, 2012, Claimant

testified before the Single Commissioner as to loss of use of her back, but she said nothing tangible about any loss of use of her right shoulder or arm. H'rg Tr. p. 23, line 25 – p. 24, line 4. To establish injury to a body part, Claimant must prove loss of use "founded on evidence of sufficient substance to afford it a reasonable basis." *Linen v. Ruscon Constr. Co.*, 286 S.C. 67, 68, 332 S.E.2d 211, 212 (1985). Taken as a whole, this evidence does not support Claimant's argument that she is entitled to a finding that her right shoulder and arm are additional injured members.

Citing to *Simmons v. City of Charleston*, 349 S.C. 64, 562 S.E.2d 476 (Ct. App. 2002), Claimant argues that, so long as her right arm and shoulder are *affected* by her cervical radiculopathy, then she is entitled to compensation for those body parts. *Simmons* set forth the rule that a claimant may seek general disability benefits if she is able to show that an injured member affects other parts of the body. 349 S.C. 64, 76, 562 S.E.2d 476, 482 (Ct. App. 2002). Claimant did not assert the *Simmons* rule below as the basis for general disability and to the extent that she raises it for the first time here, her argument is not preserved for review. *S.C. DOT v. First Carolina Corp.*, 372 S.C. 295, 301-302, 641 S.E.2d 903, 907 (2007).

What's more, Claimant's focus on the word "affect" ignores the simple fact that the Worker's Compensation Act requires a showing of loss of use in order for an injury to be compensable. *See* S.C. Code Ann. § 42-9-30 (describing disability as loss of or loss of use of a body part); *Wigfall v. Tideland Utilities, Inc.*, 354 S.C. 100, 580 S.E.2d 100 (2003) ("An award under the scheduled loss statute, however, is premised upon the threshold requirement that the claimant prove a loss, or loss of use of, a specific 'member, organ, or part of the body.'"); *Singleton v. Young Lumber Co.*, 236 S.C. 454,

471, 114 S.E.2d 837, 845 (1960) (Where the injury is confined to the scheduled member, and there is no impairment of any other part of the body because of such injury, the employee is limited to the scheduled compensation ...."). Claimant must prove more than mere effect upon an additional body part.

Substantial evidence is that which, "considering the record as a whole, would allow reasonable minds to reach the conclusion the agency reached." *McGuffin v. Schlumberger-Sangamo*, 307 S.C. 184, 186, 414 S.E.2d 162, 163 (1992). Here, substantial evidence supports the Commission's determination that Claimant's right shoulder and arm were not additional injured members. When factual findings are supported by substantial evidence, the Commission's findings must be affirmed. *Ross v. American Red Cross*, 298 S.C. 490, 492, 381 S.E.2d 728, 730 (1989). Even if the evidence is taken as conflicting, "the findings of the commission are conclusive." *Rogers v. Kinja Knitting Mills, Inc.*, 312 S.C. 377, 380, 440 S.E.2d 401, 403 (Ct. App. 1994). "The possibility of drawing two inconsistent conclusions from the evidence does not prevent the Commission's finding from being supported by substantial evidence." *Burnette v. City of Greenville*, 401 S.C. 417, 427, 737 S.E.2d 200, 205 (Ct. App. 2012). The Commission committed no error.

II. THE COMMISSION COMMITTED NO ERROR IN DENYING PERMANENT DISABILITY PURSUANT TO S.C. CODE ANN. § 42-9-30(21).

Pursuant to S.C. Code Ann. § 42-9-30(21), "where there is fifty percent or more loss of use of the back the injured employee shall be presumed to have suffered total and permanent disability and compensated under Section 42-9-10(B)." Claimant argues that the Commission erred by failing to find that she lost fifty percent or more of the use of her back. The Commission found that Claimant lost thirty percent of the use of her back.

Appellate Panel Decision and Order, p. 12. Further, the Commission concluded that Claimant "did not satisfy her burden of proving entitlement to total and permanent disability benefits pursuant to ... Section 42-9-30(21)." *Id.* at p. 13. Once again, the Claimant has the burden of proving her case by a preponderance of the evidence. *Frady v. Pacific Mills*, 231 S.C. 601, 607, 99 S.E.2d 398, 401 (1957). Findings of fact can be reversed only if the determination was clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. S.C. Code Ann. § 1-23-380(5)(d), (e); *Burnette v. City of Greenville*, 401 S.C. 417, 426, (Ct. App. 2012). The substantial evidence of this case supports the Commission's rejection of total disability under S.C. Code Ann. § 42-9-30(21).

The medical evidence indicated that Claimant did not experience a 50% or greater loss of use of her back. The only impairment rating of Claimant's back presented as evidence, prepared by Dr. Downey, assigned an impairment rating of 42% loss of use of Claimant's cervical spine due to her work-related injury, which translated to 15% to her whole person as a result of her neck injury. APA, p. 218. Claimant testified that she thought she lost over fifty percent of use of her back, but was unable to assign a particular percentage of loss. H'rg Tr. p. 23, line 25 – p. 24, line 4. Although she testified that she could not sit for long periods, she could alternate between sitting and standing. Tr. p. 18, line 9 – 14. She also testified that her administrative assistant position at Aiken Regional Hospital allowed her to alternate between sitting and standing. H'rg Tr. p. 42, line 23 – p. 44, line 11.

The Commission took Claimant's testimony and Dr. Downey's impairment rating into consideration. Appellate Panel Order, p. 5, p. 9. The Commission is entitled to

weigh the evidence presented and its conclusion in the face of conflicting evidence is not reviewable by this Court. *Swilling v. Pride Masonry of Gaffney*, 401 S.C. 178, 188, 736 S.E.2d 672, 677 (Ct. App. 2012); *Roper v. Kimbrell's of Greenville, Inc.*, 231 S.C. 453, 461 (1957). "The possibility of drawing two inconsistent conclusions from the evidence does not prevent the Commission's finding from being supported by substantial evidence." *Burnette v. City of Greenville*, 401 S.C. 417, 427, 737 S.E.2d 200, 205 (Ct. App. 2012). Thus, the Commission committed no error in finding that Claimant did not meet her burden of proving total and permanent disability under S.C. Code Ann. § 42-9-30(21).

III. THE COMMISSION PROPERLY CONCLUDED THAT CLAIMANT WAS NOT ENTITLED TO TOTAL AND PERMANENT DISABILITY UNDER S.C. CODE ANN. § 42-9-10.

Under S.C. Code Ann. § 42-9-10, total and permanent disability may be awarded "when the incapacity for work resulting from an injury is total." *Watson v. Xtra Mile Driver Training, Inc.*, 399 S.C. 455, 463, 732 S.E.2d 190, 194 (Ct. App. 2012). "The generally accepted test of total disability is inability to perform services other than those that are so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist." *Id.* Whether the Claimant experiences pain or discomfort in performing work activities is irrelevant. The sole criterion is loss of earning capacity.

Claimant has not re-entered the workforce since she left the employ of Respondent in 2009. Hr'g Tr. p. 29, lines 6-15 (May 3, 2012). "The fact that after the injury the employee has not worked and has therefore earned no wages is not in itself determinative of the extent of loss of his earning capacity." *Shealy v. Algernon Blair, Inc.*, 250 S.C. 106, 112, 156 S.E.2d 646, 649 (1967). In this situation, the Claimant must show that she made reasonable efforts to obtain employment and had failed because of an

injury produced handicap." *Id.*; *Coleman v. Quality Concrete Products, Inc.*, 245 S.C. 625, 142 S.E.2d 43 (1965). Claimant failed to prove that she made reasonable efforts to secure employment.

Instead, Claimant's position that she was permanently and totally disabled was based solely on Mr. Leonard's vocational assessment. Mr. Leonard concluded that Claimant retained "a physio-vocational profile that falls just short of the expected standards of full-time competitive employment." APA, p. 8. Although he acknowledged the possibility that Claimant is capable of re-entering the work force, he did not evaluate the existing job market for available positions she could perform within her skill set and physical limitations. *Id.* Instead, Mr. Leonard speculated that "it would be very difficult to envision such activities beyond the bounds of 'quality, dependability, and quantity.'" APA, p. 8. He acknowledged the possibility that Claimant was capable of employment, but was unwilling to look past Claimant's subjective complaints. *Id.* at p. 8. Mr. Leonard did not perform any physical fitness testing of the Claimant. *See* APA, pp. 3-11. Moreover, Mr. Leonard's assessment did not mention that Claimant was offered employment with Respondent after her injury. APA, pp. 1-11. Claimant could not remember informing Mr. Leonard that she had been offered a job with Defendants that complied with her work restrictions. H'rg Tr. p. 40, line 22 – p. 41, line 9 (May 3, 2012). Claimant also failed to mention that she voluntarily chose to turn this job down. In addition, Mr. Leonard twice noted in his FCE report that he questioned the effort put forth by Claimant during the evaluation. APA, p. 7 and 10.

Taking all this evidence together, the Commission found that Claimant did not satisfy her burden of proving total and permanent disability. Mr. Leonard's assessment

acknowledged that Claimant could possibly work. He did not conduct any objective physiological tests to support his opinion that she was nonetheless incapable of work activity. And Mr. Leonard apparently was unaware that Respondent had offered employment to Claimant. The FCE conducted in 2009 as well as Dr. Downey's physiological testing indicated that Claimant was capable of gainful employment. The Commission weighed this evidence and found Mr. Leonard's conclusion of total disability to be unpersuasive. "The Commission need not accept or believe medical or other expert testimony, even when it is unanimous, uncontroverted, or uncontradicted." *Pack v. S.C. DOT*, 381 S.C. 526, 536, 673 S.E.2d 461, 466-467 (Ct. App. 2009). "The weight to be accorded medical opinion testimony is a matter for the Commission." *Harbin v. Owens-Corning Fiberglas*, 316 S.C. 423, 431, 450 S.E.2d 112, 116 (Ct. App. 1994). The Commission committed no error in denying Claimant total and permanent disability under S.C. Code Ann. § 42-9-10.

IV. THE COMMISSION DID NOT ERR IN DETERMINING THAT CLAIMANT IS NOT ENTITLED TO SURGERY AS A COMPONENT OF HER FUTURE CAUSALLY-RELATED MEDICAL TREATMENT.

Pursuant to S.C. Code Ann. § 42-15-60(A), "the employer shall provide medical, surgical, hospital, and other treatment, including medical and surgical supplies as reasonably may be required, for a period not exceeding ten weeks from the date of an injury, to effect a cure or give relief and for an additional time as in the judgment of the commission will tend to lessen the period of disability as evidenced by medical evidence ...." Claimant argues that the Commission ignored a questionnaire filled out by Dr. Holford in which the Claimant's attorney asked Dr. Holford:

> To a reasonable degree of medical certainty, will Ms. Hammond need future causally related medical treatment, including but not limited to, surgery, physical therapy, injections, pain management and prescription

> medications, to tend to lessen her period of disability so that she can maintain her current level of functioning as a result of her neck injury sustained on or about November 10, 2008?
>
> The answer to this question was "yes." APA, pp. 69-70.

Claimant contends that this response satisfies the requirements of S.C. Code Ann. § 42-15-60. However, S.C. Code Ann. § 42-15-60 only requires that the employer provide the medical, surgical, hospital, or other treatment that will tend to lessen the period of disability. The question that Claimant is relying on does not state specifically what medical, surgical, hospital, or other treatment will be needed in the future. In fact, it is intentionally vague and ambiguous in its list of possible treatments to allow for a wide range of interpretations. In that same questionnaire, however, Dr. Holford was also asked specifically to list ***what*** treatments may be needed in the future. APA, pp. 69-70. He chose not to list any treatments. *Id.* If surgical treatments were a possible course of future treatment, Dr. Holford would have included that in the list of future medical treatment in the questionnaire. He did not. Therefore, the only conclusion that can be drawn from his questionnaire is that surgical treatments are not an option for Claimant's future care.

Likewise, Claimant relies on a note written by Dr. Daniels that indicates Claimant may be a candidate for a spinal cord stimulator. No follow up was ever obtained on this note. No consultation has been performed on the viability of a spinal cord stimulator for Claimant. There is nothing in the record to indicate the mention of a spinal cord stimulator is anything except a one-time thought. In addition, Claimant alleges that such a device would involve surgery. There has been no evidence submitted to prove this assertion and any contention that surgery is required would be pure speculation.

Dr. Downey also completed a questionnaire. This questionnaire was identical to the questionnaire filled out by Dr. Holford. APA, pp. 218-219. As in Dr. Holford's

questionnaire, Dr. Downey was asked:

> To a reasonable degree of medical certainty, will Ms. Hammond need future causally related medical treatment, including but not limited to, surgery, physical therapy, injections, pain management and prescription medications, to tend to lessen her period of disability so that she can maintain her current level of functioning as a result of her neck injury sustained on or about November 10, 2008? APA, p. 218.

Like Dr. Holford, Dr. Downey responded by answering "yes." APA, p. 218. However, Dr. Downey also answered the follow up question that Dr. Holford did not answer. Dr. Downey was asked:

> If the answer to question 5 is yes, to a reasonable degree of medical certainty, what future causally related medical treatment, including but not limited to, surgery, physical therapy, injections, pain management and prescription medications, will Ms. Hammond need to tend to lessen her period of disability so that she can maintain her current level of functioning as a result of her neck injury sustained on or about November 10, 2008? APA, p. 218.

Dr. Downey's response to this question was "Continue Symptom Management." APA, p. 218. This means a continuation of pain medication. Downey Dep. p. 5, lines 3-14. With regards to Claimant's need for future medical treatment, Dr. Downey stated that the Claimant would only need future medical treatment in the form of Cymbalta. Downey Dep., p. 14, line 16 – p. 15, line 7. Dr. Downey testified that Claimant would not need surgery for the Claimant's cervical degenerative disc disease and/or lumbar degenerative disc disease. Downey Dep., p. 9, lines 10-15. Finally, the report prepared by Mr. Leonard states that Claimant is not a candidate for any type of surgery – spinal, orthopedic, or otherwise. APA, p. 4.

The Commission did not err when it determined that future casually related medical treatment did not include surgical treatment. The substantial evidence presented shows that no physician has directly recommended surgery as an option for future

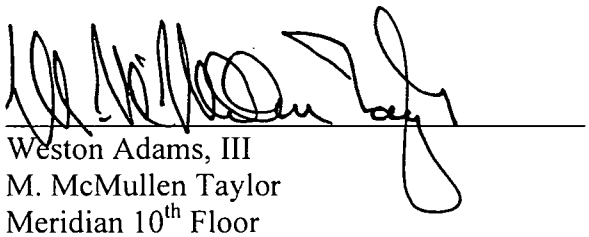
medical treatment. Findings of fact can be reversed only if the determination was clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. S.C. Code Ann. § 1-23-380(5)(d), (e); *Burnette v. City of Greenville*, 401 S.C. 417, 426, (Ct. App. 2012). Substantial evidence supports Commission's findings.

CONCLUSION

For the foregoing reasons, this Court should find no error in the Commission's Order. Claimant has not sustained a work-related injury to her right shoulder and arm. Claimant has not met her burden of proving permanent and total disability. Finally, Claimant is not entitled to surgery as a component of future and causally related medical care.

Respectfully submitted,

McANGUS GOUDELOCK & COURIE, LLC



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June 24, 2013

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE SOUTH CAROLINA WORKER'S COMPENSATION COMMISSION

CASE NO. 2013-000413

RUBENIA B. HAMMOND, ... APPELLANT,

v.

AIKEN REGIONAL MEDICAL CENTER., ... EMPLOYER,

AND

ACE AMERICAN INSURANCE COMPANY C/O
SEDGWICK CLAIMS MANAGEMENT SERVICES, INC.,
ARE THE..... RESPONDENTS.

DESIGNATION OF MATTER
TO BE INCLUDED IN THE RECORD ON APPEAL

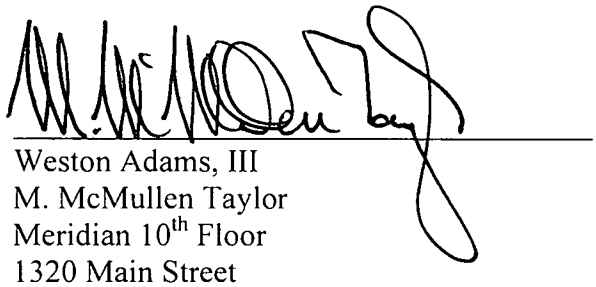
Respondents propose the following to be included in the Record on Appeal:

1. Decision and Order of Single Commissioner (August 13, 2012);
2. Decision and Order of Appellate Panel (January 13, 2013);
3. Transcript of Hearing Before Single Commissioner (May 3, 2012);
4. Claimant's Form 30, Request for Commission Review (August 21, 2012);
5. Claimant's Brief to Commission (Nov. 12, 2012);
6. Consent Order (Sept. 9, 2011);
7. Deposition of Dr. Downey; and

8. APA pages 1-11, 12, 13, 46, 54, 58-62, 69-70, 83, 102, 103, 105, 155, 159, 161, 218, 219, 224, 225-231, 228, 229, 230, 231, 284.

I certify that this designation contains no matter which is irrelevant to this appeal.

McANGUS GOUDELOCK & COURIE LLC



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June 24, 2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Commissioners Wilkerson, Williams and Beck

WCC File No. 0818089

Rubenia B.Hammond,.....Appellant,

v.

Aiken Regional Medical Center., ...Employer,

ACE American Insurance Copmany c/o
Sedgwick Claims Management Services, Inc.,
Are the..... Respondents.

PROOF OF SERVICE

I certify that on the 24th day of June 2013, I served a copy of Respondent's Initial Brief in the above referenced matter by depositing a copy of it in the United States Mail, postage prepaid, addressed to her attorney of record:

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