

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2012CP4004574

Latonya Footman

Johnson Food Services LLC

Hartford

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: _____

Attorney for : Plaintiff Defendant or Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Non-suit); Rule 43(k), SCRPC (Settled); Other _____
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):** Affirmed; Reversed; Remanded; Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order: _____

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge _____ Judge Code _____ Date _____

For Clerk of Court Office Use Only

This judgment was entered on the ____ day of _____, 20 ____ and a copy mailed first class or placed in the appropriate attorney's box on this 3 April 2013 to attorneys of record or to parties (when appearing pro se) as follows:

Andrew Nathan Safran

Ann McCrowey Mickle

Jason Wendell Lockhart

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court

Janette W. Mickle

RICHLAND COUNTY
 FILED
 JANETTE W. MICKLE
 C.L.P. & S.S.
 2013 APR -3 PM 5:43

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

LATONYA FOOTMAN,
Claimant,

Civil Action No. 2012-CP-40-04574

v.

ORDER

JOHNSON FOOD SERVICES, LLC,
Employer,

and

THE HARTFORD,
Carrier,

Defendants.

RICHLAND COUNTY
FILED
2013 APR - 1 PM 2:31
JEANNETTE W. MCBRIDE
C.C.P. & G.S.

This matter came before the Court on March 6, 2013 on Claimant's appeal from the Decision and Order of the Appellate Panel of the South Carolina Workers' Compensation Commission (hereinafter "Full Commission"). Representing Claimant was Andrew N. Safran, Esquire, and representing Defendants was Jason W. Lockhart, Esquire. Based on the extensive record in the case and the arguments of counsel, I make the following findings and conclusions.

STATEMENT OF THE CASE

This claim arises out of a Form 50 filed by Claimant on October 17, 2006. Claimant alleged that she suffered from work-related bilateral arm injuries as a result of repetitive performance of her job duties. Specifically, Claimant alleged she suffered from bilateral carpal tunnel syndrome and bilateral cubital tunnel syndrome. She indicated that the date of injury or diagnosis was September 6, 2006.

SCANNED

This matter came to be heard before the Single Commissioner on June 8, 2011 in Columbia, South Carolina pursuant to Defendants' Form 21 filed on April 5, 2011. The Form 21 was filed on the basis that Claimant's authorized treating physician, Dr. Green, determined that Claimant reached maximum medical improvement (MMI) on March 30, 2011. After determining Claimant was at MMI, Dr. Green assigned a two percent (2%) impairment rating to the left upper extremity and a two percent (2%) impairment rating to the right upper extremity. Defendants asserted that Claimant was entitled to an award of permanent partial disability benefits based on the impairment ratings provided by Dr. Green.

Claimant maintained that she was entitled to an award of permanent partial disability benefits to the left upper extremity and right upper extremity in excess of the impairment ratings provided by Dr. Green (Single Commissioner Hr'g Tr. 4-5). More specifically, Claimant presented the diagnostic report of Dr. Jackson, who conducted an Independent Medical Examination (IME) of Claimant pursuant to the request of Claimant's attorney. Dr. Jackson, in a report dated April 20, 2011, assigned a ten percent (10%) impairment rating to the left upper extremity and a ten percent (10%) impairment rating to the right upper extremity (Single Commissioner Hr'g Tr. 6:7-10). Claimant took the position that she was not seeking additional medical treatment based on the fact that she had reached maximum medical improvement and based on the absence of medical evidence indicating that she was in need of additional medical treatment. (Single Commissioner Hr'g Tr. 6:16-22).

After the hearing, in a Decision and Order dated September 16, 2011, the Single Commissioner determined that Claimant sustained compensable injuries to the right and left upper extremities as a result of Claimant's September 2006 work-related accident (Decision and Order, WCC No. 0617361). The Single Commissioner concluded that Claimant was entitled to



an award of six percent (6%) of permanent partial disability benefits to the right and left arm, respectively, pursuant to S.C. Code Ann. § 42-9-30(13). The Single Commissioner further concluded that the greater weight of the evidence supported a finding that Claimant reached maximum medical improvement on March 28, 2011 and that she is not entitled to future medical treatment pursuant to S.C. Code Ann. § 42-15-60.

Following the Single Commissioner's Decision and Order, Claimant timely appealed the Decision and Order to the Full Commission. A hearing before the Full Commission was held on March 19, 2012. In a Decision and Order signed on May 30, 2012, the Full Commission affirmed each of the Single Commissioner's Findings of Fact and Conclusions of Law with amendments. This affirmation was based "...upon the substantial evidence, including the medical evidence and testimony..." (Appellate Panel Decision and Order, WCC No. 0617361). In each of the relevant Findings of Fact and Conclusions of Law, the Full Commission provided its rationale and justification in the form of citations to the record and substantive statutory law. A Petition for Judicial Review filed by Claimant followed.

At the hearing before the undersigned, Claimant raised three main issues. First, Claimant asserted that the Single Commissioner and Full Commission erred in finding that Claimant was released to return to work with no restrictions. Second, Claimant asserted the Single Commissioner and Full Commission erred in finding that Claimant suffered a 6% permanent partial disability to both the left and right upper extremities. And finally, Claimant asserted that the Full Commission erred in reducing Claimant's award from 26.4 weeks to 22 weeks.

STANDARD OF REVIEW

The Administrative Procedures Act addresses judicial review upon exhaustion of administrative remedies. S.C. Code Ann. § 1-23-380 states:



"A party who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review under this article, and Article 1...For workers' compensation claims with dates of accident before July 1, 2007, appeals from the Appellate Panel are still filed in the court of common pleas of the county in which the alleged accident happened, or in which the employer resides or has his principal office."

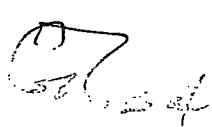
The standard of review for the Court of Common Pleas is as follows:

"(5) The Court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. The Court may affirm the decision of the agency or remand the case for further proceedings. The Court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) affected by other error of law;
- (e) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
- (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion."

S.C. Code Ann. § 1-23-380(5)(a-f).

When the evidence before the Court gives rise to but one reasonable inference, the question becomes one of law for the Court to decide. See Lorick v. S.C. Electric & Gas Co, 245 S.C. 513, 141 S.E.2d 662 (1965). Likewise, if there is absolutely no evidence in support of a finding of fact by the Commission, the question becomes a question of law. See Scott v. Havner Motor Company, 226 S.C. 580, 86 S.E.2d 475 (1955). Where the evidence is not disputed, then it becomes a matter of law. See Smith v. Union Bleachery/Cone Mills, 276 S.C. 454, 280 S.E.2d 52 (1981).



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. See Palmetto Alliance, Inc., v. S.C. Public Service Commission, 282 S.C. 430, 319 S.E.2d 695 (1984). Substantial evidence is

“...evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached, or must have reached in order to justify its action. Substantial evidence is something less than the weight of the evidence and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency’s finding from being supported by substantial evidence. **A judgment upon which reasonable men might differ will not be set aside.**”

Id at 696 referencing Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304, 307 (emphasis added).

Substantial evidence has also been defined as “...relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” Hunter v. Patrick Construction Company, 289 S.C. 46, 344 S.E.2d 613 (1986).

In the appellate review, the Appellate Panel shall, pursuant to S.C. Code Ann. § 42-17-50 (1985), review the award, weigh the evidence that was presented at the initial hearing and, if good grounds be shown therefore, make its own Findings of Fact and reach its own Conclusions of Law consistent with or inconsistent with those of the Hearing Commissioner.

Upon review of a decision of the Full Commission, the trial judge or appellate court is not permitted to substitute his or her or its own findings of fact for those of the Commission. See Brown v. R.L. Jordan Oil Company, 291 S.C. 272, 353 S.E.2d 280 (1987). Nor may the court substitute its judgment for that of the agency as to the weight of the evidence. See Tobey v. L & P Construction Co., 296 S.C. 122, 370 S.E.2d 897 (Ct. App. 1988). The Workers’ Compensation Commission is the fact finder and makes the final determination of witness credibility and the

weight to be given evidence. See Armstrong v. Union Carbide, Inc., 308 S.C. 235, 417 S.E.2d 597 (1992). The findings of the Commission will be set aside only if unsupported by substantial evidence. Id.

LEGAL ANALYSIS

I. THE FULL COMMISSION DID NOT ERR IN AFFIRMING THE SINGLE COMMISSIONER'S FINDING OF FACT THAT CLAIMANT WAS RELEASED TO RETURN TO WORK WITH NO RESTRICTIONS.

Claimant contends that the Full Commission erred in finding that she was released to return to work without restriction. I disagree.

The Single Commissioner made the following finding of fact:

"15. Based on the substantial evidence, including medical records and testimony, I find that the Claimant has been released with no restrictions, and has returned to work (full duty) with both of her employers (Deposition of Dr. Green, pages 31-32; Defendants' APA #1, page 13"

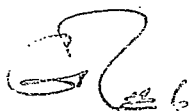
(Decision and Order, WCC No. 0617361).

On appeal, the Full Commission adopted the Single Commissioner's finding of fact as follows:

"15. Based on the substantial evidence, including medical records and testimony, We find that the Claimant has been released with no restrictions, and has returned to work (full duty) with both of her employers (Deposition of Dr. Green, pages 31-32; Defendants' APA #1, page 13"

(Appellate Panel Decision and Order, WCC No. 0617361)

The evidence in the record establishes that Claimant was treated for her injuries, reached maximum medical improvement, and was released to return to work by her authorized treating physician without any restrictions. The Commission reached this conclusion and made this finding of fact based on two specific pieces of evidence: (1) Dr. Green's deposition testimony

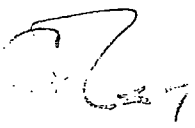


and (2) the South Carolina Workers' Compensation Commission Form 14B filled out by Claimant's authorized treating physician (Dr. Green).

Dr. Green indicated, during his deposition, that he released Claimant to return to regular duty work with no restrictions following her final appointment with his office in August 2008. (Dr. Green Deposition Tr. 30:23 – 31:7). After being told about her job description, Dr. Green stated that she could do it under no restrictions. (Dr. Green Deposition Tr. 32:9-20). He did indicate that if Claimant had come back to him and stated that a particular component of her job really bothered her that he would probably advise her to refrain or minimize that particular activity. (Dr. Green Deposition Tr. 32:20-25). Dr. Green also noted that his review of Dr. Jackson's records indicated that she was "...okay for a moderate level of activity." (Dr. Green Deposition Tr. 33:11-12).

Dr. Green also filled out a Form 14B Physician's Statement for filing with the South Carolina Workers' Compensation Commission. On the Form 14B, Dr. Green (as the authorized treating physician) indicates that Claimant suffered an injury to her left and right upper extremities. (Defendants' APA #1, p. 13). He further indicates that Claimant reached maximum medical improvement on August 11, 2008 and "...is able to return to work without restriction." (Defendants' APA #1, p. 13).

Claimant asserts that Dr. Jackson ordered her to return to work with restrictions. Dr. Jackson's reports do contain a mention of work restrictions. However, that is only one piece of the puzzle the Commissioner and Full Commission considered. The Commissioner and Full Commission also weighed the fact that Dr. Jackson is not Claimant's authorized treating physician. As previously mentioned, the authorized treating physician—Dr. Green—released Claimant to return to work without any permanent restrictions.

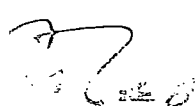


Claimant also asserted that Dr. Green's impairment rating and release is invalid because it was originally issued in 2008. Her rationale for this position is that Dr. Green operated on Claimant after the 2008 release. However, the fact that Claimant was operated on does not serve to invalidate Dr. Green's reports. As the authorized treating physician for Claimant, Dr. Green had to opportunity to re-release Claimant in 2011 following surgery. He also had the opportunity to re-rate Claimant and assign restrictions in 2011. Following the surgery, Dr. Green chose not to increase the impairment ratings or assign work restrictions.

Additionally, Claimant contends that Dr. Green's statements in his report that Claimant may return to work "as tolerated" constitutes a "work restriction." I disagree. There is a plain difference between tolerating work and being restricted from certain work functions or modalities. Dr. Green has never assigned Claimant any permanent work restrictions.

Upon review of a decision of the Commission, the trial judge or appellate court is not permitted to substitute his or her or its own findings of fact for those of the Commission. *See Brown v. R.L. Jordan Oil Company*, 291 S.C. 272, 353 S.E.2d 280 (1987). Nor may the court substitute its judgment for that of the agency as to the weight of the evidence. *See Tobey v. L & P Construction Co.*, 296 S.C. 122, 370 S.E.2d 897 (Ct. App. 1988). 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. *See Palmetto Alliance, Inc., v. S.C. Public Service Commission*, 282 S.C. 430, 319 S.E.2d 695 (1984).

The Commission's finding is founded upon the evidence presented in the record. The Commission's finding of fact contains citations to the source of such finding and provides an insight into the rationale for the finding. The Full Commission Appellate Panel agreed with the



Single Commissioner and affirmed her findings of fact on this issue. In the Order, the Full Commission also cited to portions of the record that contain their rationale for the finding of fact.

While it is possible that the Single Commissioner could have decided that Claimant's statements about her work related issues and Dr. Jackson's reports were indicative of her assertion that she is working with restrictions, after weighing the evidence and viewing the record as a whole, the Single Commissioner and Full Commission chose not make that finding. This is an example of the Single Commissioner and Full Commission weighing the evidence presented at the hearing and making a determination based on that evidence. As noted above, this Court may not "...substitute its judgment for that of the agency as to the weight of the evidence. See Tobey v. L & P Construction Co., 296 S.C. 122, 370 S.E.2d 897 (Ct. App. 1988)." Further, this appears to be an issue where there are two conclusions that can be drawn from the same evidence. And, as noted above, "[a] judgment upon which reasonable men might differ will not be set aside." Palmetto Alliance, Inc., v. S.C. Public Service Commission, 282 S.C. 430, 432, 319 S.E.2d 695, 696 (1984).

The Single Commissioner and Full Commission determination that Claimant had returned to work with no restrictions is based upon the substantial evidence presented at the hearing. Further, the Single Commissioner and Full Commission provided rationale for this decision in their respective Orders. This Court will not set aside that determination simply because an alternate conclusion *could* have been reached. For the foregoing reasons, the Full Commission's Finding of Fact related to Claimant's return to work without restriction is AFFIRMED.

II. THE FULL COMMISSION DID NOT ERR IN AFFIRMING THE SINGLE COMMISSIONER'S FINDING OF FACT AND CONCLUSION OF LAW THAT CLAIMANT SHOULD BE ASSIGNED A SIX PERCENT (6%) PERMANENT PARTIAL IMPAIRMENT RATING TO BOTH THE LEFT AND RIGHT UPPER EXTREMITIES.

Claimant contends that the Full Commission erred in determining that she should be assigned a six percent permanent partial impairment rating to both her left and right upper extremities. I disagree.

The Single Commissioner made the following findings of fact and conclusions of law:

"17. Based on the substantial evidence, including medical records and testimony, I find that the Claimant is entitled to an award of 6% permanent partial disability benefits to the left arm.

"18. Based on the substantial evidence, including medical records and testimony, I find that the Claimant is entitled to an award of 6% permanent partial disability benefits to the right arm.

(Decision and Order, WCC No. 0617361).

and

"7. Pursuant to Section 42-9-30(13), the Claimant is entitled to an award of thirteen and two tenths (13.2) weeks of permanent partial disability benefits, which equals approximately 6% to the right upper extremity"

"8. Pursuant to Section 42-9-30(13), the Claimant is entitled to an award of thirteen and two tenths (13.2) weeks of permanent partial disability benefits, which equals approximately 6% to the left upper extremity"

(Decision and Order, WCC No. 0617361).

On appeal, the Full Commission adopted the Single Commissioner's findings of fact and conclusions of law as follows:

"17. Based on the substantial evidence, including medical records and testimony, We find that the Claimant is entitled to an award of 6% permanent partial disability benefits to the left arm.

“18. Based on the substantial evidence, including medical records and testimony, We find that the Claimant is entitled to an award of 6% permanent partial disability benefits to the right arm.

(Appellate Panel Decision and Order, WCC No. 0617361)

and

“7. Pursuant to Section 42-9-30(13), the Claimant is entitled to an award of eleven (11) weeks of permanent partial disability benefits, which equals approximately 6% to the right upper extremity”

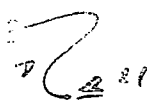
and

“8. Pursuant to Section 42-9-30(13), the Claimant is entitled to an award of eleven (11) weeks of permanent partial disability benefits, which equals approximately 6% to the left upper extremity”

(Appellate Panel Decision and Order, WCC No. 0617361).

The Full Commission reviewed the Claimant’s medical history and went through a lengthy recitation of the factual background in this case. This recitation of facts, summarized below, provides the basis and rationale for its decision to affirm the Single Commissioner’s finding of fact and conclusion of law that Claimant suffered a six percent (6%) permanent partial impairment.

Claimant testified that she began experiencing problems with both hands and wrists on September 6, 2006, while working for Johnson Food Services. (Hr’g Tr. 13:16). Claimant sought and received medical treatment with her family physician, Dr. Gary Bell, who recommended Claimant undergo nerve studies. (Hr’g Tr. 13:19-23). Based on the medical records, Claimant sought and received additional treatment with Dr. Jackson, who diagnosed her with bilateral carpal tunnel syndrome on November 28, 2006. (Cl. APA # 1, p. 1). Claimant underwent a right



carpal tunnel release on March 1, 2007 with Dr. Green of Midlands Orthopaedics. (Def. APA # 1, p. 1).

Approximately one month later, Dr. Green released her from his care, indicating she would see a big difference in her strength and tenderness in the coming months. When Claimant remained symptomatic, she returned to Dr. Jackson on August 12, 2007 and received a recommendation for additional electrodiagnostic testing. Claimant returned to Dr. Green on August 24, 2007 with complaints of shooting pain through her wrists with numbness and tingling to her right ring finger and small finger as well as pain up her arm into her shoulder on the left side. (Def. APA # 1, p. 4).

Thereafter, Claimant underwent an EMG/NCS of both upper extremities to evaluate her ulnar nerve function. Id. Claimant was ultimately allowed to continue her regular work activities. Id. She underwent another EMG/NCS in September of 2007, which revealed very mild right carpal tunnel syndrome and mild left carpal tunnel syndrome. (Def. APA # 1, p. 6). Dr. Green indicated Claimant was not a surgical candidate and recommended a resting splint with repeat nerve studies in 4 to 6 months if symptoms persisted. Id. Dr. Green determined Claimant reached maximum medical improvement with regard to her injuries on February 15, 2008 and assigned a 2% impairment rating to the right upper extremity as well as a 2% impairment rating to the left upper extremity. (Def. APA # 1, p. 8).

Five months later, Claimant sought additional treatment with Dr. Green. At this time, she presented with complaints of continued cubital tunnel type symptoms on her right side as well as left carpal tunnel symptoms. (Def. APA # 1, p. 8). Dr. Green recommended the use of a 45-60 degree extension splint for her right arm as well as an injection into the left wrist and a Sterapred pack for her cubital tunnel syndrome. Id. In addition, Claimant was ordered to light duty for 3-5

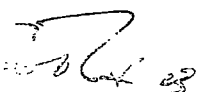
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days secondary to her on going complaints. (Def. APA # 1, p. 10). On August 11, 2008, Claimant presented at a follow-up visit which revealed an improved right mild cubital tunnel syndrome and a mildly improved left carpal tunnel syndrome. (Def. APA # 1, p. 11). Dr. Green indicated Claimant was not symptomatic enough to require surgical intervention and he discharged her from his care. Id. Claimant was placed at maximum medical improvement by Dr. Green on August 11, 2008 for her left and right upper extremities with no increase to her impairment ratings for either upper extremity. (Def. APA # 1, p. 13). Dr. Green indicated that the Claimant will not need future medical care. Id.

Claimant sought and received additional repeat nerve studies from Dr. Redmond on March 26, 2009. (Def. APA # 1, p. 14). These revealed a worsening of her left carpal tunnel syndrome and a finding that the right cubital tunnel syndrome was still mild. Id. Dr. Green indicated that improvement was present in the right carpal tunnel status post release. Id. Dr. Green recommended the Claimant undergo a left carpal tunnel release. (Def. APA # 1, p. 15).

Claimant presented to Dr. Green on September 20, 2010, with complaints of worsening symptoms on the left side. (Def. APA # 1, p. 16). Dr. Green recommended that she undergo another EMG and NCS to evaluate the possibility of Carpal Tunnel Syndrome and possible Cubital Tunnel Syndrome of both upper extremities. (Def. APA # 1, p. 17). On December 27, 2010, Dr. Green determined the Claimant again reached maximum medical improvement and released the Claimant to return to work without restrictions. (Def. APA # 1, p. 19). Dr. Green re-assigned a 2% impairment rating to the left upper extremity and right upper extremity. Id.

Following this final rating and release, at the direction of her attorney, Claimant underwent an independent medical evaluation with Dr. Jackson. Dr. Jackson agreed with Dr. Green and indicated in his diagnostic report dated April 20, 2011 that Claimant was at maximum

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medical improvement with regard to her right carpal tunnel, left carpal tunnel and right cubital tunnel. Dr. Jackson assigned a 10% impairment rating to each upper extremity, which equaled a 12% impairment rating to the whole person. (Cl. APA # 1, p. 14, 15). In addition, Dr. Jackson suggested he would assign permanent restrictions to include "no lifting more than 25 lbs, lifting no more than 12 pieces of chicken on a tray, [and] only opening 10 large cans per day." Id.

At the hearing, Claimant testified that she was currently employed with the Defendants, and was physically capable of performing her job duties and responsibilities with the Defendants. In addition, she stated that Defendants readily provided her with accommodations when she experienced left upper extremity and right upper extremity pain and problems while at work. (Hr'g Tr. 29:1-5). Claimant stated that she did experience ongoing pain and problems with her left upper extremity and right upper extremity while in the course and scope of her employment with the Defendants. (Hr'g Tr. 19:11-23). Claimant testified that she currently experienced numbness and tingling in the fingers of both her left hand and right hand. Id. More specifically, she indicated that she experienced increased pain and problems while engaging in specific activities such as lifting large pans of chicken. (Hr'g Tr. 18:13-18). On the other hand, Claimant indicated that she does not currently utilize any prescription medication for her ongoing left upper extremity and right upper extremity problems and only takes over-the-counter medication approximately 1-2 days per week when she experiences pain in the left upper extremity and right upper extremity. (Hr'g Tr. 36:25, 37:1-8). In addition, Claimant testified that she does not utilize an assistive device on the left upper extremity or right upper extremity despite her ongoing pain and problems. (Hr'g Tr. 29:9-15).

As noted above, the Full Commission spent a great deal of time reviewing Claimant's medical history, the hearing transcript, and other evidence before affirming the Single

Commissioner's findings of facts and conclusions of law. The Full Commission made the following findings of facts that to explain the rationale behind their decisions:

"11. Based on the substantial evidence, including the medical records and testimony, We find that Dr. Green's assignment of impairment ratings to be somewhat inconsistent or, at the very least, ambiguous. Initially (by medical report), authorized treating physician Dr. Green assigned a 2% impairment rating for each upper extremity. At his deposition, Dr. Green states that he agrees with an impairment rating in the range of 2% - 5%. (CITE) Dr. Green also considers the same range to be appropriate for cubital tunnel symptoms (leading the undersigned to conclude that the initial rating was for carpal tunnel symptoms only). Later in his deposition, Dr. Green assigned a total ("collective") 2% impairment rating. However, the last page of the deposition appears (at least to the undersigned) to revert to the 4% - 10% impairment rating for each upper extremity. Then finally, in a 2011 report, Dr. Green seems to revert (again) to a 2% total rating for each upper extremity. Regardless, my awards are based upon other factors as noted herein (Defendants' APA #1, pages 8, 13, and 19; Deposition of Dr. Green, pages 26-28 and 33-34; Claimant's APA #2, page 31)."

"12. Based on the substantial evidence, including the medical records and testimony, We find that Claimant's IME physician ultimately assigned a total 10% rating for each upper extremity. We considered these ratings, but ultimately do not give them as much weight as We give other factors. (Claimant's APA #1, pages 9-10 and 17)."

"14. Based on the substantial evidence, including the medical records and testimony, We find that the Claimant takes no prescription medication for her causally related condition. She takes over-the-counter medication "every now and then." (Hr'g Tr. p. 36, ll. 25) (Hr'g Tr. p. 37, ll. 1-8)."

"15. Based on the substantial evidence, including the medical records and testimony, We find that the Claimant has been released with no restrictions, and has returned to work (full duty) with both of her employers (Deposition of Dr. Green, pages 31-32; Defendants' APA #1, page 13)."

"16. Based on the substantial evidence, including the medical records and testimony, We find that no future medicals have been recommended by the authorized treating physician, and therefore

none are ordered herein. (Cl. APA # 1, p. 15).”

(Decision and Order, WCC No. 0617361).

This Court can reverse findings of fact only if the determination was clearly erroneous in view of the reliable, probative and substantial evidence on the whole record. See Palmetto Alliance, Inc., v. S.C. Public Service Commission, 282 S.C. 430, 319 S.E.2d 695 (1984). Substantial evidence is such “...relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” Hunter v. Patrick Construction Company, 289 S.C. 46, 344 S.E.2d 613 (1986).

Upon review of a decision of the Commission, the trial judge or appellate court is not permitted to substitute his or her or its own findings of fact for those of the Commission. See Brown v. R.L. Jordan Oil Company, 291 S.C. 272, 353 S.E.2d 280 (1987). Nor may the court substitute its judgment for that of the agency as to the weight of the evidence. See Tobey v. L & P Construction Co., 296 S.C. 122, 370 S.E.2d 897 (Ct. App. 1988). The Workers’ Compensation Commission is the fact finder and makes the final determination of witness credibility and the weight to be given evidence. See Armstrong v. Union Carbide, Inc., 308 S.C. 235, 417 S.E.2d 597 (1992). The findings of the Commission will be set aside only if unsupported by substantial evidence. Id.

Claimant relied on two cases at the hearing before the undersigned as support for his position. The first case was Burnette v. City of Greenville, 2012 WL 6028904 (S.C. App.). The second case was Grayson v. Carter Rhoad Furniture, 317 S.C. 306, 454 S.E.2d 320). I find that neither of these cases are persuasive to show that the Commission in this case erred by awarding a 6% impairment rating to each of Claimant’s upper extremities.



In Burnette, the Court of Appeals stated that "...the determination of an injured employees impairment rating is more art than science, involving the consideration of evidence the Commission may gather from the injured employee, medical and vocational experts, and lay witnesses." The Court of Appeals cited to Sanders v. MeadWestvaco Corp., which held:

"While an impairment rating may not rest on surmise, speculation or conjecture ... it is not necessary that the percentage of disability or loss of use be shown with mathematical exactness....

Further, the [Commission] is not bound by the opinion of medical experts and may find a degree of disability different from that suggested by expert testimony. Expert medical testimony is merely intended to aid the [Commission] in coming to the correct conclusion."

371 S.C. 284, 291-92, 638 S.E.2d 66, 70 (Ct. App. 2006) (citations and quotation marks omitted).

Further, in Grayson, the Supreme Court stated, amongst other things, that "[w]here there is conflicting medical evidence, the findings of fact of the commission are conclusive." 317 S.C. 309, 454 S.E.2d 321-22 (*citing Hoxit v. Michelin Tire Corp.*, 304 S.C. 461, 405 S.E.2d 407 (1991)).

The evidence in this case shows that Claimant was assigned two impairment ratings. The first was a 2% rating by Dr. Green (the authorized treating physician) and the second was a 10% rating by Dr. Jackson (Claimant's personal physician). The Single Commissioner undertook a review of the record and awarded permanent disability benefits that she thought reflected Claimant's level of disability based on the substantial evidence. This number was 6% to the left upper extremity and 6% to the right upper extremity. The Full Commission, on review, affirmed this rating based on their review of the record and in-depth analysis of Claimant's medical history.

It is entirely possible that another person would review the evidence and determine Claimant has 4% impairment or 8% impairment to the left and right upper extremities. Drs. Green and Jackson are both medical professionals and disagree on the impairment rating. It is even possible that another person would assign separate and different ratings to each extremity. However, that was not the Full Commission's determination in light of the whole of the evidence.

This is a perfect example of the Single Commissioner and Full Commission weighing the evidence presented at the hearing and making a determination based on that evidence. This Court will not "...substitute its judgment for that of the agency as to the weight of the evidence. See Tobey v. L & P Construction Co., 296 S.C. 122, 370 S.E.2d 897 (Ct. App. 1988)." Further, it appears to the undersigned that this is an issue where there are two conclusions can be drawn from the same evidence. And "[a] judgment upon which reasonable men might differ will not be set aside." Palmetto Alliance, Inc., v. S.C. Public Service Commission, 282 S.C. 430, 432, 319 S.E.2d 695, 696 (1984).

The finding of fact and conclusion of law related to Claimant's impairment rating is based on the evidence presented at the hearing. Further the Single Commissioner and Full Commission provided rationale for their decisions. Therefore this Court cannot, and will not, set aside a judgment simply because an alternate conclusion *could* have been reached. The Full Commission's Finding of Fact and Conclusion of Law related to Claimant's award of six percent (6%) permanent partial disability benefits to each upper extremity is AFFIRMED.

III. THE FULL COMMISSION'S REDUCTION OF CLAIMANT'S PERMANENT PARTIAL DISABILITY AWARD FROM 26.4 WEEKS TO 22 WEEKS WAS THE RESULT OF A SCRIVENER'S ERROR.

Claimant asserts that the Full Commission's decision to reduce the award from 26.4 weeks to 22 weeks was arbitrary and capricious. I disagree.

In the Single Commissioner's Decision and Order, the Single Commissioner made the following conclusion of law:

"7. Pursuant to Section 42-9-30(13), the Claimant is entitled to an award of thirteen and two tenths **(13.2) weeks** of permanent partial disability benefits, **which equals approximately 6%** to the right upper extremity"

and

"8. Pursuant to Section 42-9-30(13), the Claimant is entitled to an award of thirteen and two tenths **(13.2) weeks** of permanent partial disability benefits, **which equals approximately 6%** to the left upper extremity"

(Decision and Order, WCC No. 0617361) (emphasis added).

In the Full Commission Decision and Order, the Full Commission made the following conclusions of law:

"7. Pursuant to Section 42-9-30(13), the Claimant is entitled to an award of eleven **(11) weeks** of permanent partial disability benefits, **which equals approximately 6%** to the right upper extremity"

and

"8. Pursuant to Section 42-9-30(13), the Claimant is entitled to an award of eleven **(11) weeks** of permanent partial disability benefits, **which equals approximately 6%** to the left upper extremity"

(Appellate Panel Decision and Order, WCC No. 0617361) (emphasis added).

Pursuant to S.C. Code Ann. § 42-9-30, an injury to the arm has a maximum possible award of two hundred and twenty (220) weeks. A six percent (6%) impairment rating to the arm is equal to 13.2 weeks of compensation. While the Full Commission affirmed the assignment of a six percent (6%) permanent partial impairment rating, it appears that the Full Commission committed a mathematical and/or scrivener's error in calculating the number of weeks of permanent partial disability to be awarded relative to the assigned permanent partial impairment rating.


It is clear to any person who reads the Full Commission Decision and Order that there was no malicious, arbitrary, and/or capricious intent on the part of the Commission in "reducing" the award. In fact, **the Commission did not reduce the award at all**. It is readily apparent that the Commissioner awarded a 6% rating to each upper extremity. It is further readily apparent that the Full Commission awarded a 6% rating to each upper extremity. This is simply nothing more than a mathematical and/or scrivener's error as it relates to the number of weeks to be awarded based on the uniform impairment rating between the Commissioner and the Full Commission.

Based on a six percent (6%) rating, Claimant is entitled to 13.2 weeks of permanent partial disability for each arm. The Full Commission's finding of fact and conclusion of law on this issue should be **AFFIRMED BUT MODIFIED** to reflect 13.2 weeks of compensation.

ORDER

Based on the discussion herein, it is ordered that this case be **AFFIRMED AS MODIFIED**.


_____, 2013
Columbia, South Carolina



G. Thomas Cooper, Jr.
Judge, Fifth Judicial Circuit