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**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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Appeal from the South Carolina  
Workers' Compensation Commission  
Appellate Panel

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Appellate Case No. 2024-000038

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Debra Wilson, Claimant,

Appellant,

v.

NHC Homecare Midlands, Employer and  
Premier Group Insurance Company, Carrier,

Respondents.

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INITIAL BRIEF  
OF RESPONDENTS

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## STATEMENT OF ISSUES ON APPEAL

The Appellant set forth the following Statement of Issues on Appeal in her brief for this matter:

I. Did the Commission Panel err as a matter of law “in violation of the statutory provisions” of SC Code § 42-9-30(21) requiring reversal by vacating the award to the back and remanding requiring a bifurcation and consideration of only part of the back for an award to the back?

Pursuant to Rule 208(b)(2), SCACR, the Respondents respectfully submit that the following issues are presented to the Court in this appeal:

I. IS THERE SUBSTANTIAL EVIDENCE CONTAINED IN THE RECORD FOR THIS MATTER TO SUPPORT THE APPELLATE PANEL’S FINDINGS AND CONCLUSIONS THAT THE CLAIMANT SUSTAINED INJURIES TO HER LOWER BACK, HER ARMS AND HER PSYCHE AS A RESULT OF AN ACCIDENT ARISING OUT OF AND IN THE COURSE OF HER EMPLOYMENT WITH THE EMPLOYER, AND FURTHER THAT THE CLAIMANT’S NECK PROBLEMS HAVE NOT BEEN FOUND TO BE COMPENSABLE AS PART OF THIS MATTER?

II. DID THE APPELLATE PANEL OF THE COMMISSION ERR BY REMANDING THIS MATTER TO COMMISSIONER CAMPBELL, THE INITIAL HEARING COMMISSIONER FOR THIS CASE, FOR AN ANALYSIS AND DETERMINATION OF DISABILITY TO THE BACK AS A RESULT OF THE CLAIMANT’S ADMITTED LOWER BACK INJURY?

## STATEMENT OF THE CASE

This matter is a worker's compensation case. The parties agree that the Appellant, Debra Wilson, deceased, sustained injuries to her low back, right and left arms and psyche on April 27, 2016 as a result of an accident arising out of and in the course of her employment with the Employer, NHC Homecare Midlands. The Respondents, however, deny that Ms. Wilson sustained an injury to the cervical region of her spine - that is, her neck - as a result of the 2016 accident.

Following this accident the Respondents authorized and paid for certain medical treatment Ms. Wilson received for the injuries they agreed were caused by the accident and also paid temporary total compensation to her pursuant to the provisions of the South Carolina Workers' Compensation Law ("the Act"). While being treated for these injuries Ms. Wilson was diagnosed with lung cancer, and died on February 23, 2021. There is no dispute that her death was not caused by the accident in April 2016.

Before Ms. Wilson died both her and the Respondents filed requests for a hearing before the South Carolina Workers' Compensation Commission, asking that a Commissioner hear the issues presented in this case and issue an award of permanent compensation. (Appellant's Form 50 and Respondent's Form 51 and 21).

Because Ms. Wilson died before the hearing was scheduled the parties undertook to have a dependency investigation performed as required by S.C. Code Ann. § 42-9-280 (1976), and in order to identify the lawful beneficiaries of the award of compensation due in this matter. That investigation determined that Ms. Wilson's husband, Timothy Wilson, was her sole dependent. As such, he is entitled to receive the award of compensation to be made in this case. (Dependency Investigation).

A hearing for purposes of determining and issuing that award was held before Commissioner R. Michael Campbell, II on October 20, 2021. At that hearing the Appellant sought an award of five-hundred weeks of compensation for permanent and total disability under the provisions of S.C. Code Ann. § 42-9-30 (21) (1976). Such an award is proper in this case only if the Appellant shows that Ms. Wilson sustained more than fifty-percent of the loss of her back directly as a result of the accident in 2016.

Further, if Ms. Wilson sustained more than fifty-percent of the loss of her back as a direct result of her accident, the Respondents contend that they have rebutted the presumption that she was permanently and totally disabled as a result of her accident and before her death. See § 42-9-30 (21), *infra*. (“The presumption set forth in this item is rebuttable.”). The Respondents do agree, however, that Mr. Wilson is entitled to receive the award of compensation in this matter for the disabilities Ms. Wilson sustained to her lower back and her arms and psyche pursuant to the scheduled member provisions of S.C. Code Ann. § 42-9-30 (1976).

Commissioner Campbell issued his Decision and Order for this case on December 24, 2021. He found that Ms. Wilson had sustained more than fifty-percent loss of use of her back as a result of her accident. (Campbell Decision and Order). He also determined that she was rendered permanently and totally disabled as a result of that accident and awarded five-hundred weeks of compensation to her husband. (Campbell Decision and Order).

The Respondents requested Full Commission Review of Commissioner Campbell's Decision and Order. (Form 30). Following the submission of appellate briefs by the parties a hearing was held before an Appellate Panel of the Commission on January 23, 2023. (Parties' Commission Review Briefs). On June 9, 2023 the Panel issued its Decision and Order vacating Commissioner Campbell's decision and remanded this case to him. In that decision the Appellate Panel set forth the following conclusions of law:

5. Pursuant to S.C. Code Ann. § 42-1-160 (1976), and other applicable law and regulation, the Claimant sustained an injury to her lower back, her arms and her psyche as a result of an accident arising out of and in the course of her employment with the Employer.

6. Pursuant to S.C. Code Ann. § 42-1-160 (1976), and other applicable law and regulation, the Claimant's neck has not been found to be compensable as part of this matter.

(Appellate Panel Decision and Order).

The Appellate Panel then issued the following order:

IT IS ORDERED that the Panel vacates the determination of disability to the Claimant's back, and remands this matter to the Hearing Commissioner for an analysis and determination of disability to the back as a result of the Claimant's admitted lower back injury.

(Appellate Panel Decision and Order).

The Appellant then asked that the Panel reconsider its decision which was denied. (Motion for Reconsideration and Order denying Motion). The Appellant then filed a Notice of Appeal of the Appellate Panel's Decision and Order, and has filed her brief in support of her positions in this case. (Notice of Appeal). Contemporaneously with the filing of this brief the Respondents have filed a Motion to Dismiss this appeal on the basis that it is interlocutory and unappealable at this time.

## ARGUMENTS

I. THERE IS SUBSTANTIAL EVIDENCE CONTAINED IN THE RECORD FOR THIS MATTER TO SUPPORT THE APPELLATE PANEL'S FINDINGS AND CONCLUSIONS THAT THE CLAIMANT SUSTAINED INJURIES TO HER LOWER BACK, HER ARMS AND HER PSYCHE AS A RESULT OF AN ACCIDENT ARISING OUT OF AND IN THE COURSE OF HER EMPLOYMENT WITH THE EMPLOYER, AND THAT THE CLAIMANT'S NECK PROBLEMS HAVE NOT BEEN FOUND TO BE COMPENSABLE AS PART OF THIS MATTER.

This Court's review of the Appellate Panel's decision in this case is governed by the South Carolina Administrative Procedures Act. S.C.Code Ann. § 1-23-380, et seq. (Supp.2014); Grant v. Grant Textiles, 372 S.C. 196, 641 S.E.2d 869 (2007) ; Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981). On appeal this Court decides whether or not the Appellate Panel's decision is supported by substantial evidence or is affected by an error of law. Grant, 372 S.C. at 201, 641 S.E.2d at 871. As our Supreme Court has ruled:

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 conclusion that the administrative agency reached or must have reached in order to justify its action.

Adams v. Texfi Industries, Inc., 341 S.C. 401, 535 S.E.2d 124 (2000).

The substantial evidence test need not and must not be either judicial fact-finding or a substitution of judicial judgment for agency judgment, and a judgment upon which reasonable men might differ will not be set aside.

Holmes v. National Service Industries, Inc. , 395 S.C. at 308, 717 S.E.2d at 752 (2011) (quoting Lark, 276 S.C. at 136, 276 S.E.2d at 307 ).

The findings of an administrative agency are presumed correct and will be set aside only if unsupported by substantial evidence. A court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may reverse the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or

decisions are clearly erroneous in view of the reliable, probative and substantial evidence of the whole record.

Rodney v. Michelin Tire Corp., 320 S.C. 515, 466 S.E.2d 357 (1996).

The Appellant's only exception to the Appellate Panel's decision is that it erred by "vacating the award to the back and remanding requiring a bifurcation and consideration of only part of the back for an award to the back." The Respondents understand this exception to mean that the Appellate Panel erred by (1) vacating Commissioner Campbell's decision, (2) remanding this case to him (3) requiring him to "bifurcate" the Appellant's back and (3) requiring him to consider only the Appellant's lower back for purposes of issuing an award in this case.

On Page 9 of her brief the Appellant complains that the Respondents failed to set forth in their Form 30 any exception to Commissioner Campbell's decision "which requested a bifurcation of the back or alleged that the cervical spine was not accepted". First, counsel for the Respondents has to express that they do not fully understand this complaint. That said, the Respondents agree that they did not ask Commissioner Campbell to "bifurcate" the Appellant's back.

The Respondents, however, from the beginning of this case accepted responsibility for the injury to Ms. Wilson's lower back but have denied she injured her neck as a result of the accident in 2016. In that sense the Respondents certainly asked the Commission to determine which areas of Ms. Wilson's back - that is, the lower back or lumbar region, the middle or thoracic region and the neck or cervical region - were injured and thus compensable under the Act as a result of the accident in 2016, and also contributed to her disability. The Appellant does not disagree with this approach, as will be demonstrated later.

The Respondents' Form 30 for this matter did include the following exceptions to

Commissioner Campbell's decision:

1. Did the Single Commissioner err in failing to set forth adequate findings of fact and conclusions of law as part of the Decision and Order for this matter?

2. Did the Single Commissioner err in finding as a fact and in concluding as a matter of law that, "[I]n Dr. Forrest's opinion, the claimant is totally disabled. She has permanently lost greater than 50% use of her spine...Her cancer diagnosis is unrelated to her neck and back symptoms since the accident or her disability."?

8. Did the Single Commissioner err in finding as a fact and in concluding as a matter of law that the Claimant is entitled to compensation and other benefits for permanent-total disability under the Act?

(Respondents' Form 30)

Exception No.1 above was included in the Respondents' Form 30 because Commissioner Campbell did not make any specific findings with respect to the compensability of Ms. Wilson's neck problems. Exceptions 2 and 8 were included to challenge his conclusion that Ms. Wilson suffered a loss of more than fifty-percent of her back, as it is plain from reading his decision that he included Ms. Wilson's neck as part of his analysis and finding that she had suffered such a significant loss of use. (Decision and Order of Commissioner Campbell, Conclusion of Law No. 9).

Importantly the Appellant did not except to any of Commissioner Campbell's findings and conclusions in this case, which are replete with references to the separate regions of Ms. Wilson back, and specifically her lower back and cervical region and neck. Thus, the Appellant agrees that Commissioner Campbell has already divided and assessed the impairment to at least two areas of Ms. Wilson's back for purposes of issuing an award in this case. Frankly, a review of his Decision and Order might lead one to conclude that he presumed that the Respondents had accepted the compensability of Ms. Wilson's neck as part of this matter, which

is not accurate.

The Appellant also cites Sanders v. Meadwestvaco Corp., 638 S.E.2d 66, 371 S.C. 284 (S.C. App. 2006) for the proposition that the Commission may not divide parts of Ms. Wilson's back for purposes of entering an award of compensation here. The Appellant contends that the Appellate Panel erred when it remanded this case to Commissioner Campbell to address only the extent of disability the Appellant sustained due to the "admitted injury to her lower back". (Appellate Panel Decision and Order).

In Sanders an Appellate Panel of the Commission determined that the claimant was entitled to compensation for "permanent loss of use of the lumbar spine and SI joint." The self-insured employer, Meadwestvaco, complained that the Panel made a scheduled member award to Mr. Sanders under § 42-9-30(19) which does not specifically include the lumbar spine and SI joint.

This Court then stated:

In affirming the Appellate Panel, the circuit court interpreted the Appellate Panel's order to have awarded benefits based on injuries to the back. The circuit court concluded "[a] review of the record reflects that these injuries and disabilities were clearly to the back." Westvaco's argument that because the Appellate Panel's order was too specific in identifying the regions of the back where Sanders' loss of use occurred and that these regions are somehow separate from the back itself is without merit.

Accordingly, even though the SI joint and lumbar spine are not specifically mentioned in section 42-9-30, we find no reversible error in the manner in which the Appellate Panel characterized Sanders' injuries.

Sanders at p. 69.

The Appellant also cites Ellison v. Frigidaire Home Products, 371 S.C. 159, 638 S.E. 2d 664 (1976) for the proposition that the Commission, when determining an injured worker's

disability, may consider the combined effects of accepted injuries to that worker's body and other unrelated physical problems or limitations he or she may have. The Supreme Court there relied upon the provisions of S.C. Code § 42-9-400(a)(2007) in reaching its decision in that case.

If the Appellant is truly relying on the Ellison decision then she agrees that the Commission, when entering an award in this case, should consider the combined effects of Ms. Wilson's admitted and accepted lower back injury with her unrelated neck problems. That is, the Appellant agrees that her entire back may be divided into separate regions for purposes of considering her overall disability.

Section 42-9-400(a) was amended by the South Carolina Legislature in 2007. That amendment deleted the phrase "by reason of the combined effects of the preexisting impairment and subsequent injury" and substituted it with the phrase "and is caused by". Thus, Ellison no longer stands for the proposition that an injured worker may combine accepted injuries and other unrelated physical problems for purposes of determining their permanent disability under the Act. However, the fact remains that the Appellant recognizes that the regions of the back are divisible for purposes of analyzing an injured worker's disability.

The Appellant has the burden in this case of establishing that Ms. Wilson's neck problems are related to the accident in April of 2016. She has not done so in this case and, as noted, she did not except to Commissioner Campbell's failure to make a specific finding in that regard. A review of the path of this case is helpful to understanding why the Appellate Panel determined that Ms. Wilson's neck problems have not been deemed compensable in this case. At the time of her accident Ms. Ms. Wilson was employed as an office manager for NHC Homecare Midlands in Columbia, South Carolina. (Def. APA, Page 182). She testified at her deposition that

the accident occurred when one of her toes became caught on her chair while walking around her desk, causing her to fall to the floor. (Def. APA pg. 187).

After the accident Ms. Wilson continued working for the Employer, albeit under some restrictions, as she felt that she could not return to an “eight-hour-a-day job, five days a week,” despite testifying earlier that she could work. (Def. APA pg. 204). She also testified that her condition had been the same since the date of accident and the date of her deposition. (Id. at pg. 101).

Ms. Wilson was treated by an occupational health provider for two years before being referred to Coleman Fowble, M.D. at Midlands Orthopedics and Neurosurgery. An MRI of her lower back, dated July 25, 2016, showed no significant cord compression, but some evidence of facet arthritis at L4-5 and L5-S1. (Clmt. APA, p.). As a result Dr. Fowble ordered physical therapy and prescribed medication for her. (Clmt APA 7, pgs. 141-43). After the course of physical therapy provided minimal relief, Dr. Fowble ordered a series of injections in Ms. Wilson’s lower back, which also only provided minimal relief. (Clmt. APA 7). Dr. Fowble then referred Ms. Wilson to Ivan LaMotta, M.D. to evaluate the Respondent’s lower back problems.

Dr. LaMotta evaluated Ms. Wilson on March 23, 2017 and issued a report stating that she had reached maximum medical improvement with respect to her low back injury, and assigned her a 0% impairment rating. He also indicated she did not need any additional medical treatment. (Clmt. APA 7, pgs. 111-114). He specifically stated:

The patient has been treated appropriately. At this point she has reached maximum medical improvement. Surgery is not indicated. At this point she has exhausted conservative care. I see no need to continued medical management in terms of her low back. Besides recommending weight loss and a home care exercise program, I do believe that she will continue to require treatment for her bilateral carpal tunnel syndrome with Dr. Fowble. There is no loss of function for her lumbar spine.

There is no need for further follow up in terms of her lumbar spine is concerned. I see no contradictions for the patient to participate in light-duty work with a push-pull restriction of 20 pounds. No prolonged standing, twisting, or stretching. No kneeling, squatting or crawling.

(Claimant's APA No. 114).

The Respondents, upon her request, then referred Ms. Wilson to Thomas Holbrook, M.D. to evaluate her neck complaints. (Dr. Holbrook's report). In his report Dr. Holbrook concluded that while Ms. Wilson experienced neck pain, the entirety of his opinions in no way leads to any conclusion that she sustained any injury or major issues which would rise to a level to create any significant cervical impairment, if any at all. Interestingly, Commissioner Campbell did not address Dr. Holbrook's findings and conclusions.

Ms. Wilson's counsel arranged for her to participate in a functional capacity evaluation which was performed by Tracy Hill, a physical therapist, on September 3, 2019. (Clmt. APA 2, p. 5). In her report Ms. Hill provided the following impairment ratings for Ms. Wilson: 3% to her right hand, 5% to her left hand, 23% to her neck and 11% permanent to her lower back. (Id., pgs. 33-34). Ms. Hill, however, further stated:

The results of the Functional Capacity Evaluation performed on this date indicate that she can meet the demands of limited sedentary to limited light work.<sup>1</sup> She tolerates occasional walking, bending, twisting and reaching. She does not tolerate occasional stairclimbing, kneeling or squatting. She can lift from 5 to 11 pounds at various heights on an occasional basis. She can carry 11 pounds with 2 hands. She can carry 7 pounds in the left hand. She can push 14.2 foot pounds loaded in a sled and can pull 14.2 foot pounds loaded in a sled. She has a self-reported sitting and standing/walking tolerance of approximately 30 and 45 minutes respectively. She was observed to sit for a maximal time of 38 minutes and stand/walk for a maximal time of 20 minutes.

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<sup>1</sup> Of note, Ms. Wilson's job duties with the Employer as an Office Manager fell within these parameters of physical requirements.

(Claimant APA, P. 5).

These findings were not addressed in Commissioner Campbell's Decision and Order for this case. They bear directly not only the issue of the degree of the loss of use to two areas of Ms. Wilson's back, and their relationship to her ability to work at some physical level.

Counsel for Ms. Wilson then made arrangements for her to be evaluated by Leonard Forrest, M.D. in Mt. Pleasant, South Carolina. In his report dated September 9, 2019 Dr. Forrest stated that Ms. Wilson had reached maximum medical improvement and adopted verbatim the impairment ratings given by Ms. Hill. (Clmt APA 1). It is absolutely clear that Dr. Forrest uses Ms. Wilson's neck complaints as a factor in concluding that she has lost more than 50% of the use of her back.

Mr. Wilson testified at the hearing before Commissioner Campbell. He related the pain, discomfort and limitations his wife experienced with respect to all of her medical issues, including those related to her cancer diagnosis. However, in response to questions posed by Appellant's counsel he not once made reference to her neck complaints, despite the fact that he understood the difference between the areas of her back. In particular, he stated:

Q: Okay. Now, in reference to – she – she had carpal tunnel that came from this fall and – where – she turned and fell, landed on her hands *and then her back and – and her neck*. Tell me this, her major problem's what?

A: Her major problem?

Q: Yeah.

A: It was her back.

Q: Her back?

A: Yeah.

(Transcript of Campbell Hearing, p. 61, L. 12 to L. 21 - Emphasis added).

The Respondents, therefore, submit that there is substantial evidence contained in the record for this matter to fully support the Appellate Panel's decision in this case. The Panel correctly found that Ms. Wilson suffered injuries to her lower back, arms and psyche. The Panel further and correctly found, based on the evidence presented, that Ms. Wilson's alleged neck problems have not been found to be compensable in this case.

II. THE APPELLATE PANEL OF THE COMMISSION DID NOT ERR BY REMANDING THIS MATTER TO THE HEARING COMMISSIONER FOR AN ANALYSIS AND DETERMINATION OF DISABILITY TO THE BACK AS A RESULT OF THE CLAIMANT'S ADMITTED LOWER BACK INJURY.

The Appellate Panel of the Commission correctly found that Ms. Wilson's alleged neck problems have not been found to be compensable as part of this case. As noted the Respondents contend that an award in this case is proper only under the provisions of § 42-9-280 (1976), given that Ms. Wilson died before an award of permanent compensation could be made for her. Thus, the Respondents agree, consistent with the Appellate Panel's decision, that this matter should be remanded to Commissioner Campbell to enter an award under that statutory provision, without consideration of Ms. Wilson's alleged neck problems.

### **CONCLUSION**

Based on the foregoing, the Respondents respectfully submit that the Decision and Order of the Appellate Panel dated June 9, 2023 should be affirmed and this matter should be remanded to Commissioner Campbell for further proceedings as directed by that decision.

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