

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
APPELLATE PANEL, WORKERS' COMPENSATION COMMISSION

WCC File No.: 1101678

Appellate Case No.: 2013-001499

Sean Daley, Appellant

v.

Chapman Mechanical and
Stonewood Insurance Company
are the Respondents.

INITIAL BRIEF OF THE APPELLANT

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SC Court of Appeals

TABLE OF CONTENTS

Table of Authorities	ii
Statement of the Case	1
Argument	3
I. This Court Should Vacate the Commission’s Decision Because	
1. THE WORKERS’ COMPENSATION COMMISSION ERRED IN FAILING TO FIND AND/OR CONCLUDE AS A MATTER OF LAW THAT THE CLAIMANT HAD A PSYCHOLOGICAL AND/OR INJURY WHICH CONSTITUTED A DISABLING CONDITION	
2. THE COMMISSION ERRED IN FINDING AND/OR CONCLUDING THAT THE CLAIMANT HAD PRIOR BACK PROBLEMS THAT ROSE TO OR EVEN APPROACHED THE LEVEL OF HIS CURRENT PROBLEMS.	
3. THE COMMISSION ERRED, AS BOTH A MATTER OF FACT AND OF LAW IN FINDING AND/OR CONCLUDING THAT THE CLAIMANT SUFFERED ONLY A SINGLE MEMBER INJURY AND/OR THAT THE CLAIMANT WAS NOT PERMANENTLY AND TOTALLY DISABLED.	
Conclusion	22

TABLE OF AUTHORITIES

CASES

<i>Bass v. Isochem</i> 365 S.C. 617, 617 S.E.2d 369 (Ct. App. 2005).....	15
<i>Bass v. Kenco Group</i> 366 S.C. 450, 622 S.E.2d 577 (Ct. App. 2005)	21
<i>Brown v. Owen Steel</i> 316 S.E.2d 57 (Ct. App. 1994).....	23
<i>Carter v. Penny Tire and Recapping Co.</i> 261 S/ C/ 341, 200 S.E.2d 64 (1973)	9
<i>Colvin v. E.I. DuPont de Nemours Co.</i> 227 S.C. 465, 88 S.E.2d 581 (1955)	21
<i>Etheridge v. Monsanto Co.</i> 349 S.C. 451, 652 S.E. 2d 679 (Ct. App. 2002).....	10
<i>Frame v. Resort Services, Inc.</i> 357 S.C. 520, 593 S.E.2d 491 (Ct. App. 2004)	10
<i>Gadson v. Mikasa Corp.</i> 368 S.C. 214, 628 S.E.2d 262 (Ct. APP. 2004)	9
<i>Hall v. Desert Aire, Inc.</i> 376 S.C. 338, 656 S.E.2d 753 (Ct. App. 2007)	9
<i>Hutson v. S.C. State Ports Authority</i> 390 S.C. 108, 700 S.E.2d 462 (Ct. App. 2010)	22
<i>Jones v. Georgia Pacific Corp.</i> 355 S.C. 413, 586 S.E.2d 111 (2003)	9
<i>Liberty Mutual Insurance Co. v. South Carolina Second Injury Fund</i> 363 S.C. 612, 611 S.E.2d 297 (Ct. App. 2005).....	10
<i>Morgan v. JPS Automotives</i> 321 S.C. 201, 467 S.E.2d 457 (Ct. App. 1996).....	20
<i>Mullinax v. Winn-Dixie Stores, Inc.</i> 318 S.C. 431, 458 S.E.2d 76, 80 (Ct. App. 1995).....	10, 16

<i>Porter v. Labor Depot</i> 372 S.C. 560, 643 S.E.2d 96 (Ct. App. 2007)	15
<i>Pratt v. Morris Roofing, Inc.</i> 357 S.C. 413, 586 S.E.2d 111 (2003)	9
<i>Roper v. Kimbrell's of Greenville</i> 231 S.C. 453, 99 S.E.2d 52, 54 (1957).....	21
<i>Stephen v. Avins Construction Co.</i> 324 S.C 334, 478 S.E.2d 74 (Ct. App. 1996)	10
<i>Thompson v. Cisson Construction Company</i> 377 S.C. 137, 659 S.E. 2d 171 (Ct. App. 2008).....	16
<i>Tiller v. National Healthcare Center of Sumter</i> 334 S.C. 333, 513 S.E.2d 843 (1999).....	10
<i>Wynn v. People's Natural Gas Co.</i> 238 S.C.1, 118 S.E.2d 812 (1961).....	21

STATUTES

S.C. Code Section 1-23-380(A)(6)(d)(2005).....	10
S.C. Code Ann. Section 1-23-380 (2002).....	10
S.C. Code Ann. Section 1-23-380(A)(5)(d).....	15

QUESTIONS PRESENTED

- I. **DID THE WORKERS COMPENSATION COMMISSION ERR IN FAILING TO FIND AND/OR CONCLUDE THAT THE CLAIMANT HAD A PSYCHOLOGICAL/PSYCHIATRIC INJURY WHICH CONSTITUTED A DISABLING CONDITION?**
- II. **DID THE WORKERS COMPENSATION COMMISSION ERR IN FINDING AND/OR CONCLUDING THAT THE CLAIMANT HAD PRIOR BACK PROBLEMS THAT ROSE TO THE LEVEL OF HIS CURRENT, POST-ACCIDENT PROBLEMS?**
- III. **DID THE WORKERS COMPENSATION COMMISSION ERR IN FINDING AND/OR CONCLUDING THAT THE CLAIMANT SUFFERED ONLY A SINGLE MEMBER INJURY AND/OR THAT THE CLAIMANT WAS NOT PERMANENTLY AND TOTALLY DISABLED?**

STATEMENT OF THE CASE

The Claimant, Sean Daley, began working for the Defendant, Chapman Mechanical, as a commercial plumber, in October 2010 (Tr. p. 40, LL 9-12). Essentially all of Mr. Daley's prior employment had been in the field of commercial plumbing. He did hold some other brief jobs as a gas station clerk in high school, and some brief and sporadic restaurant jobs; however, he had never held any type of office or other sedentary type jobs (Tr. p. 39, LL 4-9). Additionally, it is highly unlikely that even restaurant work would be within the Appellant's ultimate work/lifting restrictions.

Further, Mr. Daley testified that he has never held any job for any significant length of time that did not require him to lift more than 15 lbs. (Tr. p. 39, LL 19-22). Rather, virtually all of his work has been as a commercial plumber required him to lift 50 lbs. or more on a frequent basis. He also indicated that was something he regularly had to do while employed with the Defendant, Chapman Mechanical (Tr. p. 40, LL 3-8).

Further, Mr. Daley testified, without contradiction¹ that he was in very good standing with Chapman Mechanical until the date of his injury. He also testified that he had never been criticized for slow or inferior work prior to the date of the accident. Likewise, he testified that there was not any aspect of the job with Chapman Mechanical he was not able to perform without difficulty prior to the February 9, 2011 accident date (Tr. p. 41, LL 5-13).

Mr. Daley testified as to the nature and circumstances of his accident. It is noteworthy that Chapman Mechanical provided no safety harnesses as required by OSHA. Accordingly, Mr. Daley fell off an eight-foot (8 ft.) ladder, and basically impaled himself on a four inch (4") piece of PVC pipe that was cemented in the floor and protruded several feet from the floor. (See Appellant's Exhibit 1, pp. 1-5, Exhibit 3, Exhibit 4, Exhibit 5, and Exhibit 9).

Since the date of his accident, Mr. Daley had to fight vigorously and unnecessarily to obtain the benefits to which he was lawfully entitled. It is noteworthy that his fall was witnessed by another employee, Paul Lousch, who prepared an Incident Report. It is also particularly noteworthy, and emblematic of the manner in which Chapman chose to mistreat Mr. Daley, that the Incident Report made no allegation of any safety violation allegedly committed by Mr. Daley. Ultimately; however, a second Incident Report was completed, albeit clearly punitively, claiming an alleged safety violation on Mr. Daley's part (Tr. p. 43, LL 4-17).

Mr. Daley attempted to submit further evidence as to the maltreatment of him by Chapman and how said treatment at the hands of his employer aggravated and exacerbated his psychological and/or psychiatric condition. He would earnestly contend that the Commission's

¹ It should be noted that despite the fact that deposition testimony was taken from some of Chapman Mechanical's primary officers, Chapman Mechanical was purportedly out of business as of the date of the Hearing and no Defendant, either Chapman Mechanical or Stonewood Insurance presented any testimonial evidence of any kind.

failure to fully allow said evidence and testimony is erroneous and grounds for reversal and/or remand.

As will be discussed further hereinbelow, part and parcel of Mr. Daley's claim in this case is that he was injured, not only physically, but ultimately psychologically, both from the maltreatment by Chapman Mechanical, which forced him to go without pay for a significant period of time, and fight unnecessarily hard to obtain the benefits to which he was clearly lawfully entitled and also by the persistent physical pain and the significant change in lifestyle that his injury and resulting limitations have placed upon him. As will also be discussed hereinbelow, Chapman Mechanical fired Mr. Daley while he was on substantial work restrictions, and Chapman Mechanical never provided him with adequate light duty work as was required by the authorized treating physicians (See Appellant's Exhibit 2, pp. 1-5, See also APA 13, pp. 207-210, Dr. LeBlond).²

Mr. Daley testified that he was only allowed to be out of work for two (2) or three (3) days before Chapman forced him to return to work in the office. He worked in the office for approximately one (1) month, and then the serious maltreatment by Chapman began in earnest. Ultimately Mr. Daley was taken out of the office and sent to a commercial jobsite, a school in Anderson, SC by the name of Glenview Middle School (hereinafter "Glenview"). At this job, Mr. Daley was ostensibly sent for light duty work inventorying parts. Glenview was supposed to involve sedentary work, and allegedly, Chapman was going to provide Mr. Daley with help lifting boxes. Unfortunately; however, Mr. Daley was never provided any help when needed for heavy lifting (Tr. p. 49, LL 5-24).

² Claimant would stress that the Hearing Commissioner erroneously refused to accept evidence as to the maltreatment of Chapman Mechanical of the Claimant when, in fact, maltreatment was one of the strong bases for Mr. Daley's uncontroverted psychological condition. (See Tr. p. 46, LL 15-16).

This job required Mr. Daley to lift boxes full of cast iron plumbing parts. He indicated that these boxes could weigh up to 150 lbs. Further, and uncontroverted, was Mr. Daley's testimony that the boxes of cast iron or metal parts he was required to lift and/ or move clearly weighed considerably more than 15 lbs., which at that time, was his stated lifting restriction (Tr. p. 50, LL 5-6, 11-13).³

As further evidence of Mr. Daley's maltreatment by Chapman, Chapman was aware that Mr. Daley had sustained an injury to his back, and was provided with restrictions which required him to work in a sedentary capacity. When Mr. Daley was initially sent to Glenview to inventory heavy metal and cast iron parts, Chapman provided Mr. Daley with only a hard plastic five (5) gallon paint bucket to sit on while performing this work. This inadequate "seat" caused Mr. Daley's back and legs to become more painful and bothersome. Further, Mr. Daley testified that the job required him to move his seat all over the work area because the parts were "scattered everywhere" (Tr. p. 51, LL 12-25).

Mr. Daley complained vigorously about the pain caused by sitting on this five-gallon bucket, and Chapman then grudgingly provided him with a very cheap folding lawn chair with little or no support for his back, hips and legs. This also aggravated his back, hips and legs (Tr. p. 52, LL 1-6).

Subsequently, Mr. Daley was moved from the Glenview site to a storage area called a "Conex". This is basically a large commercial trailer used for storage of heavy plumbing parts and supplies. Once again, this job involved lifting heavy objects and repeatedly moving from his seated position to various areas within the Conex, all of which was contrary to his stated restrictions (Tr. p. 52, LL 10-24). It should also be noted that Dr. LeBlond viewed the five-

³ See Claimant's APA 13, pg. 213, (Form 14B), wherein Dr. LeBlond gave Mr. Daley permanent lifting restrictions of no greater than 15 lbs.

gallon bucket and the lawn chair ostensibly provided by Chapman Mechanical for Mr. Daley to sit upon while under these restrictions and Dr. LeBlond unequivocally stated that said “seats” were inadequate, and would likely harm Mr. Daley’s condition (See APA 13, pg. 207).

Ultimately, for reasons which were never completely clear, Chapman chose to fire Mr. Daley. When he was fired, he was still on substantial work restrictions (Tr. p. 56, LL 7-8). Despite this fact, and contrary to South Carolina law, Chapman Mechanical and their insurance carrier refused to pay Mr. Daley Temporary Total Disability benefits (hereinafter “TTD”) for some five (5) months.

Ultimately, and out of sheer financial desperation, Mr. Daley agreed to a significant reduction in the past due TTD in order to simply get his current and on-going TTD started (See SCWCC Consent Order, dated September 20, 2011, signed by Commissioner Barden). Basically, Chapman Mechanical extorted Mr. Daley by leaving him in an absolutely untenable financial position with no income of any kind for five (5) months. This greatly contributed to and/or exacerbated Mr. Daley’s psychological and/or psychiatric issues causing him to be very anxious and depressed (Tr. p. 65, LL 2-7; p. 66, LL 14-18).

Mr. Daley testified that in addition to low back pain, he was also having pain in both legs (Tr. p. 56, LL 22-25). Counsel for the Respondents tried to make much of the fact that Mr. Daley had suffered from some lesser back pain and other related problems in the past. The Appellant would contend that his prior problems paled in comparison to the problems he experienced as a result of his work related accident, and accordingly, any such allegation and/or inference propounded by the Respondents is unwarranted and unfounded.

Mr. Daley testified unequivocally that any and all problems he had prior to the February 9, 2011, accident were much less severe, and in no way debilitating. The pain that he suffered

subsequent to his February 9, 2011, accident was different and much more severe than any prior back problems (Tr. p. 57, LL 5-8). Mr. Daley testified that since the accident he has not only back pain, which generally stayed between a “6 and a 7” on a scale of 1 – 10, but now also had hip and leg pain. Mr. Daley testified that his left hip averages a “5” on a scale of 1 – 10 and his right hip is a “3 or 4” on average. Likewise, Mr. Daley testified that his left leg has more pain than his right leg. His left leg generally stays at a “4” on a scale of 1 – 10, and his right leg is a “2 or 3” on the same scale (Tr. pp. 57-59).

Once again, he testified unequivocally that none of those pain ratings were similar to, or even present, prior to his February 9, 2011 accident. He admitted that prior to the accident, he had a small amount of radiating pain down his right leg; however, he testified that it never prevented him from working or enjoying life in any other way, and he was completely capable of living a normal and active life prior to his work related accident (Tr. pp. 57-59). Mr. Daley also testified that his pain and/or conditions have gotten worse even since he was released by Dr. LeBlond in November 2011 (Tr. p. 64, LL 4-8).

A key factor in this case is Mr. Daley’s psychological/psychiatric condition subsequent to his February 9, 2011, accident. Mr. Daley would steadfastly contend that he suffers from significant anxiety and depression; caused both by the maltreatment he suffered at the hands of Chapman Mechanical, the pain he now must try to endure, the substantial lifestyle alteration, the financial situation he has had to endure since the accident, and the fear about future economic hardships caused by the debilitating and impairing nature of his accident and subsequent condition.

Mr. Daley indicated that he had never been treated or medicated for anxiety or depression in the past (Tr. pg. 63, LL 1-5). Since the accident; however, Mr. Daley indicated that he has

significant anxiety and/or stress on a daily basis. He is gravely concerned about his future and his ability to make a living, and stated emphatically that this accident, and the manner in which Chapman Mechanical handled his injury and resulting claim, has caused him a substantial financial hardship (Tr. pp. 64-65).

He noted particularly the fact that Chapman Mechanical and their insurance carrier withheld the Temporary Total Disability Benefits to which he was entitled for five (5) months. With a wife and three (3) children to provide for Mr. Daley testified that fact alone sent his stress and anxiety levels “out the roof” (Tr. p. 66, LL 14-18).

At this point it is extremely noteworthy to look at the procedural history of this claim. This matter was essentially filed by the Defendants on a Form 21 Stop Payment Application, and the matter was set for a Hearing on February 7, 2012, before Commissioner Wilkerson. At that time, Counsel for the Defendants requested that the record be held open to allow the Defendants to have the Mr. Daley evaluated by a psychologist or psychiatrist of their choosing to attempt to refute Mr. Daley’s claim of psychological injury and impairment.

Over the objections of Appellant’s Counsel, the Commissioner agreed to allow the Defendants to do this; however, it is important to point that once the Defendants had this victory in their hands, it took a full two (2) months before Mr. Daley could be seen by the Defendants’ hand-picked, out-of-state psychiatrist, located in Charlotte, NC.

The Defendants ultimately chose Dr. Thomas Gaultieri in Charlotte, NC. Mr. Daley appeared for the evaluation, and Dr. Gaultieri, whose report was submitted by the Defendants, agreed that Mr. Daley was suffering from depression as a result of the fallout from this accident. Further, and of particular note, is the fact that Dr. Gaultieri prescribed medications for Mr. Daley to help treat the depression.

As has become the custom with regard to the Defendant's conduct in this matter, when Mr. Daley attempted to fill the prescriptions written by the Defendant's own chosen doctor, authorization for those prescriptions was unilaterally denied by the Defendants without justification or explanation. (Tr. pg. 70, LL 6-25).

As was testified by the Appellant, there was absolutely no evidence to controvert or refute Mr. Daley's claim for psychological/psychiatric injury. In addition to the out-of-state psychiatrist, hand-picked by the Defendants to evaluate Mr. Daley, a Board Certified Psychiatrist located in Greenville, SC, and a PhD Psychologist from Columbia, SC, both agreed that Mr. Daley suffers from significant depression and anxiety (See APA 13, Dr. Patrick Mullen, Page 205; APA 14, Dr. Robert Brabham, Page 222). Mr. Daley testified that he was candid, forthright, and honest in replying to the questions presented to him by Dr. Brabham and Dr. Mullen (Tr. p. 72, LL 20-24).

Further, Mr. Daley testified unequivocally that it was his desire to obtain and use the medication and treatment recommended by Dr. Gaultieri (Tr. p. 73, LL 3-6). Mr. Daley would assert that the treatment recommended by the Defendant's own psychiatrist is the absolute minimal treatment necessary to assist him with his depression and anxiety. Mr. Daley would contend that he is entitled to, and in need of, considerably more treatment to help him deal with his psychiatric and psychological issues in order to render him in some way, shape, or form better from a psychiatric and/or psychological perspective.

It is Mr. Daley's contention that the Commission erred in many respects, but most notably, in failing to find him permanently and totally disabled. Mr. Daley would contend that the substantial evidence, and, in fact the only evidence in this case clearly points to the conclusion that he sustained more than a single-member injury by virtue of the fact that he also

sustained debilitating problems with his hips and legs and a substantial and well-documented psychiatric and/or psychological injury. The Defendants did not submit any vocational evidence and testimony regarding Mr. Daley's abilities or condition, and accordingly, the only evidence on the record supports Mr. Daley's contentions. As such, the Commission's failure to reach such conclusions is an error of law and therefore subject to review and reversal by this Court. Mullinax v. Winn-Dixie Stores, Inc., 318 S.C. 431, 458 S.E.2d 76, 80 (Ct.App.1995).

ARGUMENT

It is the position of the Appellant, Sean Daley, that the Full Commission's decision was not based upon substantial evidence and should be reversed.

As is well settled law in South Carolina, the Workers Compensation Act is to be construed liberally in favor of the Appellant. Carter v. Penny Tire and Recapping Co., 261 S.C. 341, 200 S.E.2d 64 (1973); Hall v. Desert Aire, Inc., 376 S.C. 338, 656 S.E.2d 753 (Ct.App.2007). As such, Mr. Daley would steadfastly contend that this Court should reverse the Order of the Workers Compensation Commission in the following particulars:

I. THE WORKERS COMPENSATION COMMISSION ERRED IN FAILING TO FIND AND/OR CONCLUDE AS A MATTER OF LAW THAT THE APPELLANT HAD A PSYCHOLOGICAL AND/OR INJURY WHICH CONSTITUTED A DISABLING CONDITION.

The judicial review of the Workers Compensation Commission's factual findings is governed by the substantial evidence standard. Gadson v. Mikasa Corp., 368 S.C. 214, 628 S.E.2d 262 (Ct.App.2004). Of particular note is the proposition that "substantial evidence" is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case. Pratt v. Morris Roofing, Inc., 357 S.C. 619, 594 S.E.2d 272 (2004); Jones v. Georgia Pacific Corp.,

355 S.C.413, 586 S.E.2d 111 (2003); Etheridge v. Monsanto Co., 349 S.C. 451, 562 S.E.2d 679 (Ct.App.2002).

If, as in this case, the findings of the Workers Compensation Commission are not supported by substantial evidence, they can be, and should be, set aside. Bass v. Kenco Group, 366 S.C.450, 622 S.E.2d 577 (Ct.App.2005). While it is true that the Workers Compensation Commission's finding will normally be upheld, such a finding may not be based upon surmise, conjecture or speculation. Such findings must be founded upon evidence of sufficient substance to afford a reasonable basis for it. Tiller v. National Healthcare Center of Sumter, 334 S.C. 333, 513 S.E.2d 843 (1999).

Further, "where the evidence is susceptible of but one reasonable inference, the question is one of law for the court rather than one of fact for the Commission," Mullinax v. Winn-Dixie Stores, Inc., 318 S.C. 431, 458 S.E.2d 76, 80 (Ct.App.1995), and a court "may reverse where the decision is affected by an error of law." Stephen v. Avins Construction Co., 324 S.C. 334, 478 S.E.2d 74 (Ct.App.1996); S.C. Code Ann. Section 1-23-380 (2002). "Under the scope of review established in the APA, [the] Court...may reverse where the decision is affected by an error of law". Bass at 580; Liberty Mutual Insurance Co. v. South Carolina Second Injury Fund, 363 S.C. 612, 611 S.E.2d 297 (Ct.App.2005); Frame v. Resort Services, Inc., 357 S.C. 520, 593 S.E.2d 491 (Ct.App.2004); S.C. Code Section 1-23-380(A)(6)(d) (2005).

In the instant case, the fact that Mr. Daley suffered a psychological/psychiatric injury is absolutely uncontroverted. The Commission's failure to make such a finding and conclusion constitutes a clear error of both law and fact, and Mr. Daley contends that this Court should make new Findings and Conclusions in proper and inescapable accordance with the evidence and testimony. This is not a case where there is a dispute about substantial evidence, in this case, the

only evidence presented shows that the Appellant suffered from a psychological and/or psychiatric injury and therefore it becomes a question of law for this Court to decide.

Mr. Daley was evaluated by Robert E. Brabham, PhD, a licensed psychologist practicing in Columbia, SC. Dr. Brabham reviewed Mr. Daley's medical records at length, and also performed the following tests:

Wechsler Adult Intelligence Scale – Fourth Edition
Wide Range Achievement Test – Revision 4
Beck Depression Inventory – II
Beck Anxiety Inventory
Brain Injury Screening

Additionally, Dr. Brabham made behavioral observations and a mental status examination during the course of a very lengthy clinical interview and evaluation (See APA 14, page 215).

Dr. Brabham's evaluation is extremely thorough and his report reflects same in great detail. Dr. Brabham noted that Mr. Daley suffers from Pain Disorder as well as Depressive Disorder NOS – (Not Otherwise Specified), and a Generalized Anxiety Disorder. Dr. Brabham indicated that Mr. Daley appeared extremely credible and that the information provided to Dr. Brabham was highly consistent with information contained in the other reports which Dr. Brabham reviewed.

Of particular note in this regard is the following statement from Dr. Brabham:

It is noted that the information provided in this interview is highly consistent with information reported in other reports. This provided additional confirmation that the responses and description of events and circumstances were candid, not feigned or exaggerated, and do not appear to represent any symptom magnification.

It does not seem reasonable to suggest that someone who has worked essentially continuously since graduating high school would now feign or fake an inability to work. It is particularly unlikely that he would do so within months of his recent marriage and with a young child at home to support. I do not believe that he would subject himself and his family to the financial difficulties described in

numerous reports in any fictitious manner. (See APA 14, pg. 223, emphasis added).

Dr. Brabham ultimately concluded the following:

Based on all the evidence as described above, consistent with the observations during this evaluation and the various reports in this file, he is unable to yet effectively perform the essential duties in any gainful work activity. It is also clear that the unfortunate combination of factors and characteristics he now faces are directly related to the injury he sustained while working.

With his combination of physical, emotional, and/or cognitive difficulties, he is still unable to perform any type substantial gainful work activity which exists in the SC or the national economy. Directly as a result of his on-the-job injuries the only services he could perform are so limited in quality, dependability, or quantity that no reasonably stable market for them exists (See APA 14, pg. 224 emphasis added).

As such, it is abundantly clear from the uncontroverted findings of Dr. Brabham that Mr. Daley sustained a substantial psychological and/or psychiatric injury as a result of his fall on February 9, 2011. Therefore, Mr. Daley would respectfully submit that this Court should reverse the findings and conclusions of the Commission in this regard.

In addition to the findings of Dr. Brabham, Mr. Daley also saw a Board Certified Clinical Psychiatrist, Dr. Patrick B. Mullen. Dr. Mullen practices with Poinsett Psychiatric Group in Greenville, SC, and evaluated Mr. Daley on June 30, 2011. As did Dr. Brabham, Dr. Mullen reviewed at length the medical records in Mr. Daley's case. When Mr. Daley first presented to Dr. Mullen, his chief complaints were "depression and pain" (See APA 12, page 203). It is particularly noteworthy, and will be discussed more fully hereinbelow, that Mr. Daley's condition is considerably worse as a result of his accident of February 9, 2011. Dr. Mullen, in reviewing Mr. Daley's medical records, made the following observation:

One thing is sure and that is that his back pain is much, much worse than when he had his only MRI [prior to the accident giving rise to this claim]. At that time he was working, playing sports, skateboarding, etc. The pain was chiefly in his low back and did not interfere with his day-to-day life, his sleep, nor his mood.

Now none of that is true – his pain does interfere with his life and has changed his mood completely. (See APA 13, pg. 205, emphasis added).

Upon review of his medical records and after completing a clinical and medical evaluation of Mr. Daley, Dr. Mullen indicated that Mr. Daley was suffering from *major depression* and, further, that he was subject to stressors including loss of ability to make a living. Dr. Mullen assessed his Gross Assessment of Functions (GAF) at roughly 50 – 65.

It is particularly noteworthy that Dr. Mullen's report was prepared at a point in time when many of the things which Chapman Mechanical did to almost overtly and intentionally exacerbate Mr. Daley's psychological/psychiatric symptoms *had not even yet occurred*. While Mr. Daley was without an income at the time of Dr. Mullen's evaluation and examination, the full impact of the Defendant's unwarranted refusal to pay Temporary Total Disability Benefits had yet to be realized by Mr. Daley.

As stated hereinabove, it was not until September 2011 that the Defendants even *began* to pay Temporary Total Disability Benefits to which Mr. Daley had long been entitled. Likewise, and as stated hereinabove, Mr. Daley ultimately had to *compromise* his claim for past due Temporary Total Disability Benefits in an effort to simply get *some sort of income* with which he might be able to try and support his family.

As stated hereinabove, the Single Commissioner, over the objections of Appellant's Counsel, allowed the original Hearing to be continued so that the Defendants could obtain a psychological and/or psychiatric evaluation of the Appellant.⁴ The Defendants chose to send Mr. Daley to Dr. Thomas Gualtieri, a North Carolina Psychiatrist, practicing in various locations throughout the state of North Carolina (but with no ostensible connection to South Carolina), and

⁴ It should be noted that once the Defendants were granted this continuance it took more than two (2) months for Mr. Daley to be seen by the Defendants' chosen physician.

who evaluated Mr. Daley at his office in Charlotte, NC, notwithstanding the fact that there are countless qualified mental health practitioners in the upstate of South Carolina in more close and reasonable proximity to the locus of this action.

Dr. Gaultieri's report references the fact that he, too, reviewed the medical records of Mr. Daley. It should also be noted that Dr. Gaultieri picked up on the fact that Dr. LeBlond was aware of some of the maltreatment that Mr. Daley suffered at the hands of Chapman Mechanical, and even referenced that:

Sedentary work was recommended, *but Dr. LeBlond did not like the conditions for sedentary work which the employer provided. Seating on a plastic bucket, then a canvas lawn chair with no support, and finally on the floor to sort inventory. Dr. LeBlond wrote several letters to the employer about the inappropriateness of the offered seating* (See Defendant's APA 16 pg. 233, emphasis added).

Dr. Gaultieri also noted that *Mr. Daley's marriage was suffering* due to the disability and the loss of income. *Dr. Gaultieri also noted that Mr. Daley was worried about the future, about his chronic pain, and about whether or not the pain would ever subside to an appreciable degree* (See Defendant's APA 16, pg. 233).

Dr. Gaultieri, though providing some self-serving language in his report denying any serious "psychiatric" condition, did ultimately conclude that Mr. Daley *is depressed* which is *"probably related to his disability and the fact that he cannot return to his work as a plumber because of his back injury. The patient's depression is therefore accident related and deserves treatment. We have prescribed Wellbutrin XL 150 mgs QAM for three days, to be followed by 300 mgs daily thereafter"* (See Defendant's APA 16, pp. 237-238, emphasis added).

As such, and as stated above, *it is uncontroverted that he found Mr. Daley to be depressed as a result of his on-the-job accident.* Further, and most notably, *he prescribed anti-depressant medications, authorization for which was denied by the Defendants.* It seems

untenable that the Defendants should be allowed to avoid responsibility for a condition they clearly created, and for which medication was clearly recommended by the out-of-state physician they hand-picked to evaluate the Appellant.

In this case, not only does the substantial evidence contradict the Commission's findings, **it is the only evidence regarding psychological/psychiatric injury and impairment.** This is not a case where there is a conflict in the evidence as to psychological/psychiatric impairment. Rather, the **only evidence** on the record, i.e., the reports of Dr. Brabham, Dr. Mullen, **and** the Respondents' chosen physician, Dr. Gaultieri, indicate that the Appellant suffered from anxiety and depression related to his on the job injury.

The Appellant would further contend that the Commission's decision is flawed by virtue of a clear error of law and must be reversed. At the Hearing on this matter before the Single Commissioner, the Appellant attempted to introduce evidence of the maltreatment he received from the Respondent/Employer subsequent to his accident. The Single Commissioner erroneously refused to allow said evidence and testimony and Appellant would contend that his failure to receive such evidence and testimony constituted an error of law warranting reversal of the Commission's decision.

As stated hereinabove, an appellate court may reverse or modify the decision of the Commission if the substantial rights of the appellant have been prejudiced because the findings, inferences, conclusions or decisions are affected by an error of law. S.C. Code Ann. Section 1-23-380(A)(5)(d); Porter v. Labor Depot, 372 S.C.560, 643 S.E.2d 96 (Ct.App.2007); Bass v. Isochem, 365 S.C.454, 617 S.E.2d 369 (Ct.App.2005). While factual findings are clearly governed by the substantial evidence standard, this court is free to absolutely review the

Commission's decision concerning an error of law. Thompson v. Cisson Construction Company, 377 S.C. 137, 659 S.E.2d 171 (Ct.App.2008).

As such, Mr. Daley would steadfastly contend that he has clearly suffered an uncontroverted and significant psychiatric and/or psychological injury for which he is entitled to treatment. *That finding in and of itself, refutes any finding that the Commission may have made with regard to Maximum Medical Improvement, particularly when the very treatment recommended by the Defendants' own doctor has been denied by the Defendants.* As such, Mr. Daley would earnestly and steadfastly contend that the Order of the Commission should be reversed and remanded for further findings and conclusions consistent with the substantial evidence on the record. Additionally, the Appellant would contend that the Commission's failing to recognize the clear conclusion that the *only evidence* submitted irrefutably indicates that Mr. Daley suffered psychiatric and/or psychological injury constitutes an error of law warranting review and reversal of the Commission's decision. Mullinax v. Winn-Dixie Stores, Inc., 318 S.C. 431, 458 S.E.2d 76, 80 (Ct.App.1995)

II. THE COMMISSION ERRED IN FINDING AND CONCLUDING THAT THE APPELLANT HAD PRIOR BACK PROBLEMS THAT ROSE TO OR EVEN APPROACHED THE LEVEL OF HIS CURRENT PROBLEMS.

First and foremost, the Appellant would assert that the Commission erred in concluding and/or finding that the Appellant had prior back problems that rose to the level even approaching his current problems following his work-related injury. Mr. Daley would assert that the Functional Capacities Evaluation did *not* contradict the findings of Dr. Brabham with regard to the Appellant's capabilities. Furthermore, Mr. Daley would steadfastly assert that the Functional Capacities Evaluation and the Vocational Evaluation performed by Dr. Brabham *are separate*

and distinct evaluations, taking into account very different factors and items, and therefore, the findings of Dr. Brabham are vocationally and legally valid and support Mr. Daley's contentions in this regard.

Mr. Daley testified, both emphatically and unequivocally, that he did not have back pain or problems that even approached the level and magnitude of his problems subsequent to his February 9, 2011 on-the-job injury (Tr. pg. 57, LL 5-8). Further, while Mr. Daley conceded that he had a small amount of radiating pain in his right leg prior to the accident, he testified without equivocation or contradiction, that this pain never prevented him from working. Further, said pain never prevented him from enjoying his life in any other form or fashion (Tr. pg. 59, LL 17-25; Tr. pg. 99, LL 14-22). Further, there was no evidence whatsoever that Mr. Daley was on any medications for pain or problems in his back, legs, or hips prior to his February 9, 2011 accident.

The record is clear that Mr. Daley worked for Chapman Mechanical for several months before the accident occurred. Mr. Daley testified that, as a commercial plumber for Chapman Mechanical, he regularly had to lift 50 lbs. or more prior to his on-the-job injury (Tr. pg. 40, LL 3-8). Nothing about his pre-injury condition ever prevented him from performing all of the necessary tasks for Chapman Mechanical.

He testified that he was in great standing with Chapman until the day of his on-the-job injury. Likewise, he had never been criticized for slow or inferior work, nor had he ever had to turn down any aspect of his job as a commercial plumber for Chapman Mechanical prior to his injury of February 9, 2011, on-the-job injury (Tr. pg. 41, LL 5-13; Tr. pg. 98, L25 – pg. 99 L13). It is also noteworthy that Chapman Mechanical presented no testimony of any kind to refute in

any way, shape, or form the testimony of Mr. Daley with regards to his pre-injury condition or his post-injury pain, problems and limitations.

As stated hereinabove, Mr. Daley was never provided with adequate light-duty treatment within his restrictions. Furthermore, it appears quite clear that Chapman Mechanical went out of its way, at every available opportunity, to make Mr. Daley's life and recovery much more difficult. They provided him with inadequate light-duty work, inadequate tools and/or seating with which to perform this purported light-duty work, and no help or assistance when he needed same for lifting any items outside of his restrictions (Tr. pg. 50, LL 11-13; pp. 51, L12 – pg. 52, L 24; pg. 65, L2 – pg. 66, L18).

Further, and as set forth hereinabove, Dr. Mullen clearly picked up on the fact that, irrespective of whatever minor ailment or pain Mr. Daley may have experienced in the past, his life was full and active prior to his on the job accident and injury. In reviewing his medical records and the impact the accident had upon Mr. Daley's life, Dr. Mullen noted the following which has already been cited hereinabove but bears repeating given the assertions of the Defendants in this regard:

One thing is sure and that is that his back pain is much, much worse than when he had his only MRI [**prior to the accident giving rise to this claim**]. *At that time he was working*, playing sports, skateboarding, etc. The pain was chiefly in his low back and did *not* interfere with his day-to-day life, his sleep, nor his mood.

Now none of that is true – his pain does interfere with his life and has changed his mood completely. (See APA 13, pg. 205, emphasis added).

Dr. Mullen astutely picked up on a very salient fact in this case, namely that Mr. Daley was not only gainfully, successfully, and functionally employed before this on the job accident, but also that any purported preexisting problems did not prevent Mr. Daley from enjoying his life. Dr.

Mullen even noted that Mr. Daley regularly enjoyed vigorous recreational activities before he was injured in his fall at Chapman Mechanical.

Additionally, Mr. Daley was evaluated by Dr. Walter Grady, an orthopedist with the Spartanburg Regional Physician Group. Of particular note is the fact that Mr. Daley was found to ambulate with an antalgic gait which prevented him from undergoing some testing (See APA p. 228). Said antalgic gait was *not present prior to his on the job accident with Chapman Mechanical.*

Dr. Grady also noted that Mr. Daley's prior, i.e., his *pre-injury* MRI, showed no neurological impingement and therefore it would seem abundantly clear that Mr. Daley did *not* have any significant component of spinal pathology prior to his significant fall on the job. Dr. Grady also diagnosed Mr. Daley, post-accident, with bilateral sacroiliitis, sciatica, thigh and calf atrophy, and antalgic gait (See APA p. 230). Dr. Grady found Mr. Daley to have suffered a 23% permanent impairment to the whole person as he was on the date of the evaluation.

More compelling, however, is Dr. Grady's opinion that Mr. Daley needed a repeat MRI, a re-consultation with an ortho-spine surgeon or neurosurgeon, a TENS unit, oral anti-inflamator[ies], and other treatment modalities in order to better treat and/or handle his pain and limitations (See APA p.p. 230 – 231). Suffice it to say that *none* of these diagnostic or treatment modalities have *ever* been offered or provided by the Defendants.

Accordingly, Mr. Daley would assert that any allegation or inference that he suffered from severe, debilitating back pain and/or problems before his on the job injury with Chapman Mechanical is spurious and without merit. Mr. Daley was very clearly capable of performing heavy work/labor with Chapman Mechanical before this accident, and clearly unable to do so after this accident. As such, the Findings and Conclusions as to Maximum Medical

Improvement (MMI), degree of disability and “single member injury” must, of necessity, be reversed.

III. THE COMMISSION ERRED, AS BOTH A MATTER OF FACT AND OF LAW IN FINDING AND/OR CONCLUDING THAT THE APPELLANT SUFFERED ONLY A SINGLE MEMBER INJURY AND/OR THAT THE APPELLANT WAS NOT PERMANENTLY AND TOTALLY DISABLED.

In this matter, it is abundantly clear from the substantial evidence that Mr. Daley is permanently and totally disabled from the multiple combinations of injuries to his back, hips, legs and psyche. As set forth hereinabove, Mr. Daley very clearly suffered an injury to his psyche of a psychological and/or psychiatric nature, for which even the Defendants’ own chosen psychiatrist felt he needed treatment and prescriptions. Given that the Defendants not only refused to allow Mr. Daley to obtain the prescriptions which their own psychiatrist recommended, but also refused to allow him any other treatment so recommended and/or needed, it is clear from this fact alone that Mr. Daley has not reached MMI from a psychological and/or psychiatric perspective.

As set forth hereinabove, the evidence in this case is susceptible of only one single inference or interpretation and therefore the Commission erred as a matter of law and reversal by this Court is proper, if not mandated. Mullinax, op.cit.; Stephens, op.cit. Our courts have held that an injured worker is not limited to the scheduled loss statute, and should have the opportunity to establish a disability greater than the presumptive disability provided for under the scheduled member section, if the effects of the loss of the member extend to other parts of the body and interfere with their efficiency. Morgan v. JPS Automotives, 321 S.C.201, 467 S.E.2d 457 (Ct.App.1996). Additionally, it has been held that inability to perform regular, common, gainful labor is basically tantamount to total disability for a worker who is not qualified by

training or experience for any other employment. See Wynn v. People's Natural Gas Co., 238 S.C.1, 118 S.E.2d 812 (1961); Colvin v. E.I. DuPont de Nemours Co., 227 S.C. 465, 88 S.E.2d 581 (1955). In this case, the Appellant has worked almost exclusively as a commercial plumber, but is now faced with permanent 15 pound lifting restrictions which absolutely preclude him from performing anything he might be qualified to do.

Our courts have long held that it is not necessary to prove direct injury to each claimed member in order to recover for an injury; a Appellant must merely show that the injury has produced "harm or pain or a lessened facility of the natural use of any bodily activity or capability." Roper v. Kimbrell's of Greenville, 231 S.C. 453, 99 S.E.2d 52, 54 (1957).

This case bears striking parallels to the case of Bass v. Kenco Group, 366 S.C. 450, 622 S.E.2d 577 (Ct.App.2005) cited hereinabove. In Bass, the Appellant sustained not only a physical injury to his shoulder, but also a psychological/psychiatric injury. As is true in the instant case, in Bass, the **only evidence presented** pointed to the inescapable conclusion that the Appellant had suffered a psychological/psychiatric injury. The Court noted "As found by the circuit court, the commission's rulings concerning Bass's psychological and psychiatric problems

Are supported by the unrefuted opinions of the Employee's regular physician, his Psychiatrist, his psychologist, his vocational expert, and the Palmetto Health Alliance psychologist that the Employee suffered his post-traumatic syndrome disorder, that he had an adjustment disorder with depressed mood, that his pain profile classification was "Dysfunctional", and that these problems were directly induced by the injuries sustained in the accident...

Conversely, the Defendants proffered no contradictory evidence whatsoever either by way of APA Submissions, cross-questioning of those expert, or deposition evidence. **Thus, not only was there substantial evidence to support [the conclusions] but in fact all of the evidence proffered on these points clearly and convincingly supports the [employee's contentions]...**

The record fully supports the commission's finding that Bass suffered mental problems as a result of the physical injury Bass suffered two injuries..." (emphasis added)

Further, Mr. Daley would earnestly point out that his serious fall not only impacted and impaired his back, but also as is well documented in the records, his hips and legs. The Appellant brought to the Commission's attention the case of Hutson v. S.C. State Ports Authority, 390 S.C.108, 700 S.E.2d 462 (S.C.App.2010), for the proposition that the Commission should have allowed and/or entertained Mr. Daley's uncontroverted testimony that this significant fall he suffered at Chapman Mechanical impacted not only his back, but also his hips and legs.

In Hutson, the Appellant testified, just as did Mr. Daley in the instant case, that he not only suffered a debilitating injury to his back, but also injury/impairment to his legs for symptoms he experienced after a work related injury. In finding that the Single Commissioner erred in not accounting for the injury to his legs as per the Appellant's testimony, the Court stated:

In his order, the single commissioner made a finding of fact that Hutson suffered radicular symptoms in his right leg that affected the functioning of the limb. He reiterated this finding when, in commenting on Hutson's assurances that he was capable of running a restaurant, he indicated that but for this testimony he would have found Hutson to be permanently and totally disabled "with affects to his right leg." Given this finding, which neither the SPA nor the Fund has appealed, we hold Hutson has established at least a prima facie case for compensation for the injury to his leg pursuant to section 42-9-30 and remand the matter for further findings of fact on this matter based on the present record.

As such, Mr. Daley would likewise contend that, he has made a prima facie showing for further finding(s) that he has an injury to his legs and hips based upon his own uncontroverted testimony.


Only where a scheduled loss is not accompanied by additional complications affecting another part of the body is the scheduled recovery exclusive. Bass, op.cit.at 583; Brown v. Owen Steel, 316 S.C.278, 450 S.E.2d 57 (Ct.App.1994). In this case, the substantial, if not the only evidence indicates that the Appellant sustained injuries not only to his back, hips and legs, but also to his psyche.

In this matter, in light of the foregoing, it is incumbent upon this Court to reverse the Findings and Conclusions of the Commission which either contend that Mr. Daley is not permanently and totally disabled and/or has only a single member injury.

CONCLUSION

Mr. Daley would assert that, for the foregoing reasons, the Findings and Conclusions of the Commission must be overturned by this Court. Not only the substantial evidence, but, in fact the only evidence clearly shows that he suffered a psychological and/or psychiatric injury for which he has never been provided even the minimal treatment offered by the Defendants' own chosen physician. Further, he has suffered injury and/or impairment to his hips and legs for which he is entitled to be found permanently and totally disabled.

Respectfully submitted,



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ATTORNEY FOR THE APPELLANT

Greenville, SC

8/20, 2013

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Sean Daley,)
)
Appellant,)
vs.)
)
Chapman Mechanical and)
Stonewood Insurance,)
)
Respondents)
)
)

CERTIFICATE OF SERVICE

CASE NO: 2013-001499

The undersigned certifies that she is an employee of Jeffrey D. Ezell, Attorney at Law, and that she served, on the date set forth below, a copy of the document described below, in the above entitled action to the following persons, pursuant to §15-9-930 and §15-9-940 of the Code of Laws of South Carolina, 1976, by depositing a copy of same in the United States Mail, postage prepaid, addressed to:

TO: Genny Kitchings
Clerk of Court
South Carolina Court of Appeals
PO Box 11629
Columbia, SC 29211

Mr. Steven Rudisill
Rudisill White Kaplan
212 S. Tryon Street, Suite 1440
Charlotte, NC 28281

DOCUMENT: Initial Brief of the Appellant

DATE OF MAILING: August 20, 2013

Janet Spruell

Janet Spruell
Paralegal to Jeffrey D. Ezell

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AUG 23 2013

SC Court of Appeals

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
WCC FILE NO.: 1101678

Sean Daley,)
)
Employee,)
Claimant,)
vs.)
)
Chapman Mechanical,)
)
Employer,)
)
And)
)
Stonewood Insurance,)
)
Carrier,)
Defendants)

CERTIFICATE OF
SERVICE

The undersigned certifies that she is an employee of Jeffrey D. Ezell, Attorney at Law, and that she served, on the date set forth below, a copy of the document described below, in the above entitled action to the following persons, pursuant to §15-9-930 and §15-9-940 of the Code of Laws of South Carolina, 1976, by depositing a copy of same in the United States Mail, postage prepaid, addressed to:

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