

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

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SC Court of Appeals

APPEAL FROM FLORENCE COUNTY

South Carolina Workers' Compensation Commission

WCC Case No. 1013465

Delores Porter, Claimant,.....Appellant,

v.

Medford Nursing Center, Employer, and
Key Risk Insurance Company, Carrier Respondents.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Did the South Carolina Workers' Compensation Commission err as a matter of law in failing to dismiss the Employer's Form 21 Request for Hearing dated May 31, 2012, over the objections of the Claimant, in violation of S.C. Code Ann. § 42-9-260(F) (Supp. 2012) which, among other things, specifically mandated, "...Further, the commission may not entertain any application to terminate or suspend benefits unless and until the employer or carrier is current with all payments due?"
2. Did the South Carolina Workers' Compensation Commission err in failing to order the Employer to bring the Claimant current on all unpaid temporary partial or temporary total disability benefits from September 19, 2011 and to continue payments until further order of this Commission and pursuant to S.C. Code Ann. § 42-9-260(G) (Supp. 2012) awarding a twenty-five (25%) percent penalty be imposed upon the Employer and the Carrier computed on the amount of benefits withheld in violation of S.C. Code Ann. § 42-9-260(F) (Supp. 2012)?
3. Did the South Carolina Workers' Compensation Commission err in failing to award pursuant to S.C. Code Ann. § 42-9-90 (1985) an additional ten (10%) percent penalty upon the Employer for any installment of compensation that should have been paid pursuant to S.C. Code Ann. § 42-9-260(F) (Supp. 2012) that were not paid within fourteen (14) days after each became due as provided in S C. Code Ann. §§ 42-9-230 (Supp. 2012), 42-9-240 (1985), or 42-9-260(F) (Supp. 2012)?
4. Did the South Carolina Workers' Compensation Commission err, having once conducted a hearing in violation of the specific mandate of S.C. Code Ann. § 42-9-260(F) (Supp. 2012), in failing to find the Claimant had sustained an injury to her low back on January 23, 2010 in addition to the admitted injuries to her spine and right shoulder which needed evaluation and treatment by an orthopaedist against substantial evidence in the record?
5. Did the South Carolina Workers' Compensation Commission err, having once conducted a hearing in violation of the specific mandate of S.C. Code Ann. § 42-9-260(F) (Supp. 2012), in failing to find the Claimant had sustained an injury to her right foot on January 23, 2010 in addition to the admitted injuries to her spine and right shoulder which needed evaluation and treatment by an orthopaedist against substantial evidence in the record?
6. Did the South Carolina Workers' Compensation Commission err in failing to find Claimant had not reached maximum medical improvement and that she is in need of additional treatment for her low back and right foot against substantial evidence in the record?

7. Did the South Carolina Workers' Compensation Commission err in failing to find that if Claimant had reached maximum medical improvement that pursuant to S.C. Code Ann. § 42-9-10 (Supp. 2012) she was totally and permanently disabled and entitled to lifetime medical benefits against substantial evidence in the record?
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9. Did the South Carolina Workers' Compensation Commission err in failing to determine when the Claimant's entitlement to permanent benefits under the Act was to commence?
10. Did the South Carolina Workers' Compensation Commission err in determining the Claimant only sustained a thirty-eight (38%) percent loss of use to her spine without any consideration of her age, education, and work background against substantial evidence in the record?
11. Did the South Carolina Workers' Compensation Commission err in determining the Claimant only sustained a five (5%) percent loss of use to her right shoulder without any consideration of her age, education, and work background against substantial evidence in the record?
12. Did the South Carolina Workers' Compensation Commission err in failing to find that the Claimant had sustained a permanent loss of use to her right foot considering her age, education, and work background against substantial evidence in the record?
13. Did the South Carolina Workers' Compensation Commission err in failing to find that the Claimant had sustained a permanent loss of use to her low back considering her age, education, and work background against substantial evidence in the record?
14. Did the South Carolina Workers' Compensation Commission err in failing to find Claimant was permanently totally disabled pursuant to S.C. Code Ann. § 42-9-10 (Supp. 2012) in failing to consider the combined affects of the Claimant's loss of use to her spine and right shoulder based on her age, education, and work background against substantial evidence in the record?
15. Did the South Carolina Workers' Compensation Commission err in failing to find Claimant was permanently totally disabled pursuant to S.C. Code Ann. § 42-9-10 (Supp. 2012) in failing to consider the combined affects of the Claimant's loss of use to her spine, right shoulder, foot, and low back based on her age, education, and work background against substantial evidence in the record?

STATEMENT OF THE CASE

The Appellant, Delores Porter, hereinafter referred to as "Claimant," is fifty-one (51) years of age. She graduated high school in New York and continued her education at New York City Community College for two (2) semesters. The Claimant then moved to Georgia where she lived for the next nine (9) years. While in Georgia she attended school and became a certified nursing assistant. The Claimant then moved to Darlington, South Carolina where she began working for the Respondent, Medford Nursing Center, LLC, hereinafter referred to as "Employer," as a certified nursing assistant, which she has done for the past sixteen (16) years.

On January 23, 2010, the Claimant was attempting to prevent a patient from falling out of his wheelchair when she tripped over the footrest of the wheelchair, fell to the concrete floor, injuring her right foot, right shoulder and neck and back. The Claimant was able to pull herself up and went to the nearest telephone and called her supervisor, Darlene Robinson, who had been the weekend supervisor for the past eight (8) years. Ms. Robinson came to the Claimant's aid and asked if the Claimant needed to go home. The Claimant responded that she would attempt to complete her scheduled shift.

During the night, the Claimant's pain became significantly worse and by the next morning she was in extreme pain. The Claimant reported for work and informed her supervisor that she was having severe pain in her right shoulder and neck. The Claimant was advised by the Director of Nursing to report to the company physician. The Claimant reported to McLeod Occupational Health on January 26, 2010 and was evaluated by Dr. Peter Johnson. Dr. Johnson examined the Claimant and diagnosed her with right trapezius muscle strain and right shoulder injury. (APA #9, p. 181) Dr. Johnson instructed her to

return to work with restrictions of no reaching above shoulder level with her right arm and no lifting, pushing or pulling over twenty-five (25) pounds and instructed her to return on February 2, 2010. (APA #9, p. 182) At that time Dr. Johnson did not address the issue involving the Claimant's right leg because the pain in her neck and shoulder were so severe.

On February 2, 2010, Dr. Johnson continued the Claimant's work restrictions through February 22, 2010, at which time he released her to return to full duty and instructed her to follow up in two (2) weeks. (APA #9, p. 190)

On June 14, 2010, the Claimant returned to Dr. Johnson with continued complaints of right shoulder pain. Dr. Johnson diagnosed the Claimant with chronic right shoulder impingement. (APA #9, p. 197) He prescribed an open MRI of her right shoulder which was completed on June 18, 2010. (APA #9, p. 200) Dr. Johnson reviewed the MRI on June 21, 2010 and noted that the MRI was, "unremarkable except for some degenerative changes." He continued the Claimant's restrictions of no lifting above shoulder level and not to lift, push or pull over twenty (20) pounds with the right arm. (APA #9, p. 203)

The Claimant returned to Dr. Johnson on July 6, 2010 with complaints of pain in her right arm with increased activity. At that time Dr. Johnson referred the Claimant to Pee Dee Orthopaedic Associates. (APA #9, p. 207)

On July 8, 2010, the Claimant returned to Dr. Johnson with, "pain and spasms going from her right shoulder into her esophagus and with difficulty swallowing." (APA #9, p. 212) Dr. Johnson referred her to Dr. Robert Elvington and scheduled an appointment for Thursday, July 22, 2010. (APA #9, p. 214)

The Claimant was examined by Dr. Elvington on July 22, 2010 and reported right shoulder pain. (APA #7, p. 111) Dr. Elvington noted that the x-ray of the Claimant's right

shoulder was, “normal,” although he diagnosed her with traumatic shoulder impingement and recommended a cycle of physical therapy. (APA #7, p. 112) Dr. Elvington restricted the Claimant’s work duties to no lifting or carrying over ten (10) pounds and no pushing or pulling. (APA #7, p. 113) Dr. Elvington continued to treat the Claimant’s complaints of pain in her right shoulder pain.

On December 13, 2010, Dr. Elvington referred the Claimant to Dr. Anthony Alexander for evaluation and treatment of her neck pain. Dr. Elvington noted, “This could be root cause of shoulder pain.” (APA #7, p. 117)

On January 4, 2011, almost one (1) year after the Claimant’s accident of January 23, 2010, the Claimant was examined by Dr. Alexander:

Delores Porter is a 50 years old, right hand dominant black female who reports that in January of 2010 she tripped over a wheelchair and fell backwards onto a cement floor striking her head, neck and back. Since that time she has suffered from severe, stabbing pain in the posterior neck region that radiates to the right shoulder as well as up into the neck and between the shoulder blades and down the right arm into the hand. She also admits to having weakness in the right arm such as grip strength. She suffers from severe headaches at times. On the visual analog scale, with 10 being most severe, she rates her pain as a 10. The pain is exacerbated by reaching, pulling, pushing and raising the right arm.
(APA #7, p. 120) (Emphasis added)

Dr. Alexander ordered an, “electrodiagnostic study of the nerves of the bilateral upper extremities and cervical spine.” (APA #7, p. 121) Dr. Alexander adjusted the Claimant’s medications and resumed the Claimant’s light duty restrictions of no lifting or carrying over ten (10) pounds. (APA #7, p. 122) The studies were completed on February 23, 2011 revealing evidence of moderate right carpal tunnel syndrome and mild chronic

radiculopathy on the right side at C5 and C6. Dr. Alexander recommended an MRI of the cervical spine, physical therapy, and right carpal tunnel steroid injections. (APA #7, p. 124)

The Claimant returned to Dr. Alexander on March 14, 2011 noting, "...She is still waiting on approval for an MRI for evaluation of the cervical radiculopathy. We have not heard anything from workers' comp. up to this point. She states that medication is not controlling her pain." (APA #7, p. 128)

The MRI of the cervical spine was finally completed on March 22, 2011:

IMPRESSION:

- 1) MRI demonstrates left posterolateral disc herniation at C6-7, which is compressing the ventral cord with moderately severe left neural foraminal narrowing related to hypertrophic uncovertebra/facet joint reaction at C6-7.
- 2) At C5-6, large diffuse posterior disc bulge with right paracentral protrusion compresses the ventral cord with moderate spinal canal narrowing and bilateral neural foraminal narrowing at this level.

(APA #7, p. 130)

The Claimant returned to Dr. Alexander on March 28, 2011 for follow up after completion of the cervical MRI. At that time Dr. Alexander referred the Claimant to Dr. Rakesh Chokshi for surgical intervention. (APA #7, p. 131)

Instead, the Claimant was sent by Employer to Dr. Christopher Paramore, a neurosurgeon, on May 31, 2011 with chief complaints of, "headache, lower back pain, neck pain, shoulder pain, right foot pain & leg pain." (APA #11, p. 221) (Emphasis added) Dr. Paramore recommended a two-level anterior cervical discectomy and fusion at C6-7 pending workers' compensation approval. (APA #11, p. 225) Dr. Paramore continued the Claimant's light duty status. (APA #11, p. 226)

The Claimant underwent anterior cervical diskectomy and fusion at C5-6 and C6-7 by Dr. Paramore on June 14, 2011. (APA #11, p. 229) By August 17, 2011, Dr. Paramore noted that Claimant was still complaining of discomfort in her right shoulder. (APA #11, p. 239)

Subsequently, on August 30, 2011, the Claimant began receiving treatment from Dr. Jason O'Dell for pain in her right ankle and foot, which was exacerbated by the initial fall of January 23, 2010. (APA #7, p. 133)

The Claimant returned to Dr. Paramore on September 15, 2011 with continued complaints of right shoulder pain. Dr. Paramore obtained x-rays of the Claimant's cervical spine and instructed her to return to work with no restrictions and to return in six (6) to nine (9) months (APA #11, p. 242)

On September 19, 2011, Claimant attempted to return to work pursuant to Dr. Paramore's instructions. Dana Jones, the "Health Information Technology Administrator" with the Employer, put the Claimant on light duty. Ms. Jones testified that part of her job was bringing people off of workers' compensation disability back into the work place, (Tr. p. 50, lines 9-12), and she realized the Claimant had surgery resulting in a steel plate in her neck and was complaining of shoulder pain, and she decided to keep the Claimant on restricted duty. Ms. Jones testified,

Q. Okay, even though she had a full duty work release from Dr. Paramore, did you bring her in and just throw her back in to working full duty?

A. She did not feel that she was able to handle a regular duty assignment, so we continued to provide restricted duty for her that she felt she'd be able to do. Basically still continued the restrictions that she had prior to going out.

(Tr. p. 52, lines 15-22)

* * *

Q. Did you know she had an 80 percent impairment to her neck?

A. I know that a doctor has stated that at this point.

Q. Okay. Did you know she was having pain in her shoulder?

A. Probably.

Q. Okay. And when she was talking to you, was she talking to you about the pain she was having in her neck and the pain she was having in her shoulder?

A. There was a conversation where she said she just didn't think she could handle a regular assignment yet. And so we spoke face to face, and I didn't want her doing an assignment that she didn't feel she could do. So it wasn't a real big issue. We just let the staffer know let's keep her on restricted duty.

(Tr. p. 60, lines 4-10)

The Claimant worked intermittently until from September 19, 2011 through October 6, 2011, during which time she never received temporary partial disability benefits, although she was being paid a weekly wage below her pre-accident average weekly wage. She continued under the shoulder limitation of Dr. Elvington, (APA #7, p. 113), and of Dr. Alexander, (APA #7, p. 122). The Claimant was physically unable to work after October 6, 2011. The Employer continued to withhold temporary partial and temporary total disability benefits in violation of S. C. Code Ann. § 42-9-260(F)(G) (Supp. 2012), without benefit of the consent of the Claimant, without obtaining a signed Form 17, and without benefit of Commission Order.

On October 6, 2011, Dr. O'Dell placed the Claimant completely out of work. (APA #7, p. 136) The Claimant underwent right lower extremity calcaneus exostectomy and right lower extremity secondary Achilles' repair on December 14, 2011 at the hands of Dr. Jason

O'Dell. (APA #7, p. 150) The Claimant is informed and believes the ongoing pain in her right ankle and right foot is caused by the initial fall of January 23, 2010.

Dr. O'Dell opined that the Claimant's pre-existing foot condition had been exacerbated by her fall of January 23, 2010, as follows:

Q. ...do you have an opinion to a reasonable degree of medical certainty given the fact that she had a pre-existing condition, that that twisting falling injury exacerbated her pre-existing condition?

A. I think that that is the type of mechanism that could give somebody that problem.

Q. And is that to a reasonable degree of medical certainty?

A. Right.

(Dep. Dr. O'Dell, p. 73, lines 4-12)

On October 19, 2011, pursuant to a referral by Dr. Paramore (APA #5, p. 78; APA #7, p. 139) who wanted the Claimant's continuing shoulder pain evaluated, the Claimant was evaluated by Dr. Patrick Denton for "burning pain in the right shoulder." (APA #5, p. 78; APA #7, p. 139) Dr. Denton noted tenderness over the AC joint and diagnosed the Claimant with impingement syndrome of the right shoulder and discussed treatment remedies to include subacromial decompression. The Claimant received a corticosteroid injection and was instructed to return in four (4) weeks. (APA #7, p. 140) Dr. Denton returned the Claimant to work with no lifting or carrying over ten (10) pounds and no pushing and pulling. (APA #7, p. 142)

The Claimant returned to Dr. Denton on November 9, 2011 complaining of "numbness, tingling and burning down the lateral neck and medial clavicle area." (APA #7, p. 143) Dr. Denton again discussed possible treatment options to include subacromial decompression and indicated to the Claimant that she had reached maximum medical

improvement for the right shoulder with a two (2%) percent impairment of the right upper extremity. (APA #7, p. 144)

Dr. Paramore recommended the Claimant undergo a MRI of the cervical spine which was completed on November 22, 2011. (APA #11, p. 244) The Claimant returned to Dr. Paramore on December 1, 2011, who noted that the Claimant was continuing to complain of discomfort in the right shoulder and right arm as well as difficulty swallowing. Dr. Paramore prescribed Flexeril and instructed the Claimant to return to his office in March at which time she would probably be placed at maximum medical improvement. (APA #11, p. 246)

On February 15, 2012, the Claimant returned to Dr. Paramore with continued complaints of pain in her right shoulder and her lower extremities. Dr. Paramore referred the Claimant to pain management and found her to have reached maximum medical improvement regarding her neck. (APA #11, p. 249) On March 6, 2012, Dr. Paramore assigned an eighty (80%) percent impairment rating to the Claimant's cervical spine. (APA #15, Dep. Dr. Paramore, p. 10, lines 10-15)

The Claimant attempted to return to Dr. Denton for increasing pain in her right shoulder but was informed that the Employer refused to authorize the return visit. Additionally, the pain management recommended by Dr. Paramore on February 15, 2012 had also not been authorized.

On May 24, 2012, the Employer filed a Form 21, Request for Hearing, requesting an adjudication of the Claimant's permanency from the admitted injury of January 23, 2010 to her neck and shoulder. The Form 21 was filed 248 days after the Employer wrongfully

terminated the Claimant's temporary total disability benefits, which itself was 852 days from the date of the January 23, 2010 injury.

A hearing was conducted on July 24, 2012, at which time the Claimant moved to dismiss the Employer's Form 21, Request for Hearing, as being in violation of the Act and moved for penalties to be assessed for unpaid temporary total disability benefits. (Tr. p. 10, line 13 - p. 12, line 22) The Commission failed to rule on the Motion. S.C. Code Ann. § 42-9-260(F) (Supp. 2012) sets out:

[F]urther the motion may not entertain any application to terminate or suspend benefits unless or until the Employer/Carrier is current with all payments due.”
(S.C. Code Ann. § 42-9-260(F) (Supp. 2012))

The Commission went forward with the hearing over the objection of the Claimant and at the conclusion of the hearing instructed respective counsel to file Post-Trial Briefs, which both parties' attorneys complied with on August 14, 2012.

The Commission did not issue instructions for an Order until November 20, 2012, which was 121 days after the hearing of July 24, 2012. The proposed Order was prepared by Mr. Gallagher, Employer's counsel, and forwarded to the Commission on December 20, 2012. The Order was not issued until January 14, 2013. The Single Commissioner denied Claimant's claim that she injured her lower back in her accident on January 23, 2010; denied that the accident of January 23, 2010 aggravated or worsened the pre-existing conditions of her right leg and foot; granted Employer's Form 21 request that temporary total disability benefits be terminated; and awarded permanent partial disability to the Claimant's spine and right shoulder.

Claimant filed an appeal with the South Carolina Workers' Compensation Commission Appellate Panel on January 23, 2013. A hearing was held before the Appellate

Panel on April 16, 2013, and an Appellate Panel Decision and Order as issued on June 14, 2013 basically affirming the Order of the Single Commissioner.

Claimant then filed a Notice of Appeal with the South Carolina Court of Appeals on July 8, 2013, alleging the Employer wrongfully terminated the Claimant's weekly temporary total disability benefits without Commission Order or a signed Form 17 Receipt of Compensation. The Claimant further asserts she is entitled to weekly temporary total disability benefits beginning October 6, 2011 and continuing. The Claimant requests a twenty-five (25%) percent penalty pursuant to S.C. Code Ann. § 42-9-240 (1985) and a ten (10%) percent penalty pursuant to S.C. Code Ann. § 42-9-90 (1985) for improper termination of weekly temporary total disability benefits be assessed against the Employer.

The Claimant further asserts that she has not reached maximum medical improvement and is in need of additional medical treatment for her neck, including problems with swallowing, her right shoulder and arm, her low back, and her right foot. Further, if the Claimant has reached maximum medical improvement, she asserts she is totally and permanently disabled pursuant to S.C. Code Ann. § 42-9-10 (Supp. 2012) and § 42-9-30(21) (Supp. 2012) and entitled to lifetime medical benefits.

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act (APA) establishes the standard for judicial review of decisions of the Workers' Compensation Commission. *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 276 S.E.2d 304 (1981); *Hargrove v. Titan Textile Co.*, 360 S.C. 276, 599 S.E.2d 604 (Ct. App. 2004). A reviewing court may reverse or modify a decision of an agency if the findings, inferences, conclusion, or decisions of that agency are "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." *Burse v. South Carolina Dep't of Health & Env'tl. Control*, 360 S.C. 135, 141, 600 S.E.2d 80, 84 (Ct. App. 2004); S.C. Code Ann. § 1-23-380(A)(6)(e) (2005). Under the scope of review established in the APA, this Court may not substitute its judgment for that of the Appellate Panel as to the weight of the evidence on questions of fact, but may reverse where the decision is affected by an error of law. *Liberty Mut. Ins. Co. v. South Carolina Second Injury Fund*, 363 S.C. 612, 611 S.E.2d 297 (Ct. App. 2005); *Frame v. Resort Servs., Inc.*, 357 S.C. 520, 593 S.E.2d 491 (Ct. App. 2004); *Stephen v. Avins Constr. Co.*, 324 S.C. 334, 478 S.E.2d 74 (Ct. App. 1996); S.C. Code Ann. § 1-23-380(A)(6)(d) (2005).

The substantial evidence rule of the APA governs the standard of review in a Workers' Compensation decision. *Frame*, 357 S.C. at 527, 593 S.E.2d at 494; *Corbin v. Kohler Co.*, 351 S.C. 613, 571 S.E.2d 92 (Ct. App. 2002); see also *Lockridge v. Santens of America, Inc.*, 344 S.C. 511, 515, 544 S.E.2d 842, 844 (Ct. App. 2001) ("Any review of the commission's factual findings is governed by the substantial evidence standard."). Pursuant to the APA, this Court's review is limited to deciding whether the Appellate Panel's decision is unsupported by substantial evidence or is controlled by some error of law. See *Rodriguez v. Romero*, 363 S.C. 80, 610 S.E.2d 488 (2005); *Gibson v. Spartanburg Sch. Dist. # 3*, 338 S.C. 510, 526 S.E.2d 725 (Ct. App. 2000); S.C. Code Ann. § 1-23-380(A)(6) (2005); see also *Grant v. Grant Textiles*, 361 S.C. 188, 191, 603 S.E.2d 858, 859 (Ct. App. 2004) ("A reviewing court will not overturn a decision by the Workers' Compensation Commission unless the determination is unsupported by substantial evidence or is affected by an error of law."); *Lyles v. Quantum Chem. Co. (Emery)*, 315 S.C. 440, 434 S.E.2d 292 (Ct. App. 1993) (noting that in reviewing decision of Workers' Compensation Commission, court of appeals will not set aside its findings

unless they are not supported by substantial evidence or they are controlled by error of law). 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 the administrative agency reached in order to justify its action. *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); *Etheredge v. Monsanto Co.*, 349 S.C. 451, 562 S.E.2d 679 (Ct. App. 2002); *Broughton v. South of the Border*, 336 S.C. 488, 520 S.E.2d 634 (Ct. App. 1999).

The Appellate Panel is the ultimate fact finder in Workers' Compensation cases and is not bound by the Single Commissioner's findings of fact. *Gibson*, 338 S.C. at 517, 526 S.E.2d at 729; *Muir v. C.R. Bard, Inc.*, 336 S.C. 266, 519 S.E.2d 583 (Ct. App. 1999). The final determination of witness credibility and the weight to be accorded evidence is reserved to the Appellate Panel. *Shealy v. Aiken County*, 341 S.C. 448, 535 S.E.2d 438 (2000); *Parsons v. Georgetown Steel*, 318 S.C. 63, 456 S.E.2d 366 (1995); *Frame*, 357 S.C. at 528, 593 S.E.2d at 495; *Gibson*, 338 S.C. at 517, 526 S.E.2d at 729. The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence. *Sharpe v. Case Produce, Inc.*, 336 S.C. 154, 519 S.E.2d 102 (1999); *DuRant v. South Carolina Dep't of Health & Env'tl. Control*, 361 S.C. 416, 604 S.E.2d 704 (Ct. App. 2004); *Corbin*, 351 S.C. at 618, 571 S.E.2d at 95; *Muir*, 336 S.C. at 282, 519 S.E.2d at 591. Where there are conflicts in the evidence over a factual issue, the findings of the Appellate Panel are conclusive. *Hargrove*, 360 S.C. at 290, 599 S.E.2d at 611; *Etheredge*, 349 S.C. at 455, 562 S.E.2d at 681.

The findings of an administrative agency are presumed correct and will be set aside only if unsupported by substantial evidence. *Anderson v. Baptist Med. Ctr.*, 343 S.C. 487, 541 S.E.2d 526 (2001); *Hicks v. Piedmont Cold Storage, Inc.*, 335 S.C. 46, 515 S.E.2d 532 (1999); *Frame*, 357 S.C. at 528, 593 S.E.2d at 495. It is not within our province to reverse findings of the Appellate Panel which are supported by substantial evidence. *Pratt*, 357 S.C. at 622, 594 S.E.2d at 274-75; *Broughton*, 336 S.C. at 496, 520 S.E.2d at 637.

(*Bass v. Isochem*, 365 S.C. 454, 617 S.E.2d 369 (2005))

ARGUMENTS

1. **The South Carolina Workers' Compensation Commission erred as a matter of law in failing to dismiss the Employer's Form 21 Request for Hearing dated May 31, 2012, over the objections of the Claimant, in violation of S.C. Code Ann. § 42-9-260(F) (Supp. 2012) which, among other things, specifically mandated, "...Further, the commission may not entertain any application to terminate or suspend benefits unless and until the employer or carrier is current with all payments due."**

This matter came before the Commission on July 24, 2012 for a hearing on the Employer's Form 21 Request for Hearing filed on May 24, 2012 for a determination of whether or not the Claimant had reached maximum medical improvement and any permanent award the Claimant may be entitled.

The Claimant objected to the hearing on the basis that the Employer improperly terminated temporary total disability benefits pursuant to S.C. Code Ann. § 42-9-260(F) (Supp. 2012). Claimant asserted she was entitled to a mandatory twenty-five (25%) percent penalty for temporary total disability benefits due from September 19, 2011 through July 24, 2012 the date of the hearing and continuing pursuant to S.C. Code Ann. § 42-9-260(G) (Supp. 2012). Additionally, the Claimant asserted that she was also entitled to a ten (10%) percent penalty on unpaid benefits pursuant to S.C. Code Ann. § 42-9-90 (1985) for all temporary total disability benefits that were not paid within fourteen (14) days after they became due.

The Employer conceded that, in fact, they did stop payment of temporary total disability benefits effective September 19, 2011 and has not paid temporary total disability benefits or temporary partial disability benefits since that date; notwithstanding, the demands of the Claimant. The Employer also conceded that no Form 17 was signed

by the Claimant on September 19, 2011 when she attempted to return to work or fifteen (15) days after attempting to return to work on September 19, 2011.

Notwithstanding the Claimant's assertion that pursuant to S.C. Code Ann. § 42-9-260 (Supp. 2012) that, "...the commission may not entertain any application to terminate or suspend benefits unless and until the employer or carrier is current with all payments due," (Emphasis added), a hearing commenced. During that hearing the Employer conceded that when the Claimant returned to work on September 19, 2011 she was provided light duty because the Employer believed the Claimant could not perform her normal job duties.

Further, the Employer's Exhibit #1 of their Pre-hearing Brief and Attachment 1 of the Claimant's Post-Trial Brief reflects that during the pay period of September 18, 2011 through September 24, 2011, the Claimant worked only four (4) days for a total of thirty-two and 2/10 (32.2) hours at Eleven and 14/100 (\$11.14) Dollars per hour grossing Three Hundred Fifty-eight and 71/100 (\$358.71) Dollars, which is Ninety-five and 80/100 (\$95.80) Dollars less than her average weekly wage of Four Hundred Fifty-four and 50/100 (\$454.50) Dollars, for which she received no temporary partial disability benefits for the difference. (See Attachment #2 of Claimant's Post-Trial Brief) Additionally, during the pay period of September 25, 2011 through October 1, 2011, the Claimant worked four (4) days for a total of twenty-nine and 75/100 (29.75) hours at Eleven and 14/100 (\$11.14) Dollars per hour grossing Three Hundred Fourteen and 42/100 (\$314.42) Dollars, which is One Hundred Twenty-three and 19/100 (\$123.19) Dollars below her average weekly wage, for which she received no temporary partial disability benefits for the difference. Further, during the pay period of October 2, 2011 through October 8,

2011, the Claimant only worked, three (3) days for a total of twenty-three and 5/10 (23.5) hours at Eleven and 14/100 (\$11.14) Dollars per hour grossing Two Hundred Sixty-one and 79/100 (\$261.79) Dollars, a total of One Hundred Ninety-two and 71/100 (\$192.71) Dollars below her average weekly wage of Four Hundred Fifty-four and 50/100 (\$454.50) Dollars, for which she received no temporary partial disability benefits for the difference. (See Attachment #2 of Claimant's Post-Trial Brief)

A Form 17 Receipt of Compensation (R. p. _____) specifically states that a claimant is not to sign the Form 17 if the claimant returns to work, "With restrictions but at a salary not less than before the injury." Notwithstanding the fact that the Claimant did not earn at least her average weekly wage for the above time periods, and the fact the Employer did not pay the Claimant temporary partial disability payments during the above set out periods, and the fact that the Claimant did not sign, "a waiver of a hearing prior to the termination and suspension in writing by the recipient," the Employer improperly terminated her temporary total disability benefits.

Additionally, between September 19, 2011 and October 6, 2011, a period of eighteen (18) days, the Claimant only worked eleven (11) days and no more than four (4) days in succession at one time. At no time during the three (3) weekly pay periods did the Claimant ever attain her average weekly wage during that pay period, nor had she been declared at maximum medical improvement by her physician, nor had a hearing been conducted by the South Carolina Workers' Compensation Commission to allow the Employer to terminate or suspend the Claimant's benefits.

Pursuant to the South Carolina Workers' Compensation Statute, the employer may only terminate benefits if the claimant waives her right to a hearing. There is no

doubt that between September 19, 2011 and October 6, 2011, the Claimant was entitled to temporary partial disability benefits which she did not receive. It is also undisputed that the Claimant did not waive her right to a hearing prior to the termination or suspension of her temporary total disability benefits. Additionally, Martin v. Rapid Plumbing, 369 S.C. 278, 631 S.E.2d 547 (S.C. App. 2006) (rehearing denied), specifically finds, "...employer was required to resume payment of benefits after claimant left work after returning to work..." The fact that the physician recommended the Claimant return to full duty in no way allows the Employer to terminate benefits, when the Legislature specifically directed in § 42-9-260(F),

After the 150 day period has expired, the commission shall provide by regulation the method and procedure by which benefits may be suspended or terminated for any cause, but the regulation must provide for an evidentiary hearing and commission approval prior to termination or suspension unless such hearing is expressly waived in writing by the recipient...

(S.C. Code Ann. 42-9-260(F) (Supp. 2012)) (Emphasis added)

The statute goes on to provide,

Further, the commission may not entertain any application to terminate or suspend benefits unless and until the Employer or carrier is current with all payments due.

(Emphasis added)

If the Commission finds as a matter of law that the employer may terminate benefits upon receipt of a report from a physician, then there is absolutely no reason for § 42-9-260(F) and the claimant's benefits may be terminated prior to a hearing within the one hundred fifty (150) day period but not after the one hundred fifty (150) day period. In this case the one hundred fifty (150) day period commenced on the date of the Claimant's

injury, “when the Claimant reported the injury,” i.e. January 23, 2010, and benefits were terminated September 19, 2011, six hundred five (605) days after the injury, without the Employer requesting a Form 21 hearing, a waiver by the Claimant, or an order of the Commission as required by Statute.

The Employer has willfully, wantonly and knowingly violated the statute and the penalties are assessed without the discretion of the Commission pursuant to Martin v. Rapid Plumbing, 369 S.C. 278, 631 S.E.2d 547 (S.C. App. 2006) (rehearing denied). To the extent that the Commission asserts that 25A S.C. Code Ann. Regs. 67-505 or 25A S.C. Code Ann. Regs. 67-506 allows the Employer to terminate this Claimant’s benefits prior to a hearing, that interpretation violates the specific directive of § 42-9-260(F) and (G) and the Regulation so interpreted is in violation of the Act.

Our Court of Appeals in Gadson v. Mikasa Corporation, 368 S.C. 214, 628 S.E.2d 262 (S.C. App. 2006), specifically directs,

Regulations authorized by the legislature have the force of law. Gaffney Ledger v. South Carolina Ethics Comm’n, 360 S.C. 107, 600 S.E.2d 540 (2004); McNickel’s, Inc. v. South Carolina Dep’t of Revenue, 331 S.C. 269, 503 S.E.2d 723 (1998); Goodman v. City of Columbia, 318 S.C. 488, 458 S.E.2d 531 (1995) cf. S.C. Code Ann. § 1-23-10(4) (2005) (defining “Regulation” as “each agency statement of general public applicability that implements or prescribes law or policy or practice requirements of any agency. Policy or guidance issued by an agency other than in a regulation does not have the force or effect of law.”). However, regulations may not alter or add to the terms of a statute. United States Outdoor Advertising, Inc. v. South Carolina Dep’t of Transp., 324 S.C. 1, 481 S.E.2d 112 (1997) (Emphasis added)

Our Supreme Court has specifically held in McNickel's, Inc. v. South Carolina Dep't of Revenue, 331 S.C. 269, 503 S.E.2d 723 (1998),

While the Legislature may not delegate its power to make laws, in enacting a law complete in itself, it may authorize an administrative agency or board "to fill up the details" by prescribing rules and regulations for the complete operation and enforcement of the law within its expressed general purpose. *Heyward v. South Carolina Tax Comm'n*, 240 S.C. 347, 126 S.E.2d 15 (1962). An administrative regulation is valid as long as it is reasonably related to the purpose of the enabling legislation. *Hunter & Walden Co. v. South Carolina State Licensing Bd. for Contractors*, 272 S.C. 211, 251 S.E.2d 186 (1978) **Although a regulation has the force of law, it must fall when it alters or adds to a statute.** *Society of Professional Journalist v. Sexton*, 283 S.C. 563, 324 S.E.2d 313 (1984) **A rule may only implement the law.** *Banks v. Batesburg Hauling Co.*, 202 S.C. 273, 24 S.E.2d 496 (1943). (Emphasis added)

Pursuant to the Administrative Procedures Act, S.C. Code Ann. § 1-23-380(5), this Court may reverse or modify the South Carolina Workers' Compensation Commission Order if, as here, it is in violation of, among other things, statutory provisions in excess of the statutory authority, made upon unlawful procedure or affected by error of law.

The Claimant respectfully prays that the Employer's Form 21, Request for Hearing, filed on May 24, 2012 be denied and that the Employer be ordered to pay temporary total disability benefits and temporary partial disability benefits as set out above to date and continuing until further order of the Commission plus a mandatory twenty-five (25%) percent penalty pursuant to § 42-9-260(G) and ten (10%) percent penalty pursuant to § 42-9-90 for said failures.

2. **The South Carolina Workers' Compensation Commission erred in failing to order the Employer to bring the Claimant current on all unpaid temporary partial or temporary total disability benefits from September 19, 2011 and to continue payments until further order of this Commission and pursuant to S.C. Code Ann. § 42-9-260(G) (Supp. 2012) awarding a twenty-five (25%) percent penalty be imposed upon the Employer and the Carrier computed on the amount of benefits withheld in violation of S.C. Code Ann. § 42-9-260(F) (Supp. 2012).**

This exception is not abandoned but is fully argued above.

3. **The South Carolina Workers' Compensation Commission erred in failing to award pursuant to S.C. Code Ann. § 42-9-90 (1985) an additional ten (10%) percent penalty upon the Employer for any installment of compensation that should have been paid pursuant to S.C. Code Ann. § 42-9-260(F) (Supp. 2012) that were not paid within fourteen (14) days after each became due as provided in S.C. Code Ann. §§ 42-9-230, 42-9-240, or 42-9-260(F) (Supp. 2012).**

This exception is not abandoned but is fully argued above.

4. **The South Carolina Workers' Compensation Commission erred, having once conducted a hearing in violation of the specific mandate of S.C. Code Ann. § 42-9-260(F) (Supp. 2012), in failing to find the Claimant had sustained an injury to her low back on January 23, 2010 in addition to the admitted injuries to her spine and right shoulder which needed evaluation and treatment by an orthopaedist against substantial evidence in the record.**

When Claimant initially presented to Dr. Paramore on May 31, 2011, she announced that she was having, “neck pain with pain radiating down the right arm with some tingling involved. She also has chronic headache as well as pain in the right lower back and right leg.” (APA #11, p. 223) (Emphasis added) In his Deposition taken on May 23, 2012, Dr. Paramore testified,

- Q. Okay. Could you tell me what she was complaining about when she first came into the office?
- A. Headache, lower back pain, neck pain, shoulder pain, and right foot and leg pain.
- Q. Okay. Who referred her to you? How did she wind up coming to this office?
- A. Dr. Alexander saw her and sent her.
- Q. That's Pee Dee Orthopaedics?
- A. That's correct.
- Q. Okay. And he was treating her for the shoulder problems?
- A. I think he was probably treating her for everything, but – but he sent her to me, specifically, because of the neck.

(APA #15, Dep. Dr. Paramore, p. 15, line 19 – p. 16, line 8)

Further, Dr. Paramore testified that he did not examine the Claimant's back and that if, in fact, she was complaining of pain in her back, it should be evaluated and treated.

- A. ...Still complaining of some discomfort in her right shoulder with multiple complaints involving the lower extremities. And because she was continuing to have pain, we talked about referring her to pain management. And at this point, we did call her at M--M.M.I. and that's what – when the impairment rating was generated.
- Q. Okay. And what was the purpose of the pain management?
- A. Because she was still having pain, and we didn't really have a good explanation.
- Q. And when you're addressing yourself pain, that would be talking about pain in the shoulder, the neck, the head or the back?
- A. Right shoulder is – and lower extremities is what my note from this date says here.
- Q. Lower extremities mean the legs?
- A. Yes.
- Q. And would that be indicative of a problem with the low back?

- A. Possibly.
- Q. Okay. And if – if that pain continues to be a complaint with her, what would your recommendation be at this point in time.
- A. Well, it really depends on the nature of the pain. If it was radiating from the back down the legs, then that might necessitate a workup of her low back. If it was just the legs, I would probably have her follow-up with her family physician.

(APA #15, Dep. Dr. Paramore, p. 20, line 9 – p. 21, line 12)

Dr. Paramore's evaluation of the Claimant's impairment and need for additional medical treatment and his findings whether or not the Claimant had reached maximum medical improvement only applied to the Claimant's cervical spine and not to her low back or her shoulder.

In failing to find that the Claimant sustained an injury to her low back in the accident of January 23, 2010 that at least needed to be evaluated pursuant to Dr. Paramore's medical opinion, which is uncontradicted in the medical record, the Commission ruling that the Claimant has reached maximum medical improvement is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. This Court should reverse or modify that decision pursuant to § 1-23-380(e).

- 5. The South Carolina Workers' Compensation Commission erred, having once conducted a hearing in violation of the specific mandate of S.C. Code Ann. § 42-9-260(F) (Supp. 2012), in failing to find the Claimant had sustained an injury to her right foot on January 23, 2010 in addition to the admitted injuries to her spine and right shoulder which needed evaluation and treatment by an orthopaedist against substantial evidence in the record.**

The deposition of Dr. Jason O'Dell contains numerous opinions of Dr. O'Dell that the Claimant's accident of January 23, 2010 exacerbated her pre-existing right foot

condition, which exacerbated her pain and increased her need for surgery to the right foot.

A. According to my history, it said that she had some prior treatment on the posterior aspect of her Achilles and there's not much detail there, but it said that it had improved but had been exacerbated from her injury.

(Dep. Dr. O'Dell, p. 10, line 24 – p. 11, line 3)

* * *

Q. If we assume that she had some type of right lower extremity problem involving the Achilles heel and that ankle before this fall of January the 23rd, 2010, do you have an opinion to a reasonable degree of medical certainty as to whether or not this fall being tripped by the footrest of the wheelchair and ---

A. Right.

Q. --- falling to the -- I guess, to the right and being twisted landing on her shoulder to the point where she's got a nerve impingement in the shoulder and she's got some problems with her cervical spine as a result of the fall, whether or not that fall also exacerbated the problems that she was having with her right lower extremity?

A. I think that's reasonable.

Q. And is that to a reasonable degree of medical certainty?

A. Yeah.

(Dep. Dr. O'Dell, p. 43, line 9 – p. 44, line 1)

* * *

Q. --- do you have an opinion to a reasonable degree of medical certainty given the fact that she had a pre-existing condition, that that twisting falling injury exacerbated her pre-existing condition?

A. I think that that is the type of mechanism that could give somebody that problem.

Q. And is that to a reasonable degree of medical certainty?

A. Right.

(Dep. Dr. O'Dell, p. 73, lines 4-12)

In failing to find that the Claimant sustained an injury to her right foot in the accident of January 23, 2010 pursuant to Dr. O'Dell's medical opinion which is uncontradicted in the medical record, the Commission ruling that the Claimant has reached maximum medical improvement is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. This Court should reverse or modify that decision pursuant to § 1-23-380(5)(e).

6. **The South Carolina Workers' Compensation Commission erred in failing to find Claimant had not reached maximum medical improvement and that she is in need of additional treatment for her low back and right foot against substantial evidence in the record.**

This exception is not abandoned but is fully argued above.

7. **The South Carolina Workers' Compensation Commission erred in failing to find that if Claimant had reached maximum medical improvement that pursuant to S.C. Code Ann. § 42-9-10 (Supp. 2012) she was totally and permanently disabled and entitled to lifetime medical benefits.**

The Claimant's only past relevant work was as a certified nursing assistant which she had performed for this Employer for sixteen (16) years. She has no other relevant vocational training. She has significant impairment in her neck and back, her right shoulder, her right foot. No one reasonably could arrive at a conclusion that this Claimant could return to her previous work activities; and the Employer has not demonstrated any evidence that an individual of Claimant's age, education, and work background could be gainfully employed. In fact, the Employer has knowingly assisted the Claimant in obtaining long term disability benefits based on these very injuries.

Lula Wallace, the Payroll and Benefits Coordinator for the Employer, testified at the hearing on July 24, 2012, as follows:

- Q. What was your job then?
- A. I was the Administrative Assistant.
- Q. To what?
- A. Wilson Senior Care.
- Q. Administrative Assistant to the Administrator?
- A. The corporate office, just the corporate office.
- Q. Okay. That's a different position than you have now?
- A. Correct.
- Q. And that you had back in October and September of 2011?
- A. Correct.
- Q. Were you a party to any of Ms. Porter's initial filing of the Workers' Comp claim?
- A. No.
- Q. Did you ever deal with Ms. Porter other than the issues related to a short-term disability?
- A. Yes, sir. I also handle employee benefits.
- Q. Okay. With regard to this claim, is the extent of your involvement with her claim itself limited to these dealings with her in September of 2011 and October of 2011?
- A. Correct.
- (Tr. p. 28, line 24 – p. 29, line 20)

Dana Jones, the Health Information Technology Administrator for the Employer, testified at the hearing of July 24, 2012, as follows:

- Q. Even though she had a full work release from Dr. Paramore, did you bring her in and just throw her back in to working full duty?

A. She did not feel that she was able to handle a regular duty assignment, so we continued to provide restricted duty for her that she felt she's be able to do. Basically still continued the restrictions that she had prior to going out.

Q. And what were those restrictions? Was there anything specific, or was it more just do what you can kind of do. Tell us about what that was.

(Tr. p. 52, lines 15-25)

* * *

Q. All right. And did you direct her to Lula at that point to begin the short-term disability process?

A. I directed her to our facility staffer, the scheduler. Because once it's not a workers' comp issue, which according to her and those involved it wasn't, then I sent it through the chain of command.

Q. You're out of the picture?

A. Yes.

Q. At any point during your conversations with her during your investigation and whether or not this was related, did she ever indicate that anything related to her neck and/or shoulder was the reason she needed to go out of work?

A. No. Now, I will say she didn't feel she could work a regular assignment due to her neck and shoulder at that time, but that was separate from the reason she was going out.

Q. And you were accommodating those concerns, correct?

A. Yes.

(Tr. p. 56, lines 2-20)

* * *

Q. Would you have been able to accommodate that on an indefinite basis?

A. I mean, I guess I can't say what could have ever happened. That would be the goal, is to accommodate until she returned to regular capacity.

(Tr. p. 57, lines 3-7)

* * *

Q. And during this period of time when she was trying to go back to work, do you recall her complaining about her shoulder and her neck?

A. I don't recall.

Q. Well, then what kind of restrictions were you trying to give her?

A. Whatever she felt comfortable with. She's again stated that she didn't feel comfortable with a full duty assignment returning. She was released to full duty, but I did not feel comfortable having someone do something that they didn't feel comfortable with.

Q. And what was her problem; why was she not comfortable; what was she complaining about?

A. I don't remember her complaining. I just know she wasn't ready.

(Tr. p. 63, line 23 – p. 64, line 12)

Although the Commission made a finding that the Claimant did at least sustain an injury to her cervical spine based on Dr. Paramore's eighty (80%) percent impairment rating and an injury to her right shoulder based on Dr. Denton's two (2%) percent impairment rating to her right upper extremity, the Commission made no effort to determine that combined effect on the Claimant's earning capacity as a nurse's aid of sixteen (16) years.

The Claimant's testimony as it relates to her limited work background, her age, and her credible complaints of pain are not even addressed by the Commission. The Commission ignored the Employer's concern and their inability to provide employment on a continuing basis to the Claimant.

The Commission's Order is self limited to an evaluation of the Claimant's impairment to her arm and neck pursuant to § 42-9-30 and completely ignores the

Claimant's prayer for relief under § 42-9-10. Therefore, the matter should be remanded back to the Commission with instructions to evaluate Claimant's claim for benefits pursuant to § 42-9-10.

8. The South Carolina Workers' Compensation Commission erred in failing to determine the date upon which the Claimant had reached maximum medical improvement.

Although the Commission asserts Claimant has reached maximum medical improvement, it does not set out the date when that occurred and does not set out on what basis it arrives at that conclusion.

9. The South Carolina Workers' Compensation Commission erred in failing to determine when the Claimant's entitlement to permanent benefits under the Act was to commence.

In addition to the Commission's failing to determine the date on which Claimant reached maximum medical improvement, it also fails to set out upon which date the Claimant was entitled to a permanent partial disability award.

10. The South Carolina Workers' Compensation Commission erred in determining the Claimant only sustained a twenty-eight (28%) percent loss of use to her spine without any consideration of her age, education, and work background.

This exception is thoroughly argued above. However, it is pertinent to emphasize that although Dr. Paramore awarded the Claimant an eighty (80%) percent impairment to the cervical spine, which in his Deposition of May 23, 2012 he translated into a twenty-eight (28%) percent to the whole person, the doctor testified that the impairment rating to the cervical spine did not include the low back complaint which needed to be evaluated in order to determine the extent of Claimant's "total" impairment to the spine. Likewise, the

Commission made no attempt to evaluate the relationship between the spinal injury that Dr. Paramore was treating the Claimant for and the combined affects of the Claimant's shoulder injury which Dr. Elvington was treating her for, and the impact of the combined impairments and the Claimant's ability to perform her duties as a certified nursing assistant considering her age, education, and work background as a certified nursing assistant for over sixteen (16) years with this Employer, and the Employer's hesitancy in putting the Claimant back to full duty as a certified nursing assistance and the assistance the Employer gave Claimant to obtain long term disability benefits.

11. The South Carolina Workers' Compensation Commission erred in determining the Claimant only sustained a five (5%) percent loss of use to her right shoulder without any consideration of her age, education, and work background.

Dr. Elvington began treating Claimant for her shoulder injury on July 22, 2010 when he limited her ability to work to "No pushing or pulling." (APA #3, p. 46) He renewed those restrictions on September 2, 2010 (APA #3, p. 49) and again on October 21, 2010 (APA #3, p. 52) when he referred Claimant to Dr. Alexander for "Right shoulder pain and upper extremity pain. Shoulder impingement, traumatic." (APA #3, p. 51)

Dr. Alexander saw Claimant on January 4, 2011 and on February 23, 2011 and noted that the Claimant had "pain, numbness and tingling in the bilateral upper extremities. More pronounced on the right." (APA #3, p. 57) Dr. Alexander recommended an MRI of the cervical spine, physical therapy, and right carpal tunnel steroid injections. (APA #3, p. 57) He did not release her to return to work without restrictions and, in fact, when the MRI of March 22, 2011 was reviewed on March 28,

2011 (APA #60), Dr. Alexander noted, "This patient is not a candidate for cervical epidural steroid injections. She needs a surgical referral." (APA #3, p. 63) His Assessment at that time was,

1. C6-7 left posterolateral disc herniation with cervical cord compression; 2. C5-6 right paracentral disc protrusion with ventral cord compression and moderate spinal canal narrowing.

(APA #3, p. 63)

Dr. Alexander of Pee Dee Orthopaedic Associates did not see Claimant again as the authorized treating physician for the shoulder nor did Dr. Elvington. However, the Claimant was sent by the worker's compensation carrier on May 31, 2011 to Dr. Paramore for treatment of her neck. Dr. Paramore noted,

She tripped and fell backward striking her back and neck. Since that time she has neck pain with pain radiating down the right arm with some tingling involved. She also has chronic headache as well as pain in the right lower back and right leg.

(APA #4, p. 65) (Emphasis added)

Dr. Paramore performed surgery on the Claimant's neck on June 14, 2011. (APA #4, p. 68) After her neck surgery, on August 17, 2011, Dr. Paramore ordered physical therapy for the Claimant's shoulder, after which on September 15, 2011 he noted,

[S]he has continued to do physical therapy with some improvement in her neck and right shoulder. She has persistent shoulder pain. She is taking some Percocet for pain. X-rays today show maturing fusion. From the standpoint of her neck I believe she can return to work. I will see her back in 6 to 9 months for more x-rays.

(APA #4, p. 74) (Emphasis added)

On September 19, 2011, Claimant attempted to return to work. Even her supervisor realized she was not ready to return to full duty. (See Tr. p. 52, lines 15-22; Tr. p. 60, lines 4-10)

At no time had Claimant been released by Dr. Elvington to return to full duty as to her shoulder nor had she been released by Dr. Alexander for her shoulder.

On October 19, 2011, Claimant was referred to Dr. Denton at Pee Dee Orthopaedic Associates for evaluation of her right shoulder pain by Dr. Paramore, her authorized neurosurgeon. (APA #5, p. 78) Dr. Denton allowed the Claimant to return to work with the following restrictions on October 19, 2011, "No Lifting/Carrying over 10 lbs, NO PUSHING OR PULLING." (APA #5, p. 79) He continued to treat the Claimant for her shoulder. On November 9, 2011, Dr. Denton noted, "

She states that the corticosteroid injection has fixed her shoulder. She has full range of motion and no pain at the shoulder. However, she continues to have numbness and tingling and burning down the lateral neck and medial clavicle area.

(APA #5, p. 82)

On November 9, 2011, Claimant saw Dr. Denton, at which time he stated,

If the patient fails conservative treatment, subacromial decompression is an option. Today we discussed treatment options and the patient elected to proceed with continue with home exercise program. I do not see indication for surgical intervention on her shoulder at this time. I do feel she has reached maximum medical improvement of the right shoulder with 2% impairment of the right upper extremity.

(APA #5, p. 84; APA #7, p. 144)

On November 14, 2011, Dr. Denton completed a Form 14B, on which he diagnosed Claimant with “right shoulder impingement, right cervical numbness and tingling.” He listed the body part injured as the “right shoulder” and gave Claimant a “2% medical impairment to the right upper extremity.” (APA #5, p. 85)

Claimant had not been released to return to full duty by Dr. Denton, the authorized orthopaedist who was treating her for her right shoulder, until November 9, 2011. (APA #5, p. 85) She was not rated by Dr. Paramore until March 6, 2012 on his Form 14B involving her neck. (APA #4, p. 77) There is no medical dispute Claimant was not released to full duty for both her neck and shoulder until November 9, 2011.

- 12. The South Carolina Workers' Compensation Commission erred in failing to find that the Claimant had sustained a permanent loss of use to her right foot considering her age, education, and work background.**

This exception is not abandoned but is fully argued above.

- 13. The South Carolina Workers' Compensation Commission erred in failing to find that the Claimant had sustained a permanent loss of use to her low back considering her age, education, and work background.**

This exception is not abandoned but is fully argued above.

- 14. The South Carolina Workers' Compensation Commission erred in failing to find Claimant was permanently totally disabled pursuant to S.C. Code Ann. § 42-9-10 (Supp. 2012) in failing to consider the combined affects of the Claimant's loss of use to her spine and right shoulder based on her age, education, and work background.**

This exception is not abandoned but is fully argued above.

15. **The South Carolina Workers' Compensation Commission erred in failing to find Claimant was permanently totally disabled pursuant to S.C. Code Ann. § 42-9-10 (Supp. 2012) in failing to consider the combined affects of the Claimant's loss of use to her spine, right shoulder, foot, and low back based on her age, education, and work background.**

This exception is not abandoned but is fully argued above.

CONCLUSION

Claimant respectfully asserts that the South Carolina Workers' Compensation Commission erred by proceeding to conduct a hearing when Claimant's back temporary total disability benefits were not current in violation of the statute. It is undisputed that when the Claimant attempted to return to work on September 19, 2011 she was still under the limitations of Dr. Alexander, Dr. Elvington, and most recently Dr. Denton concerning the use of her right arm. Even the Employer's representative acknowledged that the Claimant was not able to return to full duty. The Claimant was not offered a Form 17 to sign, did not waive her rights to a hearing, her benefits were terminated without temporary partial benefits being paid, and temporary total disability benefits were not reinstated when she ceased to be able to work and was placed under the restrictions of Dr. Denton, "No pushing or pulling."

Your Claimant respectfully prays that this Court vacate the Order of the South Carolina Workers' Compensation Commission Appellate Panel dated June 14, 2013 and the Order of the Single Commissioner below dated January 14, 2013; dismiss the Form 21 Request for Hearing of the Employer; and order the Employer to immediately bring the Claimant's back temporary total disability benefits current from September 19, 2011,

when they were illegally terminated, to the present and continue until further order of the South Carolina Workers' Compensation Commission.

Further, your Claimant respectfully prays that the Employer be ordered to pay a mandatory twenty-five (25%) percent penalty of the above unpaid temporary total disability benefits for failure to comply with § 49-9-260(G).


Further, your Claimant respectfully prays that the Employer be ordered to pay an additional ten (10%) percent penalty for failure to promptly pay temporary total disability benefits pursuant to § 42-9-90.

Notwithstanding the statutory mandate not to proceed to a hearing until benefits were brought current, the Commission continued to conduct the hearing and erred in finding that the Claimant had reached maximum medical improvement, was not entitled to benefits for her low back or her right foot or treatment for her low back or right foot, which was clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. Additionally, the Commission erred in failing to find that if the Claimant had reached maximum medical improvement, she was entitled to an award of total permanent disability and lifetime medical benefits under the Act, which was clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record.

Or in the alternative, your Claimant prays that the Orders of the Appellate Panel and the Single Commissioner be vacated and the matter be remanded back to the South Carolina Workers' Compensation Commission for the purpose of conducting a hearing de novo to determine whether the Claimant has now reached maximum medical improvement; and if she has not, that she be provided medical care for her neck, low back, right arm, and right foot until further order of the Commission. If the Claimant has

been determined to be at maximum medical improvement that the Commission make a determination as to whether or not Claimant is totally and permanently disabled pursuant to § 42-9-10 after considering the combined affects of the Claimant's impairments to her back, neck, right shoulder, and right foot, considering her age, education, and work background and entitled to lifetime medical benefits pursuant to § 42-9-10.

Respectfully submitted,



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August 29, 2013

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

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SC Court of Appeals

APPEAL FROM FLORENCE COUNTY

South Carolina Workers' Compensation Commission

WCC Case No. 1013465

Delores Porter, Claimant,.....Appellant,

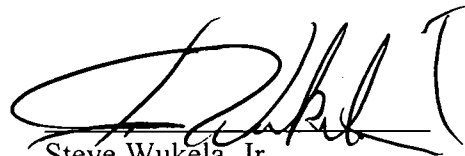
v.

Medford Nursing Center, Employer, and
Key Risk Insurance Company, Carrier Respondents.

PROOF OF SERVICE

I certify that I have served the Initial Brief of Appellant on the Employer, Medford Nursing Center, and the Carrier, Key Risk Insurance Company, by depositing a copy of it in the United States Mail, postage prepaid, on August 29, 2013, addressed to their attorney of record George D. Gallagher, Esquire, McAngus Goudelock & Courie, LLC, Post Office Box 12519, Capitol Station, Columbia, South Carolina 29211-2519.

August 29, 2013



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