THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
APPELLATE PANEL, WORKERS' COMPENSATION COMMISSION

WCC No.: 1101678

Appellate Case No.: 2013-001499

Sean Daley.....Appellant,

v.

Chapman Mechanical and
Stonewood Insurance Company.....Respondents.

BRIEF OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

QUESTIONS PRESENTED

I. **DID THE WORKERS' COMPENSATION COMMISSION CORRECTLY FIND THAT APPELLANT FAILED TO PROVE BY SUBSTANTIAL EVIDENCE A DISABLING PSYCHOLOGICAL/PSYCHIATRIC INJURY?**

II. **DID THE WORKERS' COMPENSATION COMMISSION CORRECTLY FIND THAT APPELLANT'S INJURY WAS GOVERNED BY *SINGLETON V. YOUNG LUMBER CO.* AND THAT APPELLANT WAS NOT PERMANENTLY AND TOTALLY DISABLED?**

III. **DID THE WORKERS' COMPENSATION COMMISSION CORRECTLY FIND THAT APPELLANT SUFFERED FROM BACK PROBLEMS PRIOR TO THE DATE OF THE ACCIDENT?**

STATEMENT OF THE CASE

This matter was heard before the Appellate Panel of the Workers' Compensation Commission in Columbia, South Carolina on April 15, 2013. The Panel issued its Decision and Order on June 14, 2013, fully affirming the single commissioner's Decision and Order finding Appellant sustained a twenty percent (20%) permanent partial disability to his back, and denying claims for psychological injury and permanent and total disability benefits. Subsequently, Appellant brought this appeal. Respondents hereby submit their reply.

On the date of the accident, February 9, 2011, Appellant had only been working for Chapman Mechanical ("Chapman") as essentially a plumber's assistant for approximately four (4) months. (Hr. T., p. 82). Appellant was installing piping into a ceiling when the ladder came out from underneath him and he fell backwards, hitting his back on a piece of PVC pipe on the way down. (Hr. T., p. 42).

After his accident, Appellant was out of work for two or three days, and then returned to

his job, performing office work provided by Chapman. After several weeks, Chapman moved Appellant from the office to a job site to help inventory parts. Eventually, Appellant was let go by Chapman, and, at the instruction of his attorney, Appellant has not looked for any work since November 2011. (Hr. T., p.93). In fact, Appellant has refused to look for any gainful employment in direct contradiction with Dr. Robert LeBlond's release with restrictions and the results of the Functional Capacities Evaluation. (A.P.A. p. 158). Dr. LeBlond gave Appellant a six percent (6%) impairment rating to the whole person and placed him at maximum medical improvement on November 21, 2011. (A.P.A. p. 213).

Appellant's medical history reveals a long-standing back and bilateral leg pain issue prior to the injury on February 9, 2011. During the last several months of 2010, just prior to his injury, the record clearly shows that the Appellant repeatedly reported to the Greenville Hospital System and to New Horizon Family Health Services complaining of middle and lower back pain that had been getting progressively worse for approximately two to four (2-4) years. (A.P.A. pp. 21, 24, 56). In November 2010, Appellant received a series of x-rays and MRIs which revealed a "vertebra which is partially sacralized on the right and appears to articulate with the upper sacrum" and "a rather focal posterior central disk extrusion at the L4-5 level of the lumbar spine." (A.P.A. pp. 61-62).

With regards to Appellant's alleged psychological condition, of particular interest is the complete lack of any mention of psychological issues until Appellant was instructed by his attorney to present to Dr. Patrick Mullen almost five (5) months after the accident. The medical evidence put forward by Appellant is "too underwhelming" (Appellate Panel Decision, p. 8) to overturn the Appellate Panel's findings of fact. As noted above, Appellant saw Dr. Mullen in

June 2011, who opined that Appellant was "somewhat depressed" (A.P.A. p. 204), but nowhere was there any indication that any depression was disabling or permanent. Apparently unsatisfied with Dr. Mullen's diagnosis, Appellant's attorney sent him to Dr. Robert Brabham on January 17, 2012. Dr. Brabham initiated both the Beck Depression Inventory and Beck Anxiety Inventory, which revealed only a moderate level of depression and a mild level of anxiety, respectively. (A.P.A. p. 221). A third opinion was sought regarding Appellant's psychological condition, presenting to Dr. C. Thomas Gualtieri on May 10, 2012. Dr. Gualtieri opined that Appellant was "a bit depressed" (A.P.A. p. 232), but he also clearly stated that Appellant "does not have any serious psychiatric or cognitive problems that can be related to [the] accident." (A.P.A. p. 237). Additionally, Dr. Gualtieri noted that he does "not anticipate persistent neuropsychiatric difficulties or disability related to [the accident]." (A.P.A. p. 238).

ARGUMENT

I. THE WORKERS COMPENSATION COMMISSION DID NOT ERR IN FAILING TO FIND APPELLANT SUFFERED A PSYCHOLOGICAL INJURY AS A RESULT OF THE COMPENSABLE ACCIDENT

The South Carolina Administrative Procedures Act (A.P.A.) establishes the substantial evidence rule, which governs the standard for judicial review of decisions made by the Commission's Appellate Panel. Landry v. Carolinas Healthcare System, 396 S.C. 149, 154, 719 S.E.2d 288, 291 (Ct. App. 2011). Substantial evidence is "not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which . . . would allow reasonable minds to reach the conclusion the administrative agency reached in order to justify its actions." Id. (citing Liberty Mut. Ins. Co. v. Second Injury Fund, 363 S.C. 612, 620, 611 S.E.2d

297, 300 (Ct. App. 2005)). Under the A.P.A., the reviewing court may not substitute its judgment for the Commission's "as to the weight of the evidence on questions of fact, but may reverse where the decision is affected by an *error of law*." Stone v. Traylor Bros., Inc., 360 S.C. 271, 274, 600 S.E.2d 551, 552 (Ct. App. 2004) (emphasis added). An error of law exists "where the evidence is susceptible of but one reasonable inference" Mullinax v. Winn-Dixie Stores, Inc., 318 S.C. 431, 437, 458 S.E.2d 76, 80 (Ct. App. 1995).

The Commission is given broad discretion and is entitled to determine the weight and credibility to be given to all of the evidence that is considered in a particular case. Fishburne v. ATI Systems Intern., 384 S.C. 76, 86-87, 681 S.E.2d 595, 600 (Ct. App. 2009). Additionally, "[w]here the medical evidence conflicts, the findings of the Commission are conclusive." Mullinax, at 435, 681 S.E.2d at 78. Appellant repeatedly refers to the "uncontroverted" evidence of a "substantial" psychological injury which is allegedly directly caused by the accident of February 9, 2011. However, the medical evidence is certainly far from uncontroverted, and the Commission, after properly weighing all of the evidence before it, found that "no psychological overlay as a sequla to this injury" existed. (Appellate Panel Decision, p. 9).

Despite the Appellant misconstruing and aggrandizing several medical records, it is clear – from the plain language of the reports – that neither Dr. Mullen, nor Dr. Gualtieri, found that the Appellant was disabled by any psychological condition that was related to the injury. (A.P.A. pp. 205-06; 232-38). As discussed above, Dr. Mullen found Appellant only "somewhat depressed", and Dr. Gualtieri stated that Appellant "does not have any serious psychiatric or cognitive problems that can be related to [the] accident." Appellant asserts that one of the causes of his alleged psychological condition is the "sedentary lifestyle" he is forced to live, which has

caused him to gain "about 40-50 pounds due to inactivity." (A.P.A. p. 215). However, on the date of the injury, Appellant was substantially the same weight as he was when he presented to Dr. Gualtieri in May 2012. (Hr. T., p. 85; A.P.A. pp. 233, 236). Moreover, the medical evidence shows that Appellant is not displaying any sign of atrophy, a common side effect of extended periods of a sedentary lifestyle. (A.P.A. p. 153). The fact that there is a disagreement between medical evidence regarding Appellant's psychological status means that, as a matter of law, this court must defer to the Commission and affirm its findings of fact. Brown v. Peoplease Corp., 402 S.C. 476, 481-82, 741 S.E.2d 761, 764 (Ct. App. 2013) (citing Potter v. Spartanburg Sch. Dist. 7, 395 S.C. 17, 23, 716 S.E.2d 123, 126 (Ct. App. 2011).

Furthermore, a large portion of Appellant's claim of psychological damage is allegedly related to "maltreatment" by Chapman. The vast majority of this 'evidence' was properly excluded by the Appellate Panel and should not be considered by this court. However, even if this court finds, purely on evidentiary grounds, that these allegations should be considered, the weight given to it should be minimal. Throughout Appellant's Initial Brief, there are claims of "extort[ion]" (Appellant's Brief, p. 5), and accusations that the manner in which Chapman, cautiously and lawfully, handled Appellant's claim contributed to Appellant's alleged psychological problems. (Appellant's Brief, pp. 3, 5, 7). These allegations are wholly irrelevant to Appellant's claim, and far too speculative and tenuous to be given any weight as a proximate cause of Appellant's alleged psychological problems.

Under South Carolina law, "mental injuries are compensable if . . .the mental injury is induced either by physical injury . . . or by unusual or extraordinary conditions of employment." Stokes v. First Nat'l Bank, 298 S.C. 13, 19, 377 S.E.2d 922, 926 (Ct. App. 1988). With the

exception of seating complaints made by the Appellant, every allegation of "maltreatment" arose after his employment was terminated and certainly was not a condition of employment. This timeline justifies the Commission's finding that evidence of such alleged "maltreatment" is irrelevant and this finding should be affirmed by this court.

Two further issues warrant discussion concerning Appellant's supposed psychological condition: (1) Appellant's alleged inability to find gainful employment; and (2) the cause of Appellant seeking medical help for his condition. First, as will be discussed more fully below, Appellant contends that he is permanently and totally disabled, and cannot find any type of gainful employment due to his injury. According to Appellant's Brief, this has led to a decline in Appellant's psychological condition. However, this is in direct contradiction with medical evidence and the results of the Functional Capacities Evaluation given by Dr. LeBlond. In fact, according to the Functional Capacities Evaluation results, Appellant is capable of sitting and standing constantly; climbing ladders frequently; occasionally squatting, kneeling, crawling, and engaging in repetitive lumbar bending. (A.P.A. p. 158). Prior to his work as a plumber's assistant, Appellant had experience working at several positions in restaurants, gas stations, and lube shops. (Hr. T., pp. 91-92). Appellant freely admitted that the reason he has not looked for work since Dr. LeBlond released him with restrictions in November of 2011 is because his attorney has requested that he not do so. (Hr. T., p. 93).

Finally, Appellant has been seen by a number of medical professional since the accident occurred in February of 2011, but not once did he complain of psychological issues until he was urged to see a psychologist by his attorney. In fact, nowhere in the medical records is there any indication that Appellant was suffering from any depression or psychological problems from the

date of his injury until he was sent to see Dr. Mullen at the direction of counsel. Dr. LeBlond treated Appellant for months, both before and after he was seen by Dr. Mullen, yet he never mentioned to Dr. LeBlond any symptoms of depression or anxiety. (see e.g. A.P.A. p. 254-63). The calculated and coached nature of this visit is apparent when one compares the Appellant's self-reported "symptoms" with other evidence of record. Despite repeatedly claiming that he suffered from "anxiety" when questioned by Dr. Mullen and Dr. Brabham during their examinations, when asked by his own attorney at the hearing in front of Commissioner Wilkerson, Appellant stated that he "[does not] know what anxiety is." (Hr. T., p. 64). Even subsequent to his first visit to Dr. Mullen, the only mention of any depression comes in the records of Drs. Mullen, Brabham, and Gaultierri, two doctors and a psychologist, who were sought out for that particular diagnosis. Appellant makes no complaints to any other physician or therapist, and no other practioner noted any difference in Appellant's mood or demeanor.

All of the evidence that was before the Commission clearly shows that it was substantial and supports its findings of fact and final decision. As stated in the Appellate Panel's opinion, the evidence of a "psychological overlay is too underwhelming to merit an award for same." (Appellate Panel Decision, p. 8). Pursuant to the applicable standard of judicial review and the clearly settled law of South Carolina, this court must affirm the Commission's findings.

II. THE APPELLATE PANEL WAS CORRECT IN FINDING THAT APPELLANT'S CLAIM INVOLVED ONLY A SINGLE MEMBER PURSUANT TO *SINGLETON V. YOUNG LUMBER CO.* AND THAT APPELLANT WAS NOT PERMANENTLY AND TOTALLY DISABLED.

The Appellant argues that the Commission erred in failing to find that alleged secondary

injuries to his legs, hips, and psyche constituted independent compensable injuries, allowing him to recover under a "two-member" theory. In Singleton v. Young Lumber Co., 236 S.C. 454, 114 S.E.2d 837 (1960), the South Carolina Supreme Court held that in order to obtain compensation in addition to the scheduled member actually injured, claimant must show some "superadded injury or disease." Id., at 471, 114 S.E.2d at 846 (citing Globe Indemnity Co. et. al. v. Walker, 84 Ga. App. 687, 67 S.E.2d 176, 178 (1951)). The Supreme Court in Wigfall v. Tideland Utilities, Inc., 354 S.C. 100, 589 S.E.2d 100 (2003) interpreted Singleton to stand "for the rule that an individual is not limited to scheduled benefits under Section 42-9-30 if he can show *additional injuries* beyond a lone scheduled injury." Id. at 109–10, 580 S.E.2d at 103 (emphasis added). In relying on the seminal case of Singleton, the Commission found that the alleged pain/injury to the hips, buttocks, or lower extremities "emanates from the back, and there is no independent injury." (Final Decision and Order, p. 8).

The term "injury" must mean more than simply testimony from the Appellant that another body part is affected. The case Fishburne v. ATI Systems Int'l, 384 S.C. 76, 681 S.E.2d 595 (Ct. App. 2009) is illustrative of this point. In Fishburne, the Claimant alleged to have pain in the right leg emanating from an admitted injury to the lower back. Id. at 83, 681 S.E.2d at 599. The Court of Appeals affirmed the Commission's award of ten percent (10%) permanent partial disability to the back and noted that, despite Claimant's testimony of pain, there was "no evidence that she had sustained a specific injury to her right lower extremity . . . ." Id. at 89, 681 S.E.2d at 601. This clear statement of law shows that the Appellant must put forward some evidence, above merely his testimony, that his hips and legs are painful, showing that the additional complained-of pain is a legitimate site of an injury. There is no treatment, and nothing

in the record, aside from Appellant's statements, which established that he suffered any injury to his hips or legs. If Appellant cannot meet this standard, then the Commission's findings must be affirmed.

Appellant's reliance on Roper v. Kimbrell's of Greenville, 231 S.C. 453, 99 S.E.2d 52 (1957) to argue that his contended radiculopathy establishes a second and independent injury is unfounded. In recent years, this court has greatly limited the application of Roper, and established the "situs of the injury" theory as the governing rule for compensation in South Carolina. Therrell v. Jerry's, Inc., 370 S.C. 22, 633 S.E.2d 893 (2006). Under Therrell, the South Carolina Supreme Court expressly rejected the "functional impairment" test for scheduled recovery, essentially what the Appellant is arguing this court should apply, and stated that "our scheduled compensation scheme focuses on the site of the injury and not the resulting functional limitation." Id., at 29, 633 S.E.2d at 897 (citing Gilliam v. Woodside Mills, 319 S.C. 385, 461 S.E.2d 818 (1995)). Applying the situs of the injury rule, as opposed to a theory that has been expressly rejected by the South Carolina Supreme Court, limits Appellant's recovery to scheduled disability to his back, as it is clearly the site of the injury.

As more fully discussed in Argument Section I of this Brief, it is the Respondent's contention that Appellant has not suffered any compensable psychological injury, and that the Appellate Panel ruled correctly on that issue. However, if this court does find a psychological injury exists, Respondents argue that it is not a scheduled member for which Appellant may recover benefits pursuant to the Workers' Compensation Act.

The court in Lee v. Harborside Cafe held that a worker's psychological system is not a scheduled member as intended by the South Carolina General Assembly. 350 S.C. 74, 564

S.E.2d 354, (Ct. App. 2002). Lee and its progeny stand for the well-established rule that "a purely intangible injury such as one to the psychological system was [not] intended by the legislature to be classified as a scheduled member." Id., at 80, 564 S.E.2d at 357. In reaching its decision, the court in Lee cited to Fields v. Owens Corning Fiberglass, 301 S.C. 554, 393 S.E.2d 172 (1990) which closely mirrors the present circumstances. In Fields, the Supreme Court overturned the Commission's award of a ten percent (10%) psychological impairment, stating that "[r]espondent's only injury to a member, organ, or body part was the injury to her back for which she received a specific scheduled loss award." Id. At 556, 393 S.E.2d at 174. Therefore, it is clear that in the present case Appellant has failed to show that his alleged psychological condition constitutes an additional compensable injury. The Commission's findings, as a matter of well-established law, must be affirmed.

The Appellant's argument regarding his psychological second injury relies almost exclusively on the case of Bass v. Kenco Group, 366 S.C. 450, 622 S.E.2d 577 (Ct. App. 2005). This reliance is erroneous, and the posture in the Bass case can be easily distinguished from the circumstances currently before the court. The Appellant is correct when he states that in Bass, the only evidence before the Commission and the Court of Appeals unequivocally showed that the claimant was "dysfunctional" and "had developed severe depression and panic attacks." Id. at 455-56, 622 S.E.2d at 579-80. The evidence in Bass truly was, as the Appellant repeatedly contends here, "uncontroverted," and both the Commission and Appellate Panel found in favor of the Claimant. Id. at 456, 622 S.E.2d at 580.

This one-sided evidence is not the case in this appeal. As discussed at length above, there is a clear disagreement between the medical records and opinions offered into evidence regarding

Appellant's psychological condition. Additionally, the Commission in the present case found that no compensable psychological injury existed with the Appellant. The Commission's findings of fact must not be disturbed on appeal.

Further, the Commission's findings that the Appellant failed to prove that he was permanently and totally disabled as a result of the accident is supported by substantial evidence, and the Commission must be given deference to determine the credibility and weight it gives to each piece of evidence. Dr. LeBlond only gave the Appellant a six percent (6%) impairment rating to the entire person and cleared him to go back to work. (A.P.A. p. 213). The Functional Capacities Evaluation clearly indicates that the Appellant is capable of returning to work subject to the outlined restrictions, and the Appellant is not permanently and totally disabled. As noted several times, the reason the Appellant has not looked for employment that will meet his few work restrictions is because his attorney encouraged him not to do so. The only relevant evidence of Appellant's complete inability to return to work is in the report of Dr. Brabham, however, the Commission chose to not give this conclusion persuasive weight. The presence of conflicting evidence regarding the Appellant's permanent and total disability indicates that this is a question of fact, rightfully determined by the Commission, and not to be disturbed upon review.

III. THE COMMISSION DID NOT ERR IN FINDING APPELLANT SUFFERED FROM BACK PROBLEMS PRIOR TO THE DATE OF THE ACCIDENT.

Respondent argues that a clear reading of the medical history in the record on appeal shows that there is substantial evidence to support the Commission's finding that Appellant

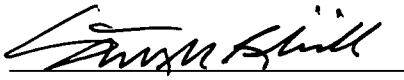
suffered from pre-existing back problems prior to his accident. In late 2010, until immediately prior to his accident, Appellant made a number of visits to the Greenville Hospital System, as well as to New Horizon Family Health Services, all of which were predicated by chronic, aching back pain that had apparently been getting progressively worse for several years. (A.P.A. p.p. 21-24, 56, 60-63). On October 20, 2010, Appellant presented to North Greenville Hospital complaining of aching back pain that registered as an eight (8) on a scale of zero-ten (0-10); the *exact* same pain scale that Appellant gave after his injury. (A.P.A. pp. 21-24).

Appellant's own repetitive subjective readings of his pain level are not the only evidence that the Commission relied upon in making its finding that Appellant suffered from a pre-existing pain condition. In a series of x-rays and MRIs, it was found that Appellant had a "vertebra which was partially sacralized on the right and appears to articulate with the upper sacrum" (A.P.A. p. 61), as well as "a rather focal posterior central disc extrusion at the L4-5 level of the lumbar spine." (A.P.A. p. 62). In order to deal with all of his chronic pain, Appellant was prescribed Lortab, which he continued to take up until, and after, his accident. In fact, it was Appellant's continued use of Lortab, in conjunction with the medication prescribed by Dr. LeBlond, that predicated his expulsion from Dr. LeBlond's care for failed drug screenings. (A.P.A. pp. 262-63). All of this medical history clearly demonstrates that the record before the Commission regarding the Appellant's pre-existing condition met the substantial evidence standard that controls judicial review, and, therefore, the Commission's decision must be affirmed.

CONCLUSION

Respondents assert that the Decision and Order entered by the Commission must be affirmed by this Court. The evidence of record repeatedly shows that there is a conflict between medical records, opinions and testimony in this case. It is well-established law that where there is a conflict or differing opinions, the issue is one of fact to be determined by the Commission. The Court of Appeals may not substitute its own judgment for that of the Commission. Therefore, for the reasons stated above, this Court must affirm the Commission's findings that Appellant did not suffer from a psychological injury, nor any secondary injury to his hips and legs for which he is permanently and totally disabled.

Respectfully submitted,

By: 

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CERTIFICATE OF SERVICE

We do hereby certify that on this date the foregoing or attached Brief of Respondents was duly served upon the parties to this action and/or their attorney(s) of record by U.S. Mail, pursuant to the South Carolina Appellate Court Rules, in particular SCACR Rule 208.

This 17th day of September, 2013.

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