THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2013-001382

LaTonya Footman, ...Claimant/Appellant,

v.

Johnson Food Services, LLC, Employer,
and The Hartford, Carrier, ...Defendants/Respondents.

INITIAL BRIEF OF RESPONDENTS

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STATEMENT OF THE CASE

This is an appeal from the May 30, 2012 Order of the South Carolina Workers' Compensation Commission which was affirmed by Order of the Honorable Judge G. Thomas Cooper, Jr. on April 1, 2013. Appellant filed a Rule 59(e) Motion to Alter/Amend Judgment on April 15, 2013 that was denied by Judge Cooper.

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

This matter came to be heard before the Single Commissioner on June 8, 2011 in Columbia, South Carolina pursuant to Defendants' Application to Stop Payment of Benefits, (hereinafter, "Form 21") filed on April 5, 2011. The Form 21 was filed on the basis that Appellant's authorized treating physician, Dr. Michael S. Green, determined that Appellant reached maximum medical improvement (MMI) on March 30, 2011. After determining Appellant was at MMI, Dr. Green assigned a two percent (2%) impairment rating to the left upper extremity and a two percent (2%) impairment rating to the right upper extremity. (Defendants/Respondents' APA Submissions, May 24, 2011, pp. 13, 19) Respondents asserted that Appellant was entitled to an award of permanent partial disability benefits based on the impairment ratings provided by Dr. Green.

Appellant maintained that she was entitled to an award of permanent partial disability benefits to the left upper extremity and right upper extremity in excess of the impairment ratings provided by Dr. Green (Transcript of Proceedings, June 8, 2011, pp.

4-5). More specifically, Appellant presented the diagnostic report of Dr. Jackson, who conducted an Independent Medical Examination (IME) of Appellant pursuant to the request of Appellant's attorney. Dr. Jackson, in a report dated April 20, 2011, assigned a ten percent (10%) impairment rating to the left upper extremity and a ten percent (10%) impairment rating to the right upper extremity (Claimant/Appellant's APA Submissions, May 27, 2011, pp. 14-15). Appellant took the position that she was not seeking additional medical treatment based on the fact that she had reached maximum medical improvement and based on the absence of medical evidence indicating that she was in need of additional medical treatment. (Transcript of Proceedings, June 8, 2011, p. 6, lines 16-22).

After the hearing, in a Decision and Order dated September 16, 2011, the Single Commissioner determined that Appellant sustained compensable injuries to the right and left upper extremities as a result of Appellant's September 6, 2006 work-related accident (Decision and Order, dated September 16, 2011). The Single Commissioner concluded that Appellant was entitled to an award of six percent (6%) of permanent partial disability benefits to the right and left arm, respectively, pursuant to S.C. Code Ann. § 42-9-30(13). The Single Commissioner further concluded that the greater weight of the evidence supported a finding that the Appellant reached maximum medical improvement on March 28, 2011 and that she was not entitled to future medical treatment pursuant to S.C. Code Ann. § 42-15-60.

In a timely fashion, the Claimant/Appellant filed a Request for Commission Review (Form 30) on September 20, 2011, raising numerous exceptions to the Decision and Order. After Appellant and Respondent Briefs were filed and served on the Full Commission of the South Carolina Workers' Compensation Commission, a Review

Hearing was held on March 19, 2012. By the Full Commission Decision and Order of the South Carolina Workers' Compensation Commission filed on May 30, 2012, the Full Commission affirmed the Decision and Order of the Single Commissioner dated September 16, 2011 in its entirety, with the one exception of reducing Claimant/Appellant's disability payment.

In a timely fashion on June 29, 2012, the Claimant/Appellant filed a Petition for Judicial Review with the South Carolina Court of Common Pleas, Fifth Judicial Circuit.

A hearing was held before Judge G. Thomas Cooper, Jr., Presiding Judge of the Fifth Judicial Circuit, on March 6, 2013, and in which the Appellant raised three main issues for adjudication. First, Appellant asserted that the Single Commissioner and the Full Commission of the South Carolina Workers' Compensation Commission erred in finding that Appellant was released to return to work with no restrictions. Second, Appellant asserted the Single Commissioner erred in finding that Appellant suffered a 6% permanent partial disability to both the left and right upper extremities. Appellant further asserted the Full Commission of the South Carolina Workers' Compensation Commission erred in reducing Appellant's award from 26.4 weeks to 22 weeks.

On April 1, 2013, Judge G. Thomas Cooper issued an Order affirming the Decision and Order of the Full Commission of the South Carolina Workers' Compensation Commission with a modification to correct a scrivener's error related to the number of weeks of compensation awarded by the South Carolina Workers' Compensation Commission.

On April 15, 2013, the Appellant filed a Notice of Motion and Motion to Alter or Amend Judgment. By Order dated June 3, 2013, Judge G. Thomas Cooper Denied the Motion to Alter or Amend Judgment.

Claimant/Appellant timely appealed to this Court.

STANDARD OF REVIEW

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

> "A party who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review under this article, and Article 1..."

The standard of review for the Court of Appeals is as follows:

> "(5) The Court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. The Court may affirm the decision of the agency or remand the case for further proceedings. The Court may reverse or modify the decision if substantial rights if the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are:
>
> (a) in violation of constitutional or statutory provisions;
> (b) in excess of the statutory authority of the agency;
> (c) made upon unlawful procedure;
> (d) affected by other error of law;
> (e) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
> (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion."

S.C. Code Ann. § 1-23-380(5)(a-f).

When the evidence before the Court gives rise to but one reasonable inference, the question becomes one of law for the Court to decide. *See* Lorick v. S.C. Electric & Gas Co, 245 S.C. 513, 141 S.E.2d 662 (1965). Likewise, if there is absolutely no evidence in support of a finding of fact by the Commission, the question becomes a question of law. *See* Scott v. Havner Motor Company, 226 S.C. 580, 86 S.E.2d 475 (1955). Where the

evidence is not disputed, then it becomes a matter of law. *See* Smith v. Union Bleachery/Cone Mills, 276 S.C. 454, 280 S.E.2d 52 (1981).

Findings of fact can be reversed only if the determination was clearly erroneous in view of the reliable, probative and substantial evidence on the whole record. *See* Palmetto Alliance, Inc., v. S.C. Public Service Commission, 282 S.C. 430, 319 S.E.2d 695 (1984). Substantial evidence is

> "...evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached, or must have reached in order to justify its action. Substantial evidence is something less than the weight of the evidence and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence. **A judgment upon which reasonable men might differ will not be set aside.**"
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> Id at 696 *referencing* Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304, 307 (emphasis added).

Substantial evidence has also been defined as "...relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Hunter v. Patrick Construction Company, 289 S.C. 46, 344 S.E.2d 613 (1986). 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 same conclusion the administrative agency reached in order to justify its action. Etheredge v. Monsanto Co., 349 S.C. 451, 456, 562 S.E.2d 679,681-82 (Ct. App. 2002). The findings of the Full Commission are presumed correct and can be set aside only if unsupported by substantial evidence or based on an error of law. McGuffin v. Schlumberger-Sangamo, 307 S.C. 184, 186, 414 S.E.2d 162, 163 (1992).

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

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

The Full Commission is the ultimate fact finder in workers' compensation cases. Ross v. American Red Cross, 298 S.C. 490, 492, 381 S.E.2d 728, 730 (1989). It is not within the appellate courts' purview to reverse findings of the Full Commission which are supported by substantial evidence. Broughton v. South of the Border, 336 S.C. 488, 496, 520 S.E.2d 634, 637 (Ct. App. 1999). Where there is a conflict in the evidence, either by different witnesses or the testimony of the same witnesses, the factual findings of the Commission are conclusive. Anderson v. Baptist Med. Ctr., 343 S.C. 487, 492-93, 541 S.E.2d 526, 528 (2001). Furthermore, the Commission is free to believe or disbelieve some or all of the testimony of witnesses. See, Holcomb v. Dan River

Mills/Woodside Div., 286 S.C. 223, 225, 333 S.E.2d 338, 340 (Ct. App. 1985) (because the Commission is the trier of fact in workers' compensation cases, it "may believe part or all of a witness's testimony").

ARGUMENTS

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

The Single Commissioner made the following finding of fact:

> "15. Based on the substantial evidence, including medical records and testimony, I find that the Claimant has been released with no restrictions, and has returned to work (full duty) with both of her employers (Deposition of Dr. Green, pages 31-32; Defendants' APA #1, page 13"
>
> (Decision and Order dated September 16, 2011, p. 10).

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

> "15. Based on the substantial evidence, including medical records and testimony, We find that the Claimant has been released with no restrictions, and has returned to work (full duty) with both of her employers (Deposition of Dr. Green, pages 31-32; Defendants' APA #1, page 13"
>
> (Full Commission Decision and Order dated May 30, 2012, p. 6)

The evidence in the record establishes that Appellant was treated for her injuries, reached maximum medical improvement, was released to return to work by her authorized treating physician without any restrictions. The Commission reached this conclusion and made this finding of fact based on two specific pieces of evidence: (1) Dr. Green's deposition testimony (Deposition of Dr. Michael S. Green dated October 3, 2008); and (2) the Physicians' Statement (Form 14B) completed by Dr. Green on September 18, 2008. (Defendants/Respondents' APA Submissions, May 24, 2011, p. 13).

Dr. Green indicated, during his deposition, that he released Appellant to return to regular duty work with no restrictions following her final appointment with his office in

August 2008. (Deposition of Dr. Michael S. Green, October 3, 2008, p. 30, line 23 – p. 31, line 7). After being told about her job description, Dr. Green stated that she could do it with no restrictions. (Deposition of Dr. Michael S. Green, October 3, 2008, p. 32, lines 9-20). He did indicate that if Appellant had come back to him and stated that a particular component of her job really bothered her that he would probably advise her to refrain or minimize that particular activity. (Deposition of Dr. Michael S. Green, October 3, 2008, p. 32, lines 20-25). Dr. Green also noted that his review of Dr. Jackson's records indicated that she was "...okay for a moderate level of activity." Deposition of Dr. Michael S. Green, October 3, 2008, p. 33, lines 11-12).

Dr. Green also filled out a Form 14B Physician's Statement for filing with the South Carolina Workers' Compensation Commission. On the Form 14B, Dr. Green, as the authorized treating physician, indicates that Appellant suffered an injury to her left and right upper extremities. (Defendants/Respondents' APA Submissions, May 24, 2011, p. 13). He further indicates that Appellant reached maximum medical improvement on August 11, 2008 and "...is able to return to work without restriction." (Defendants/Respondents' APA Submissions, May 24, 2011, p. 13).

Upon review of a decision of the Commission, the trial judge or appellate court is not permitted to substitute his or her or its own findings of fact for those of the Commission. *See* Brown v. R.L. Jordan Oil Company, 291 S.C. 272, 353 S.E.2d 280 (1987). Nor may the court substitute its judgment for that of the agency as to the weight of the evidence. *See* Tobey v. L & P Construction Co., 296 S.C. 122, 370 S.E.2d 897 (Ct. App. 1988). Findings of fact can be reversed only if the determination was clearly erroneous in view of the reliable, probative and substantial evidence on the whole record.

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

The Commission's finding is grounded in the evidence presented in the record. The Commission's finding of fact contains citations to the source of such finding and provides an insight into the rationale for the finding. The Full Commission agreed with the Single Commissioner and affirmed her findings of fact on this issue. In its Order, the Full Commission also cited to portions of the record that contain their rationale for the finding of fact.

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

The Circuit Court's decision to affirm the Single Commissioner and Full Commission determination that Appellant had returned to work with no restrictions is

based upon the substantial evidence presented at the hearing. Further, the Single Commissioner and Full Commission provided rationale for this decision in their respective Orders. This Court should not set aside that determination simply because an alternate conclusion *could* have been reached. For the foregoing reasons, the Circuit Court's Order and the South Carolina Workers' Compensation Commission's Finding of Fact related to Appellant's return to work without restriction should be affirmed.

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

Appellant contends that the Circuit Court erred in affirming the Full Commission of the South Carolina Workers' Compensation Commission in finding the Claimant/Appellant should be assigned a six percent permanent partial impairment rating to both her left and right upper extremities based on a legally insufficient fact finding process related to a grip strength test performed by Appellant.

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

> "17. Based on the substantial evidence, including medical records and testimony, I find that the Claimant is entitled to an award of 6% permanent partial disability benefits to the left arm.
>
> "18. Based on the substantial evidence, including medical records and testimony, I find that the Claimant is entitled to an award of 6% permanent partial disability benefits to the right arm.
>
> (Decision and Order dated September 16, 2011, p. 11).
>
> and
>
> "7. Pursuant to Section 42-9-30(13), the Claimant is entitled to an award of thirteen and two tenths (13.2) weeks of permanent partial disability benefits, which equals approximately 6% to the right upper extremity"
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> "8. Pursuant to Section 42-9-30(13), the Claimant is entitled to an award of thirteen and two tenths (13.2) weeks of permanent partial disability benefits, which equals approximately 6% to the left upper extremity"
>
> (Decision and Order dated September 16, 2011, p. 12).

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

> "17. Based on the substantial evidence, including medical records and testimony, We find that the Claimant is entitled to an award of 6% permanent partial disability benefits to the left arm.
>
> "18. Based on the substantial evidence, including medical records and testimony, We find that the Claimant is entitled to an award of 6% permanent partial disability benefits to the right arm.
>
> (Appellate Panel Decision and Order dated May 30, 2012, p. 19)
>
> and
>
> "7. Pursuant to Section 42-9-30(13), the Claimant is entitled to an award of eleven (11) weeks of permanent partial disability benefits, which equals approximately 6% to the right upper extremity"
>
> and
>
> "8. Pursuant to Section 42-9-30(13), the Claimant is entitled to an award of eleven (11) weeks of permanent partial disability benefits, which equals approximately 6% to the left upper extremity"
>
> (Appellate Panel Decision and Order dated May 30, 2012, p. 22).

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

Appellant testified that she began experiencing problems with both hands and wrists on September 6, 2006, while working for Johnson Food Services. (Transcript of Proceedings, June 8, 2011, p. 13, line 16). Appellant sought and received medical treatment with her family physician, Dr. Gary Bell, who recommended Appellant undergo nerve studies. (Transcript of Proceedings, June 8, 2011, p. 13, lines 19-23). Based on the medical records, Appellant sought and received additional treatment with Dr. Jackson, who diagnosed her with bilateral carpel tunnel syndrome on November 28, 2006. (Defendants/Respondents' APA Submissions, May 27, 2011, p. 1). Appellant underwent a right carpal tunnel release on March 1, 2007 with Dr. Green of Midlands Orthopaedics. (Defendants/Respondents' APA Submissions, May 24, 2011, p. 1).

Approximately one month later, Dr. Green released her from his care, indicating she would see a big difference in her strength and tenderness in the coming months. When Appellant remained symptomatic, she returned to Dr. Jackson on August 12, 2007 and received a recommendation for additional electrodiagnostic testing. Appellant returned to Dr. Green on August 24, 2007 with complaints of shooting pain through her wrists with numbness and tingling to her right ring finger and small finger as well as pain up her arm into her shoulder on the left side. (Defendants/Respondents' APA Submissions, May 24, 2011, p. 1).

Thereafter, Appellant underwent an EMG/NCS of both upper extremities to evaluate her ulnar nerve function. Id. Appellant was ultimately allowed to continue her regular work activities. Id. She underwent another EMG/NCS in September of 2007, which revealed very mild right carpal tunnel syndrome and mild left carpal tunnel syndrome. (Defendants/Respondents' APA Submissions, May 24, 2011, p. 6). Dr. Green

indicated Appellant was not a surgical candidate and recommended a resting splint with repeat nerve studies in 4 to 6 months if symptoms persisted. Id. Dr. Green determined Appellant reached maximum medical improvement with regard to her injuries on February 15, 2008 and assigned a 2% impairment rating to the right upper extremity as well as a 2% impairment rating to the left upper extremity. (Defendants/Respondents' APA Submissions, May 24, 2011, p. 8).

Five months later, Appellant sought additional treatment with Dr. Green. At this time, she presented with complaints of continued cubital tunnel type symptoms on her right side as well as left carpal tunnel symptoms. (Defendants/Respondents' APA Submissions, May 24, 2011, p. 8). Dr. Green recommended the use of a 45-60 degree extension split for her right arm as well as an injection into the left wrist and a Sterapred pack for her cubital tunnel syndrome. Id. In addition, Appellant was ordered to light duty for 3-5 days secondary to her on going complaints. (Defendants/Respondents' APA Submissions, May 24, 2011, p. 10). On August 11, 2008, Appellant presented at a follow-up visit which revealed an improved right mild cubital tunnel syndrome and a mildly improved left carpal tunnel syndrome. (Defendants/Respondents' APA Submissions, May 24, 2011, p. 11). Dr. Green indicated Appellant was not symptomatic enough to require surgical intervention and he discharged her from his care. Id. Appellant was placed at maximum medical improvement by Dr. Green on August 11, 2008 for her left and right upper extremities with no increase to her impairment ratings for either upper extremity. (Defendants/Respondents' APA Submissions, May 24, 2011, p. 13). Dr. Green indicated that the Appellant will not need future medical care. Id.

Appellant sought and received additional repeat nerve studies from Dr. Redmond on March 26, 2009. (Defendants/Respondents' APA Submissions, May 24, 2011, p. 14). These revealed a worsening of her left carpal tunnel syndrome and a finding that the right cubital tunnel syndrome was still mild. Id. Dr. Green indicated that improvement was present in the right carpal tunnel status post release. Id. Dr. Green recommended the Appellant undergo a left carpal tunnel release. (Defendants/Respondents' APA Submissions, May 24, 2011, p. 15).

Appellant presented to Dr. Green on September 20, 2010, with complaints of worsening symptoms on the left side. (Defendants/Respondents' APA Submissions, May 24, 2011, p. 16). Dr. Green recommended that she undergo another EMG and NCS to evaluate the possibility of Carpal Tunnel Syndrome and possible Cubital Tunnel Syndrome of both upper extremities. (Defendants/Respondents' APA Submissions, May 24, 2011, p. 17). On December 27, 2010, Dr. Green determined the Appellant again reached maximum medical improvement and released the Appellant to return to work without restrictions. (Defendants/Respondents' APA Submissions, May 24, 2011, p. 19). Dr. Green re-assigned a 2% impairment rating to the left upper extremity and right upper extremity. Id.

Following this final rating and release, at the direction of her attorney, Appellant underwent an independent medical evaluation with Dr. Jackson. Dr. Jackson agreed with Dr. Green and indicated in his diagnostic report dated April 20, 2011 that Appellant was at maximum medical improvement with regard to her right carpal tunnel, left carpal tunnel and right cubital tunnel. Dr. Jackson assigned a 10% impairment rating to each upper extremity, which equaled a 12% impairment rating to the whole person.

(Claimant/Appellant's APA Submissions, May 27, 2011, pp. 14-15). In addition, Dr. Jackson suggested he would assign permanent restrictions to include "no lifting more than 25 lbs, lifting no more than 12 pieces of chicken on a tray, [and] only opening 10 large cans per day." Id.

At the hearing, Appellant testified that she was currently employed with the Respondents, and was physically capable of performing her job duties and responsibilities with the Respondents. In addition, she stated that Respondents readily provided her with accommodations when she experienced left upper extremity and right upper extremity pain and problems while at work. (Transcript of Proceedings, June 8, 2011, p. 29, lines 1-5). Appellant stated that she did experience ongoing pain and problems with her left upper extremity and right upper extremity while in the course and scope of her employment with the Respondents. (Transcript of Proceedings, June 8, 2011, p. 19, lines 11-23). Appellant testified that she currently experienced numbness and tingling in the fingers of both her left hand and right hand. Id. More specifically, she indicated that she experienced increased pain and problems while engaging in specific activities such as lifting large pans of chicken. (Transcript of Proceedings, June 8, 2011, p. 18, lines 13-18). On the other hand, Appellant indicated that she does not currently utilize any prescription medication for her ongoing left upper extremity and right upper extremity problems and only takes over-the-counter medication approximately 1-2 days per week when she experiences pain in the left upper extremity and right upper extremity. (Transcript of Proceedings, June 8, 2011, p. 36, line 25 and p. 37, lines 1-8). (Hr'g Tr. 36:25, 37:1-8). In addition, Appellant testified that she does not utilize an assistive device

on the left upper extremity or right upper extremity despite her ongoing pain and problems. (Transcript of Proceedings, June 8, 2011, p. 29, lines 9-15).

As noted above, the Full Commission spent a great deal of time reviewing Appellant's medical history, the hearing transcript, and other evidence before affirming the Single Commissioner's findings of facts and conclusions of law. The Full Commission made the following findings of facts that to explain the rationale behind their decisions:

> "11. Based on the substantial evidence, including the medical records and testimony, We find that Dr. Green's assignment of impairment ratings to be somewhat inconsistent or, at the very least, ambiguous. Initially (by medical report), authorized treating physician Dr. Green assigned a 2% impairment rating for each upper extremity. At his deposition, Dr. Green states that he agrees with an impairment rating in the range of 2% - 5%. (CITE) Dr. Green also considers the same range to be appropriate for cubital tunnel symptoms (leading the undersigned to conclude that the initial rating was for carpal tunnel symptoms only). Later in his deposition, Dr. Green assigned a total ("collective") 2% impairment rating. However, the last page of the deposition appears (at least to the undersigned) to revert to the 4% - 10% impairment rating for each upper extremity. Then finally, in a 2011 report, Dr. Green seems to revert (again) to a 2% total rating for each upper extremity. Regardless, my awards are based upon other factors as noted herein. (Defendants' APA #1, pages 8, 13, and 19); Deposition of Dr. Green pages 26-28 and pp. 33-34 and (Claimant APA #2, page 31)."
>
> "12. Based on the substantial evidence, including the medical records and testimony, We find that Claimant's IME physician ultimately assigned a total 10% rating for each upper extremity. We considered these ratings, but ultimately do not give them as much weight as We give other factors. (Claimant's APA #1, pages 9-10 and 17)."
>
> "13. **Based on the substantial evidence, including the medical records and testimony, I find that, to his well-**

> **deserved credit (as far as being candid is concerned), after Dr. Jackson noted inconsistencies in Claimant's right grip strength testing, he "pointed out [to Claimant] the consistency of effort in grip strength as a basic element of building a doctor/patient relationship." I give this record great weight for the reason that these are notes of Claimant's own expert**. (Defendants' APA #2, pages 20-21; Claimant's APA #1, pages 7-8).
>
> "14. Based on the substantial evidence, including the medical records and testimony, We find that the Claimant takes no prescription medication for her causally related condition. She takes over-the-counter medication "every now and then." (Hr'g Tr. p. 36, ll. 25) (Hr'g Tr. p. 37, ll. 1-8)."
>
> "15. Based on the substantial evidence, including the medical records and testimony, We find that the Claimant has been released with no restrictions, and has returned to work (full duty) with both of her employers (Deposition of Dr. Green, pages 31-32; Defendants' APA #1, page 13)."
>
> "16. Based on the substantial evidence, including the medical records and testimony, We find that no future medicals have been recommended by the authorized treating physician, and therefore none are ordered herein. (Cl. APA # 1, p. 15)."
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> (Appellate Panel Decision and Order dated May 30, 2012, pp. 20-21) [Emphasis added]

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

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

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

The Full Commission, on review, affirmed this rating based on their review of the record as a whole, along with in-depth analysis of Appellant's medical history. The Circuit Court likewise affirmed.

It is entirely possible that another person would review the evidence and determine Appellant has 4% impairment or 8% impairment to the left and right upper extremities. Drs. Green and Jackson are both medical professionals and disagree on the impairment rating. It is even possible that another person would assign different ratings to

each extremity. However, that was not the Full Commission's determination in light of the whole of the evidence.

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

Further, precedent as noted above clearly states that this Court can reverse findings of fact only if the determination was clearly erroneous in view of the reliable, probative and substantial evidence on the **whole** record. The Single Commissioner and Full Commission exhaustively laid out the reasoning for the findings of fact and conclusions of law in this claim. The evidence in the record is substantial and is more than adequate to support the Decisions made by the Single Commissioner and Full Commission.

Even if, as Appellant contends, the reference to grip strength and the weight afforded to it is an error of law, there are no grounds with which to reverse affirmation of the Circuit Court as the reliable, probative and substantial evidence in the whole record supports the conclusions made by the Single Commissioner and Full Commission. Therefore, the Order of the Circuit Court should be affirmed.

CONCLUSION

For the foregoing reasons, the Circuit Court Order affirming the Single Commissioner and Appellate Panel (Full Commission) Decision and Order should be AFFIRMED in its entirety.

Respectfully submitted,

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