IN THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

APPELLATE PANEL

WCC File No. 0905998 & 0901428

Case No. 2013-001669

Katherine Haines, Claimant

Respondent,

v.

Dollar Tree Stores, Inc., Employer
And ARCH Insurance Company, Carrier,

Appellants.

RESPONDENTS' FINAL BRIEF

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STATEMENT OF ISSES ON APPEAL

The Commission correctly determined that the Claimant/Respondent is totally and permanently disabled under Section 42-9-10 and Section 42-9-30(21) of the South Carolina Code of Laws (1976, as amended), based upon the greater weight of reliable, probative, substantial evidence on the whole record.

STATEMENT OF THE CASE

This is an appeal by Dollar Tree Stores, Inc. and ARCH Insurance Company ("Appellants") from a decision of the South Carolina Workers' Compensation Commission finding that Katherine L. Haines ("Respondent") is totally and permanently disabled as a result of injuries she sustained on February 12, 2009 (W.C.C. No. 0901428) and June 3, 2009 (W.C.C. No. 0905998) while working for Dollar Tree Stores.

With respect to the procedural history relevant to this appeal, Respondent filed a Request for Hearing (Form 50) on May 31, 2012. She alleged an injury on February 12, 2009, to her neck and back when some shelving collapsed and fell on her. On June 28, 2012, Appellants timely filed an Answer to Respondent's Request for Hearing (Form 51). Respondent had previously filed a Notice of Claim on May 25, 2011 alleging an injury to her left shoulder on June 3, 2009. Both claims were heard by Commissioner Derrick L. Williams on September 4, 2012. The Hearing Commissioner issued an Order on October 10, 2012. Thereafter, he issued an amended Order on October 22, 2012, which vacated the earlier Order and resolved all issues.

The Hearing Commissioner concluded that Respondent was totally and permanently disabled under Section 42-9-30(21) of the Code of Laws of South Carolina in that she had sustained 50% loss of use or disability to her back. The Hearing Commissioner further concluded that the Claimant was totally and permanently disabled under Section 42-9-10 in that she suffered injury to more than one body part and her incapacity to work is total. The Hearing Commissioner ordered Appellants to pay to Respondent the balance of 500 weeks of compensation in a lump sum, for a total of $120,378.74. The Appellants were also ordered to provide related and authorized medical care and treatment.

Respondent properly filed a Request for Commission Review (Form 30) on November 6, 2012. Appellants properly filed a Request for Commission Review (Form 30) on November 7, 2012. The parties were heard at a Full Commission hearing on February 19, 2013. On July 1, 2013, the Appellate Panel issued a Decision and Order affirming the Order of the Hearing Commissioner in full. From this decision, Appellants have appealed to this Honorable Court.*

* Appellants included a Statement of Facts in their brief. The Respondent does not believe such a section is required in a brief. The statement of facts is really a part of the Appellants' argument. See Appendix C, Form 18 of the Appellate Court Rules.

INTRODUCTION

The Respondent, Katherine Haines, worked for Dollar Tree for fourteen years, until she had work-related accidental injuries on February 12, 2009 and June 3, 2009. The Respondent tried to "work through" her injuries. Despite her continuing complaints, the orthopedist initially authorized to treat her released her to full duty. The Appellants eventually recognized that the Respondent needed further care. In fact, she had a severe back injury that required a "two level anterior cervical discectomy and fusion [C4-5 and C5-6] for neck and right arm pain" on March 15, 2011. (R. p. 74). One doctor has given the opinion that the delay in treatment contributed to the Respondent's continuing problems. Yet even after surgery she attempted to return to work. Since this attempt, she has been told that she cannot work by two doctors and a vocational expert.

The Respondent submits that there is little if any evidence supporting the Appellant's two claims: that she did not have two body parts affected by her work injury and that she is not totally and permanently disabled or, stated differently, that her incapacity for work is not total. She respectfully submits that the claims of the Appellants are without merit.

The Respondent is totally and permanently disabled under both Section 42-9-10 (general disability) and Section 42-9-30(21) (schedule disability). The Commission findings and order should be affirmed.

ARGUMENTS

I. Standard of Review

The "substantial evidence rule" of the Administrative Procedures Act specifies the standard of review in an appeal from a decision of the South Carolina Workers' Compensation Commission. Liberty Mut. Ins. Co. v. South Carolina Second Injury Fund, 363 S.C. 612, 611 S.E.2d 297 (S.C. App. 2005), reh. den.; §1-23-380(A)(5). Appellate courts apply the "substantial evidence rule" when considering a challenge to factual determinations by the Commission. "Substantial evidence" is not a mere scintilla of evidence nor evidence considered from one side. "Substantial evidence" is evidence that, when the whole record is considered, would allow reasonable minds to reach the conclusion the Commission reached. Thompson v. South Carolina Steel Erectors, 369 S.C. 606, 632 S.E.2d 874 (S.C. App., 2006).

The Respondent respectfully submits that the order of the Commission is supported by substantial evidence. The Appellants do not agree. To prevail they must show this Court that the findings of the Commission are clearly erroneous in view of the reliable, probative and substantial evidence on the whole record. This they cannot do, because the testimony of the only lay witness, the Respondent, the medical evidence, and the report of a vocational expert are capable of only one interpretation: the Respondent is totally and permanently disabled, whether one considers general disability under Section 42-9-10 or schedule disability under Section 42-9-30(21).

As best the Respondent can tell, the Appellants have raised no error of law in support of their challenge of the Commission order.[1]

II. The Respondent is totally and permanently disabled under Section 42-9-10, general disability.

General disability under Section 42-9-10 requires proof of "incapacity for work resulting from an injury [which] is total". This is the "economic model" of disability, meaning that a claimant must prove the total loss of earning capacity. The Commission found that the Respondent proved that she is unable "to perform services other than those that are 'so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist.'" "Total disability does not require helplessness." Wynn v. Peoples Natural Gas Co. of S.C., 238 S.C.1, 118 S.E.2d 91 (1961).

- **There is substantial, reliable and probative evidence to support the finding of the Commission that more than one body part was injured or affected by the work injury.**

In addition to total incapacity for work, a claimant must prove injury to more than one body part, recognizing the "common sense fact that, when two or more scheduled injuries [or a scheduled and non-scheduled injury] occur together, the disabling effect may be far greater than the arithmetical total of the schedule allowances added together. Wigfall v. Tideland Utils. Inc., 354 S.C. 100, 580 S.E.2d 100 (2003).

The Appellants argue that the evidence does not establish by a preponderance that the Respondent qualifies for general disability because she did not prove that two body parts resulted from her work injury. The Appellants appear to believe that at least two body parts must suffer "impairment" in order to satisfy this requirement, and they quote the seminal case of Singleton v. Young Lumber Co., 236 S.C. 454, 114 S.E.2d 837 (1960). However, the Appellants quote only so much of Singleton as supports their argument. The full quote is as follows:

> Where the injury is confined to a scheduled member, and there is no impairment of any other part of the body because of such injury, the employee is limited to the scheduled compensation, even though other considerations such as age, lack of training, or other conditions peculiar to the individual, effect a total or partial industrial incapacity. To obtain compensation in addition to that scheduled for the injured member, claimant must show that some other part of his body is affected. (Emphasis added.) Singleton at 236 S.C. 471.[2]

Many South Carolina cases support the interpretation that the additional body part or parts need not be directly injured or given an impairment rating. In Brown v. Owen Steel Co., 316 S.C. 450, 450 S.E.2d 57 (S.C. App. 1994), reh. den., cert. den., this Court did not

[1] The order under appeal is actually the Amended Order of the hearing Commissioner dated October 22, 2012, which vacated a previous order and made certain changes in the calculation of the lump sum award.

[2] The quote is actually from the finding of the Commission, which cites cases from several other states.

allow general disability because the "scheduled loss was not accompanied by additional complications affecting another part of the body." In Simmons v. City of Charleston, 349 S.C. 64, 562 S.E.2d 476 (S.C. App. 2002), reh. den., cert. dismissed, this Court, affirming an award of general disability, wrote:

> All that is required is that the injury to a scheduled member also affect another body part. Here, Simmons presented evidence his right leg remained swollen and painful as of the date of the hearing before the single commissioner.

Mr. Simmons was bitten by a spider on his right leg while fighting a fire. He was diabetic and suffered peripheral neuropathy in his extremities, which caused him not to recognize pain. The added stress on his left leg caused blisters and other problems on his right leg, resulting in amputation of his right leg. Since the work injury to the left leg affected another body part (the right leg), he was awarded total general disability. There is no authority to the effect that the second body part must have an "impairment rating". The cases almost uniformly use the phrase "affect another body part".

The Respondents cite the case of Colonna v. Marlboro Park Hosp., 745 S.E.2d 128 (S.C. App, 2013) for the proposition that another body part must be impaired or injured. In that case, however, the claimant contended that her second affected body part was her back, because a spinal cord stimulator was implanted to treat her right leg. This Court, quoting the passage from Singleton cited above, italicized the word "affected", once again emphasizing that "impairment" and "affected" are synonymous in this context. The testimony was conflicting in this case as to whether or not the stimulator was affecting or impairing Ms. Colonna in any way. So the Court deferred to the Commission. ("We find substantial evidence in the record to support the circuit court's decision that Colonna did not suffer additional injury or impairment as a result of the spinal cord implantation.") The implantation did not "affect" another body part.

The Appellants also cited in their brief an unpublished opinion of this Court, Bolds v. UTI Integrated Logistics, No. 2011-UP-162 (2013), for the proposition that radiculopathy to the claimant's arm and leg without other evidence of physical deficiency in the extremities does not satisfy the "multiple body part rule" of general disability. Once again, the holding of this case is an affirmance of the fact-finder, the Commission. Unlike the instant case, there did not appear to be evidence of the effect radiculopathy was having in the Bolds case. In fact, the opinion contains the following:

> They [Drs. Patel, Ahearn and Stovall] noted Bolds did not suffer from any additional physical deficiencies from the injury.

The Form 14B, Physician's Statement, was promulgated by the Commission for use in hearings. Such form, prepared by the last authorized provider to treat the Respondent, Dr. David Redmond of Palmetto Health Baptist Pain and Orthopedic Center, should put the Appellants' claim to rest. On this form, Dr. Redmond indicates that the back is the Respondent's "Body Part(s) Injured" and the right arm and the right leg are the "Body Part(s) Affected". This exhibit alone provides "substantial evidence" to support the finding

of the Commission or to allow reasonable minds to reach the conclusion the Commission reached."

But there is more evidence supporting the Respondent's claim.

At her first office visit with Dr. Boyd, the doctor notes Respondent's complaint of neck pain progressing to involvement of her "arms with pain and tingling and more recently her right leg." (R. p. 155). At a post-surgery office visit on May 9, 2011, Dr. Boyd noted that the Respondent complained of continuing to have numbness and tingling down her arms right side and shooting pain down her right arm, right flank, and right leg. (She also had numbness and pain in her neck.) (R. p. 174). She had similar complaints at her last visit with Dr. Boyd. (R. p. 184).

Dr. Boyd referred the Respondent to the Baptist Pain Center. These records document right arm, left arm, shoulder and neck pain. Dr. Redmond, the director at the Pain Center, prepared the aforementioned Form 14B and documented right arm and right leg problems.

Dr. Leonard E. Forrest first saw the Respondent for an evaluation at her request on June 28, 2010, when treatment was being denied by the Appellants. This was before the Respondent underwent the cervical fusion. Dr. Forrest wrote that she complained of pain "down the right arm". He recommended further treatment, and his report was instrumental in getting the Appellants' to agree to a referral to Dr. Boyd. On October 1, 2011, Dr. Donald Johnson did an independent medical examination at the Respondent's request. This, of course, was after the fusion March 15, 2011. The Respondent complained of pain in the right side of her neck with radiation into the right shoulder blade area and pins and needles in the right arm to the thumb, as well as some numbness into her right leg. Dr. Johnson did not do a vigorous physical examination, because of pain and spasms on the Respondent's right side.

One important observation by Dr. Johnson needs to be stressed:

> I do feel that there is a relationship between the length of time between this patient's injury and her subsequent surgical decompression, that period being over two years. ... . I would note that the first orthopedic specialist who saw her, Dr. Burnworth, diagnosed cervical stenosis as well as cervical radiculopathy. Because there was over a two year period before surgical decompression occurred, I think that this time period is a likely factor explaining why the patient continues to be symptomatic." (R. p. 149).

The Respondent's additional problems are well-documented; and they were unnecessary.[3]

The Respondent testified to the problems she is having in detail. (R. p. 74 l.4- p. 79, l.21). She has very limited range of motion in her neck. She has pain in her right buttocks and into her right leg. She gets severe spasms and pain in her left leg, and Dr. Redmond prescribed her a cane. (She has fallen quite a few times.)

---

[3] Dr. Burnworth referred the Respondent to another orthopedist in his office, Dr. Felmly, who ultimately released her with no impairment and no restrictions on September 29, 2009, despite the MRI findings referred to by Dr. Johnson. (R. p. 394).

The Respondent submits that the above medical evidence and her testimony provide substantial evidence to support the findings of the Commission that more than one body part was affected by the work injuries, such that general disability under Section 42-9-10 is warranted. Certainly the findings of the Commission were not clearly erroneous in view of the reliable, probative and substantial evidence on the whole record.

- **There is substantial, reliable and probative evidence to support the finding of the Commission that the Respondent's incapacity to work is total.**

As stated above, general disability under Section 42-9-10 requires proof of "incapacity for work resulting from an injury [which] is total". The Appellants contend that substantial, reliable, competent evidence does not establish that the Respondent is unable to work. The Respondent believes that she proved how badly she wanted to work. She continued to work after her injury, until her problems became so severe that she had to seek better treatment. Even after she underwent cervical fusion, she tried to work. She wanted to go to South Carolina Vocational Rehabilitation in hopes of being retrained; but Dr. Redmond did not encourage her; he felt rehabilitation was not "practical". (R. p. 282).

The Form 14B of Dr. Redmond actually answers the question of whether or not the Respondent is able to work and it alone should be adequate to overcome the claims of the Appellants. Dr. Redmond states unequivocally that the Respondent is unable to return to work at her current employment at Dollar Tree. He gives these restrictions:

> Less than sedentary to sedentary, but only if she is not required to drive, as she has limited cervical mobility; medications can also affect concentration and may prevent successful return to substantial gainful employment. Also working against the Respondent being able to work is her required future medical treatment: follow up with pain management every two to three months. (R. p. 289).

Furthermore, Dr. Donald Johnson wrote the following:

> I felt the patient would be qualified to do only sedentary work and feel that she will have difficulty even at this physical demand level because of the significant number of narcotics she is taking on a daily basis with chronic pain. She has had a two-level cervical fusion. She has decreased range of motion of her neck and difficulty with any type of activity which requires work from the shoulder level and above and any activity which requires rotation of her neck from side to side. She would best be restricted from bending, stooping, working overhead and climbing. She will need to move from a sitting to standing position on a frequent basis and change positions to control her pain.
>
> It is quite likely that she will have significant absenteeism because of her pain and will be a liability both to herself, her coworkers and her employers if she takes her daily narcotics while trying to work. As I recommended she will need chronic pain management in the future.

> Given the above, it is unlikely that she can be accommodated in the workplace in my opinion.
> My opinions given above are most probable to a reasonable degree of medical certainty. (R. p. 150).

The evidence also establishes that the Respondent has a TENS unit for pain and a cane to assist with balance or walking.

Adger Brown, a vocational expert, met with the Respondent, reviewed her medical records and compared her functional abilities to available jobs. His conclusion: "Based on the totality of the information, and relying most on those records existing sine the time of this lady's surgery in March of 2011, it is my opinion, within a reasonable degree of vocational certainty, that Ms. Haines is incapable of returning to any form of employment and should be considered permanently and totally disabled." (R. p. 297). In the section of his report entitled "Conclusions", Mr. Brown goes through the reasons for his determination that the Respondent is incapable of earning. Her "greatest problem" is her physical limitation. As Mr. Brown observes, if her long term employer will not allow her to return to work, who will hire her? The requirement that she take narcotics to maintain her pain level at a tolerable level is disabling in and of itself. The Respondent cannot take these medicines while working; and she cannot function without them. Her age, transferable skills, positional requirements, and her inability to be competitive in the work force all create the reality that no one will employ her.

The Appellant's response to the above opinions of doctors and a vocational expert that the Respondent is unemployable is an "Employability Analysis and Labor Market Survey" completed by The Directions Group. This report can be discounted simply because it is based on assumptions or facts that are not accurate. The Directions Group concludes that the Respondent is capable of performing work in the "sedentary to light physical demand work capacity". (Emphasis added.) (R. p. 320). This is patently incorrect. The last authorized provider, Dr. Redmond, determined that the Respondent can work at the "less than sedentary to sedentary" capacity. (Emphasis added.) (R. p. 289). The Directions Group also did not consider the impact of having to take narcotic drugs on the ability to get a job and work. The Respondent respectfully submits that an expert witness, to have her report accepted, cannot pick and choose her facts. One has to go back to the point in time when Dr. Boyd allowed the Respondent to attempt a return to work after surgery to find the term "light duty". Even though he called it "light duty" at that time, Dr. Boyd states that the Respondent is not to work more than four hours per day and twenty hours per week and that she is not "to lift, push, pull or tug greater than 10 pounds.", which is sedentary work. (R. p. 170). The above applied only from April 11 to May 9, 2011. On the latter date, Dr. Boyd referred the Respondent to Dr. Redmond. (R. p. 174).

As to the "labor market survey" presented by The Directions Group, Mr. Brown summed it up:

> [H]owever, of the eight jobs that are listed, all of them appear to require at least the capacity to work at the full range of sedentary, if not sedentary to light level of physical demand. It is also clearly noted in this report that this listing of jobs was based on an electronic search from the South

> Carolina Job Bank and the internet, with no indication that any employers were ever contacted to determine Ms. Haines' particular suitability or to discuss Ms. Haines' specific limitations. As such, this labor market survey adds nothing to the clinical picture other than to state that jobs exist in the local community but not necessarily for Ms. Haines. (R. p. 297).

The Appellants cite the case of Watson v. Xtra Mile Driver Training, Inc., 399 S.C. 455, 732 S.E.2d 190 (S.C. App. 2012) as support for their position on whether or not the Respondent is capable of work. In that case, this Court affirmed the Commission finding that Ms. Watson was able to return to her work. The Appellants seek to compare this Respondent with Ms. Watson. This is impossible to do accurately based on the opinion of the Court. Ms. Watson's job with the employer was sedentary in physical requirements. The big differences appear to be that the functional capacity evaluation assessed Ms. Watson's physical demand capacity to be "light", that Ms. Watson's doctors said she could work, and Ms. Watson's own testimony describing her restrictions. In the instant case, this Respondent can only perform "less than sedentary to sedentary", her doctors do not believe she can work, and her testimony clearly backs up the finding that she cannot work.

If one reads the testimony of the Respondent, it is clear that she is unable to work. Yes, she has a G. Ed. She also had certification as a nursing assistant at one time; but no one can argue that she can perform that job. She began work with Dollar Tree in 1997 and worked there continuously for fourteen years. No one can argue that she cannot perform that job. Now, the Respondent does not drive unless she has to. TR 78. Consider the following:

> A. Well, with going to the program [at Baptist] I went to for the five weeks, they teach you how to live in a different way, do the things you used to do but in a completely different way. Like for instance, like the bathroom, used to only take me a half hour to clean. Now it takes me about two and a half hours to clean because when I do one task, it's all I can do to get through that, so then I go and I sit down, get my bearings back together and then go back again. It just – takes me longer to things than it used to take me [sic].
>
> Q. Why would you have to stop between the bathroom –
>
> A. The pain. My pain level would go up, and that's even with taking pain medication.
>
> Q. Now, you mentioned using a cane. What problems do you have with walking?
>
> A. My gait.
>
> Q. What do you mean?
>
> A. When I walk, I'm not stable.

Q. And why is that?

A. I don't under – I don't know that. I do know that I brought it to Dr. Redmond's attention, and he made the statement that he does not –he said, "I don't want to make you feel embarrassed," he said, "but how would you feel about me putting you on a cane just for stability so that you have just that extra sturdiness?" And I told him, yes, I would try it. (R. p. 75 l.4- p. 76, l.5).

In this same part of the transcript, the Respondent tells how the medications affect her. There is no way that she can get and keep a job of any type.

The Respondent submits that the findings of the Commission concerning her inability to work are supported by substantial, reliable and competent evidence. Therefore, the award of total and permanent disability under Section 42-9-10 should be affirmed.

III. The Respondent is totally and permanently disabled under Section 42-9-30(21).

The Respondent was also awarded total and permanent disability through schedule disability under Section 42-9-30(21). The Commission found that she proved that that she has suffered fifty percent or more "loss of use of the back". Under schedule disability, which utilizes the "medical model" of disability, a claimant need not prove loss of earning capacity; it is presumed. In the case of a claimant having fifty percent or more loss of use of the back, total and permanent disability is presumed. However, recent amendments to the statute provide that, "The presumption set forth in this item is rebuttable."

- **The Appellants concede that the Respondent has fifty percent or more loss of use of her back.**

At the outset, the Respondent calls attention to the fact that the Appellant argues that the Respondent is not "permanently and totally disabled due to fifty percent permanent loss of use to her back because Appellants rebutted the presumption of permanent and total disability." (Emphasis added.) Nowhere in their brief do the Appellants question the finding of the Commission that the Respondent has fifty percent or more loss of use of her back due to the work injury. In fact, the Appellants acknowledge in their Initial Brief of Appellant "that Respondent sustained a significant injury to her cervical spine." Therefore, there is no need to discuss the degree of the Respondent's impairment in this brief; fifty percent or more loss of use of the back is effectively stipulated. So, if this Court agrees with the Respondent that she has lost her earning capacity as a result of the work injury, then the decision of the Commission should be affirmed as to Section 42-9-30(21) without further discussion.

- **There is substantial, reliable and probative evidence to support the finding of the Commission that the Respondent's incapacity to work is total.**

The arguments above concerning loss of earning capacity under Section 42-9-10 are just as compelling in support of the Respondent's total and permanent disability under Section

42-9-30(21), just as the arguments in the balance of this brief apply to Section 42-9-10. The testimony of the Respondent, the medical records, and the report of Adger Brown, vocational expert, prove convincingly that the Respondent cannot find and hold a reliable, dependable job.

In their effort to rebut the overwhelming weight of evidence in support of the claim for total and permanent general and schedule disability, the Appellants rely most heavily on the "Employability Analysis and Labor Market Survey" prepared by The Directions Group. Sen. Daniel Patrick Moynihan has been quoted as saying, "Everyone is entitled to his own opinion, but not his own facts." Such is the case with the report of The Directions Group.

The uncontroverted fact is that the last doctor to assess the Respondent's work capacity was Dr. Redmond, who said she is restricted to work at the "less than sedentary to sedentary" physical demand level. This means she can lift no more than ten pounds and in many instances cannot lift ten pounds. Additionally, Dr. Redmond said the Respondent has "limited cervical mobility; medications can also affect concentration and may prevent successful return to substantial gainful employment." Claimant also cannot have a job that requires her to drive.[4] (R. p. 289). Therefore, no opinion in The Directions Group report can be accepted as reliable, probative, competent evidence. Those opinions are based upon the false assumption that the Respondent can work in the "sedentary to light" physical demand level. (R. p. 320 and 322). She cannot.

The Directions Group listed employment that the Respondent could possibly get—if she could work at the sedentary (up to ten pounds) to light (up to twenty pounds) level. Presumably the listed jobs are within this range; but, as Mr. Brown, the vocational expert wrote, the jobs may be available, but there is no way to tell if the Respondent can perform those jobs. We do not know the requirements of those jobs. She certainly cannot be a shuttle driver within her restrictions; and no one will or should hire someone who must take narcotic drugs to control their pain. The Directions Group gave no consideration to the restrictions ordered by Dr. Redmond, nor to those listed by Dr. Johnson.

The Directions Group report certainly does not rebut the presumption that the Respondent is totally and permanently disabled.

The Appellants, as mentioned above, cite the Watson case and the testimony of the Respondent as supporting their position that they have rebutted the presumption of total and permanent disability. The opinion of this Court in Watson clearly shows that this Respondent is very different from Ms. Watson. The opinion of the Court was that Ms. Watson's testimony did not support her complaints of inability to work. If one reads the testimony of the Respondent, one cannot question that she is totally and permanently disabled.

Ms. Watson's doctors did not support her claimed inability to work, and it is not clear where the severe restrictions listed in the dissenting opinion came from, when the

[4] Under cross-examination the Respondent testified that she drives only when she has to and has to be very cautious. (R. p. 99, l.15 – p. 100, l. 13). Under questioning by her attorney, she stated that she used to drive a lot, but now doesn't drive unless she has to. She is afraid of having an accident due to medication and loss of range of motion in her neck. (R. p. 78, ll. 1-11).

functional capacity evaluation found that she could perform light work (up to twenty pounds). Ms. Watson agreed to the functional capacity evaluation coming into evidence, although she apparently sought to discredit it later. Apparently Ms. Watson's doctors agreed with the weight restrictions of the evaluation. On the other hand, the Respondent's functional capacity evaluation found that she could work only at the "Less than Sedentary to Sedentary category of the Physical Demands Characteristics of work chart". (R. p. 264). Dr. Redmond, the authorized health care provider who is still treating the Respondent (pain management), [5] restricted her to the same level of work.

One has to go back many months to the beginning of the Respondent's treatment to find any medical evidence that she can do light level work. This was during a time when, as Dr. Johnson pointedly states, the Respondent's serious neck injury was overlooked. Since she was allowed to get proper treatment for her injuries, she was allowed to return to work only once, after her surgery, and then restricted to lifting any more than ten pounds. In assessing her current work restrictions, only the reports of Dr. Redmond and Johnson can properly be considered.

By the way, the opinion of this Court also states that Ms. Watson "no longer takes any anti-inflammatories or pain medication." This is a major difference with the Respondent, who is on narcotics. (R. p. 72, l.16 – p. 74, l.3).

The Appellants mention two compact discs (CDs) recorded by private investigators. If this Court looks at this evidence, please note that everyone conceded that the Respondent is not in the December 1, 2011, disc, as this was her daughter. This is actually the only date with anyone doing anything in any way strenuous (carrying a child). The Respondent was not using her cane around the house, but she explained that she uses it for stability: "When I am at home, I try to – don't use it unless absolutely necessary." She has had to adapt her house to accommodate her disability. (R. p. 74, ll. Ll. 13-19).

Finally, the Appellants state in their brief that the Respondent conceded that her past work experience at Riviera Insurance and Dollar Tree qualified her for several jobs listed by The Directions Group. This is not true. The Respondent was asked she would "qualify" for certain "full-time" jobs, she responded that she would be, if she were able to work eight hours a day. One must recall that the Respondent did everything she could to return to work at Dollar Tree. She may have the qualifications to do the job the Appellants asked about; but she is not physically capable of doing them.

CONCLUSION

In the Watson case, this Court was reviewing an order of the Commission which denied the claimant total and permanent disability, which is the situation in many cases cited by the Appellants. In the instant case, this Court obviously is reviewing a Commission order which awarded total and permanent disability. In Watson and similar cases, the claimants/appellants had the burden of showing that the Commission denial was not

[5] The Respondent still has to be seen by Dr. Redmond every two months. (R. p. 72, ll. 10-11).

supported by substantial evidence. In this case, defendants/appellants must shoulder that burden, proving that an award is not supported by evidence.

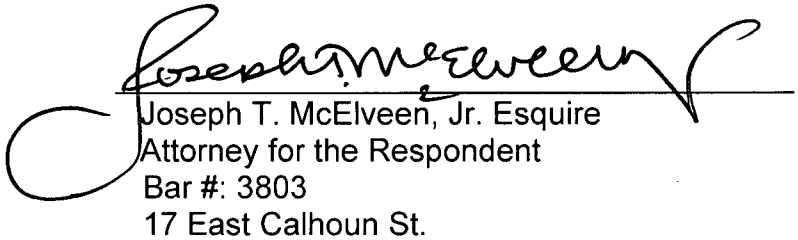
The Appellants have failed to carry their burden, as the overwhelming weight of the evidence supports the findings and order of the Commission. Assuming for the purpose of argument only that this Court could uphold a Commission decision in a case with similar facts to this one, but different findings, i.e. denial of total and permanent disability, this Court still would not be in error in affirming this Commission order. The law clearly takes this phenomenon into account, such that the possibility of drawing two inconsistent conclusions from the evidence does not prevent an order of Commission from being supported by substantial evidence. S.C. Coastal Conservation League v. South Carolina Dept. of Health and Environmental Control, 363 S.C. 67, 610 S.E.2d 482 (2005), reh. den. The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on question of fact." S.C. Code Ann. §1-23-380(A)(5).

The findings and order of the Commission that the Respondent is totally and permanently disabled under Section 42-9-10 and Section 42-9-30(21) are supported by substantial, reliable, probative evidence. The evidence clearly shows that the work injury affected multiple body parts. The Appellants failed to carry their burden of rebutting the presumption of total and permanent disability, because the Respondent proved with substantial evidence that she has suffered a total loss of earning capacity.

The Respondent respectfully submits that the findings and order of the Commission should be affirmed.

Respectfully submitted,

The Bryan Law Firm of SC, L.L.P.



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December 12, 2013

IN THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

APPELLATE PANEL

WCC File No. 0905998 & 0901428

Case No. 2013-001669

Katherine Haines, Claimant

Respondent,

v.

Dollar Tree Stores, Inc., Employer
And ARCH Insurance Company, Carrier,

Appellants.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Final Brief of the Respondent complies with Rule 211(b), SCACR.

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PROOF OF SERVICE

I certify that I have served the Respondent's Final Brief on the Appellants, by depositing a copy of it in the United States Mail, postage prepaid, on 12/12/13, addressed to their attorney of records, Brad B. Easterling, Esquire, 200 E. Broad St., Suite 250, Greenville, SC 29601, on 12/12/13.

12/12/13
Date

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