

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Opinion No. 5205

Case No. 2013-000005

Neal Beckman, Employee,.....Appellant,

v.

Sysco Columbia, LLC, Employer, and
Gallagher Bassett Services, Inc., Carrier,.....Respondents.

PETITION FOR REHEARING

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Cases

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The Respondents respectfully submit that the Court may have misapplied the standard of evidence in addressing the Appellant's appeal and specific evidence may have been overlooked; therefore, the Respondents' petition this Honorable Court for a rehearing based on the following:

1. The appropriate standard of review is determining whether the South Carolina Workers' Compensation Commission's Decision and Order dated December 5, 2012 is supported by substantial evidence.

The Appellate Court in considering an appeal from a Decision and Order of the South Carolina Workers' Compensation Commission (hereinafter "Commission"), is limited to deciding whether the Commission's Decision is supported by substantial evidence or is controlled by some error of law. *Rogers v. Kunja Knitting Mills Company*, 312 S.C. 377, 440 S.E.2d 401, rehearing denied (Ct.App. 1994). In an appeal from the Commission, the Appellate Court may not substitute its judgment for that of the Commission as to the weight of evidence on questions of fact but may reverse where the Decision is affected by some error of law. *Gibson v. Spartanburg School District No. 3*, 338 S.C. 510, 526 S.E.2d 725 (Ct.App. 2012). Therefore, a Decision of the Commission must be affirmed if the factual findings are supported by substantial evidence. *Stokes v. First National Bank*, 306 S.C. 46, 410 S.E.2d 248 (1991). Substantial evidence is not a mere scintilla of evidence but is evidence that in considering the record as a whole would allow reasonable minds to reach the conclusion the administrative agency reached in order to justify its action. *Pratt v. Morris Roofing, Inc.*, 357 S.C. 619, 622, 594 S.E.2d 272, 274 (2004). The possibility of drawing two inconsistent conclusions from the evidence does not prevent the administrative findings from being supported by substantial evidence. *Hoxit v. Michelin Tire Corp.*, 304 S.C. 461, 405 S.E.2d 407 (1991).

If the factual findings of the Commission are supported by substantial evidence, the Commission's conclusions must be affirmed. *Ross v. American Red Cross*, 298 S.C. 490, 381 S.E.2d 728 (1989).

The pertinent findings of fact of the Commission's Decision which were addressed on appeal include: the Claimant has sustained a 35% permanent loss of use of the spine (encompassing Claimant's entire spine and including any alleged radiculitis) pursuant to §42-9-30(21) and that the greater weight of the evidence shows only the Claimant's back was affected by the March 25, 2010 admitted injury by accident. (R. 28). In Opinion No. 5205, the Court states that there is evidence to support the Appellant's contention that he is entitled to disability under the §42-9-20 loss of earnings capacity statute as opposed to being limited to a scheduled loss of use of his back under §42-9-30. The Respondents respectfully submit that the Court should have reviewed whether there was substantial evidence to support the above findings of the Commission as opposed to determining that there is evidence in the record to support the Appellant's allegations that he suffered from radiculopathy as a result of his back injury.

The Court concluded that the Commission's Decision was erroneous in view of the evidence that the Appellant suffered from radiculopathy as a result of his back injury; however, the weight of the evidence on this factual matter was reserved for the Commission. The Commission weighed the evidence of the Appellant's alleged radiculopathy as well as the evidence discussed herein below and reached the conclusion that the Claimant is limited to an award for a permanent loss of use of his back only. As this Court may not substitute its judgment for that of the Commission as to the weight of evidence on questions of fact, the Respondents respectfully request that the Court rehear

this matter in order to determine whether there is substantial evidence to support the Commission's December 5, 2012 Decision and Order, not substantial evidence to support the Appellant's arguments.

2. The Respondents respectfully submit that the Court may have overlooked or miscited pertinent evidence in the record.

In discussing the evidence in the record to support that the Appellant suffered from radiculopathy, the Court cited to evidence from Dr. Scott Boyd who provided a surgical evaluation on February 27, 2012. Opinion No. 5205 references that Dr. Boyd states that the Appellant suffered pain that radiated into his left leg and he had numbness around his foot. The report of Dr. Boyd actually states the Appellant "describes his pain pattern as that most predominantly of low back pain. His pain does occasionally radiate down into his left leg and he states that he has some numbness around his foot." The Respondents hereby submit that Dr. Boyd summarized the Appellant's subjective complaints reported to him but Dr. Boyd did not conclude or diagnose the Appellant with radiculopathy and numbness in his lower extremity. (R. 205). Further, Dr. Boyd's surgical evaluation states that he does not appreciate any significant nerve root compromise which would explain the Appellant's alleged radicular complaints. (R. 206). Dr. Boyd does not discuss any additional affected body parts in addition to the low back throughout his impressions and plan. (R. 206). Dr. Boyd only discussed objective evidence of a muscular spasm and pain in the lumbar spine. (R. 206). Dr. Boyd further indicated that the Appellant is not a surgical candidate, assigned an 8% impairment of the back, agreed that the Appellant could perform medium physical duty work for an 8-hour day and indicated in the future the Appellant may only benefit from pain medication and

muscle relaxers. (R. 206). As such, Dr. Boyd's report does not provide evidence to support the Appellant's alleged radiculopathy as discussed in Opinion No. 5205.

In addition to the report of Dr. Boyd, there is additional evidence in the record to support the Commission's Decision that the Appellant was entitled to an award for permanent loss of use of his back only and that he did not have any additional affected body parts as a result of the back injury. The diagnostic studies reveal that there is no impingement or nerve root compromise. (R. 129 - 130, 228 - 229). The authorized treating physician, Dr. Timothy Zgleszewski, reviewed the EMG/NCS and stated that given the EMG/NCS, the Appellant did not have radiculopathy in either leg. (R. 153). Furthermore, Dr. Zgleszewski and Dr. Boyd both provided a physical exam of the Appellant. According to Dr. Boyd, the Appellant appeared to have normal power in his lower extremities and a steady gait. (R. 205). In the medical notes from April 19, 2010 through May 2, 2011, Dr. Zgleszewski noted the Appellant's gait and station to be nonantalgic and further noted that he was able to raise up on his heels and toes. (R. 131-192). Dr. Zgleszewski further noted that the bilateral lower extremity examination was normal and it remained stable and unchanged throughout the course of treatment (R. 131-192). Further, the Appellant's lower extremity physical capabilities while using an elliptical machine, treadmill and weights at Gold's Gym were captured on surveillance and submitted into the evidentiary record. (R. 249 and CD video). At the visit prior to his release, the Appellant reported no leg pain and no pain radiating to his legs (R. 188). Thereafter, despite the Appellant's alleged radiculopathy and pain complaints, there was no medical treatment rendered and no medications were prescribed over the year prior to

the Single Commissioner Hearing on April 26, 2012. (R. 99, Hearing Transcript page 51, lines 3 - 25).

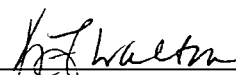
The Respondents respectfully submit that the above evidence may have been overlooked by this Honorable Court. The Commission reviewed the above evidence and found that the Appellant's disability is contained to the loss of use of his back and there is not an affect on any additional body parts. As the Commission is reserved the task of weighing the evidence and reaching the findings of fact, the Commission's Decision should not be reversed so long as there is substantial evidence to support the Commission's Decision. *Shealy v. Aiken County*, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000). Although there may be conflicting evidence as to whether the Appellant's back injury had an affect on another body part, when the evidence is conflicting over a factual issue, the findings of the Commission are conclusive. *Hargrove v. Titan Textile Company*, 260 S.C. 267, 290, 599 S.E.2d 604, 611 (Ct.App. 2004).

As support for the request for a rehearing, the Respondents also refer to the Court's analysis in *Fishburne v. ATI Systems International*, 384 S.C. 76, 681 S.E.2d 595 (Ct.App. 2009). Similarly, the Appellant in *Fishburne* asserted that the Commission erred in finding that she was only entitled to a schedule loss award - 10% loss for her back including her right lower extremity. *Fishburne's* EMG/NCS was negative and *Fishburne* reported to the pain management specialist at one point that the pain was not all the way down her leg like it was when she was first injured. *Id.* at 83, 598. The Court stated that the objective medical evidence did not support *Fishburne's* claim that she suffered from a serious medical condition, the MRIs only showed mild degenerative disc disease, and none of *Fishburne's* physicians recommended she have any surgery. *Id.* at

87 - 88, 601. Despite *Fishburne's* claims that her back injury negatively affected her right leg, this Court determined that the Commission's Decision awarding *Fishburne* a permanent partial disability of 10% loss of use of her back including her right lower extremity was within the medical evidence and testimony presented to the Commission. *Id.* at 88, 601. The Appellant in this matter also has a negative EMG/NCS, is not a surgical candidate and does not have any nerve root compromise on his MRIs. Therefore, the Respondents respectfully contend that the objective evidence in this case supports the Commission's Decision that the Appellant is entitled to 35% loss of use of his back only. Although the Appellant had subjective complaints of radiculopathy which were recognized by Dr. Zgleszewski, there is also evidence to support that the Appellant did not have any additional affected body parts. The mere possibility of drawing two inconsistent conclusions from the evidence does not prevent the Commission's finding that the Appellant is only entitled to permanent loss of use of his back from being supported by substantial evidence. As such, the Respondents respectfully request a rehearing of this matter.

RESPECTFULLY SUBMITTED,

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March 26, 2014
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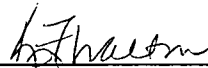
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PROOF OF SERVICE

I certify that I have served the Respondents' Petition for Rehearing on all interested parties by depositing a copy in the United States Mail, postage prepaid, on March 26, 2014, addressed to the Appellant's attorneys of record Fred W. Riesen, Jr., Esquire, 3660 West Montague Ave., North Charleston, South Carolina, 29418 and Steven B. Samuels, Esquire, 1320 Richland Street, Columbia, South Carolina, 29201.



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