THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM SOUTH CAROLINA
WORKER'S COMPENSATION COMMISSION

The Honorable Susan S. Barden, Melody L. James and Scott T. Beck

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WCC File No. 1015200

HENTON T. CLEMMONS, JR., EMPLOYEE,.....APPELLANT,

v.

LOWE'S HOME CENTERS, INC.-HARBISON, EMPLOYER, AND
SEDGWICK CLAIMS MANAGEMENT SERVICES, INC.,
CARRIER,.....RESPONDENTS.

FINAL BRIEF OF RESPONDENTS

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STATEMENT OF THE CASE

Claimant was employed with Lowe's on September 12, 2010 when he suffered from a work related injury. (R. p. 2). Pursuant to a Consent Order, the parties agreed that Claimant suffered from an accepted injury to his back, neck and right knee and agreed to continued medical care with the physician the Claimant had already chosen, Dr. Drye. (R. p. 25). In addition, the Carrier agreed to pay Claimant temporary total disability benefits from the date of the accident until properly terminated. (R. p. 25). On June 7, 2011, Claimant was released by Dr. Drye at maximum medical improvement and assigned an impairment rating of 25% whole person to his back. (R. p. 25). Thereafter, Carrier forwarded a Form 17 to Claimant's counsel. (R. p. 382). Carrier asked that, once the Form 17 was executed, Claimant provide a settlement demand pertaining to permanent disability. (R. p. 382). On September 22, 2011, Claimant signed a Form 17 indicating he could return to work. (R. p. 25).

Consequently, on January 4, 2012, Carrier filed a Form 21 requesting a determination of any compensation due for permanent total or partial disability. (R. p. 72). In response to Claimant's request for an additional medical evaluation, Carrier withdrew its request in order to provide for another evaluation from Claimant's treating neurosurgeon, Dr. Drye. (R. p. 384). On June 18, 2012, Dr. Drye examined Claimant and reviewed recently performed magnetic imaging studies of Claimant's lumbar spine and neck. (R. p. 111). Dr. Drye concluded that he had reached maximum medical improvement and reaffirmed his earlier impairment rating of 25% whole person to the back. (R. p. 112). Carrier subsequently requested that Claimant consider settlement "on a Form 16 basis" and "provide ... a settlement demand at [his] earliest convenience." (R. p. 385). Having received no settlement demand, Carrier then filed a Form 21

seeking determination of any permanent compensation and a credit for any overpayment of temporary compensation. (R. p. 74).

At a hearing held on September 25, 2012 before Single Commissioner Derrick L. Williams, Claimant argued that it was his prerogative to request compensation at a time of his choosing; thus, Carrier's Form 21 seeking determination of compensation violated his due process rights. Claimant further argued that he had not reached maximum medical improvement and was entitled to a second opinion regarding his back and an alleged neurological dysfunction. In the alternative, Claimant argued that if the Commission found he had reached maximum medical improvement, then he claimed that he was permanently and totally disabled due to either 1) a greater than fifty percent loss of use to the back pursuant to S.C. Code Ann. § 42-9-30(21) or 2) loss of earning capacity pursuant to S.C. Code Ann. § 42-9-10. (R. pp. 127-131). Carrier argued that Claimant had reached maximum improvement, that a second opinion was unnecessary in light of additional evaluation by his treating physician, and that Claimant was not permanently and totally disabled under S.C. Code Ann. § 42-9-30(21) or S.C. Code Ann. § 42-9-10. The Single Commissioner agreed, awarding Claimant permanent partial disability based upon a finding of 48% impairment to Claimant's back. (R. pp. 4-21).

On December 20, 2012, Claimant filed a Form 30 Request for Commission Review. A hearing was held before the Full Commission on April 16, 2013. By Order entered July 7, 2013, the Full Commission affirmed the Single Commissioner's Order in its entirety. (R. pp. 22-43). Claimant timely noticed an appeal to this Court.

STATEMENT OF THE FACTS

On September 12, 2010, Claimant slipped on wet pine straw while waiting on a customer and fell flat on his back. (R. p. 313, lines 2-15). Subsequently, he complained of low back pain radiating to his legs. (R. p. 90). Initial medical examinations diagnosed Claimant with back strain, radiculopathy and right knee strain. (R. pp. 82, 85, 86). Claimant's condition progressively deteriorated, and he was referred to Dr. Armsey for further evaluation and treatment. (R. p. 90). He was unable to walk due to poor balance. (R. p. 91). On November 1, 2010, Dr. Armey's examination revealed acute ataxia and Claimant was immediately referred to Dr. Drye, a neurosurgeon. (R. pp. 91-92). Claimant's neurologic examination showed normal strength and reflexes. (R. p. 91). He denied any headache, visual changes, cognitive or memory problems, and very little neck discomfort. (R. p. 101). An MRI showed spinal cord compression from disk herniation. (R. p. 102). Dr. Drye diagnosed Claimant as having a "herniated nucleus pulposus with cord compression and severe myelopathy, C5 and C7." (R. p. 93). On November 9, 2010, Claimant underwent an anterior cervical discectomy and fusion of C5-6 and C-6-7. (R. p. 95).

Post-surgery, Claimant returned to the hospital complaining of poor sensation and control of his legs. (R. pp. 96-97). He was transferred to HealthSouth rehabilitation facility on November 17, 2010. (R. p. 98). By November 24, 2010, Claimant had recovered 90% of normal sensation in his legs with only mild spasticity. (R. p. 104). He reported no issues with pain. (R. p. 104). Following his inpatient rehabilitation, Claimant continued with outpatient physical therapy. (R. p. 106). After completing a full course of physical therapy, Claimant had "regained relatively normal function in the upper extremities with no major complaints of numbness, tingling or weakness." (R. p. 110). He had regained full strength of his upper and lower

extremities. (R. p. 110). However, mild residual spasticity affected his gait and balance. (R. p. 110). During follow-up visits with Dr. Drye on February 16, 2011 and April 12, 2011, Claimant reported "no major pain issues." (R. pp. 107-108). Dr. Drye concluded on June 7, 2011 that Claimant had reached maximum medical improvement, assigning a 25% whole person impairment based on his injury to the cervical spine including a subsequent fusion and mild myelopathic residual symptoms." (R. p. 110).

On September 16, 2011, Claimant signed a Form 17 indicating he could return to work. Lowe's offered and Claimant accepted a position as cashier with accommodations allowing him to sit as needed and request assistance as needed. (R. p. 124).

On January 4, 2012, Carrier filed a Form 21 requesting a determination of any compensation due for permanent total or partial disability and request credit for overpayment of temporary benefits. (R. p. 72). In response to Claimant's request for an additional medical evaluation, Carrier withdrew its request in order to provide for another evaluation from Claimant's treating neurosurgeon, Dr. Drye. (R. p. 384).

On June 18, 2012, Dr. Drye examined Claimant and reviewed recently performed magnetic imaging studies of Claimant's lumbar spine and neck. (R. p. 111). Claimant reported neck and back stiffness pain experienced in the morning which improved as he moved about. (R. p. 111). Dr. Drye characterized this pain as "axial" and "myofascial" suggestive of "arthritic-type symptoms." (R. p. 111). Dr. Drye also noted that Claimant had gained considerable weight and advised him that losing weight would likely help reduce his back pain. (R. p. 111). Dr. Drye concluded that he had reached maximum medical improvement and reaffirmed his earlier impairment rating of 25% whole person to the back. (R. p. 111). Thereafter, on July 24, 2012,

Carrier filed another Form 21 request credit for overpayment of temporary benefits and to determine any permanent disability award. (R. p. 74).

On September 5, 2012, Claimant went to Dr. Mandell, a neurologist, for an unauthorized independent medical evaluation. (R. pp. 135-140). Dr. Mandell noted that Claimant's "symptoms are stable now, not improving and not worsening for the past several months at least." (R. p. 137). Claimant's mental state was normal. (R. p. 138). Dr. Mandell concluded that Claimant did not "require additional treatment concerning his injuries other than perhaps ongoing physical therapy for balance and gait." (R. p. 140). Dr. Mandell also concluded that, as of the time of his evaluation, there was "no indication" that Claimant required further surgery. (R. p. 140). Dr. Mandell had no disagreement with Claimant's current work restrictions. (R. p. 140).

Claimant's attorney then sent Claimant to Dr. Forrest of the Southeastern Spine Institute for another unauthorized medical evaluation on September 6, 2012. (R. pp. 172-173). Dr. Forrest stated that Claimant had reached maximum medical improvement. (R. p. 173). Dr. Forrest opined that Claimant's permanent impairment rating for his neck and low back was at least 40%. (R. p. 173). Claimant's attorney then sent Claimant to a physical therapist, Tracy Hill, for a functional capacity evaluation ("FCE") on September 11, 2012. (R. pp. 141-165). According to Ms. Hill, Claimant qualified for a whole person impairment rating of 28%, and he also qualified for a whole person impairment rating of 8%. (R. pp. 141-142). Also on September 11, 2012, another unauthorized independent medical evaluation of Claimant was performed by Dr. Margalit of Sunset Family Practice. (R. pp. 166-170). Dr. Margalit concurred with Dr. Drye's opinions concerning continuing work restrictions and weight loss. (R. p. 170).

However, Dr. Margalit disagreed with Dr. Drye's impairment rating, stating that Claimant "lost more than 50% of the functional capacity of his back." (R. p. 170).

After appropriate medical treatment, Claimant returned to work at Lowe's in his same position as cashier, with work restrictions, and even received a raise. (R. p. 301, lines 10-14; p. 302, lines 1-11; p. 324, lines 5-18). To address any claim for total disability pursuant to S.C. Code Ann. § 42-9-10, Claimant underwent a vocational assessment on September 13, 2012. (R. pp. 174-196). The assessment, performed by Harriet Fowler at the request of Claimant's attorney, did not conclude that Claimant had lost earning capacity. The assessment noted that Claimant was currently working at Lowe's in a light duty job in a satisfactory manner. (R. p. 195). Ms. Fowler merely advised that light duty may not be sustainable over a lengthy period of time, and therefore, working at a sedentary level may provide a better chance for sustainable employment. (R. p. 196).

STANDARD OF REVIEW

Judicial review of a Worker's Compensation Commission decision is directed by the substantial evidence rule of the Administrative Procedures Act, S.C. Code Ann. § 1-23-380(A)(5). *Gray v. Club Group, Ltd.*, 339 S.C. 173, 180, 528 S.E.2d 435, 439 (Ct. App. 2000); *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981). "This Court can reverse or modify the decision of the Commission where the substantial rights of the appellant have been prejudiced because the decision is affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence considering the record as a whole." *Trotter v. Trane Coil Facility*, 393 S.C. 637, 644, 714 S.E.2d 289, 293 (2011).

The 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, 729 (1989). A reviewing court should affirm the decision of the Commission unless it is clearly erroneous in view of the substantial evidence of the whole record. *Lark*, 276 S.C. at 136, 276 S.E.2d at 307. "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 possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Ellis v. Spartan Mills*, 276 S.C. 216, 218, 277 S.E.2d 216, 217 (1981). "Where there are conflicts in the evidence over a factual issue, the findings of the Commission are conclusive." *Etheridge v. Monsanto Co.*, 349 S.C. 451, 455, 562 S.E.2d 679, 681 (Ct. App. 2002).

ARGUMENT

I. The Commission did not err in deciding permanent disability benefits at the request of the Carrier.

Claimant argues that the Commission violated his substantive and procedural due process right to request a hearing for determination of permanent disability award at a time of his choosing. By granting Carrier's Form 21 request for a hearing, the Commission, according to Claimant, exceeded its authority under the S.C. Worker's Compensation Act, thereby arbitrarily and capriciously depriving him of his alleged property right in worker's compensation benefits. According to Claimant, only he "has the right to bring a cause of action for a determination of these benefits and it is a denial of due process to force the Claimant to a premature determination of those benefits where he has not made a request that he be awarded any benefits whatsoever under the Act." Appellant's Brief, p. 21. Claimant's argument wholly lacks merit.

To establish a procedural due process claim, a person must show deprivation of his liberty or property interests due to the government's failure to provide notice, an opportunity to be heard in a meaningful way, or judicial review. *Harbit v. City of Charleston*, 382 S.C. 383, 393, 675 S.E.2d 776, 781 (Ct. App. 2009). Under *Adams v. H.R. Allen, Inc*, this Court identified "adequate notice," "adequate opportunity for a hearing," "the right to introduce evidence," and "the right to confront and cross-examine witnesses" as the minimal due process requirements in a contested case proceeding such as a Worker's Compensation hearing. 397 S.C. 652, 657, 726 S.E.2d 9, 12 (Ct. App. 2012). Here, a hearing was conducted after proper notice was provided to all parties. Claimant had the right to call any witness he desired. He was afforded the opportunity to cross-examine all witnesses called by Carrier. He was afforded the opportunity to present any admissible evidence to the Commission. His claim was heard by an impartial adjudicator. Claimant has not complained that he was denied any of these fundamental

procedural rights. The fact that he is able to bring this appeal belies any real contention of a procedural due process violation. *See Harbit v. City of Charleston*, 382 S.C. 383, 394, 675 S.E.2d 776, 781 (Ct. App. 2009) ("The existence of review is an indication of the presence of procedural due process, rather than its absence.").

To establish a substantive due process claim, a person must show "he possessed a constitutionally protected property interest that was deprived by state action so far beyond the limits of legitimate governmental action, no process could cure the deficiency." *Seabrook v. Knox*, 369 S.C. 191, 198, 631 S.E.2d 907, 911 (2006). Claimant appears to confuse constitutional due process protections with due process protections under administrative law. A Due Process Clause inquiry is "far narrower" than an administrative law inquiry into whether agency action is arbitrary and capricious. *Sylvia Dev. Corp. v. Calvert County*, 48 F.3d 810, 829 fn. 7 (4th Cir. 1995). "While administrative law focuses on whether an agency's decision was supported by record evidence and abided by statutory criteria, substantive due process enquires into the conceivable outer limits of legitimate government power." *Id.* Substantive due process essentially protects against the uncommon situation of truly egregious government conduct as opposed to failure to comply with state law. *See Collins v. City of Harker Heights*, 503 U.S. 115, 126 (1992) (stating that Due Process Clause is designed "to prevent government from abusing its power, or employing it as an instrument of oppression."); *International Assoc. of Machinists & Aerospace Workers v. Haley*, 482 Fed. Appx. 759, 766 (4th Cir. 2012) ("Only the most egregious official conduct can be said to be arbitrary in the constitutional sense"); *c.f. Ross v. Medical University*, 328 S.C. 51, 492 S.E.2d 62 (1997) (analyzing constitutional due process claims separately from procedural requirements under the S.C. Administrative Procedure Act).

Claimant appears to argue that the Commission violated the Due Process Clause because it exceeded its statutory authority in granting Carrier's request for a hearing to determine permanent disability benefits. *Ultra vires* acts do not rise to the level of deprivation contemplated under the Due Process Clause. *See Sylvia Dev. Corp. v. Calvert County*, 48 F.3d 810, 829 fn. 7 (4th Cir. 1995) (" ... to conclude that every agency decision reversed as arbitrary and capricious under state or federal administrative law rises to the level of a constitutional claim would distort the substantive due process doctrine."); *Locust Valley Enters., LLC v. Upper Saucon Twp.*, 2008 U.S. Dist. LEXIS 53232, 26 (E. D. Pa. 2008) ("[T]o sustain a [due process] claim, plaintiff must prove that the government action in question is something more than . . . arbitrary, capricious, or in violation of state law."). Thus, Claimant's argument that the Commission violated his constitutionally protected substantive due process rights necessarily fails as a matter of law.

Instead, Claimant appears to be arguing that this Court should reverse the Commission's decision as action that exceeds the Commission's authority, or as arbitrary and capricious,[1] under S.C. Code Ann. § 1-23-380 of the S.C. Administrative Procedure Act ("APA"). Contrary to Claimant's assertion that Carrier lacked statutory authority to seek a hearing to determine any permanent disability benefits, the APA emphatically states that "in a contested case, all parties must be afforded an opportunity for hearing ...." S.C. Code Ann. § 1-23-320(A). More specifically, the South Carolina Worker's Compensation Act provides that "[i]f the employer and the injured employee or his dependents fail to reach an agreement in regard to compensation under this Title within fourteen days after the employer has knowledge of the injury ... either party may make application to the Commission for a hearing in regard to the matters at issue and

[1] Under the APA, "a decision is arbitrary if it is ... governed by no fixed rules or standards. *Deese v. South Carolina State Bd. of Dentistry*, 286 S.C. 182, 184-185, 332 S.E.2d 539, 541 (Ct. App. 1985).

for a ruling thereon." S.C. Code Ann. § 42-17-20. Carrier had on two occasions asked for a settlement agreement for permanent disability compensation and received no settlement offer. Because the parties failed to reach agreement as to any award of permanent disability, Carrier had the right to request a hearing to determine compensation for any permanent disability. *McMillan v. Midlands Human Res.*, 305 S.C. 532, 534, 409 S.E.2d 443, 445 (Ct. App. 1991). And the Commission was authorized to act on Carrier's request pursuant to S.C. Code Ann. § 42-17-20. Therefore, it was within the Commission's jurisdiction and authority to hold a hearing at the request of Carrier to determine whether Claimant was entitled to permanent disability benefits.

Claimant turns to *SC Property & Casualty Ins. Co. v. Carolinas Roofing & Sheet Metal Contractors Self-Insured Fund* as support for his argument that the Commission lacks jurisdiction to hear Carrier's Form 21 request because the employee did not initiate the hearing to determine permanent disability benefits. 303 S.C. 368, 401 S.E.2d 144 (1990). In *Carolinas Roofing*, the employee had entered into a settlement agreement with the employer and its workers compensation carrier that fully satisfied any and all liability under the Workers Compensation Act. *Id.* at 370, 145. Thereafter, the carrier became insolvent, making the S.C. Property & Casualty Insurance Guaranty Association ("Guaranty Association") responsible for providing coverage. *Id.* The Guaranty Association then filed a complaint in the court of common pleas seeking to determine its liability for the claim. *Id.* The circuit court ruled that the Worker's Compensation Commission had exclusive jurisdiction and entered judgment in favor of defendants. *Id.* On appeal, the Supreme Court held that the settlement agreement terminated the employee's pending claim before the Worker's Compensation Commission; therefore, the

Commission lacked jurisdiction to decide the issue raised by the Guaranty Association. *Id.* at 372, 146.

Claimant seizes upon the Court's holding that the Commission lacks jurisdiction when there is no "pending employee claim" before the Commission, arguing that the lack of a Form 50 from Claimant to determine his benefits strips the Commission of jurisdiction to hear Carrier's request via Form 21 to make a determination of any permanent disability award. Claimant's argument is clearly mistaken. Under S.C. Code Ann. § 42-3-180, "all questions arising under [the Act], if not settled by agreement of the parties interested therein with the approval of the Commission, shall be determined by the Commission, except as otherwise provided in this Title." The Commission enjoys a broad grant of authority over any dispute related to an award of compensation. *Price v. Peachtree Elec. Servs.*, 396 S.C. 403, 409, 721 S.E.2d 461, 464 (Ct. App. 2011). The Commission's jurisdiction is not determined by which party initiates a determination of compensation.

Claimant's reasoning that the Commission lacks jurisdiction to hear Carrier's Form 21 request because claimants bear the burden of proof in establishing entitlement to permanent disability also falls short. "Subject matter jurisdiction and application of a burden of proof (to a claim within the court's jurisdiction) are different concepts." *Altman v. Griffith*, 372 S.C. 388, 396 fn. 2, 642 S.E.2d 619, 623 fn. 2 (Ct. App. 2007). "Subject matter jurisdiction is the power to hear and determine cases of the general class to which the proceedings in question belong." *Dove v. Gold Kist*, 314 S.C. 235, 237-238, 442 S.E.2d 598, 600 (1994). Subject matter jurisdiction is not triggered or determined by which party has the burden of proof. Unquestionably, Claimant bears the burden of proof as the "party asserting the affirmative of an issue," and the fact that Carrier requested a hearing to determine whether benefits are due does

not shift the burden of proof. 2 AM JUR 2D *Administrative Law* § 354. Claimant's focus on burden of proof in support of his argument that "only the Claimant has the right to bring a cause of action for a determination of ... benefits" is irrelevant.

II. Substantial evidence supports the Commission's finding that Claimant was not permanently and totally disabled due to loss of 50% or more of the use of his back.

Claimant sought total and permanent disability under S.C. Code Ann. § 42-9-30(21) due to an alleged fifty percent loss of use or disability of his back. " ... [I]n cases where there is fifty percent or more loss of use of the back the injured employee shall be presumed to have suffered total and permanent disability and compensated under Section 42-9-10(B)." S.C. Code Ann. § 42-9-30(21). This presumption is rebuttable. *Id.* In Claimant's view, he bears the burden of making out a prima facie case of impairment of 50% or more, which was satisfied merely by putting forward the medical opinions of Drs. Forrest and Margalit, as well as his own testimony. Therefore, Claimant argues, Carrier must rebut the presumption of total permanent disability that he established, and Carrier has utterly failed to overcome the presumption. Thus, according to Claimant, the Commission's finding of 48% impairment to Claimant's back fails for lack of evidence. Claimant's cites no supporting authority for his theory, nor can he, because his proposed manner of determining total permanent disability under S.C. Code Ann. § 42-9-30(21) is contrary to well-settled law applicable to the Commission's fact-finding concerning the extent of impairment.

"The extent of an injured workman's disability is a question of fact for determination by the Appellate Panel and will not be reversed if it is supported by competent evidence. *Fishburne v. ATI Sys. Int'l*, 384 S.C. 76, 86-87, 681 S.E.2d 595, 600 (Ct. App. 2009). "While an impairment rating may not rest on surmise, speculation or conjecture . . . it is not necessary that the percentage of disability or loss of use be shown with mathematical exactness." *Id.* "The

Appellate Panel is not bound by the opinion of medical experts and may find a degree of disability different from that suggested by expert testimony." *Id.* "Expert medical testimony is designed to aid the Commission in coming to the correct conclusion; therefore, the Commission determines the weight and credit to be given to the expert testimony. *Id.*

Here, the Commission received varying opinions regarding the extent of Claimant's impairment. Dr. Drye, Claimant's attending physician since November 8, 2010, after reviewing imaging studies of Claimant's lumbar spine and cervical spine and referring to the American Medical Association Guide to the Evaluation of Permanent Impairment, assigned "a 25% whole person impairment based on his injury to the cervical spine including a subsequent fusion and mild myelopathic residual symptoms." (R. p. 110). He concluded that Claimant's stiffness and pain in his back was "strongly suggestive of arthritic-type symptoms," and advised Claimant that continued stretching exercises as well as weight loss would help with his lumbar symptoms. (R. p. 111).

Dr. Forrest, retained by Claimant's counsel, opined that, after spending about an hour and half with Claimant, Claimant's permanent impairment rating for his neck and low back was at least 40%. (R. p. 173); (R. p. 350, lines 10-12). Dr. Margalit, after spending about an hour with Claimant, opined that Claimant "lost more than 50% of the functional capacity of his back." (R. p. 170); (R. p. 349, lines 20-24). The opinions of Dr. Margalit and Dr. Forrest were apparently made without use of the American Medical Association Guide to the Evaluation of Permanent Impairment.[2] (R. p. 171); (R. p. 173). Ms. Hill, a physical therapist also retained by Claimant's counsel, gave a layperson's assessment that Claimant qualified for a whole person impairment

[2] Impairment ratings not determined under the A.M.A. guidelines may be given less weight. *Harbin v. Owens-Corning Fiberglas*, 316 S.C. 423, 430, 450 S.E.2d 112, 116 (Ct. App. 1994).

rating of 28% which converted to a 80% cervical spine impairment, and a whole person impairment rating of 8% which converted to a 11% lumbar spine impairment. (R. pp. 141-142).

Additionally, Claimant testified that he thought he had lost 80% of the use of his back. (R. p. 337, line 10 – p. 338, line 11). A great deal of his testimony describing his impairment concerned complaints of stiffness and pain in his neck and lower back. (R. pp. 319, lines 14-19; p. 320, lines 6-10; p. 327, line 21 – p. 328, line 2; p. 327, line 22 – p. 329, line 4; p. 329, lines 5-21; p. 330, lines 3-10; p. 330, lines 17-20; p. 335, lines 23-25). However, he reported to Dr. Drye that this pain is worse in the morning and improves as he moves about. (R. p. 76). Claimant did not ask for, and Dr. Drye did not prescribe any pain medication. (R. p. 76); (R. p. p. 348, line 23 – p. 58, line 1). He previously testified during his deposition that he experienced no back pain. (R. p. 351, line 7 – p. 352, line 10).

Upon review of this evidence, the Commission found Dr. Drye's conclusions to be the most persuasive. (R. p. 26). After weighing all of the evidence, including evidence concerning Claimant's lumbar spine and radicular symptoms, the Commission found that Claimant sustained a 48% permanent partial disability to his back. (R. p. 26). Substantial evidence supports the Commission's finding of 48% permanent partial disability to his back. "Substantial evidence is evidence that, in viewing the record as a whole, would allow reasonable minds to reach the same conclusion that the full commission reached." *Sellers v. Pinedale Residential Ctr.*, 350 S.C. 183, 188, 564 S.E.2d 694, 697 (Ct. App. 2002). "The possibility of drawing two inconsistent conclusions from the evidence does not prevent the commission's findings from being supported by substantial evidence." *Id.* Although evidence was entered into the record indicating impairment of Claimant's back to be 50% or more, "where the medical evidence conflicts, the findings of fact of the Commission are conclusive." *Mullinax v. Winn-Dixie Stores*, 318 S.C.

431, 435, 458 S.E.2d 76, 78 (Ct. App. 1995). The Commission considered the evidence and, as it was entitled to do, made a finding of impairment that was different than the ratings put forward by Claimant, but nonetheless well within the evidence presented. *Fishburne v. ATI Sys. Int'l*, 384 S.C. 76, 88, 681 S.E.2d 595, 601 (Ct. App. 2009). The Commission committed no error in awarding under S.C. Code Ann. § 42-9-30(21) permanent partial disability instead of permanent total disability.

Claimant's assertion that his medical evidence and lay testimony must be accepted by the Commission as meeting his burden of proof of showing impairment of 50% or more to his back directly contradicts the Commission's duty and prerogative to consider all evidence of impairment, and reach its own determination of impairment. The Commission may adopt particular evidence of impairment as its own finding, or it may make a finding of impairment that is greater or lesser than the impairment ratings submitted so long as the Commission's impairment rating is within the evidence in the record. *Fishburne v. ATI Sys. Int'l*, 384 S.C. 76, 87, 681 S.E.2d 595, 600 (Ct. App. 2009). Claimant's argument, followed to its logical conclusion, would contradict well-settled law holding that medical evidence is not conclusive, and that the Commission is "also given discretion to weigh and consider all the evidence, including both lay and expert testimony." *Ballenger v. Southern Worsted Corp.*, 209 S.C. 463, 467, 40 S.E.2d 681, 682-683 (1946); *Fishburne v. ATI Sys. Int'l*, 384 S.C. 76, 87, 681 S.E.2d 595, 600 (Ct. App. 2009).

As an additional argument, Claimant attempts to characterize the Commission's rejection of total and permanent disability as hinging upon a rebuttal based upon loss of earning capacity, and argues that, under S.C. Code Ann. § 42-9-30, evidence of lost earning capacity is an error of law. Claimant's Brief, p. 25-29. Claimant misconstrues the Commission's Order. Claimant

sought permanent and total disability on two separate grounds: 1) a 50% or greater loss of use to the back pursuant to S.C. Code Ann. § 42-9-30(21) or 2) loss of earning capacity pursuant to S.C. Code Ann. § 42-9-10. In its findings of fact and conclusions of law, the Commission rejected the first ground by finding that "Claimant sustained a 48% permanent partial disability to his back." (R. p. 42). The Commission then addressed Claimant's request for permanent and total disability under S.C. Code Ann. § 42-9-10. (R. p. 42).

Under the general disability statute, S.C. Code Ann. § 42-9-10, "disability in compensation cases is to be measured by loss of earning capacity." *Stephenson v. Rice Servs.*, 323 S.C. 113, 118, 473 S.E.2d 699, 702 (1996); *Wynn v. People's Natural Gas Co.*, 238 S.C. 1, 11, 118 S.E. 2d 812, 818 (1961). "The generally accepted test of total disability is inability 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." *Id.* "An employee who is capable of performing other work that is continuously available to him would not be deemed totally disabled simply because he is unable to resume duties of the particular occupation which he was engaged at the time of his injury." *Id.* "An award of compensation must be based upon the claimant's *incapacity* because of injury to earn the wages which (he) was receiving at the time of injury in the same or any other employment." *Shealy v. Algernon Blair Inc.*, 250 S.C. 106, 112, 156 S.E.2d 646, 649 (1967) (emphasis in original). "Loss of earning capacity is the criterion." *Id.* "There is no recognition of the elements of pain and suffering, or of increased discomfort and difficulty in performing the work, as long as there is no diminution in earning capacity." *Id.* An award of total disability "may not rest on surmise, conjecture or speculation and must be founded on evidence of sufficient substance to afford a reasonable basis for it." *Coleman v. Quality Concrete Products, Inc.*, 245 S.C. 625, 631, 142 S.E.2d 43, 45 (1965).

After reviewing the evidence, the Commission concluded that Claimant was not permanently and totally disabled pursuant to S.C. Code Ann. § 42-9-10 because Claimant "has returned back to work with the employer for almost two years." (R. p. 40); (R. p. 42). Because Claimant continues to work at Lowe's, and even received a raise subsequent to his return to work, he cannot show loss of earning capacity. (R. p. 301, lines 10-14; p. 302, lines 1-11; p. 324, lines 5-18). *see Harbin v. Owens-Corning Fiberglas*, 316 S.C. 423, 427, 450 S.E.2d 112, 114 (Ct. App. 1994) ("It is undisputed that Harbin has not suffered any actual loss of earning capacity; he continues to work for Owens and, as the result of a subsequent raise, he now earns more than he did at the time of the accident."). Claimant was employed as a cashier at Lowe's before the work injury and continued in this position, with restrictions, when he returned to work. (R. p. 324, lines 5-18). Claimant's vocational assessment did not conclude that his injury rendered him incapable of finding work. (R. pp. 194-196).

Claimant does not challenge the Commission's finding or conclusion rejecting total and permanent disability pursuant to S.C. Code Ann. § 42-9-10. He attempts to reframe the Commission's Order by characterizing its rejection of total and permanent disability pursuant to S.C. Code Ann. § 42-9-10 as a finding or conclusion of rebuttal of the presumption of total and permanent disability under S.C. Code Ann. § 42-9-30(21). The Commission's Order makes no mention of a rebuttal, and as explained above, clearly considered lack of earning capacity under S.C. Code Ann. § 42-1-10, not § 42-9-30(21).

III. The Commission committed no error in declining to separately award permanent disability benefits to Claimant for residual myelopathy.

Claimant argues that the Commission erred in failing to make an award for myelopathy as a separate neurological injury. As the basis for his argument, Claimant points to Dr. Mandell's evaluation in which Dr. Mandell opined that:

> [Claimant] still has spasticity in his legs, hyperreflexia, difficulty with coordination, inability to run and difficulty with balance. I would say he is probably 85% better but still has this 15% neurological injury left over. (R. p. 139).

Claimant cannot contend that Dr. Mandell's casual reference to residual neurological symptoms can reasonably be taken an impairment rating. Rather, Dr. Mandell is simply explaining that Claimant had not recovered 100% of his pre-injury functioning. (R. p. 139).

The only other physician that touched on the issue of myelopathy was Dr. Drye, who noted that Claimant continued to have some altered gait from his previous myelopathy as well as longstanding, pre-injury inversion of the right foot and ankle. (R. p. 111). However, Dr. Drye did not offer nor suggest any separate impairment rating for Claimant's gait problems, and the MRI of Claimant's cervical MRI as well as lumbar study did not indicate any post-surgery nerve compression. (R. pp. 111-112). The lumbar study demonstrated a disc protrusion at Ll-2, and at L5-S1 there was very advanced degenerative disc disease. (R. p. 111). However, there was no evidence of any direct nerve root impingement or large disc herniation. (R. p. 111). Dr. Drye opined that Claimant's current symptoms were most consistent with axial and myofascial pain and strongly suggestive of arthritic type symptoms. (R. p. 111).

"The Appellate Panel's decision must be affirmed if supported by substantial evidence in the record." *Fishburne v. ATI Sys. Int'l*, 384 S.C. 76, 85, 681 S.E.2d 595, 599 (Ct. App. 2009). The substantial evidence in this case does not support a finding that Claimant is entitled to a separate award based upon myelopathy. What is more, the Commission found that "[t]he Claimant's permanent partial disability includes any radicular symptoms to his right leg." (R. p. 40). In other words, the Commission included Claimant's residual myelopathy as part of its finding of 48% impairment to his back. The Commission committed no error.

IV. The Commission did not err in declining to make a separate award for the "low back."

Claimant contends that he is entitled to an award of permanent partial disability for the pain and alleged impairment to his low back. However, the "low back" is not a scheduled member and is not a body part that is subject to a separate award. Section 42-9-30(21) addresses "loss of use of the back." The word "back" is not defined in the Act; therefore, the term must be defined according to its plain and ordinary meaning. *Hartford Accident & Indem. v. S.C. Second Injury Fund*, 316 S.C. 420, 422, 450 S.E.2d 110, 111 (Ct. App. 1994). According to the Merriam-Webster Dictionary, the word "back" is defined as "the rear part of the human body especially from the neck to the end of the spine." *See* "Back" *Merriam-Webster.com* at <http://www.merriam-webster.com/dictionary/back>. Clearly, the word "back" includes the lower back. Nothing in the S.C. Worker's Compensation Act recognizes the "low back" as separate from the "back." The Commission committed no error here.

V. The Commission's finding that it placed greater weight on Dr. Drye's opinion is not reviewable by this Court.

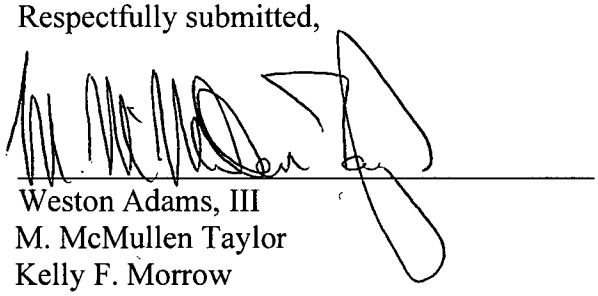
Claimant argues that the Commission erred by giving greater weight to the medical opinion of his attending physician, Dr. Drye. "The Administrative Procedures Act mandates that the commission take the evidence, judge the credibility and weight of that evidence, and from that judgment determine the facts of the case." *Rogers v. Kunja Knitting Mills, Inc.*, 312 S.C. 377, 381, 440 S.E.2d 401, 403 (Ct. App. 1994). The "weight to be accorded evidence is reserved to the [...] Commission." *Etheridge v. Monsanto Co.*, 349 S.C. 451, 455, 562 S.E.2d 679, 681 (Ct. App. 2002). The reviewing court may not substitute its judgment for that of the Commission concerning the weight of the evidence on questions of fact. *Mullinax v. Winn-Dixie Stores*, 318 S.C. 431, 435, 458 S.E.2d 76, 78 (Ct. App. 1995). "It is not the task of the court to weigh the evidence as found by the commission." *Anderson v. Baptist Med. Ctr.*, 343 S.C. 487,

495, 541 S.E.2d 526, 529 (2001). Thus, Claimant's attempt to persuade this Court to reject the weight given by the Commission to Dr. Drye's opinions is unavailing.

CONCLUSION

For the reasons stated above, this Court should affirm the Commission's Order.

Respectfully submitted,



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Jan. 21, 2014

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM SOUTH CAROLINA
WORKER'S COMPENSATION COMMISSION

The Honorable Susan S. Barden, Melody L. James and Scott T. Beck

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WCC File No. 1015200

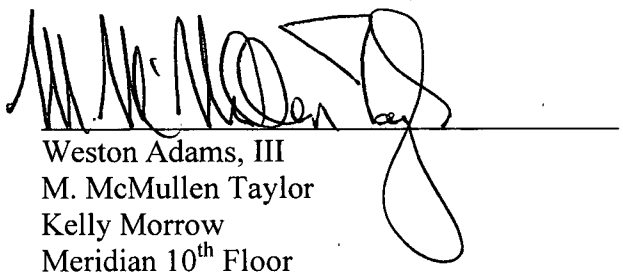
HENTON T. CLEMMONS, JR., EMPLOYEE,.....APPELLANT,

v.

LOWE'S HOME CENTERS, INC.-HARBISON, EMPLOYER, AND
SEDGWICK CLAIMS MANAGEMENT SERVICES, INC.,
CARRIER,.....RESPONDENTS.

PROOF OF COMPLIANCE

The undersigned certifies that the Final Brief of Respondents Lowe's Home Centers, Inc. – Harbison and Sedgwick Claims Management Services Inc. comply with Rule 211(b), SCACR. The undersigned further certifies that the Final Brief of Respondents comply with the South Carolina Supreme Court's August 13, 2007 Order re: Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings.



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January 22, 2014

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CERTIFICATE OF SERVICE

I certify that I have served a copy of a Respondents' Final Brief by placing in the United States Mail, postage prepaid, on the 22nd day of January, 2014, addressed to counsel of record, as follows:

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