ORIGINAL

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS COMPENSATION COMMISSION

Appellate Case No: 2013-001212

Joseph Mickle,	)
	)
Appellant-Respondent.	)
	)
v.	)
	)
Boyd Brothers Transportation, Inc.	)
Employer, and Lumbermans	)
Underwriting Alliance, Carrier,	)
	)
Respondents-Appellants.	)

FINAL BRIEF OF RESPONDENTS-APPELLANTS, BOYD BROTHERS TRANSPORTATION, INC., EMPLOYER, AND LUMBERMANS UNDERWRITING ALLIANCE, CARRIER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Other Authorities

ISSUES PRESENTED ON APPEAL

I. **Did the South Carolina Workers' Compensation Commission Have Jurisdiction Where Appellant-Respondent's Employer Is Exempt from The Workers' Compensation Act and/or Appellant-Respondent Did Not Qualify as a Statutory Employee of Boyd Brothers.**

II. **Whether the Appellant-Respondent is entitled to 500 Weeks' Worth of Benefits and Lifetime Medical Care Where There Is No Substantial Evidence That He was Either Totally or Permanently Disabled?**

III. **Whether the Appellate Panel of the South Carolina Workers' Compensation Commission committed error in adopting the Hearing Commissioner's calculations of the amount of any lump sum Award that the Appellant-Respondent may be entitled to assuming that South Carolina has jurisdiction in this matter?**

STATEMENT OF THE CASE

This is a Workers' Compensation Appeal arising out of the injuries sustained by Appellant-Respondent, Joseph Mickle, when he was removing a tarp from the load on his flatbed truck on July 12, 2010, in Vernon, Alabama. (R. p. 17) At the time of this injury, Appellant-Respondent Mickle drove a flatbed truck for WTI Transport, Inc. ("WTI Transport"). (R. p. 16)

Appellant-Respondent was hired by WTI Transport in 2002 as an owner/operator. (R. p. 15) On April 19, 2010, Appellant-Respondent became a full-time, regular employee of WTI Transport. (R. p. 16) After injuring his back in July 2010, Appellant-Respondent reported his injury to WTI Transport, who paid him temporary benefits from July 12, 2010 until February 24, 2011 under the Alabama Workers' Compensation Act. (R. p. 17) On July 1, 2011, Appellant-Respondent sought benefits for total and permanent disability resulting from the injury to his back and legs. (R. p. 14) Though his injury occurred in Alabama and he received his temporary total weekly benefits in Alabama, Appellant-Respondent now seeks benefits for personal disability in South Carolina. (R. p. 14)

WTI Transport and Respondent-Appellant, Boyd Brothers Transportation, Inc. ("Boyd Brothers") have taken the position that Appellant-Respondent was employed by WTI Transport, and because WTI Transport does not regularly employ four or more employees in South Carolina, the South Carolina Workers' Compensation Commission ("Commission") does not have jurisdiction over this case. (R. p. 14) Further, Respondent-Appellants disputed the assertion that Appellant-Respondent is totally and permanently disabled, arguing that he is entitled to an award for only partial disability. (R. pp. 14-15) In this appeal, the Respondents-Appellants take

the position that there is no evidence to support the monetary Award of the Hearing Commissioner which was adopted by the Appellate Panel. A hearing was held in this matter on November 18, 2011, in Columbia, South Carolina. (R. p. 12) In an Order dated March 14, 2012, the Hearing Commissioner ruled that the Commission had jurisdiction in the proceeding pursuant to §§ 42-3-180 and 42-1-400 of the South Carolina Code and that Appellant-Respondent is totally and permanently disabled as a result of the injury to his back and legs. (R. pp. 25-26) Respondents-Appellants appealed to the Appellate Panel of the Full Commission of the Workers' Compensation Commission which affirmed the Hearing Commissioner in its Order of May 14, 2013. Respondents-Appellants now take an Appeal from the Appellate Panel Order.

STANDARD OF REVIEW

"The South Carolina Administrative Procedures Act governs judicial review of a decision of the workers' compensation commission." Lark v. Bi-Lo, Inc., 276 S.C. 130, 134, 276 S.E.2d 304, 306 (1982); Bass v. Isochem, 365 S.C. 454, 467, 617 S.E.2d 369, 376 (Ct. App. 2005) cert. dismissed as improvidently granted Aug. 2007; Hargrove v. Titan Textile Co., 360 S.C. 276, 288, 599 S.E.2d 604, 610 (Ct. App. 2004). Pursuant to the APA, an appellate Court's review is limited to deciding whether the Appellate Panel's decision is unsupported by substantial evidence or is controlled by some error of law. Grant v. Grant Textiles, 372 S.C. 196, 200, 641 S.E.2d 869, 871 (2007); S.C. Code Ann. Section 1-23-380(A)(5) (Supp. 2006).

1. Substantial Evidence Standard

The judicial review of the Appellate Panel's factual findings is governed by the substantial evidence standard. Gadson v. Mikasa Corp., 368 S.C. 214, 221, 628 S.E.2d 262, 266 (Ct. App. 2006); Frame v. Resort Servs., Inc., 357 S.C. 520, 527, 593 S.E.2d 491, 494 (Ct. App. 2004); Corbin v. Kohler Co., 351 S.C. 613, 617, 571 S.E.2d 92, 94-95 (Ct. App. 2002); Lockridge v. Santens of America, Inc., 344 S.C. 511, 515, 544 S.E.2d 842, 844 (Ct. App. 2001). The Appellate Panel's decision must be affirmed if supported by substantial evidence in the record. Shuler v. Gregory Elec., 366 S.C. 435, 440, 622 S.E.2d 569, 571 (Ct. App. 2005) (citing Sharpe v. Case Produce, Inc., 366 S.C. 154, 160, 519 S.E.2d 102, 105 (1999)). A reviewing court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. S.C. Code Ann. Section 1-23-380(A)(5)(d)(e)(Supp. 2006); see, also, Hall v. United Rentals, Inc., 371 S.C. 69, 77, 636 S.E.2d 876, 881 (Ct. App. 2006). However, a reviewing court may reverse or modify a decision of the Appellate Panel if the

findings, inferences, conclusions, or decisions of them are "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." S.C. Code Ann. Section 1-23-380(A)(5)(e)(Supp. 2006); Bass v Kenco Group, 366 S.C. 450, 457, 622 S.E.2d 577, 580 (Ct. App. 2005); Bursey v. S.C. Dep't of Health & Envtl. Control, 360 S.C. 135, 141, 600 S.E.2d 80, 84 (Ct. App. 2004) aff'd, 369 S.C. 176, 631 S.E.2d 899 (2006).

It is not within the appellate court's province to reverse the Appellate Panel's factual findings if they are supported by substantial evidence. Etheredge v. Monsanto Co., 349 S.C. 451, 454, 562 S.E.2d 679, 681 (Ct. App. 2002) (citing Hoxit v. Michelin Tire Corp., 304 S.C. 461, 405 S.E.2d 407 (1991)); Muir v. C.R. Bard, Inc., 366 S.C. 266, 282, 519 S.E.2d 583, 591 (Ct. App. 1999). 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 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); Jones v. Georgia-Pacific Corp., 355 S.C. 413, 417, 586 S.E.2d 111, 113 (2003); Brown v. Greenwood Mills, Inc., 366 S.C. 379, 392, 622 S.E.2d 546, 554 (Ct. App. 2005) cert. denied Jan. 2007; Broughton v. South of the Border, 336 S.C. 488, 495, 520 S.E.2d 634, 637 (Ct. App. 1999). The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence. Sharpe, 366 S.C. at 160, 519 S.E.2d at 105; Smith v. NCCI Inc., 369 S.C. 236, 247, 631 S.E.2d 268, 274 (Ct. App. 2006); DuRant v. S.C. Dep't of Health & Envtl. Control, 361 S.C. 416, 420, 604 S.E.2d 704, 707 (Ct. App. 2004).

The Appellate Panel is the ultimate fact finder in Workers' Compensation cases and is not bound by the single commissioner's findings of fact. Bass v. Isochem, 365 S.C. at 468, 617 S.E.2d at 376; Frame, 357 S.C. at 528, 593 S.E.2d 495; Muir, 336 S.C. at 281, 519 S.E.2d at 591. The final determination of witness credibility and the weight assigned to the evidence is reserved to the Appellate Panel. Shealy v. Aiken County, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000); Frame, 357 S.C. at 528, 593 S.E.2d 495. Where there are conflicts in the evidence over a factual issue, the findings of the Appellate Panel are inconclusive. Brown, 366 S.C. at 393, 622 S.E.2d at 554; Etheredge, 349 S.C. at 455, 562 S.E.2d at 681; see also Mullinax v. Winn Dixie Stores, Inc., 318 S.C. 431, 435, 458 S.E.2d 76, 78 (Ct. App. 1995) ("Where the medical evidence conflicts, the findings of fact of the [Appellate Panel] are conclusive.").

The findings of the Appellate Panel are presumed correct and will be set aside only if unsupported by substantial evidence. Bass v. Kenco Group, 366 S.C. at 458, 622 S.E.2d at 581; Frame, 357 S.C. at 528, 593 S.E.2d 495; Broughton, 336 S.C. at 496, 520 S.E.2d at 637. The appellate court is prohibited from overturning findings of fact of the Appellate Panel unless there is no reasonable probability the facts could be as related by the witness upon whose testimony the finding was based. Liberty Mut. Ins. Co. v. South Carolina Second Injury Fund, 363 S.C.612, 621, 611 S.E.2d 297 (Ct. App. 2005) cert. denied July 2007; Hargrove, 360 S.C. at 290, 599 S.E.2d at 611; Etheredge, 349 S.C. at 455-56, 562 S.E.2d at 681. The Appellate Panel's factual findings will normally be upheld; however, such a finding may not be based upon surmise, conjecture, or speculation, but must be founded on evidence of sufficient substance to afford a reasonable basis for it. Tiller v. Nat'l Health Care Ctr. of Sumter, 334 S.C. 333, 339, 513 S.E.2d

843, 845 (1999); Muir, 336 S.C. at 282, 519 S.E.2d at 591; Sharpe v. Case Produce Co., 329 S.C.534, 543, 495 S.E.2d 790, 794 (Ct. App. 1997) rev'd on other grounds.

ARGUMENT

I. Whether the South Carolina Workers' Compensation Commission was Without Jurisdiction Because WTI Transport Did Not Regularly Employ Four or More Employees in South Carolina and/or Appellant-Respondent Did Not Qualify as a Statutory Employee of Boyd Brothers.

1. WTI Transport Did Not Regularly Employ Four or More Employees in South Carolina at the Time of Claimant's Injury, Thus Appellant-Respondent Is Not a Covered Employee Authorized to File a Worker's Compensation Claim, and the Commission Lacked Jurisdiction to Hear This Claim.

The Commission is without jurisdiction because WTI Transport did not regularly employ four or more employees in South Carolina at the time of Appellant-Respondent's injury. (See, R. pp. 13, 23.) Section 42-15-10 of the South Carolina Code conditions an employee's right to file a claim under the Workers' Compensation Act on the employee being "covered" by the Act. Nolan v. Nat'l Sales Co., 292 S.C. 1, 3-4, 354 S.E.2d 575, 577 (Ct. App. 1987), aff'd, 294 S.C. 371, 364 S.E.2d 752 (1988). Sections 42-1-50 and 42-1-360 of the Act exempt employers with fewer than four employees from coverage under the Act, and the Commission has no jurisdiction to hear any claims asserted against such employers. See, Harding v. Plumley, 329 S.C. 580, 584, 496 S.E.2d 29, 31 (Ct. App. 1998) (stating that whether an employer regularly employs the requisite number of employees to be subject to the Act is a jurisdictional issue). Thus, where an

employer does not regularly employ four or more employees in South Carolina, the employer is exempt from the Act, its employees are not covered by the Act, and they are therefore "not authorized to file a claim at all." Nolan, 292 S.C. at 4, 354 S.E.2d at 577.

To be authorized to file a worker's compensation claim, Appellant-Respondent is required to show that he was an "employee covered by the provisions of [the Act]." § 42-15-10. This means that he first has to show that his employer, WTI Transport, was subject to the Act's provisions. The parties stipulated and the Single Commissioner held that WTI Transport did not regularly have four or more employees in the state of South Carolina, (R. pp. 13, 23), thus WTI Transport is exempt from the Act's provisions, see § 42-1-360, and the Commission has no jurisdiction to hear any claims asserted against it. Appellant-Respondent is employed by an exempt employer, thus he is not an employee "covered by the provisions" of the Act, and he was not authorized to file a worker's compensation claim. See Nolan, 292 S.C. at 3-4, 354 S.E.2d at 577 ("Unless the employee is 'covered by the provisions' of South Carolina's Workers' Compensation Act, he is not authorized to file a claim at all."). Appellant-Respondent was an employee of WTI Transport at the time of his injury, and WTI Transport was exempt from the Act's provisions, thus the Act did not cover Appellant-Respondent and the Commission lacked jurisdiction to hear his claim. See id. ("[T]his state's Workers' Compensation Act did not cover [Claimant] because [the employer] regularly employed less than four employees in South Carolina.").

2. **Appellant-Respondent Was Not a Statutory Employee of Boyd Brothers, Thus Appellant-Respondent Was Not a Covered Employee Authorized to File a Worker's Compensation Claim, and the Commission Lacked Jurisdiction to Hear This Claim.**

The Single Commissioner held that Respondent/Appellant was a statutory employee of Boyd Brothers under § 42-1-400 of the Workers' Compensation Act and that because Boyd Brothers has more than four employees in South Carolina the Commission has jurisdiction in this proceeding. (R. pp. 25-26) Respondents-Appellants maintain that there is no jurisdiction. The consideration of the facts of this case mandates a holding that Appellant-Respondent was not a statutory employee of Boyd Brothers.

South Carolina Code § 42-1-400 states:

> When any person . . . referred to as 'owner,' undertakes to perform or execute any work which is a part of his trade, business or occupation and contracts with any other person . . . for the execution . . . of the whole or any part of the work undertaken by such owner, the owner shall be liable to pay to any workman
>
> employed in the work any compensation under this Title which he would have been liable to pay if the workman had been immediately employed by him. § 42-1-400.

Known as the Statutory Employer Doctrine, this provision states that employees of a subcontractor are statutory employees of a general contractor when the work they perform constitutes a part of the trade or business of the general contractor. See Marchbanks v. Duke Power Co., 190 S.C. 336, 362-63, 2 S.E.2d 825, 836 (1939). The determination of whether a worker is a statutory employee is jurisdictional, thus the question on appeal is one of law. Harrell v. Pineland Plantation, Ltd., 337 S.C. 313, 320, 523 S.E.2d 766, 769 (1999).

Three tests are applied to determine whether an employee's activity is sufficient to make him a statutory employee within the meaning of § 42-1-400: (1) Is the activity an important part of the owner's business or trade; (2) Is the activity a necessary, essential, and integral part of the owner's trade, business, or occupation; and (3) Has the identical activity previously been performed by the owner's employees? See Ost v. Integrated Prods., Inc., 296 S.C. 241, 245-47, 371 S.E.2d 796, 799 (1988); Edens v. Bellini, 359 S.C. 433, 442-43, 597 S.E.2d 863, 868 (Ct. App. 2004). If any one of these tests is satisfied, the injured worker is considered the statutory employee of the owner. Voss v. Ramco, Inc., 325 S.C. 560, 568, 482 S.E.2d 582, 586 (Ct. App. 1997). Whether an individual is a statutory employee is generally resolved by determining whether the alleged employer has the "right and authority to control and direct [the] particular work or undertaking, as to the manner or means of its accomplishment." Id. (citing S.C. Workers' Comp. Comm'n v. Ray Covington Realtors, Inc., 318 S.C. 546, 549, 459 S.E.2d 302, 303 (1995)).[1] For example, where the employer exerted almost complete control over the Claimant, had the ability to terminate the claimant, and directed where the claimant would work, how he engaged in sales of machinery, and to whom he could make his sales, the claimant was a statutory employee of the employer. Id. at 567-68, 482 S.E.2d at 586.

Because Appellant-Respondent argues that WTI Transport's employees should be counted as statutory employees of Boyd Brothers, the relevant inquiry concerns the nature of WTI Transport's relationship with Boyd Brothers and the nature of the activities performed by WTI Transport's employees. See, id. at 568, 482 S.E.2d at 586. An examination of the record will show that there is no evidence that the activity performed by Appellant-Respondent is an

[1] Voss was decided in the context of an independent contractor relationship. See Voss, 325 S.C. at 568, 482 S.E.2d at 586. However, cases decided in the context of a contractor/subcontractor relationship between the two employers are equally applicable to cases involving a parent/subsidiary relationship. See Poch v. Bayshore Concrete Prods., 386 S.C. 13, 29, 686 S.E.2d 689, 698 (Ct. App. 2009).

important part of the Boyd Brothers' business or trade, that it is a necessary, essential, or integral part of Boyd Brothers' trade, business, or occupation, or that Respondent/Appellant was performing said activity in furtherance Boyd Brothers' business interests.

The record reveals that Appellant-Respondent's activities as a flatbed truck driver are not a necessary or important part of Boyd Brothers' business or trade. Lynn Ingram Colley, the Human Resources Director for Boyd Brothers, (R. p. 202, lines 16-18), testified that Boyd Brothers and WTI Transport operate as two separate and distinct entities, (R. p. 203, lines .3-4). Each company has its own president, recruiting department, fleet managers, pricing schemes, and dispatchers. (R. p. 203, lines 5-18) WTI Transport maintains its own fleet of trucks, (R. p. 203, lines 9-10; R. p. 208, lines 3-6), has its own clients, (R. p. 203, line 12), and handles its own bookkeeping, (R. p. 207, line 23 – p. 208, line 2). This evidence makes clear that no work done by WTI Transport's employees benefits Boyd Brothers' business or trade.

Though Appellant-Respondent testified that he considered himself to work for "WTI/Boyd Brothers," (R. p. 180, lines 6-8), the remainder of the record shows that he is, at best, confused about the relationship between the two companies. He acknowledged that his paychecks came from only WTI Transport, not from Boyd Brothers, (R. p. 176, lines 23-25; see, R. p. 207, line 14 – p. 208. line 2), that he was dispatched by only WTI Transport, (R. p. 191, lines 11-13), and that he drove for only WTI Transport, not for anyone else, (R. p. 191, lines 8-10). In fact, he explicitly testified that he did not know the nature of the relationship between WTI Transport and Boyd Brothers. (R. p. 193, lines 4-7)

The only evidence in the record of a business relationship between the two companies regards Boyd Brothers' administration of WTI Transport's employees' insurance claims. (See R. p. 178, line 7 – R. p. 179, line 22) (explaining that Appellant-Respondent's insurance cards say "Boyd Care").) While Appellants acknowledge that Boyd Brothers administers WTI Transport's insurance benefits, the record shows that WTI Transport pays for these services and Boyd Brothers is merely providing an administrative service. (See, R. p. 204, lines 5-21) That WTI Transport pays Boyd Brothers to administer its insurance plan does not show that Appellant-Respondent's truck driving for WTI Transport constituted a necessary, essential, or integral part of Boyd Brothers' business.

Although both WTI Transport and Boyd Brothers are flatbed truck carriers, (R. p. 215, lines 3-6), there is no evidence in the record that activities identical to those performed by Appellant-Respondent have been performed by Boyd Brothers' employees, that Appellant-Respondent was retained by Boyd Brothers to perform those activities, or that those activities were performed in furtherance of Boyd Brothers' business interests. This case is distinguishable from Smith v. T.H. Snipes & Sons, Inc., 306 S.C. 289, 290, 411 S.E.2d 439, 439 (1991), where the South Carolina Supreme Court held that the decedent employee was a statutory employee of the defendant, because the employee in that case was *hired by the defendant* to do work which was an essential part of the defendant's business. Similarly, in Woodard v. Westvaco Corp., 315 S.C. 329, 338, 433 S.E.2d 890, 895 (Ct. App. 1993) (overruled on other grounds), the employee was held to be a statutory employee of the defendant because the employee's firm was *hired by the defendant* to perform work that is a necessary part of the defendant's business.

Flatbed truck driving may be a part of Boyd Brothers' business, but the instant case is distinguishable from cases like Smith and Woodward because there is *no evidence* that Boyd Brothers hired Appellant-Respondent or WTI Transport to drive a truck for them. Further, unlike in Voss, there is no evidence that Boyd Brothers controlled or directed Appellant-Respondent's work, had the ability to terminate him, or directed where and when he would work. See Voss, 325 S.C. 567-68, 482 S.E.2d at 586. In fact, all evidence in the record is to the contrary. Appellant-Respondent testified that he was not dispatched by Boyd Brothers, did not drive for Boyd Brothers, and was not paid by Boyd Brothers. (See, R. p. 176, lines 23-25; R. p. 191, lines 8-13) (explaining that Respondent/Appellant's checks came from only WTI Transport, he was dispatched by only WTI Transport, and he drove for only WTI Transport).)

It is completely irrelevant that WTI Transport and Boyd Brothers both happen to be in the flatbed trucking industry. Appellant-Respondent did not perform any activity that was an important part of Boyd Brothers' business or necessary, essential, or integral to Boyd Brothers' interests because none of his activities as an employee of WTI Transport benefitted Boyd Brothers' business interests. Though Boyd Brothers may have employees who perform the same work as Appellant-Respondent—an assumption which has no evidentiary support in the record—Appellant-Respondent was not a statutory employee of Boyd Brothers because he was not hired to perform any work for them. None of the three tests that qualify a worker as a statutory employee is satisfied, thus Appellant-Respondent is not a statutory employee of Boyd Brothers, and the South Carolina Workers' Compensation Commission cannot rely on Boyd Brothers' coverage under the Workers' Compensation Act to derive jurisdiction in this case.

It appears that the basis for the Hearing Commissioner's finding as affirmed by the Appellate Panel that South Carolina Workers' Compensation Commission has jurisdiction in this case is that Boyd Brothers and WTI are subsidiaries. Other than the testimony of Lynn Colley, HR Director of Boyd Brothers, that both companies have the same owners, there is no evidence as to any business relationship between the two companies other than Boyd Brothers being paid to adjust the workers' compensation and medical claims of WTI Transport, Inc. As mentioned above, the Appellant-Respondent testified he was hired by WTI Transport, Inc., he drove for WTI Transport, Inc., was dispatched by WTI Transport, Inc. and was working for WTI Transport, Inc. at the time of his injury. There is no testimony that the Appellant-Respondent was performing part of the trade, business or occupation of Boyd Brothers. Just because the two companies are subsidiaries does not make one the statutory employer of the other. There is no case law, without more evidence, that support this holding. Therefore, the finding that South Carolina has jurisdiction in this case is error.

II. Appellant-Respondent Has Not Introduced Substantial Evidence That He Made "Reasonable Efforts" to Obtain Other Employment, That His Injury Prevents Him from Working in Any Capacity, or That His Doctors Determined Him to Be Incapable of Working, Thus Appellant-Respondent Has Failed to Show That He Is Permanently or Totally Disabled, and He is Not Entitled to 500 Weeks' Worth of Benefits or Lifetime Medical Care.

1. The Appellant-Respondent Has Failed to Prove That He Is Incapable of Performing Any Meaningful, Gainful Work, Thus He Has Failed to Show That He Is Totally and Permanently Disabled.

In South Carolina, workers' compensation is not awarded for the physical injury as such, but for the "disability" produced by such injury. Outlaw v. Johnson Serv. Co., 254 S.C. 486, 489, 176 S.E.2d 152, 154 (1970). The disability is to be measured by the employee's capacity or incapacity to earn the wages he was receiving at the time of his injury. Id.; see, also, § 42-1-120. Thus, if an award is made under § 42-9-10 for total disability, there must be substantial evidence that the Appellant-Respondent's "incapacity for work resulting from [the] injury is total." "The fact that after the injury the employee has not worked and has therefore earned no wages is not in itself determinative of the extent of loss of his earning capacity." Shealy, 250 S.C. at 112, 156 S.E.2d at 649. Loss of earning capacity is the criterion. Id.

The only way to show total loss of earning capacity is to prove the inability to work as a result of the injury. See, id. at 113, 156 S.E.2d at 649. The mere fact that Appellant-Respondent may experience some pain or difficulty performing further work does not equate with a lack of earning capacity. See, id. at 112, 156 S.E.2d at 649. "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.; see, Ingle v. Mills, 204 S.C. 505, 513, 30 S.E.2d 301, 304 (1944) ("The object of the Workmen's Compensation Act is to compensate for, or to

relieve from, the loss or impairment of an employee's capacity to earn . . . and not to indemnify for any physical ailment or impairment as such . . . and to exclude from allowable elements of compensation everything except diminution of earning power.").

As an initial matter, the burden of proving the inability to work can be met only by evidence that the Appellant-Respondent has made reasonable efforts to obtain employment and failed because of an injury-induced handicap. Shealy, 250 S.C. at 113, 156 S.E.2d at 649; see, also, Coleman v. Quality Concrete Prods., Inc., 245 S.C. 625, 631, 142 S.E.2d 43, 45 (1965) ("Whenever claimant depends in part on a showing that he has been unable to get work because of his physical condition it naturally follows that claimant must prove that he has made reasonable efforts to secure employment."). Though Appellant-Respondent testified that he attempted to ride in a truck and had great difficulty doing so, (R., p. 183, ll. 5-15), he has not introduced a scintilla of evidence that he has made "reasonable efforts" to find work in another capacity or that his injury prevents him from doing so. His doctors have determined that he is capable of sedentary work, (R., pp. 55, 60; and 75), yet he has elected to do nothing. Personal reluctance to return to work and pain or difficulty in performing work are insufficient to justify a finding of total and permanent disability. See, Shealy, 250 S.C. at 113, 156 S.E.2d at 650.

In addition to failing to show that he has attempted to return to work but has been unable to do so, Appellant-Respondent fails to show that any medical doctor has determined him to be totally and permanently disabled. The medical evidence in the record uniformly shows that Appellant-Respondent has a 10-11% regional impairment to the lumbar spine. (R., pp. 55; 58) The Functional Capacity Evaluation, as well as three of Appellant-Respondent's own doctors, placed him in the "sedentary to light work" capacity. (R., p. 24; R. pp. 55, 60, and 75) The

vocational psychologist concluded that Appellant-Respondent is unable to perform any gainful work activity, but he is a licensed psychologist, not a medical doctor, who evaluated Appellant-Respondent's psychological ability to return to work, not his physical ability to do so. (See, R., p. 54) All three of the medical doctors who made determinations as to Appellant-Respondent's work restrictions concluded that he is able to perform sedentary work. (R., pp. 55, 60, and 75)

Should the Full Commission had given more weight to the report by the vocational psychologist than to those by Appellant-Respondent's medical doctors and conclude that Appellant-Respondent is currently unable to perform any gainful work activity, there is still no evidence in the Psychological and Vocational Evaluation—or anywhere else in the record—that Respondent/Appellant's disability **is permanent**. Appellant-Respondent may currently be taking "significant prescription medications which prohibit him from driving a truck," (R., p. 24), but there is no evidence to support Appellant-Respondent's proposition that these prescriptions are permanent or that the medications prevent him from performing any other form of work. As his doctors specifically noted, Appellant-Respondent is capable of doing sedentary work. (R., pp. 55, 60, and 75) Dr. Poletti even laid out several treatments that Appellant-Respondent could pursue in the future should his back condition fail to improve. (R., p. 56) Because Appellant-Respondent did not introduce evidence that he has made "reasonable efforts" to obtain other employment, much less that his injury prevented him from working or that his doctors determined him to be incapable of working, Appellant-Respondent has not shown that he is permanently or totally disabled, and he is not entitled to 500 weeks' worth of benefits or lifetime medical care pursuant to § 42-9-10 of the Workers' Compensation Act.

2. **The Workers' Compensation Appellate Panel Erred When It Awarded Appellant-Respondent Benefits for a Period of 500 Weeks Because Respondent/Appellant Is Not Permanently or Totally Disabled.**

Because Appellant-Respondent is not permanently or totally disabled, the Commission miscalculated his award. As discussed above, Appellant-Respondent has not produced any evidence that he is permanently or totally disabled. Pursuant to § 42-9-20 of the South Carolina Code, when the incapacity for work resulting from a work-related injury is partial, the employer shall pay benefits for a period not to exceed 340 weeks from the date of injury. For loss of use of the back in cases where the loss of use is 49% or less, including the instant case where the impairment is 10-11%, the injured employee is entitled to benefits for a pro-rated period of 300 weeks. § 42-9-30(21). Employees who suffered a back injury are presumed to have a permanent and total disability, thereby entitling them to benefits for a period of 500 weeks, only if there is 50% or more loss of use of their back. Id. Because Appellant-Respondent suffered only a 10-11% impairment to his back, (R., pp. 55 and 58), the Commission erred when it determined that Appellant-Respondent is entitled to benefits for a period of 500 weeks plus lifetime medical care.

3. **The Workers' Compensation Commission Appellate Panel Errored When It Awarded Appellant-Respondent His Payment in a Lump Sum Because Appellant-Respondent Has Not Met His Burden of Proving That This Is an Extraordinary Case Justifying Payment in a Lump Sum Rather Than in Installments.**

"It is ... settled that one of the obvious primary purposes of the Act was to prevent injured employees and those lawfully dependent upon them for support from becoming charges

upon society and the public generally for support." Flemon v. Dickert-Keowee, Inc., 259 S.C. 99, 104, 190 S.E.2d 751, 753-54 (1972). To that end, § 42-9-220 of the South Carolina Code lays out the manner in which compensation shall be paid, and it contains a presumption that benefits will be paid periodically, not in a lump sum. "A careful examination of this statute reveals a primary purpose and general scheme to pay compensation at intervals corresponding to the time the employee would have received his wages had he not been injured." Ashley v. Ware Shoals Mfg. Co., 210 S.C. 273, 280, 42 S.E.2d 390, 393 (1947).

The reasoning for this presumption in favor of periodic payments to injured workers is "grounded in the underlying principle of workmen's compensation: the protection of income. Experience has taught that this income-protection is best accomplished through periodic payments." 29 S.C. L. Rev. 12 (1977); see, also, Ashley, 210 S.C. at 280, 42 S.E.2d at 393 ("The purpose of this method is to prevent an imprudent employee or dependent from wasting the means for his support and thereby becoming a burden upon society."). Often, "the lump sum is soon dissipated and the worker is right back where he or she would have been if workers' compensation had never existed." Larson's Worker's Compensation Law, § 132.07[1]. To prevent this all-too-often occurrence, workers' compensation benefits should be administered in weekly or monthly sums except in "those exceptional cases in which it can be demonstrated that the purpose of the Act will best be served by a lump-sum award." Id.

The South Carolina Supreme Court has construed the statute "as permitting acceleration or commutation of weekly compensation only in unusual cases," as the state legislature "intended that periodical payments should be the rule and lump sum settlements the exception."

Ashley, 210 S.C. at 280, 42 S.E.2d at 393. In a lump-sum benefits case, the burden of proving facts to justify such an award rests on the employees. Woods v. Sumter Stress-Crete, Inc., 266 S.C.245, 248, 222 S.E.2d 760, 761 (1976). In the instant case, Appellant-Respondent simply has not shown that his is an appropriate case that would justify the payment of a lump sum. Indeed, Appellant-Respondent has introduced no evidence supporting an application for lump-sum benefits, thus there is no evidence to support a finding that his is an "extraordinary" case justifying the payment of benefits in a lump sum, and Appellant-Respondent has failed to meet his burden of proof. As there is no evidence in the record or Order sufficient to overcome the statutory presumption in favor of "periodic" payments, see § 42-9-220, the award of lump sum benefits must be reversed, see, 29 S.C. L. Rev. 13 (1977).

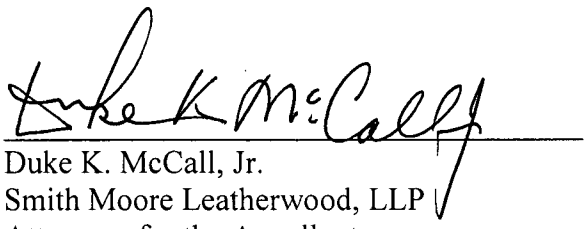
III. Did the Appellate Panel of the Workers' Compensation Commission in adopting the Hearing Commissioner findings error in its calculations of the amount of any lump sum Award that the Appellant-Respondent may be entitled to assuming that South Carolina has jurisdiction in this matter?

There is no evidence of the amount of weekly temporary total benefits paid weekly to the Appellant-Respondent under the Alabama Workers' Compensation Act. Without a finding of the amount of weekly benefits that the Appellant-Respondent has already been paid under the Alabama Act, or some evidence submitted to established the number of weeks paid and the amount of benefits paid to the Appellant-Respondent, the figures in the Hearing Commissioner's Award as affirmed by the Appellate Panel are without merit. Therefore, without any evidence of the amount of benefits paid and the number of weeks paid under the Alabama Act, the Award of a specific amount of monies to the Appellant-Respondent by the Hearing Commissioner as affirmed by the Appellate Panel must be based upon surmise, speculation and conjecture.

CONCLUSION

WHEREFORE, for the foregoing reasons, Respondents-Appellants request that this Court find: (1) that South Carolina did not have jurisdiction to hear this case because the Appellant-Respondent's employer did not have four or more employees in the State at the time the Respondent/Appellant was injured; (2) that Appellant-Respondent is neither permanently nor totally disabled and thus does not qualify for 500 weeks' worth of benefits or lifetime medical care; (3) that Appellant-Respondent's award, if any, should be limited to a percentage of disability to his back because he is not permanently or totally disabled; and (4) that the monetary award, assuming jurisdiction and totally disability without conceding these issues, should be reversed since there is no evidence to support the monetary calculations of the Hearing Commissioner as affirmed by the Appellate Panel. Therefore, the Award of the South Carolina Workers' Compensation Commission should be reversed.

Respectfully submitted,



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April 23, 2014

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS COMPENSATION COMMISSION

Appellate Case No: 2013-001212

Joseph Mickle,	)
	)
Appellant-Respondent.	)
	)
v.	)
	)
Boyd Brothers Transportation, Inc.	)
Employer, and Lumbermans	)
Underwriting Alliance, Carrier,	)
	)
Respondents-Appellants.	)

CERTIFICATION OF RESPONDENTS-APPELLANTS BOYD BROTHERS TRANSPORTATION, INC., EMPLOYER AND LUMBERMANS UNDERWRITING ALLIANCE, CARRIER

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This is to certify that the Final Brief of Boyd Brothers Transportation, Inc., Employer, and Lumbermans Underwriting Alliance, Carrier, Respondents-Appellants complies with Rule 211(b) of the South Carolina Rules of Court.

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April 23rd, 2014

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	)
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PROOF OF SERVICE

IT IS HEREBY CERTIFIED that a copy of the **Final Brief of Boyd Brothers Transportation, Inc. and Lumbermans Underwriting Alliance** was served upon the Appellant-Respondent by placing a copy of the same in the United States Mail, postage prepaid, on the **28TH** day of April, 2014, addressed as follows:

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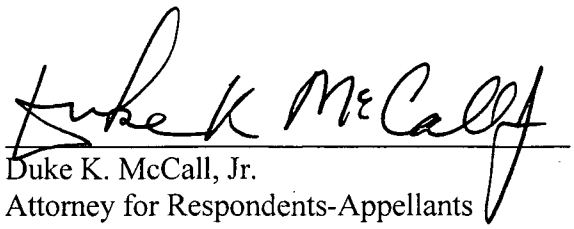

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