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, Claimant — Appellant-Respondent,

v.

Boyd Brothers'Transportation, Inc., Employer and Lumbermans' Underwriting Alliance, Carrier,

Respondents-Appellants

INITIAL BRIEF OF RESPONDENT JOSEPH MICKLE, APPELLANT-RESPONDENT

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STATEMENT OF THE CASE

By his July 1, 2011 Form 50, Claimant sought benefits for total and permanent disability resulting from injuries to his back and legs from an admitted work accident on July 12, 2010. On July 12, 2010, Claimant was pulling the tarp off the top of the load while he was in Vernon Alabama when he felt a pinch of pain in his back. Claimant recalled that at first he didn't think too much about the pain in his back but that when he got ready to leave, there was no one there to pick up the tarp so that he and his co-worker had to pick up the tarp themselves and put it on the trailer. Claimant indicated that he reinjured his back picking up the tarp but that he kept going and he finished the trip; however, the next morning, Claimant was unable to get out of bed due to pain in his back and legs. Claimant reported the accident; the accident was admitted and the Defendants paid Claimant temporary benefits from July 12, 2010, until February 24, 2011.

The accident took place in Alabama and Claimant initially received benefits from Alabama; however, Claimant chose to pursue benefits for permanent disability in South Carolina, the state where he was hired, where he received medical care, and where he has lived for more than thirty years. The owner/employer, Boyd Brothers' Transportation, Inc., (Boyd Brothers), denied coverage for the claim in South Carolina, asserting that Claimant was actually employed by its wholly owned subsidiary, WTI Transport, Inc. (WTI). Boyd Brothers asserted that WTI had only three South Carolina employees.

An evidentiary hearing was held before Commissioner Scott T. Beck on November 18, 2011. On March 14, 2012, the Hearing Commissioner issued his Order finding that jurisdiction was proper before the Commission; that Claimant was entitled to lump sum payment of benefits for his total and permanent disability resulting from the injuries to his back and legs with credit to Defendants for temporary benefits paid; and that Claimant was entitled to lifetime medical

care. Boyd Brothers appealed before the Appellate Panel. By its May 14, 2013, Order, the Appellate Panel affirmed the Order of the Hearing Commissioner in full. Both parties have appealed.

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act (APA) establishes the standard for judicial review of decisions by the Appellate Panel. S.C.Code Ann. § 1–23–380 (Supp.2011); Lark v. Bi-Lo, Inc., 276 S.C. 130, 134-35, 276 S.E.2d 304, 306 (1981). Under the scope of review established in the APA, this court may not substitute its judgment for that of the Appellate Panel as to the weight of the evidence on questions of fact, but may reverse where the decision is affected by an error of law. Stone v. Traylor Bros., Inc., 360 S.C. 271, 274, 600 S.E.2d 551, 552 (Ct.App.2004); Hamilton v. Martin Color-Fi, Inc. 405 S.C. 478, 485, 748 S.E.2d 76, 80 (Ct.App.,2013).

The substantial evidence rule governs the standard of review in a workers' compensation decision. Frame v. Resort Servs. Inc., 357 S.C. 520, 527, 593 S.E.2d 491, 494 (Ct.App.2004). 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). "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 that the administrative agency reached or must have reached in order to justify its action. Lark, 276 S.C. at 135, 276 S.E.2d at 306; Broughton v. S. 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 finding from being supported by substantial evidence." Palmetto Alliance, Inc. v. S.C.

Pub. Serv. Comm'n, 282 S.C. 430, 432, 319 S.E.2d 695, 696 (1984); Hargrove v. Titan Textile Co., 360 S.C. 276, 290, 599 S.E.2d 604, 611 (Ct.App.2004). In workers' compensation cases, the Appellate Panel is the ultimate finder of fact; therefore, the final determination of witness credibility and the weight to be accorded evidence is reserved to the Appellate Panel. Hamilton v. Martin Color-Fi, Inc. 405 S.C. 478, 748 S.E.2d 76 (Ct.App.,2013); Bass v. Kenco Grp., 366 S.C. 450, 458, 622 S.E.2d 577, 581 (Ct.App.2005); Shealy v. Aiken Cnty., 341 S.C. 448, 535 S.E.2d 438 (2000).

When the jurisdiction of the Commission is at issue, the reviewing court is not bound by the Commission's findings of fact upon which jurisdiction are dependent; this Court's review is governed by the preponderance of the evidence standard. Gray v. Club Group, Ltd., 339 S.C. 173, 181, 528 S.E.2d 435, 439 (Ct.App.2000). However, "[i]n determining jurisdictional questions, doubts of jurisdiction will be resolved in favor of inclusion of employees within workers' compensation coverage rather than exclusion." Wilson v. Georgetown County, 316 S.C. 92, 94, 447 S.E.2d 841, 842 (1994). Any reasonable doubt as to the construction of the Act will be resolved in favor of coverage. Mauldin v. Dyna–Color/Jack Rabbit, 308 S.C. 18, 22, 416 S.E.2d 639, 641 (1992). It is the policy of South Carolina courts to resolve jurisdictional doubts in favor of the inclusion of employers and employees under the Workers' Compensation Act. Hill v. Eagle Motor Lines, 373 S.C. 422, 429, 645 S.E.2d 424, 427 (2007); Wilkinson ex rel. Wilkinson v. Palmetto State Transp. Co. 382 S.C. 295, 676 S.E.2d 700 (2009).

The South Carolina Workers' Compensation Commission's decision to award benefits by lump sum is reviewed for abuse of discretion. Swilling v. Pride Masonry of Gaffney, 401 S.C. 178, 190, 736 S.E.2d 672, 678 (Ct.App. 2012).

ARGUMENT

I. The South Carolina Workers' Compensation Commission properly exercised jurisdiction over the case where the Commission rightly found that Claimant was a statutory employee of Boyd Brothers' Transportation Inc. under the South Carolina Workers' Compensation Act.

Joseph Mickle, Claimant, drove a flatbed truck in his work for WTI Transport, Inc., a Division of Boyd Brothers Transportation, Inc.. Because the work activity Claimant engaged in for WTI, flatbed trucking, was part of the general trade, business, or occupation of the owner, Boyd Brothers, the Workers' Compensation Commission properly ruled that Claimant was a statutory employee of the owner pursuant to S.C. Code Section 42–1–400 (1985).

First, the Workers' Compensation Commission recognized that Claimant's direct employer, WTI, was stipulated to be the wholly owned subsidiary of Boyd Brothers. Nevertheless, Boyd Brothers argues on brief, "It appears that the basis for the Hearing Commissioner's finding that the South Carolina Workers' Compensation Commission has jurisdiction in this case is that Boyd Brothers and WTI are subsidiaries." (Brief of Boyd Brothers p. 14). Boyd Brothers then wrongly suggests that there was no evidence as to any business relationship between the two companies. In fact, prior to the commencement of the hearing before Commissioner Beck, a stipulation was entered into between the parties that WTI is a wholly owned subsidiary of Boyd Brothers. (Tr. p.6, line 23-p. 7, line 6; p. 9, lines 5-6).

The Hearing Commissioner actually indicated in his Order: "Defendants' objection to Claimant's APA Tab 11, comprised of information obtained from the companies' profiles on the internet and benefits forms provided by Boyd Brothers' Transportation, Inc. to Claimant, submitted for the purpose of showing that WTI, Transport, Inc. is Boyd Brothers' Transportation, Inc.'s subsidiary, was sustained in light of Defendants' stipulation that WTI Transport, Inc. is a wholly owned subsidiary of Boyd Brothers' Transportation, Inc." (Order at p.

4). Thus, as was undisputed before the Hearing Commissioner, these companies do not have a mere "business relationship" - - Boyd Brothers owns WTI outright.

Boyd Brothers conceded before the hearing Commissioner that the work of WTI and its employees, including Claimant, was flatbed trucking, i.e., the same work activity which is the trade, business, and occupation of Boyd Brothers. However, Boyd Brothers fails to grasp the substance of the statutory employment concept, arguing: "It is completely irrelevant that WTI Transport and Boyd Brothers both happen to be in the flatbed trucking industry." (Brief of Boyd Brothers at 11). To the contrary, under the Act, the admitted fact that Boyd Brothers' subsidiary and its employees performed precisely the same work performed by the parent company and its employees is wholly relevant to the ruling that Claimant was a statutory employee of Boyd Brothers. It is the fact that the employees of the owner and the employees of the subsidiary/direct employer perform precisely the same work which makes those working for the subsidiary the statutory employees of the owner, Boyd Brothers, as a matter of law.

In fact, the statutory employment doctrine depends upon the nature of the work being done. South Carolina Code Section 42–1–400 (1985), specifically provides:

> When any person, in this section and §§ 42–1–420 and 42–1–430 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 (in this section and § § 42–1–420 to 42–1–450 referred to as "subcontractor") for the execution or performance by or under such subcontractor 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.

As the Commission rightly found, under the plain meaning of the statute, where owner, Boyd Brothers, undertook to perform its work, the flatbed trucking of goods, i.e., the work which is its

trade, business, and occupation, by having the employees of its subsidiary, WTI, perform flatbed trucking, Boyd Brothers became liable to pay to the workmen employed in performing the work any compensation under this Title which it would have been liable to pay if the workman had been directly employed by Boyd Brothers.

The fact that the work being performed is the work of the owner is the basis for the Act's imposing liability on the owner. The point is that Boyd Brothers cannot avoid liability for benefits to the workers performing its flatbed trucking work by going through a subsidiary. The South Carolina Supreme Court has clearly explained that this is the purpose of the statute: "The rationale is to prevent owners and contractors from subcontracting out their work to avoid liability for injuries incurred in the course of employment." Glass v. Dow Chem. Co., 325 S.C. 198, 201 n.1, 482 S.E.2d 49, 50 n.1 (1997). In this case, because the employees of the subsidiary, WTI, perform flatbed trucking, and because flatbed trucking is the work of the owner, under the Act, the owner, Boyd Brothers, is the statutory employer of those employees who perform the owner's work through the subsidiary, WTI.

Boyd Brothers wrongly argues that it is not Claimant's statutory employer because it did not contract directly with Claimant to perform work for Boyd Brothers. To the contrary, although coverage under the Act is generally dependent on the existence of an employer-employee relationship, the statutory employer doctrine set out in Section 42–1–400 (1985), provides an exception to this general rule by imposing on an owner, depending upon the nature of the work performed, liability for the payment of compensation benefits to a worker who is not directly employed by the owner. Thus, by statute, Boyd Brothers was properly determined to be Claimant's statutory employer.

The statutory employment doctrine applies to cases involving a parent/subsidiary relation. In Poch v. Bayshore Concrete Products/South Carolina, Inc., 686 S.E.2d 689 (CtApp 2009), the South Carolina Court of Appeals found that the statutes and case law dealing with statutory employment in cases involving a contractor/subcontractor relationship would also apply to cases involving a parent/subsidiary relationship. The Court of Appeals found that Poch was directly employed by Bayshore SC, a wholly owned subsidiary of Bayshore Corp. and that Poch was a statutory employee of Bayshore Corp. because Poch's work activity was an essential part of Bayshore Corp's business.

There is no issue involving an independent contractor in this case; nevertheless, Boyd Brothers appears to confuse the doctrine of statutory employment with the question of control which arises in cases involving an independent contractor. Boyd Brothers argues that it was not properly found to be Claimant's statutory employer because it did not have the right to control the particular work or undertaking as to the manner or means of its accomplishment, citing S.C. Workers' Comp. Comm'n v. Ray Covington Realtors, Inc., 318 SC 546, 549, 459 S.E.2d 302, 303 (1995). Such an argument, wrongly attempting to rely upon the control test relevant to an independent contractor question to argue against statutory employment, has been soundly rejected by our Courts. Recently, the South Carolina Court of Appeals in Collins v. Charlotte, 400 S.C. 50, 732 S.E.2d 630 (Ct. App. 2012), agreed that the questions of control relevant to an independent contractor issue are not at all relevant to the question of statutory employment. The Collins Court explained, "Once the Commission determined Collins was an employee of Seko's subcontractor, West, which the parties in this case did not dispute, the Commission should have looked to whether Collins' activities were part of Seko's trade, business, or occupation." Thus, control is irrelevant to the question of statutory employment as a matter of law; the relevant

question is as to the nature of the work being done and whether the work being done was part of the trade, business, and occupation of Boyd Brothers.

A three factor test is applied in determining whether the activity of an employee of a subcontractor 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?; or
> (3) has the identical activity previously been performed by the owner's employees?

Riden v. Kemet Elec. Corp., 313 S.C. 261, 437 S.E.2d 156 (Ct.App.1993); Smith v. T.H. Snipes and Sons, Inc., 306 S.C. 289, 411 S.E.2d 439 (1991). In Revels v. Hoechst Celanese Corp., the Court of Appeals found that the test to be used to determine if a worker is a statutory employee is "whether or not [the work] being done is or is not a part of the general trade, business or occupation of the owner." Revels, 301 S.C. 316, 318, 391 S.E.2d 731, 732 (Ct.App.1990).

Under our Act, the three factors are in the alternative so that, if the activity at issue meets even one of the three criteria, the worker qualifies as the statutory employee of the owner. Edens v. Bellini, 359 S.C. 433, 442-443, 597 S.E.2d 863, 868 (Ct.App. 2004); Olmstead v.Shakespeare, 354 S.C. 421, 581 S.E.2d 483 (2003). In this case, all three factors are met:

> (1) The activity is an important part of the owner's business or trade. Boyd Brothers is in the business of trucking. Likewise, WTI's business is trucking. Trucking is an important part of the business of Boyd Brothers and the success of the subsidiary is financially beneficial to the parent company;
> (2) The activity is a necessary, essential, and integral part of the owner's trade, business, or occupation. Flatbed trucking is a necessary, essential and integral part of the owner's trade, business or occupation in that Boyd Brothers is in the business of flatbed trucking.
> (3) The identical activity has previously been performed by the owner's employees. Boyd Brothers Transportation employs drivers to drive its flatbed trucks to deliver building materials - - this is precisely the same work activity Claimant performed for Boyd Brothers' wholly owned subsidiary, WTI.

Boyd Brothers maintains that there is no evidence that Claimant was performing any work, trade or business of Boyd Brothers, nor is there any evidence that WTI was performing any work, trade or business of Boyd Brothers. To the contrary, it is undisputed that the work, trade or business of both Boyd Brothers and of WTI is the transportation of goods and materials by flatbed truck. It is also undisputed that this is precisely the work activity Claimant was performing at the time of his injury. Therefore, under all three criteria of the test for statutory employment under S.C. Code Ann. Section 42–1–400 (1985), Claimant was the statutory employee of the owner, Boyd Brothers Transportation.

Any doubts as to a worker's status should be resolved in favor of the claimant by including him under the Workers' Compensation Act rather than excluding him. Davis v. S.C. Dept. of Corrections, 289 S.C. 123, 345 S.E.2d 245 (1986); Ost v. Integrated Products, Inc. 296 S.C. 241, 248, 371 S.E.2d 796, 800 (1988); Riden, 313 S.C. at 263, 437 S.E.2d at 158; Edens, supra. While any doubt as to whether a claimant was a statutory employee must be resolved in favor of including the worker under the Act, here, there is no doubt that this Claimant was the statutory employee of Boyd Brothers. Therefore, as a matter of law, pursuant to S.C. Code Ann. Section 42–1–400 (1985), as applied by our Courts, the Commission correctly found that Claimant is covered under the Act as a statutory employee of Boyd Brothers. The Commission's decision should be affirmed.

II. The Commission properly found that Claimant is totally and permanently disabled pursuant to Section 42-9-10 where the substantial evidence established that he is unable to perform any substantial gainful work activity as the result of the injuries to his back and legs.

The general disability statute, 42-9-10, provides for benefits based on "incapacity for work." The disability is to be measured by the employee's capacity or incapacity to earn the wages which he was receiving at the time of his injury. Loss of earning capacity is the criterion." Keeter v. Clifton Manufacturing Co., 225 S.C. 389, 82 S.E.2d 520 (1954). "The whole philosophy of our Workers' Compensation Act is to compensate for, or relieve from, the loss of employee's capacity to earn..." Burnette v. Startex Mills, 193 S.C. 118, 10 S.E.2d 164 (1940). The term "disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment. Under the traditional theory, the goal of worker's compensation law is to compensate workers for reductions in their earning capacity caused by work-related injuries. Stephenson v. Rice Servs., Inc., 323 S.C. 113, 116, 473 S.E.2d 699, 700 (1996); Simmons v. City of Charleston, 349 S.C. 64, 73, 562 S.E.2d 476, 481 (Ct.App. 2002).

Under the Act "total disability" does not require complete, abject helplessness. Rather it is an inability to perform services other than those that are so limited in quality, dependability, or quantity that no reasonably stable market exists for them. Coleman v. Quality Concrete Products, Inc., 245 S.C. 625, 142 S.E.2d 43 (1965); McCollum v. Singer Co., 300 S.C. 103, 107, 386 S.E.2d 471, 474 (Ct.App.1989). An injured worker is properly found totally disabled where he is "disabled to perform common labor and could not obtain employment as such, and he was not qualified by training or experience for any other." Colvin v. E.I. Dupont De Nemours, 227 S.C. 465, 88 S.E.2d 581 (1955).

Here, the experts are unanimous in indicating that Claimant is not and will not be able to return to his prior work as a heavy truck driver. In fact, the doctors have all opined that his physical condition precludes him from performing anything more strenuous than sedentary work. However, as established by the evidence and confirmed by the vocational opinion, Claimant is not qualified by training or experience to obtain or perform a desk job. Claimant has never earned wages in a sedentary position; he has no experience working in an office or with a computer. (Claimant's APA, p. 4). In addition, he is precluded from performing sedentary work by his physical limitations and by the effects of his prescription medications. As opined by the Vocational Expert, Claimant is unable to perform any substantial gainful work activity which exists in South Carolina or the national economy. Directly as a result of his on-the-job injuries, the only services he could perform are "so limited in quality, dependability or quantity that no reasonably stable market for them exists" (Claimant's APA, p. 10).

Employees who because of a work-related injury can perform only limited tasks for which no reasonably stable market exists are considered totally disabled notwithstanding their nominal earning capacity. Stephenson v. Rice Services, Inc., supra. "The criterion of the right of Claimant to compensation under the Act is this: Has his injury lessened his earning capacity and deprived him in whole or in part of the power to obtain employment?" Manning v. Gossett Mills, 192 S.C. 262, 6 S.E.2d 256 (1939). In Claimant's case, the answer to this question is indisputably, "Yes." Claimant's injury has destroyed his earning capacity. Claimant cannot return to the strenuous truck driving he had performed for over thirty-five years and through which he had earned wages throughout his entire working life. Claimant's vocationally relevant work experience, as performed, was limited to heavy physical labor. Claimant's prior work required walking, standing, sitting, bending, and heavy to very heavy lifting, pushing and

pulling. Prior to the admitted work injury, Claimant was able to earn wages by performing this heavy physical work.

Claimant is unqualified to obtain or perform a desk job. Claimant's injuries and condition further preclude sedentary work due to the fact that Claimant is unable to sit for long periods and also due to the effects of his prescribed medications. Therefore, as the result of his work accident, Claimant is no longer able to perform manual labor. In addition, Claimant is not qualified or able to perform sedentary work Claimant is a high school graduate, having obtained his diploma in 1963. Claimant agreed that pulling flatbeds was basically the work he had done during his working life of over thirty-five years. (Tr. p. 45, lines 20-22).

Claimant indicated that he drove a flatbed truck and that his work as a truck driver required him to do heavy manual labor tasks, including strapping down or tarping the loads. Claimant explained that this process required the driver to chain the load down, throw and pull chains, tarp them and untarp them, and that this was heavy work. Claimant further indicated that lifting the tarps weighing from 50 to some 150 pounds was heavy work. Claimant testified that 85% of the work of a truck driver is driving over the road and that that is a lot of hard work. He explained that just getting in the truck requires climbing, pulling, and twisting in order to sit in the driver's seat. Claimant described the physical demands of driving an 18-wheeler: "Well, for one, when you're climbing, you've got to pull, twist, sit. There's a lot of bumping and twisting and bending, looking at your - - trying to look in your mirror and stuff like that. It's a lot of physical work. Shifting gears, you've got to use your clutch all the time, braking; all that affects you. And it bothers your back a lot." (Tr. p. 50, lines 15-24). When asked how rough was the ride in a flatbed truck compared to a regular pickup truck or a car, Claimant responded, "It ain't

even close." He explained, "It's very much different. The ride is just like riding in a wagon compared to a car. That's the way they ride....It's very rough." (Tr. p. 51, lines 13-17).

After the accident, it took Claimant approximately three hours to make the 100 miles home to South Carolina. He testified that he kept driving slowly, with stops to rest, in order to try to make it home. Since the injury, Claimant has not been able to drive trucks. He testified that he would love to be able to go back to work and that he would be working if he could, but that his physical condition would not allow him to perform physical labor. (Tr. p. 30, line 10-p. 31, line 3). Claimant reviewed his over thirty five year history as a heavy truck driver, concluding, "That's all I really ever done was drove trucks." (Tr. p. 23, lines 19-20; p. 33, lines, 17-22). Claimant indicated that even getting in and out of a truck is very difficult for him since his accident. However, Claimant testified that, even if he *were* able to get in, he knew that he could not drive a truck. (Tr. p. 40). Claimant indicated that he had tried to see what he could do by riding along with a friend driving a Peterbilt truck in the hopes that he would be able to do it. However, Claimant reported that after riding in the Peterbilt, he did not think he was going to make it back home due to the pain. (Tr. p. 30, lines 12-16). Thus, the only work this Claimant had performed over the last approximately thirty-five years was heavy flatbed truck driving, but he is now unable to drive or even ride in a flatbed truck given the condition of his back.

Claimant indicated that Hydrocodone and Oxycodone are prescribed for his pain but that the drugs make him drowsy so that he could not safely drive a truck under the influence of his medications. (Tr. p. 31, lines 19-21). Further, Claimant confirmed that the Department of Transportation would not allow him to drive commercially because he must take these medications. (Tr. p. 47). Claimant indicated that he had followed the advice of his doctors and that he was no longer working as a truck driver.

Claimant indicated that his back was painful and that his leg was going numb just from sitting in the witness chair to testify at the hearing. He explained that the bottom of his feet feels like pins sticking when he walks and that his back hurts him every day. Claimant indicated that his legs are numb 90 percent of the day and that that keeps him from walking. Claimant indicated that he has to take a pill to even try to do anything. Claimant's doctor recommended that he use a cane for balance and he uses the cane every day. (Tr. p. 40, lines 1-4).

The medical evidence submitted amply confirms the Commission's finding that Claimant is permanently and totally disabled by the injuries to his back and legs. Claimant was referred to Midlands Orthopedics. On August 25, 2010, Dr. Fowble noted that Claimant had pain radiating to both legs with numbness. On September 15, 2010, Dr. Fowble opined, "I don't think he can drive a large truck because of the vibration of this will irritate the facet joints." On November 24, 2010, Dr. Fowble noted that Claimant complained of constant radiation to the right leg with intermittent radiation to the left leg. Dr. Fowble diagnosed facet arthropathy at L4-5 on the right and he indicated that Claimant had failed multiple conservative modalities, including therapy, medications, and injections. Dr. Fowble noted Claimant's lower back pain with radiation and that the brace gave Claimant a lot of help while walking but that it did not seem to help him much while sitting. Dr. Fowble noted that Claimant's pain was constant. (Claimant's APA, p. 28).

On February 24, 2011, Dr. Ivan LaMotta noted complaints of low back pain since July 12, 2010. Dr. LaMotta noted that the constant lower back pain radiated down both legs, the right worse than the left, particularly when sitting or driving. Dr. LaMotta noted that physical therapy and epidural steroid injections had been tried without any significant relief of symptoms and that Claimant's pain was rated at a 7/10 for the back and 4/10 for the legs. Dr. LaMotta noted

Claimant's stiffness, severe night-time pain, difficulty walking, fatigue, muscle weakness, and joint pain. Dr. LaMotta opined that Claimant's quality of life and ability to function had been significantly affected by his pain and that the pain increased with standing, bending, twisting, sitting, walking, coughing and sneezing. Dr. LaMotta noted that Claimant's lumbar range of motion was severely limited. Dr. LaMotta opined that based on the functional capacity evaluation, Claimant would be able to perform nothing more strenuous than sedentary work. Dr. LaMotta indicated that Claimant was not a surgical candidate and that he had reached maximum medical improvement with a whole person impairment of 8% translating into an 11% regional impairment to the lumbar spine. (Claimant's APA pp. 14-20).

Claimant's physical therapist noted increased pain in Claimant's back and legs with standing and sitting, along with stiffness and limited flexion, continuous numbness in his legs, and difficulty walking, sitting or carrying. The therapist noted that Claimant is unable to sit long, that standing, sitting, and walking make his legs numb, and that his right leg feels like it will give out on him. (Claimant's APA, pp. 50-56). Claimant's family doctor noted that Claimant's pain radiated down both legs and that he was unable to do any significant activity due to back pain. Dr. Prashad noted decreased flexion in the back and that Claimant had an abnormal gait due to back pain. (Claimant's APA, pp. 77-82).

Claimant was seen by Dr. Steven Poletti for an IME. On August 30, 2011, Dr. Poletti observed, "I'm in agreement that his work restriction status would be sedentary. I would ascribe him impairment secondary to back pain and leg pain. I do think that he does have nerve compression. That is the nature of lateral recess stenosis and is the result of the facet arthropathy." Dr. Poletti assigned a ten percent permanent medical impairment for

radiculopathy and an additional five percent impairment to the legs as the result of bilateral nerve root compression into his exit foramen. (Claimant's APA p. 12).

Claimant was evaluated by vocational expert, Dr. Robert E. Brabham, PhD, MRC, CRC. On September 9, 2011, Dr. Brabham noted, "his limitations on sitting and standing are such that vocationally even any sedentary work, which might otherwise have been suggested, is precluded. Vocationally, any work requires some combination of sitting, standing and/or walking for a full 8-hour workday, without the need to rest for prolonged periods of time, something he is unable to do in his present condition. Furthermore, any such jobs would require that he be able to use his back, buttocks, hips, and bilateral lower extremities repetitively and continuously while meeting minimal productions standard...he would not be able to sustain any repetitive activity for an eight-hour basis, day after day, in his present condition..." (Claimant's APA, p. 10). Dr. Brabham opined, "He is unable to perform any substantial gainful work activity which exists in the South Carolina or the national economy. Directly as a result of his on-the-job injuries, the only services he could perform are so limited in quality, dependability or quantity that no reasonably stable market for them exists" (Claimant's APA, p. 10). .

Lynn Ingram Colley is the Human Resources Director for Boyd Brothers Transportation, Inc. and she does the adjusting for Boyd Brothers and WTI's workers' compensation claims. Ms. Colley agreed that almost all the medical benefits Claimant was provided after his accident were from medical providers in South Carolina. Ms. Colley agreed that, according to the medical evidence, Claimant can now do only very light work which would not include driving a truck. Ms. Colley confirmed that Claimant would not be able to work for WTI or Boyd Brothers in light of his medical restrictions. (Tr. p. 70, lines 10-16).

The Commission found that Claimant is unable to perform any substantial gainful work activity and, therefore, that he is permanently and totally disabled as a result of his injuries to

multiple body parts under §42-9-10. In making the disability determination, the Commission found that Claimant's work history was in manual labor - - almost exclusively in truck driving, but that the authorized treating physicians have restricted Claimant from the manual labor required to drive trucks. The Commission found that Claimant is sixty-six (66) years of age with a high school education and that the Functional Capacity Evaluation (FCE) and Claimant's treating physicians limit him to no more than sedentary to a very light work capacity. The Commission found that Claimant is required to take significant prescription medications which prohibit him from driving a truck and which would also substantially limit his ability to perform any other form of work. The Commission took into consideration the results of the vocational assessment conducted by Vocational Expert, Dr. Robert Brabham, which concluded that Claimant is unable to perform any substantial gainful work activity. Dr. Brabham found that Claimant "is unable to perform any substantial gainful work activity which exists in the South Carolina or the national economy." Dr. Brabham opined, "Directly as a result of his on-the-job injuries, the only services he could perform are so limited in quality, dependability or quantity that no reasonably stable market for them exists." Thus, the Commission's finding of total and permanent disability is well supported by substantial evidence.

Boyd Brothers argues incorrectly that the opinion of Dr. Brabham was not relevant to the issue of Claimant's loss of earning capacity on the grounds that Dr. Brabham is a licensed psychologist and not a medical doctor. To the contrary, the testimony of a vocational expert is relevant to the question of earning capacity and loss of employability. As noted by the South Carolina Supreme Court in Stephenson v. Rice Services, Inc., 323 S.C. 113, 121, 473 S.E.2d 699 703 (1996),

> ...[T]he medical evidence here goes directly to the issue of employability....In fact, one of the medical experts specialized in vocational psychology and, therefore, his opinion was directly relevant to the issue whether Stephenson was capable of sustained, continuous

employment prior to his accident.

Stephenson, 323 S.C. at 121, 473 S.E.2d at 703. The medical expert with a specialty in vocational psychology whose opinion was found directly relevant to the question of employability in Stephenson was actually Dr. Robert Brabham, the vocational expert who has opined that this Claimant is unable to perform any substantial gainful work activity in the national or South Carolina economy as the result of his work injuries. Although not the exclusive means of proof, the two most common types of evidence proving a loss of earning capacity under the Act are (1) the testimony of a vocational expert and (2) evidence of reasonable efforts to obtain employment. As recognized in Stephenson, supra, expert vocational evidence is relevant to a finding regarding employability and loss of earning capacity. See also Hutson v. South Carolina State Ports Authority, 399 S.C. 381, 390, 732 S.E.2d 500, 504 (2012)("The only evidence in the record bearing on Hutson's future earning capabilities is from the vocational expert...").

Boyd Brothers argues that the Commission erred in not limiting his finding of disability so as to equal the percentage of permanent medical impairment assigned by the doctors. To the contrary, as a matter of law in South Carolina, "the degree of loss of use can in no way be limited to the percentage of medical impairment established by the medical testimony." Lyles v. Quantum Chemical Co. (Emery), 434 S.E.2d 292 (Ct.App. 1993). The Commission was not required, or even permitted, to judge loss of use or disability on the basis of Claimant's permanent medical impairment standing alone. Instead, it is well established under Workers' Compensation practice and as a matter of law that a finding of loss of use does not depend on the medical impairment rating percentage. Professor Larson observes, "As to issues touching disability...the fact-finders may find disability when the medical testimony denies its existence or

may find a degree of disability different from any degree supported by medical testimony." 3 A. Larson, The Law of Workmen's Compensation §79.52(c) n. 33 (1983), quoted in Cropf v. Pantry, Inc., 344 S.E.2d 879 (Ct. App. 1986).

Boyd Brothers incorrectly argues that the Commission erred in finding that Claimant's medical impairment and resulting disability are permanent. To the contrary, the authorized treating physicians and the IME physician, Dr. Poletti, all agree that Claimant had reached maximum medical improvement. Dr. LaMotta opined that Claimant is not a surgical candidate and that he had reached maximum medical improvement as of February 24, 2011. (Claimant's APA p. 15). Thus, the authorized treating physicians have opined that Claimant is not a surgical candidate while the IME doctor, Dr. Poletti, suggested only that Claimant might undergo an open procedure "as a last ditch effort" to control his pain "if the pain was bad enough that he couldn't live with it." However, Dr. Poletti did not indicate that such an effort, even if successful, would return to Claimant to the ability to perform manual labor. (Claimant's APA, p. 12). Dr. Poletti opined that Claimant will continue to require pain management, epidural steroid injections, and continued pain medications in the future. (Claimant's APA, p. 12). Dr. Poletti indicated that, in his opinion, Claimant may be a candidate for retirement." (Claimant's APA, p. 12). Vocational expert, Dr. Brabham, opined, "...he must be expected to permanently remain unable to engage in full-time gainful, competitive employment as a result of his medical conditions..." (Claimant's APA, p. 9).

Thus, the substantial evidence amply supports the Commission's finding of total and permanent disability. Claimant is a classic example of a manual laborer who is no longer able to perform manual labor and who has neither the education nor training to perform any other job.

Under these circumstances, the finding of total disability was required under the Act and the Workers' Compensation Commission's decision should be affirmed.

III. The Commission decision to award a lump sum should be affirmed where there has been no evidence or argument suggesting that the Commission's decision to award a lump sum was the result of an abuse of discretion.

The Commission's decision to award a lump sum was unquestionably in the best interest of Claimant. Claimant's earnings were cut by a third as of the date of accident and his temporary benefits were stopped as of February 24, 2011, some eight months before the hearing, resulting predictably in financial devastation for Claimant. (Order at p. 7; Tr. p. 25; Claimant's APA, p. 2). However, Appellants argue that the Commission erred in awarding a lump sum payment on the basis that the Commission was required to order periodic payments in the absence of proof that this was an extraordinary case so as to justify a lump sum award. To the contrary, as of 1983, payment of benefits by lump sum is covered by S.C. Code Ann. § 42-9-301.

Under the prior statute, § 42-9-300, periodic payments were the standard and lump sum payments were required to be justified by exceptional and unusual circumstances. However, while the former statute did require that a lump sum be justified by and awarded only in unusual or exceptional circumstances, those requirements were deleted from the new statute. Section 42-9-301 provides for the lump sum payment of a disability compensation award "when the Employee so requests and the Commission deems it not to be contrary to the best interest of the Employee/Employer." Hooks vs. Southern Bell Tel. and Tel. Co., 291 SC 41, 351 SE 2d 900, 902 (Ct. App. 1986). The new statute further changed the standard of review so that the burden of proving that a lump sum was an abuse of discretion is on the party opposing the lump sum. "An abuse of discretion occurs if the Commission's findings are wholly unsupported by the

evidence or the conclusions reached are controlled by an error of law." Swilling v. Pride Masonry of Gaffney, 401 S.C. 178, 190, 736 S.E.2d 672, 678 (Ct.App. 2012).

Before ordering a lump sum, the Commission must give the employer and carrier an opportunity to be heard on the issue. Todd v. Holt & Vereen Const. Co., 276 S.C. 615, 616, 281 S.E.2d 215, 216 (1981). Here, at the outset of the hearing, Commissioner Beck reviewed the positions of the parties, including Claimant's request for a lump sum and the fact that Appellants opposed the lump sum requested. Counsel for Appellants agreed that Boyd Brothers and WTI "oppose lump sum payment and assert that Claimant is not totally and permanently disabled." (Tr. p. 11, lines 19-22). However, Appellants did not expand on the bare objection and particularly made no argument that the lump sum requested would constitute an abuse of discretion. Thus, Appellants were given the opportunity to be heard, yet they raised no further objection or complaint and they failed to make any argument or assertion that a lump sum award would cause any hardship. In Swilling, supra, just as in this case, the employer offered no evidence of hardship arising from a lump sum award; the Court of Appeals found, "Accordingly, we find no abuse of discretion by the Commission in awarding a lump sum." Swilling, 401 S.C. at 191, 736 S.E.2d at 678. Likewise, here, where the employer submitted no evidence or argument that the lump sum award would cause hardship, Appellants failed to carry the burden of proving that the lump sum award was an abuse of discretion which the statute explicitly places upon them.

Where Appellants did not argue or show that the Commission's award of a lump sum was an abuse of discretion; the decision to award a lump sum should be affirmed.

IV. The Order of the South Carolina Workers' Compensation Commission should be affirmed and remanded for correction by the Commission in order to correct the credit to the employer for prior payment of temporary benefits according to the undisputed evidence.

By his appeal, Claimant sought correction of an error in calculating the credit owed to Boyd Brothers against the award for its prior payment of temporary benefits from the date of the accident until benefits were stopped on February 24, 2011. Because the calculations for the award relied upon a typographical error in the Hearing Commissioner's Order Instructions which wrongly indicated that the accident took place on "7/12/08," rather than on the correct date of accident in 2010, 7/12/10, the Order mistakenly gave Boyd Brothers credit for previously paying temporary benefits from the mistaken date of accident of July 12, 2008, through the date of MMI, February 24, 2011. This error resulted in Boyd Brothers being mistakenly given credit against the award for 136 weeks of temporary benefits. Boyd Brothers actually paid only 32 weeks of temporary benefits, from July 12, 2010, the actual, undisputed, date of the accident, through the date of MMI, February 24, 2011. (Commissioner Boyd's Order p. 6; Vocational Report, p. 2; Tr. p. 25; pp. 43-43; p. 69; Boyd Brothers' Commission Brief, p. 3).

Therefore, the Commission's Order mistakenly provided a credit to Boyd Brothers for payment of 136 weeks of temporary benefits despite the undisputed fact that only 32 weeks of temporary benefits were actually paid. Notably, Boyd Brothers has not disputed that it paid only 32 weeks of temporary benefits, rather than the 136 weeks of payments for which it has mistakenly been credited.

Boyd Brothers does argue that there is no evidence of the amount of weekly temporary benefits it paid to Claimant from July 12, 2010 through February 24, 2011. Therefore, Boyd Brothers argues that the calculation error is impossible to correct. To the contrary, the actual date of the accident on July 12, 2010, is undisputed as is the fact that Boyd Brothers

actually paid only 32 weeks of temporary benefits. The error may be corrected by giving Boyd Brothers credit against the award for only having paid temporary benefits for 32 weeks.

Therefore, the Order should affirmed and remanded to the Commission for correction so that the employer is properly given credit only for paying temporary benefits which were actually paid.

CONCLUSION

The Commission correctly determined as a matter of law that Boyd Brothers is Claimant's statutory employer under S.C. Code Ann. Section 42–1–400 (1985) and that the Commission properly has jurisdiction over this claim. The Commission further correctly found that Claimant is a manual laborer who is no longer able to perform manual labor and who has neither the education nor training to perform any other job. The Commissioner's finding that Claimant is permanently and totally disabled as the result of the injuries to his back and legs so that the only services he can perform are so limited in quality, dependability, or quantity that no reasonably stable market for them exists is overwhelmingly supported by the expert medical and vocational evidence submitted. Finally, the decision to award a lump sum has not been shown to be an abuse of discretion and, accordingly, should be affirmed. However, the award should be remanded to the Commission so that the credit to Boyd Brothers may be corrected to give the employer credit only for temporary benefits actually paid.

Respectfully submitted,

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May 13, 2014

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Appeal No. 2013-001212

Joseph Mickle, Appellant-Respondent,

v.

Boyd Brothers' Transportation, Inc., and Lumbermans' Underwriting Alliance,

Respondents-Appellants.

PROOF OF SERVICE

I, the undersigned, an employee of the MULLIS LAW FIRM do hereby certify that I have served the Appellant-Respondent, Joseph Mickle's, **INITIAL BRIEF of RESPONDENT** this 13th day of May, 2014, by regular U.S. mail with proper postage affixed, addressed as follows:

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