ORIGINAL

FILED

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
) CASE NO. 2012-CP-32-02093 &
COUNTY OF LEXINGTON) CASE NO. 2012-CP-32-02111

Ricky D. Kneece,

Employee
Claimant/Appellant,

vs.

Kneece Farms,

Employer,
and

Legion in Liquidation and the South Carolina Property and Casualty Insurance Guaranty Association,

Carrier,
Defendants/Respondents.

ORDER

This matter was before the Court by cross appeals from an order of the South Carolina Workers' Compensation Commission ("Commission") dated April 19, 2012, granting the Claimant Ricky Kneece benefits under the South Carolina Workers' Compensation Act. Oral argument was held on March 20, 2013 and the matter has been briefed by the parties. For the reasons set out, the order of the Commission is reversed.

PROCEDURAL HISTORY

The Claimant was injured November 22, 1999, when a tire which he was changing violently exploded while under pressure causing him injury to the head, brain and face as well as the left side of his body. The explosion was severe enough to cause the Claimant to lapse into a coma after the explosion and had to be transported by helicopter to the hospital where he was

treated for his many injuries. (Tr. Page 46, lines 6-11; R. at page 249).

This matter was commenced by the filing and service of a Form 50 dated November 7, 2001, alleging that the Claimant, Ricky Kneece, had suffered an injury by accident to his head/brain, face, mouth/teeth, nasal passage, sinus, left eye and left knee on or about November 22, 1999, while employed by Kneece Farms (the employer was insured by Legion Insurance Company which has been liquidated and the claim is now covered by the South Carolina Property and Casualty Insurance Guaranty Association).

After a hearing held January 11, 2005, the Hearing Commissioner Michelle Childs issued her order finding that the Claimant had suffered compensable injuries to his brain/head, face, nasal passage, sinus, left eye, left knee, and teeth. The 2005 Order sets forth the evidence of the Claimant's permanent and severe physical brain damage as follows:

> Both Dr. Lenwood Smith, a neurologist, and Dr. Randolph Waid, a clinical psychologist opined that the Claimant suffered injuries to his head and brain creating mental and emotional deficits which would cause Claimant difficulties in coping with everyday life. Dr. Smith noted in his report dated September 30 that the Claimant's injuries, both **permanent and severe**, interfere with his abilities to operate equipment safely or enjoy farming or recreation (2005 Order at page 8; R. at page 1280) [Emphasis added].

In reliance on the medical evidence, Commissioner Childs found in 2005 that the Claimant suffered a permanent and severe brain injury. The Commissioner found:

> 1. That the Claimant Ricky Kneece, was an employee of Kneece Farms on or about November 22, 1999, on which date he sustained injuries to his brain/head, face, nasal passage, sinus, left eye, left knee and teeth. (R. at page 1282)
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> 9. That as a result of his injury, the Claimant was diagnosed with conditions, including a closed head injury, chronic olecranon bursitis of his left elbow, intraarticular left biceps tendon rupture, patellofemoral syndrome of symptomatic plica, anterior instability of the shoulder, diffuse cerebral edema with subarachnoid hemorrhage, neurocognitive deficits, left femoral condyle fracture and a fracture of the nasal bridge and left nasal bone. (2005 Order at page 11; R. at page 1283).

The Commissioner ordered as follows:

> 4. That the Defendants are responsible for treatment for the Claimant's closed head injury and depression including all past treatment by Dr. Waid and for all future treatment including that from Dr. Waid and his referral to Dr. Larry Bergmann. (2005 Order at page 13; R. at page 1285).

Commissioner Childs found and concluded that the Claimant had suffered a permanent and severe brain injury and the 2005 Order constitutes the law of the case and is binding on the parties.

The 2005 Order found that the Claimant was not at MMI (2005 Order). The 2005 Order held the Defendants/Respondents responsible for treatment rendered by Dr. L. Randolph Waid, a licensed clinical psychologist, for Claimant's brain and head injury. In addition, the 2005 Order found the Claimant was entitled to future treatment for depression by Dr. Lawrence Bergmann as recommended by Dr. Waid and follow-up treatment with Dr. Waid for Claimant's closed head injury. (2005 Order).

On or about July 9, 2010, the Claimant filed a Form 50 requesting a hearing seeking an order of this Commission finding him to be permanently and totally disabled with a physical brain injury and pursuant to S.C. Code Ann. Section 42-9-10, Claimant sought all benefits to which he was entitled under the act. After a full hearing on all matters raised by the parties, the Hearing Commissioner found the Claimant totally and permanently disabled with a physical brain injury and ordered the Defendants/Respondents to provide the Claimant with the relief afforded him under the Workers' Compensation Act for life.

In particular, by Order dated April 19, 2012, the Hearing Commissioner found:

(1) That the Claimant was permanently and totally disabled with physical brain damage pursuant to § 42-9-10 (C) (2011 Order at page 28; R. at page 193);

(2) That the Claimant was permanently and totally disabled in terms of performing his past job as a farmer/owner/operator of a farm supply and farming operation or any

other kind of job or gainful employment on a reliable, sustained basis and that Claimant was unable to perform services other than those that are so limited in quality, dependability, and quantity as a reasonable, stable market for them does not exist (2011 Order at page 29; R. at page 194);

(3) That Claimant sustained causally related injuries to his left knee (10% impairment) (Order 2011 at page 30; R. at page 195) and his left shoulder and elbow (17% impairment) (2011 Order at page 30; R. at page 195);

(4) That the Defendants failed to pay for all medications in the amount of $14,010.77 prescribed by Claimant's physicians as required by Commission Order; (2011 Order at page 30, R. at page 195);

(5) That the Claimant had accumulated mileage to which he was entitled reimbursement. (2011 Order at page 30; R. at page 195).

Further, the Hearing Commissioner found and concluded that the job and work offered by Claimant's family farm, Delano R. Kneece & Son, Inc. was sheltered employment and benevolent in nature. The Hearing Commissioner found that the Claimant's wife gave credible testimony that no such job ordinarily exists and that Claimant could not and would not be hired for farm work given his cognitive and physical limitations. Further, the Hearing Commissioner found that the paycheck which Claimant draws from the farm is because of the largesse of his family and not because he performs any substantial, beneficial work for the farm. (2011 Order at pages 27-28; R. at pages 192-193).

The Hearing Commissioner concluded that the Claimant was entitled to treatment and benefits for life as provided by §42-9-10(C) (2011 Order at page 35; R. at page 200).

The Defendants appealed the Order of April 19, 2012 to the Full Commission. The Full Commission reversed the Hearing Commissioner's finding that the Claimant had suffered a physical brain injury. In particular, the Full Commission found as follows:

> The Commissioners find a Claimant who can drive a "complicated" computer-operated tractor for fifty (50) hours per week has not sustained a physical brain injury. The Claimant sustained an injury pursuant to Regulation 67-1101.

(2012 Order at page 10; R. at page 32).

Based on its finding, the Full Commission reversed the findings of fact and conclusions of law of the Hearing Commissioner that the Claimant was totally disabled, accompanied by physical brain injury pursuant to §42-9-10(C). The Commission concluded that the Claimant sustained an injury pursuant to S.C. Reg. 67-1101. The Full Commission left intact all other findings of fact and conclusions of law of the Hearing Commissioner not inconsistent with the Full Commission order.

The Claimant has appealed the order of the Commission and maintains that he was totally and permanently disabled with physical brain damage and entitled to benefits under S.C. Code Ann. 42-9-10(C). The Defendants have appealed the Commission order maintaining that the Commission erred in finding and concluding that the Claimant was otherwise totally and permanently disabled and entitled to benefits under that Workers' Compensation Act.

STANDARD OF REVIEW

The Administrative Procedures Act (the APA) "governs appellate review of a final decision from an administrative agency." Hill v. Eagle Motor Lines, 373 S.C. 422, 427, 645 S.E.2d 424, 428 (2007) *see* S.C. Code Ann. §§1-23-31-, et. seq. Under the APA, this 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. § 1-23-380 (A)(5); Shealy v. Aiken Cnty., 341 S.C. 448, 455, 535 S.E.2d 442 (2000). It is not within the appellate court's province to reverse the appellate panel's factual findings if they are supported by substantial evidence. 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. 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. Houston v. Deloach & Deloach, 378 S.C. 543, 663 S.E.2d 85 (Ct. App. 2008).

Moreover,

> [t]he court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
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> (a) in violation of constitutional or statutory provisions;
> (b) in excess of the statutory authority of the agency;
> (c) made upon unlawful procedure;
> (d) affected by other error of law;
> (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; and
> (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. S.C. Code Ann. § 1-23-380(A)(5)(a)-(f).

Crisp v. SouthCo., Inc. and Pennsylvania National Mutual Casualty Insurance Co., Op. No. 27229 (S.C. Sup. Ct. filed March 6, 2013).

THE CLAIMANT'S APPEAL

The Workers' Compensation Commission found that: "a claimant who can drive a 'complicated' computer-operated tractor for fifty hours per week has not sustained a physical brain injury. The claimant sustained an injury pursuant to Regulation 67-1101." (Order page 10; R. at page 32). This Court concludes that there is no evidence in the record to support the Commission's finding. Instead, the substantial evidence of record compels the Court to conclude that the Claimant suffered severe and permanent physical brain damage and is totally and permanently disabled with physical brain damage compensable pursuant to §42-9-10 (C). For the reasons set out, the order of the Workers' Compensation Commission is reversed and the Claimant shall be found to be totally and permanently disabled with physical brain damage and

entitled to all benefits under the Act.

Section 42-9-10 limits weekly compensation to 500 weeks, with certain exceptions. However, a claimant, as here, who is totally and permanently disabled and who has suffered physical brain damage is not subject to the 500 week limit. Section 42-9-10(C) provides as follows:

> Notwithstanding the five-hundred-week limitation prescribed in this section or elsewhere in this title, any person determined to be totally and permanently disabled who as a result of a compensable injury is a paraplegic, a quadriplegic, or who has suffered physical brain damage is not subject to the five-hundred-week limitation and shall receive the benefits for life.

The Supreme Court has held that Section 42-9-10(C) awards lifetime weekly disability payments only in cases where the physical brain damage is severe and permanent. Construing §42-9-10(C), the Supreme Court explained:

> Section 42-9-10(C) awards lifetime benefits for totally disabled claimants suffering "physical brain damage as an exception to the normal five-hundred-week limitation along with only two other conditions: paraplegia and quadriplegia. Thus, the context implies the General Assembly meant to require severe, permanent impairment of normal brain function in order for an injured worker to be deemed physically brain damaged under § 42-9-10(C).

Sparks v. Palmetto Hardwood, Inc. and Palmetto Timber S.I Fund, Op. No. 27229 (S.C. Sup. Ct. filed March 6, 2013).

In Crisp v. SouthCo., Inc. and Pennsylvania National Mutual Casualty Insurance Co., Op. No. 27229 (S.C. Sup. Ct. filed March 6, 2013), the Court relied in part on S.C. Code Ann. §42-9-400(d) which addresses brain damage as a permanent physical impairment. S.C. Code Ann. §42-9-400(d) defines "permanent physical impairment" as follows:

> As used in this section, 'permanent physical impairment' means any permanent condition, whether congenital or due to injury or disease, of such seriousness as to constitute a **hindrance or obstacle to obtaining employment** or to obtaining reemployment if the employee should become unemployed. S.C. Code Ann. § 42-9-400(d) [Emphasis added]

The Court concluded that for the physical brain damage to be "severe", a worker with severe physical brain damage must be unable to return to suitable gainful employment. Crisp v. SouthCo., Inc. and Pennsylvania National Mutual Casualty Insurance Co.

The statute does not require total and permanent disability to be solely the result of the physical brain damage. Pearson v. JPS Converter and Indus. Corp., 327 S.C.393, 489 S.E.2d219 (Ct. App. 1996). Thus, if the Claimant's physical brain damage combines with the Claimant's other injuries and characteristics to totally and permanently disable him under the Act, he is entitled to lifetime benefits under S.C. Code Ann Section 42-9-10(C)).

The holding in Crisp is consistent with existing case law which provides that 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 job market exists for them. McCollum v. Singer, Co., 300 S.C. 103, 386 S.E. 2d 471 (Ct. App. 1989); Wigfall v. Tideland Utilities, Inc., 354 S.C. 100, 580 S.E.2d 100 (2003). In fact, the mere fact of employment is not necessarily evidence of earning capacity. Stephenson v. Rice Services, Inc., 323 S.C. 113, 473 S.E.2d 699 (1996) [recognizing that wages earned by Claimant totally and permanently disabled by virtue of paraplegia not necessarily evidence of earning capacity; see footnote (2) at 473 S.E.2d 703]. In Lyles v. Quantum Chemical Co., 315 S.C. 440, 434 S.E.2d 292 (Ct. App. 1993), the Court recognized that a Claimant who was totally and permanently disabled as a result of an injury to his back may continue to work notwithstanding a finding of total and permanent disability.

The Full Commission finding that "a claimant who can drive a 'complicated' computer-

operated tractor for fifty (50) hours per week has not sustained a physical brain injury," is wholly unsupported by the facts and evidence of record.

The medical evidence, when viewed from the record as a whole, compels the finding that the Claimant suffered physical brain damage resulting in severe and permanent impairment of his normal brain function. Dr. Smith, the treating neurologist, found that the impact to the Claimant from his physical brain damage **was severe and permanent.** Dr. Smith concluded that the Claimant would no longer be the "same competitive businessman" that he would have been prior to his accident. Moreover, Dr. Smith opined that the Claimant's social skills and ability to interact with others would be adversely affected by the Claimant's injuries. Dr. Carl White, the Claimant's internist, diagnosed the Claimant to have suffered from a **"dead zone" in his brain.** In particular, from an MRI taken in 2007, Dr. White found a 32 x 43 mm area in the Claimant's right frontal lobe compatible with encephalomomalacia. In addition, Dr. White opined that the Claimant's hypothyroidism was related to his head trauma resulting in lethargy, weight gain and general lack of energy and desire. Moreover, Dr. White confirmed that the Claimant's emotional changes and memory loss were related to his head trauma and frontal lobe damage.

Dr. Randolph Waid with MUSC diagnosed the Claimant as suffering from cognitive disorder, personality change and headaches resulting from traumatic brain injury. Dr. Waid, who conducted a battery of tests on the Claimant, concluded that the Claimant who functioned in the low average IQ range would have difficulties concentrating, memory impairment, and dysfunction in regard to both cognitive and emotional/psychological function. Dr. Waid assessed a 22% impairment to the whole person as a result of the Claimant's traumatic brain injury. Similarly, Dr. Larry Bergmann and Dr. Roger Deal treated the Claimant for headaches, sleep loss, dizziness, fatigue irritability, memory impairment, anger and depression from 2005 to

the date of the hearing below and recommended ongoing treatment for the Claimant. Dr. Bergmann assigned an 11% whole person impairment to the Claimant. In 2010, Dr. Shissias, a neurologist, began treating the Claimant for chronic daily headaches, memory loss and depression arising from Claimant's 1999 accident. Dr. Shissias, who is of the opinion that the Claimant is suffering Organic Brain Syndrome secondary to traumatic brain injury, finds that the Claimant is unable to make major decisions without input from his wife and that without her the Claimant would require a legal guardian to handle his financial affairs.

The Supreme Court in Crisp recognized that there are essentially three ways to determine whether a person has sustained physical brain damage: CT or MRI scanning; cognitive behavioral level of functioning; and neuropsychological testing. Crisp v. SouthCo Inc. and Pennsylvania National Mutual Casualty Insurance Co., *supra.*

The Defendants employed Dr. Julian Adams to evaluate the Claimant. Dr. Adams, who saw the Claimant twice, found that the Claimant suffered a mild to moderate head injury in the accident with no serious problem of an organic nature. However, Dr. White's MRI reflected a dead zone in Claimant's brain. Dr. Adams admits in his report that he "did not perform extensive psychological testing" to ascertain the existence of physical brain damage whereas Dr. Deal and Dr. Brawley (the Defendants' expert) conducted such testing. Dr. Adams did not employ any of the diagnostic tools recognized in Crisp to determine whether the Claimant suffered physical brain damage and his opinions are not credible on the issue of the Claimant's physical brain damage.

Moreover, Dr. Adams' conclusions are contrary to those of the Defendants' witness Dr. Tora Brawley, a clinical psychologist who examined the Claimant in January of 2011, and concluded the Claimant "continues to suffer from several vegetative symptoms, chronic pain and

stressors" and that the Claimant has a residual brain dysfunction as a result of the accident. Dr. Brawley also found that the Claimant was not at maximum medical improvement (MMI) with respect to his fatigue, weight gain, decreased energy level, loss of interest in recreation activities, feelings of depression, feelings of anxiety, increased irritability, and decreased frustration tolerance. Instead of corroborating Dr. Adams' opinion, Dr. Brawley's findings corroborate those of Drs. Smith, White, Shissias, Waid, Bergmann and Deal. Moreover, Dr. Brawley also recommends continued treatment for his psychological symptoms as did Dr. Bergmann, Dr. White and Dr. Shissias. While the Defendants point to the testimony of Dr. Adams to support their contention that the Claimant's brain damage was mild to moderate, this Court may not view the evidence blindly from the Defendants' side of the case. Not only is Dr. Adams' opinion not supported by substantial evidence, his opinion is not supported by the Defendants' evidence.

In her 2005 Order in this matter, Commissioner Childs, relying on the evidence of Dr. Smith that the Claimant's brain injury was both permanent and severe, found that the Claimant suffered a brain injury. In particular, the Commissioner found that the Claimant had suffered a closed head injury giving rise to neurocognitive deficits. She ordered the Defendants to treat the Claimant for his closed head injury.

In reviewing a finding of fact of the Workers' Compensation Commission, this Court is not required to suspend disbelief. The evidence of record, when viewed as a whole, compels the finding that the Claimant suffered physical brain damage with a severe and permanent impairment of his normal brain function.

Having concluded that the Claimant suffered physical brain damage with a severe and permanent impairment of his normal brain function, the Court will turn to the finding of the Workers' Compensation Commission that a Claimant who can operate a complicated computer-

operated tractor has not sustained a physical brain injury.

First, there is no credible medical evidence to support the Commission finding that a Claimant who can operate a complicated computer-operated tractor has not sustained a physical brain injury. Second, there is no evidence that he can operate a complicated computer-operated tractor. The evidence of record reflects that the Claimant lives on the family farm and spends his day there. There is evidence of record that the Claimant performs certain work for his family farm, including driving a tractor. While the Commission was imprecise as to which tractor it was referring to in its Order, the Court infers that the Commission was referring to the fact that the Claimant's family bought a tractor equipped with GPS and computer-operated equipment which accommodates the Claimant's limitations by automatically operating the tractor and its equipment, allows him to plow, plant and fertilize. The record reflects, and is undisputed on this point, that the Claimant drives the tractor but cannot program or operate the equipment. The Claimant is only required to "mash" a button to start the equipment. A family member must program the equipment and accompany him to the field to assist the Claimant in the event the equipment fails. Moreover, the Claimant's family accommodates the Claimant's mistakes. This evidence has not been refuted by the Defendants.

The medical evidence supports the finding that the Claimant suffered physical brain damage. The record when read as a whole does not support the Commission's finding that the Claimant's ability to drive a tractor is evidence that the Claimant did not suffer physical brain damage. The Commission's finding is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. The finding appealed from does not withstand scrutiny when viewed in context of the record as a whole. Houston v. Deloach & Deloach, *supra*.

Moreover, the Commission erred in finding and concluding that the Claimant's severe and permanent physical brain damage was compensable under Regulation 67-1101. First, the Claimant's severe and permanent physical brain damage injury is specifically compensable under §42-9-10(C). Second, Regulation 67-1101 does not address physical brain damage.

There being no evidence of record to support the Commission's finding and conclusion, that the Claimant did not suffer physical brain damage, the only inference to be drawn from the evidence of record supports the finding that the Claimant was totally and permanently disabled with permanent and severe physical brain damage.

The Court in Wigfall v. Tideland Utilities, Inc., *supra,* set out the manner in which a claimant may prove total disability under Section 42-9-10. A Claimant may demonstrate total disability in one of three ways under §42-9-10. First, a Claimant may be presumptively totally disabled. As such, a Claimant must show a physical injury enumerated in §42-9-10. Second, a Claimant may establish total disability under §42-9-20 by showing an injury, which is not a §42-9-30 scheduled injury, caused sufficient loss of earning capacity to render him totally disabled. Coleman v. Quality Concrete Prod.'s, Inc., 245 S.C. 625, 142 S.E. 2d 43 (1965) [Claimant established that a double hernia, coupled with a lack of education or adequate job training, made him unable to find comparable, stable employment]. Third, the Claimant may establish total disability through multiple physical injuries. Under this scenario a Claimant who has a §42-9-30 scheduled injury must show an additional injury. Singleton, supra; see also McCollum v. Singer Co., 300 S.C.103, 386 S.E. 2d 471 (Ct. App. 1989) [Court found Claimant totally disabled due to combined partial impairments to the back, stomach and leg]. Wigfall v. Tideland Utilities, Inc., *supra,*

In addition to physical brain damage, the Claimant suffered extensive injuries to his left

upper and lower extremities, head and face. After two surgeries to his left arm and elbow, Dr. Michael Green assigned a 17% impairment to the Claimant's upper left extremity. After two surgeries to Claimant's left knee, Dr. James O'Leary assigned a 10% impairment rating to the Claimant's lower left extremity. It is undisputed that the Claimant's physical brain damage was disabling. The Claimant's permanent and severe physical brain injury has caused him memory loss, depression, irritability, chronic daily headaches, mood swings, loss of sleep and dizziness. The Claimant's mental and emotional deficits cause him difficulties in coping with everyday life. After his psychological testing, Dr. Waid assigned a 22% whole person impairment to the Claimant for his injuries and Dr. Bergmann assigned an 11% impairment to the Claimant for the injuries for which he and Dr. Deal treated the Claimant.

Indeed, the Claimant's permanent and severe physical brain damage interferes with his abilities to operate farm equipment safely and reliably operate the family farm. The Claimant now functions in the low average IQ range and has no formal education beyond high school. Farming is all the Claimant knows. The Claimant's family has purchased farming equipment which accommodates the Claimant's disabilities. The Claimant's family has hired farm hands to assist the Claimant with his chores and to perform the Claimant's chores. The Claimant's father has eliminated his income from the farm to free up funds with which to pay the Claimant. The Claimant's son has now gone to work on the farm and performs much of the Claimant's responsibilities. The family has managed its farming practices to maximize the farm's income while permitting the Claimant the opportunity to work on the farm. The Claimant can no longer manage the farm's financial affairs and without his wife, Claimant would need a legal guardian to manage his affairs.

Dr. Stewart, a Board Certified Vocational Rehabilitation Counselor, concluded that the

Claimant has suffered a complete loss of earning capacity because of his injuries. Dr. Stewart recognized that the Claimant enjoyed a "benevolent and sheltered employment situation," and opined that, "[i]n an open, competitive labor market [the Claimant] would find himself vocationally disabled and unable to work gainfully." (R. at page 400). The impact of the Claimant's injuries is best described by Dr. Stewart who stated that the Claimant's:

> ...mental, emotional and physical problems and limitations and the combination of those mental/cognitive, emotional and physical conditions and the findings and opinions contained in the medical/neurological/psychiatric/professional/trauma counseling records, the number of years/length of time his problems and limitations have continued, the multiple prescribed medication he continues to have to take, the deterioration in his overall ability to work and be productive and need for help from others, and Dr. Shissias' statement concerning '...He is unable to make major decisions without input from wife, his primary caregiver. Believe that without her, he would require legal guardian or payee to manage his affairs....' (APA at page 4; R. at page 400).

The Claimant's wife who also performs chores on the farm, including that of the farm bookkeeper, testified that because of Claimant's disabilities he would be unable to compete in an open job market. In fact the family farm would not hire a farm hand with Claimant's disabilities. No farming operation would go to the cost and expense of providing work accommodations for a farm hand such as the Claimant. Her testimony is consistent with that of Dr. Stewart.

Based on the foregoing, the substantial evidence of record reflects that the Claimant suffered a complete loss of earning capacity. The Commission so held. The Claimant's permanent and severe physical brain damage is not a Section 42-9-30 schedule injury. The Claimant has demonstrated loss of earning capacity resulting from his permanent and severe physical brain damage and is totally and permanently disabled. Moreover, the Claimant's injuries to his left upper extremity and his left lower extremity are Section 42-9-30 schedule injuries. The Claimant's schedule injuries in combination with each other and the Claimant's non schedule injuries are likewise totally disabling. Wigfall v. Tideland Utilities, Inc., *supra.*

Because the Claimant's severe and permanent physical brain damage combines with the Claimant's other injuries and characteristics to totally and permanently disable him under the Act, he is entitled to lifetime benefits under S.C. Code Ann Section 42-9-10(C) in addition to all other benefits under the Act.

The Defendants argue that the Claimant is paid wages by his family and urge the Court to recognize these payments as evidence of earning capacity. As will be discussed more fully, infra, the Commission below concluded that the Claimant's family farm was sheltered employment and the payments by the family are not evidence of earning capacity. The evidence of record supports the Commission's conclusion in this regard. Moreover, evidence of employment after a totally disabling injury is not necessarily evidence of earning capacity Stephenson v. Rice Services, Inc., 323 S.C. 113, 473 S.E. 2d 699 (1996) [recognizing that wages earned by Claimant totally and permanently disabled by virtue of paraplegia not necessarily evidence of earning capacity]; Lyles v. Quantum Chemical Co., 315 S.C. 440, 434 S.E. 2d 292 (Ct. App. 1993) [wages earned by Claimant totally and permanently disabled by virtue of back injury].

The Defendants appear to argue that the Claimant's injuries are not property pled. In particular, the Defendants argue that the Claimant's Form 50 alleges permanent total disability due to a general disability and not due to a specific disability. The Defendants argue that therefore the Claimant can only meet the requirements for permanent total disability through the general disability standard by showing a loss of earning capacity.

However, the Defendants failed to raise this issue in their exceptions raised in their Form 30 (notice of appeal from the Hearing Commissioner to the Full Commission) and accordingly the issue is not preserved for the purposes of appeal. Creech v. Ducane Co., 320 S.C. 559, 467

S.E. 2d 114 (Ct. App. 1995). Assuming arguendo that the Defendants' argument is properly before the Court, as set out above, the Claimant met his burden of proof of total and permanent disability with physical brain damage under each of the theories of liability under Section 42-9-10 as set out in Wigfall v. Tideland Utilities, Inc., *supra.*

For the foregoing reasons, it is clear that based on the evidence of record, the Claimant is totally and permanently disabled with physical brain damage and entitled to benefits provided for in Section 42-9-10. Crisp v. SouthCo., Inc. and Pennsylvania National Mutual Casualty Insurance Co.; Wigfall v. Tideland Utilities, Inc., *supra.* The Full Commission erred in finding that the Claimant did not sustain a physical brain injury and is reversed.

THE DEFENDANTS' APPEAL

The Full Commission affirmed the holding of the Hearing Commissioner that the Claimant has suffered a loss of earning capacity, notwithstanding the financial support offered him by his family farm. In addition, the Commission order requires the Defendants to pay for the Claimant's past and future medical treatment by Drs. Bergmann, Deal, Shissias, White, Wicker and Ugino. In addition, the Commission ordered the Defendants to pay for the Claimant's mileage and prescription costs associated with his treatment by his physicians. The Defendants appeal the Commission order in this regard. For the reasons set out, the Commission order is affirmed.

Substantial evidence exists to support the Commission's finding the Claimant to have suffered a complete loss of earning capacity. The record is replete with evidence that the Claimant's injuries combine to permanently and totally disable him in terms of performing his past job as a farmer/owner/operator of a farm supply and farming operation or of any other kind of job or gainful employment on a reliable sustained basis. In addition, the evidence of record

supports the Commission's conclusion that the claimant is unable to perform the services other than those that are so limited in quality, dependability, and quantity that a reasonably stable market for them does not exist. There is no evidence that any jobs for which the Defendants claim the Claimant is qualified exist in the community where the Claimant lives. Cf. Johnson v. Rent-A-Center, Inc., 398 S.C. 595, 730 S.E. 2d 857 (2012). Last, the Commission's finding that the services that the Claimant performs for his family farm, given the accommodations his family has made to enable him to perform certain limited services, are not evidence that a reasonably stable market exists for the services the Claimant provides for the family farm is supported by substantial evidence.

In finding that the Claimant had suffered a complete loss of earning capacity, the Commission found and concluded that the work offered by Claimant's family farm is sheltered employment and benevolent in nature. The Defendants argue South Carolina law does not recognize the doctrine of sheltered or benevolent employment or in the alternative, that the doctrine of sheltered or benevolent employment does not apply to this case. This Court disagrees.

In order to be entitled to total and permanent disability Workers' Compensation benefits for a work injury, the Claimant must be unable to perform services other than those that are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist. Eaddy v. Smurfit-Stone Container Corp., 355 S.C. 154, 584 S.E. 2d 390 (Ct. App. 2003). Total disability under the Workers' Compensation Act does not require complete, abject helplessness. McCollum v. Singer Co., 300 S.C. 103, 386 S.E. 2d 471 (Ct. App. 1989). South Carolina courts have held that the mere fact of employment is not necessarily evidence of earning capacity. Stephenson v. Rice Services, Inc., 323 S.C. 113, 473 S.E. 2d 699 (1996).

Indeed, evidence that a claimant has been able to earn occasional wages or perform certain kinds of gainful work does not necessarily rule out a finding of total disability. McCollum v. Singer Co.; Stephenson v. Rice Services, Inc., *supra*. The Supreme Court pointed out in Stephenson v. Rice Services, Inc. that a person who becomes a paraplegic, as a result of a work-related accident, may recover for permanent and total disability under Section 42-9-10 yet continue to work. Likewise, the Claimant who has suffered physical brain damage as a result of a work-related accident may likewise recover for permanent and total disability under Section 42-9-10 yet continue to work. Based on existing South Carolina case law precedent alone, the Commission correctly found and concluded that the Claimant suffered a complete loss of earning capacity.

However, the Commission went further to find and conclude that the Claimant's employment on his family farm was sheltered or benevolent employment and as such did not constitute evidence of earning capacity. Because the South Carolina Workers' Compensation Act was based on the North Carolina Act, the Commission turned to North Carolina case law for guidance. See, e.g.. Nelson v. Yellow Cab Co., 349 S.C. 589, 564 S.E.2d 110 (2002). Citing Peoples v. Cone Mills Corp., 316 N.C. 426, 342 S.E.2d 798 (1986) the Commission held "an injured employee's earning capacity must be measured not by the largesse of a particular employer, but by the employee's own ability to compete in the labor market. The fact that an employee is capable of performing employment tendered by employer is not, as a matter of law an indication of plaintiff's ability to earn wages." Saums v. Raleigh Community Hospital, 346 N.C. 760, 487 S.E.2d 746 (1997).

As the Commission correctly pointed out, the rationale behind the benevolent employment rule is simple: Proffered employment would not accurately reflect earning capacity

if other employers would not hire the employee with the employee's limitation at a comparable wage level. The same is true if the accommodations or modification of the job to meet the employee's limitations are not ordinarily found in the competitive job market. In other words, if the Claimant does not have the ability to earn wages competitively, he will be left with no income should his job be terminated. Peoples v. Cone Mills Corp., *supra.* See also Baker v. Sam's Club, 589 S.E.2d 387 (N.C. App. 2003).

Clearly, the benevolent employment doctrine as articulated by the Commission below is merely an extension of long-standing South Carolina law. See McCollum v. Singer Co., *supra;* Stephenson v. Rice Services, Inc., *supra.* See also Lyles v. Quantum Chemical Co., 315 S.C. 440, 434 S.E. 2d 292 (Ct. App. 1993); Wigfall v. Tideland Utilities, Inc., *supra.*

The Defendants/Respondents' principal objection to the Commission's application of the benevolent employment doctrine to the facts of this case stems from the fact that the family farm makes regular payment to the Claimant. The Defendants argue that the amounts paid the Claimant meet or exceed the Claimant's wages prior to his workers' compensation injury are evidence that he has not lost earning capacity and, therefore; Defendants/Respondents argue that the benevolent employment doctrine is not applicable to the facts of this case.

Dr. Stewart concluded that the Claimant suffered a total loss of earning capacity. Claimant's wife testified that the Claimant was unemployable and that the Delano R. Kneece & Son, Inc. would not employ a stranger with the Claimant's disabilities.

The undisputed testimony of record that those amounts paid the Claimant by the family farm are not intended to represent wages earned and the amount is not calculated on the basis of services performed by the Claimant on behalf of the family farm, but rather those amounts paid the Claimant are in the nature of a gift and do not constitute wages for work expended on behalf

of the farm or wages calculated on the basis of productivity. The Claimant's wife also testified about the nature of the work the Claimant is able to perform and the fact that the family has essentially kept him working because he is family. The fact that the Claimant's family, through personal sacrifice and careful business practices, is able to afford to pay the Claimant any amount whatever is not evidence of the Claimant's earning capacity.

Last, the Defendants/Respondents argue that in the event that the Hearing Commissioner's Order is allowed to stand, the Defendants/Respondents should be entitled to a credit for the amount the Claimant receives from his employment from the family farm. The Defendants/Respondents are entitled to no credit. The payments from the Delano R. Kneece and Son, Inc. family farm are a collateral source. This issue was decided in the 2005 Order and is the law of the case. See also McLeod v. South Carolina Insurance Company, 272 S.C. 254, 251 S.E.2d 193 (1979).

The Defendants argue that the Commission erred in ordering them to provide and pay for the Claimant's treatment by his personal physicians, Dr. White, Dr. Wicker, and Dr. Shissias and Dr. Ugino. The Commission's findings and conclusions in this regard are clearly supported by the evidence of record and should be sustained.

Citing Section 42-15-60, the Appellants argue that Drs. White, Whicker, Shissias, and Ugino were not authorized by the Appellants prior to treatment and therefore, the Appellants were under no obligation to pay for past treatment or to provide future treatment by these physicians. The Appellants argue that Section 42-15-60, provides that the employer and only the employer may determine an authorized medical treatment. This Court disagrees.

Section 42-15-60, vests the Commission with authority to direct an employer to provide medical treatment which in the judgment of the Commission will tend to lessen the period of

disability. Here, the Commission found that the Claimant's physicians were treating him for injuries resulting from his accident and that the Claimant was benefiting from his treatment. The record is uncontroverted in this regard and is based on the expert medical evidence of record. Dodge v. Bruccoli, Clark, Layman, Inc., 334 S.C. 574, 514 S.E. 2d 593 (Ct. App. 2012) [holding an employer liable for a claimant's future medical treatment if it tends to lessen the claimant's period of disability despite the fact the claimant has returned to work and has reached maximum medical improvement.].

The Commission is afforded considerable discretion under Section 42-15-60. Where it deems necessary, the Commission may override an employer's choice of medical provider or refusal to treat. Indeed, the Commission may excuse a claimant's justified refusal to seek treatment from the employer's provider. The Workers' Compensation Act should be liberally construed in furtherance of the purposes to which it was designed and any reasonable doubts as to its construction should be resolved in favor of the Claimant.

The record is replete with evidence supporting the Commission's order requiring the Defendants to pay for all past and future medical care including treatment, prescription medication, and mileage.

CONCLUSION

THEREFORE, based on the foregoing, the Workers' Compensation Commission erred in finding and concluding that the Claimant did not suffer physical brain damage. Accordingly, the Commission Order of April 19, 2012 is reversed. The Claimant is totally and permanently disabled with physical brain damage and entitled to benefits provided for in Section 42-9-10. The Defendants' appeal is without merit and is dismissed. The order of the Hearing Commissioner dated April 28, 2011 is reinstated. The matter is remanded to the Workers'

Compensation Commission to enter its order awarding benefits under S.C. Code Section 42-9-10(C) from the date of the 1999 accident and continuing for life together with all other benefits ordered by the Hearing Commissioner in his order dated April 28, 2011.

IT IS SO ORDERED.

R. KNOX MCMAHON
PRESIDING JUDGE,
LEXINGTON COUNTY COURT OF
COMMON PLEAS

Lexington, South Carolina
Dated: 18 July, 2013

FILED
2013 JUL 19 P 12:08
BETTY A. CARRIGG
CLERK OF COURT
LEXINGTON, SC

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2012CP3202093

2ND 2012CP3202111

Ricky D Kneece	**Kneece Farms** **South Carolina Property and Casualty Insurance Guaranty Asso** **Virginia Crocker (Judicial Director)** **Legion in Liquidation** **South Carolina Workers Compensation Commission**
PLAINTIFF(S)	**DEFENDANT(S)**

Submitted by:	**Attorney for:** ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other:

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk:

INFORMATION FOR THE JUDGMENT INDEX **Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.**		
Judgment in Favor of (List name(s) below)	**Judgment Against (List name(s) below)**	**Judgment Amount To be Enrolled (List amount(s) below)**
If applicable, describe the property, including tax map information and address, referenced in the order:		

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

	2145	7/22/2013
Circuit Court Judge	**Judge Code**	**Date**

For Clerk of Court Office Use Only

This judgment was entered on **n/a**, and a copy mailed first class or placed in the appropriate attorney's box on **22nd day of July 2013**, to attorneys of record or to parties (when appearing pro se) as follows:

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ATTORNEY(S) FOR THE DEFENDANT(S)

Beth A. Carrigg/wh

Beth A. Carrigg - Clerk of Court

Court Reporter

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.