STATE OF SOUTH CAROLINA **COUNTY OF CHARLESTON**	)	**IN THE COURT OF COMMON PLEAS** **FOR THE 9th JUDICIAL CIRCUIT**
WALTER SMITH, JR., Employee/Appellant,	)	CASE NO. 2011-CP-1001093 WCC FILE NO. 0706002
v.	)	
CERES MARINE TERMINALS, Employer, and	)	**ORDER**
TOKIO MARINE & NICHIDO FIRE INSURNCE COMPANY, Carrier, Respondents.	)	

STATEMENT OF THE CASE

This matter came before the undersigned for oral arguments on February 10, 2014 in Charleston, South Carolina, pursuant to the Claimant's appeal from the South Carolina Workers' Compensation Commission. The Claimant argues that the South Carolina Workers' Compensation Commission erred as a matter of law in finding as fact that the Claimant's injuries are limited to his left hand as a scheduled member under S.C. Code Ann. § 42-9-30; erred in finding as a matter of fact that the Claimant sustained 45% loss of use of his left hand as a scheduled member; erred in finding as a matter of fact that the Claimant sustained a single scheduled injury to his left hand and no injuries to any other body parts; erred in failing to find as fact that the Claimant's work capacity is limited as a longshoreman to that of a header or supervisor and that he has sustained no loss of earning capacity; erred in finding that the Claimant presented no credible evidence as to his current average wages or the wages he believes he could be making were it not for his injury; erred in finding as fact that the Claimant's diminution of earning capacity was as a result of the loss of business at the Port of Charleston; erred in concluding as a matter of law that the Claimant's only recovery under the S.C. Workers' Compensation Act was limited to § 42-9-30; erred in concluding

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as a matter of law that the holding of Singleton v. Young Lumber Co., 236 S.C. 454, 114 S.E.2d 837 (1960) applies to the facts of this claim; and erred as a matter of law in concluding that S.C. Code Ann. § 42-9-20 does not apply to the Claimant's claim for benefits.

Following a hearing on October 9, 2009, Commissioner Andrea Roche filed a Decision and Order on March 3, 2010 in which she awarded the Claimant benefits for a 45% loss of use of his non-dominant left hand as a result of an accident on April 16, 2007. The Claimant appealed the March 3, 2010 Decision and Order. On January 14, 2011, after a review of the Record and briefs of the parties, the South Carolina Workers' Compensation Commission's Appellate Panel affirmed Commissioner Roche's Decision and Order in its entirety. By its unanimous Decision and Order dated January 14, 2011, the Commission found and concluded that the Claimant is entitled to compensation for 45% loss of use of his left hand as a scheduled member under S.C. Code Ann. § 42-9-30. The Commission found that the Claimant has not shown that any other part of his body was affected as a result of the accident, and thus Singleton v. Young Lumber Company did not apply to the case. It further found that the Claimant sustained a scheduled member injury to his left hand and is not entitled to an award of permanent partial disability based upon wage loss, as any wage loss award would be based on surmise, conjecture, and speculation and therefore would not be appropriate. After careful consideration of the briefs, oral arguments, and the Record on Appeal, it is the conclusion of this Court that the unanimous January 14, 2011 Decision and Order of the South Carolina Workers' Compensation Commission is supported by substantial evidence in the record and the applicable law and therefore, the Commission's Decision and Order is hereby AFFIRMED.

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EVIDENCE SUMMARY

At the time of the October 9, 2009 hearing, the Claimant, Walter Smith, was 66 years old. He has been employed as a longshoreman for more than 40 years and has primarily worked as a foreman over the past 15 years. On April 16, 2007, the Claimant injured his non-dominant (left) ring finger and admits that his injury was limited to his left ring finger. (Hearing Transcript p. 74, ll. 3-5) He received medical treatment with Dr. William Muirhead, who placed the Claimant at maximum medical improvement on March 7, 2008 and stated that he could return to work on the waterfront with restrictions on climbing and lifting greater than 10 pounds with his left hand. (APA #2, p. 17) Dr. Muirhead also stated that that the Claimant could work at a greater level than this if he felt like it. (APA #2, p. 19) Dr. Muirhead approved a number of waterfront jobs including the Claimant's prior job as a foreman. (APA #20-23) The Claimant returned to his position as a foreman and was working in that capacity at the time of his hearing before the Workers' Compensation Commission. Dr. Muirhead assigned the Claimant 17% permanent impairment to his left hand. (APA #2, p. 19)

The Claimant admits that his ability to earn wages as a longshoreman has been affected by the economy and the decrease in volume on the waterfront. (Hearing Transcript pp.78-79). However, because he has a "D card," he is able to work almost every day there is a ship at the Port. (Hearing Transcript pp.94-95). In addition, any decrease in wages due to decreased port volume is not peculiar to the Claimant, but affected longshoremen across the board, according to Kenneth Riley, President of the International Longshoreman's Association, Local 1422, who testified on behalf of the Claimant. (Hearing Transcript pp.49-50). Jill Depaulo, with Ceres Marine Terminals, also confirmed that the volume of work on the waterfront had been significantly down at the time of the accident as a result of a downturn in the economy, which in

turn reduced the man hours available to longshoreman across the board. (Hearing Transcript pp. 93-95).

DISCUSSION

I. The Workers' Compensation Commission properly concluded that the Claimant did not meet his burden of proving lost wages under S.C. Code Ann. § 42-9-20.

It is within the sole discretion of the Commission to award compensation under the scheduled loss statute rather than the wage loss statute, so long as there is substantial evidence to support such an award. Fields v. Owens Corning Fiberglas, 301 S.C. 554, 555, 393 S.E.2d 172, 173 (1990). Substantial evidence exists to support the Commission's finding in this regard if, viewing the record as a whole, reasonable minds could reach the same conclusion. Lark v. Bi-Lo, 276 S.C. 130, 276 S.E.2d 304 (1981). Substantial evidence is not a mere scintilla of evidence, but evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the agency reached. Grayson v. Carter Rhoad Furniture, 317 S.C. 306, 454 S.E.2d 320 (1995).

As noted in the Commission's January 14, 2011 Decision and Order, "[w]age loss cases are awarded under either S.C. Code Ann. §42-9-10 and §42-9-20 . . .", however, ". . . neither of these sections applies to a single scheduled member injury." The Commission found that "[a]s such, the Claimant has sustained a scheduled member injury to his left hand, and is not entitled to an award of permanent partial disability based upon wage loss. Moreover, based upon the evidence submitted any wage loss would be based on surmise, conjecture, and speculation and therefore would not be appropriate." It is well known that workers' compensation awards must not be based on surmise, conjecture or speculation. Kennedy v. Williamsburg County, 242 S.C. 477, 131 S.E.2d 512 (1963).

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The Claimant admits that, following the accident, he returned to the same job as a foreman he had been working for over 15 years. (Hearing Transcript p. 76, l. 20 – p. 77, l. 1) He is still working as a foreman. (Hearing Transcript p. 77, l. 23) It is the duty of a foreman to "supervise the gang and ensure that they're getting the work done." (Hearing Transcript p. 93, l. 9-12). The Claimant has "very high seniority" on the waterfront. (Hearing Transcript p. 95, l. 4). The Claimant is under no restrictions as to the number of hours he can work following the injury to his non-dominant, left hand. However, work on the waterfront has been affected by the general economy and the earnings of longshoremen decreased across the board. The Claimant admits that the state of the general economy and decrease in work on the waterfront has had an impact on his ability to earn wages as a foreman. (Hearing Transcript p. 79, l. 11) He admits that would be true regardless of his injury. (Hearing Transcript p. 79, l. 15) Kenneth Riley, President of the International Longshoreman's Association, Local 1422, testified on behalf of the Claimant. Mr. Riley testified the economy has affected work on the waterfront. Volume has decreased for numerous companies. (Hearing Transcript pp. 47-48) Because volume is down, gang members' wage earning capacity has decreased across the board. (Hearing Transcript pp. 49-50) However, because the Claimant has a "D card," he is able to work almost every day there is a ship at the Port. (Hearing Transcript pp.94-95).

The Claimant presented no evidence as to the wages he has earned since he returned to work in April 2008. He presented no evidence as to the wages he believes he would be earning but for his left hand injury. He presented no evidence as to his expected earnings in the future. He presented no evidence as to the current earnings of a similar employee. While the Claimant claims his earnings have diminished, both the Claimant and Mr. Riley concede that earnings have diminished across the board at the port because of reduced volume, which is entirely

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independent from Smith's left hand injury. Smith also admits that he is currently receiving approximately $1,700 in Social Security retirement benefits, which now supplements his earned income and decreases his need to work. The Commission found that there was no reliable evidence in the record to support a finding or conclusion that the Claimant has sustained a loss of wage-earning capacity as a result of his left hand injury and that any award based upon a loss of wage earning capacity would be speculative. This finding is supported by substantial evidence in the record and, therefore, must be AFFIRMED.

II. The Workers' Compensation Commission's finding that Smith "suffered a single scheduled injury to the left hand" is supported by substantial evidence and is affirmed in accordance with the Administrative Procedures Act.

As stated in Singleton v. Young Lumber Company, 236 S.C. 454, 471, 114 S.E.2d 837, 845 (1960),

> "Where the injury is confined to the scheduled member, and there is no impairment of any other part of the body because of such injury, the employee is limited to the scheduled compensation [pursuant to section 42–9–30].... To obtain compensation in addition to that scheduled for the injured member, claimant must show that some other part of his body is affected."

The Claimant claims entitlement to pursue benefits under S.C. Code Ann. § 42-9-20 because he claims that his left hand injury also affects "another part of his body," namely, the fingers on that same hand. The Commission properly rejected this argument, found that Smith's "injuries are limited to his left hand as a scheduled member," and awarded benefits under S.C. Code Ann. § 42-9-30. The Commission's finding in this regard is supported by substantial evidence in the record and the applicable law. Further, any perceived error is harmless because, even if the

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Claimant were entitled to pursue benefits under § 42-9-20, he failed to prove any causally-related loss of wages. *See* Eadie v. H.A. Sack Co., 322 S.C. 164, 172, 470 S.E.2d 397, 401 (Ct. App. 1996) (holding a harmless error does not constitute grounds for reversal).

The Commission's analysis is in line with the principle espoused in Singleton, *supra*, which recognized "the common-sense fact that, when two or more scheduled injuries...occur together, the disabling effect may be far greater than the arithmetical total of the scheduled allowances added together." *See* Colonna v. Marlboro Park Hosp., 404 S.C. 537, 745 S.E.2d 128 (Ct. App. 2013). In the Claimant's case, it cannot reasonably be said that the "disabling effect" of the injuries to the individual fingers on the Claimant's left hand is greater than the scheduled allowance for his hand as a whole. All hand injuries necessarily affect the fingers. Dr. Muirhead did not issue an impairment rating to the fingers in addition to the impairment rating for the hand; the impairment ratings to the fingers were issued in the alternative to the impairment rating for the hand. Therefore, the award of 45% loss of use of the hand, which nearly triples the impairment rating to the hand assigned by Dr. Muirhead, fully compensated the Claimant for any injury or affect on his individual fingers and there was no need to resort to a different method of compensating the Claimant for his hand injury. Moreover, had the Claimant been permitted to pursue benefits solely under S.C. Code Ann. §42-9-20, he would have received no award whatsoever, because the substantial evidence in the record supports the Commission's finding that any award based upon a loss of wage earning capacity would be speculative.

CONCLUSION

After considering the oral arguments and briefs of the parties, and after thoroughly reviewing the Record on Appeal, it is the conclusion of this Court that the South Carolina Workers' Compensation Commission's Findings of Fact are supported by substantial evidence

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and the Commission committed no error of law in awarding the Claimant 45% loss of use of the left hand based upon the evidence in the record.

IT IS, THEREFORE, HEREBY ORDERED that the January 14, 2011 Decision and Order of the South Carolina Workers' Compensation Commission is AFFIRMED in its entirety in accordance with the Administrative Procedures Act.

IT IS SO ORDERED!

May 2, 2014

The Honorable R. Markley Dennis, Jr.