

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Opinion No. 5205

Case No. 2013-000005

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S.C. SUPREME COURT

Neal Beckman, Employee,.....Respondent,

v.

Sysco Columbia, LLC, Employer, and
Gallagher Bassett Services, Inc., Carrier,.....Petitioners.

PETITION FOR A WRIT OF CERTIORARI

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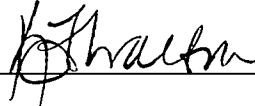
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CERTIFICATE OF COUNSEL

Counsel for Petitioners certifies that the Petition for Rehearing was made and finally denied by the Court of Appeals on July 9, 2014.



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August 7, 2014

QUESTION PRESENTED FOR REVIEW

1. Did the Court of Appeals exceed its scope of review in concluding that there is not substantial evidence in the record to support the South Carolina Workers' Compensation Commission's Decision and Order dated December 5, 2012?

STATEMENT OF THE CASE

The Respondent, Neal Beckman, was employed as a delivery driver with Sysco Columbia, LLC when he was involved in an admitted accident arising out of and in the course of his employment on March 25, 2010. Following the accident, Sysco Columbia, LLC and Gallagher Bassett Services, Inc. (hereinafter "Petitioners") provided the Claimant authorized medical care and treatment primarily with Dr. Timothy Zgleszewski. The Respondent also underwent a surgical evaluation with Dr. Scott Boyd. A Hearing was held before the single Commissioner in Summerville, South Carolina on April 26, 2012 to address the issues set forth in the Petitioners' Form 21 pursuant to Regulation 67-506 of the South Carolina Code based on their position that the Respondent reached maximum medical improvement. The Petitioners asserted that the Respondent reached a level of maximum medical improvement on May 2, 2011 per Dr. Zgleszewski's medical note or alternatively by February 27, 2012 per Dr. Scott Boyd's medical note. The Petitioners further asserted that the Respondent should be awarded permanent disability benefits pursuant to §42-9-30 for loss of use of his back. The Respondent argued that any permanency award should be based on a loss of earnings under §42-9-20 due to his assertion that he had additional body parts affected by his back injury.

Following the Hearing, the single Commissioner issued her Decision and Order, wherein she set forth the following Findings of Fact:

1. Claimant injured his low back in an admitted accident on March 25, 2010.
2. Claimant alleges that his admitted injury also affects his buttocks, legs, right foot, and right SI joint.
3. Claimant is 45 years of age (testimony of Claimant).
4. Claimant is a high school graduate. He attended one year of technical college when he studied to be an architectural engineer (testimony of Claimant; Claimant's APA #7, page 81; Defendants' APA #19, page 179).

5. Claimant's IQ is "high average" per Defendants' vocational expert. Claimant's vocational expert states that Claimant's word reading is the grade equivalent of 12.9, his sentence comprehension is the equivalent of 12.9, and his math computation is the equivalent of 12.9. Claimant enjoys reading books and magazines relating to guns (Defendants' APA #19, page 182; Claimant's APA #7, page 81).
6. Claimant's employment history includes work (a) as a stevedore (foreman) on container ships, (b) as a delivery driver for Coke and a beer distributor, and (c) in auto body repair (testimony of Claimant; Defendants' APA #19, pages 179-180; Claimant's APA #7, pages 81-82).
7. Claimant's job with Employer was delivery driver of food and restaurant supplies. This job is considered heavy (testimony of Claimant; Claimant's APA #7, page 81; Defendants' APA #19, page 175; Claimant's APA #10).
8. Claimant is a six-year employee (testimony of Claimant).
9. The objective evidence is interpreted by the authorized treating physician as showing "shallow protrusions, but no significant nerve root compromise" (Defendants' APA #12, page 106; *See also* Claimant's APA #4; Defendants' APA #16).
10. There is no objective evidence of radiculopathy. The authorized treating physician diagnoses radiculitis based upon Claimant's subjective complaints. At one point (post discectomy on April 2011), Claimant reported no leg pain at all (Defendants' APA #14, pages 110 and 115).
11. The Claimant also underwent an EMG/NCS study that revealed normal results with no objective evidence of radiculopathy.
12. I was not persuaded by Claimant's testimony regarding the alleged nine-day episode, including his (a) having to drag his left foot/leg behind him, and (b) description of having the posture/gait of a "mummy" (testimony of Claimant; Claimant's APA #11, containing a photograph of Claimant).
13. Because of his work-related injury, Claimant underwent injections, physical therapy, and a percutaneous discectomy (Claimant's APA #5, page 46).
14. Claimant reached maximum medical improvement on February 27, 2012 (Defendants' APA #12, page 106).
15. The authorized treating physician assigned a 15% combined impairment rating for the back and SI joint. Defendants' IME assigned an 8%

impairment rating (Claimant's APA #5, page 73; Defendants' APA #14, page 108; Defendants' APA #12, page 106; Claimant's APA #8, page 86).

16. My observations of Claimant's sitting tolerance at the hearing are very different than those noted by Claimant's vocational expert, as I noted no difficulties during the hour-long hearing. Claimant told Defendants' vocational expert that he attends church "every Sunday", but told his own vocational expert that is "unable to attend church due to his sitting intolerance" of greater than 30 minutes (observations of the undersigned; Claimant's APA #7, pages 79-80; Cf. Defendants' APA #19, page 181).
17. Claimant works out at Gold's Gym five days each week, and has lost approximately 40 lbs. since the date of the accident (testimony of Claimant; Defendants' surveillance video; Defendants' APA #19, page 181).
18. Claimant's statement to his vocational expert that he is socially withdrawn and can no longer tolerate being in crowds is inconsistent with his ability/desire to work out at Gold's Gym five days a week (Claimant's APA #7, page 80).
19. Claimant is able to drive (testimony of Claimant; Defendants' surveillance video).
20. Claimant is able to engage in his hobby of woodworking (testimony of Claimant).
21. Claimant takes no medication on a daily basis. No prescriptions have been written for Claimant within a year's time prior to the date of the hearing (testimony of Claimant).
22. Claimant showed "good" effort in his FCE, and the test results were considered valid by the evaluator (Defendants' APA #12, pages 106 and 111).
23. The restrictions from the FCE limit Claimant to medium duty work, and preclude him from returning to any of his pre-accident jobs (Claimant's APA #5, page 73; Defendants' APA #14, pages 108 and 111; Claimant's APA #6).
24. I give greater weight to the conclusions of Defendants' vocational expert. I base this finding on my review of the medical evidence and on my observations of Claimant at the hearing (Claimant's APA #7; Defendants' APA #19).

25. As to future medicals, Claimant is entitled to receive injections per the recommendation of the authorized treating physician, Dr. Zgleszewski. The surgical opinion by Dr. Scott Boyd suggests future medications although Claimant does not presently take any (Claimant's APA #5, page 73; Defendants' APA #14, page 108; Defendants' APA #8, page 86).
26. The Claimant has sustained a 35% permanent loss of use of the spine (encompassing Claimant's entire spine and including any alleged radiculitis) pursuant to §42-9-30(21).
27. I find that the greater weight of the evidence shows only the Claimant's back was affected by the March 25, 2010 admitted injury by accident.
28. Claimant is to receive his award in lump sum.
29. Claimant's request that Defendants provide him with a gym membership is denied. Claimant has worked out at gyms since he was 15 years of age, and worked out at Gold's Gym prior to the date of the injury (testimony of Claimant).
30. Claimant's average weekly wage is \$1,062.94, yielding a compensation rate of \$689.71.

(R.pp. 12-17, Decision & Order dated June 18, 2012).

As support for the aforementioned findings, the Single Commissioner issued the following Rulings of Law:

1. Under §42-1-130, the Claimant was a covered employee, and under §42-1-140, the Employer was a covered Employer at the time in question.
2. Under §42-1-160, the Claimant sustained injuries to his low back only in an accident arising out of and in the course of his employment on March 25, 2010.
3. Under §42-15-60, the Defendants provided the Claimant proper and adequate medical care and treatment and the Claimant reached maximum medical improvement for his injuries sustained as a result of the March 25, 2010 accident by February 27, 2012. Further under §42-15-60, the Defendants shall be responsible for the causally related medical care and treatment which they authorized and which was incurred on or before February 27, 2012, the date of maximum medical improvement. Further under §42-15-60, the Defendants are responsible for the Claimant's injections per the recommendations of the authorized treating physician, Dr. Zgleszewski, and the Claimant's causally related future medications as

outlined by Dr. Scott Boyd as is necessary to lessen the Claimant's causally related disability resulting from the March 25, 2010 injury by accident.

4. Under §42-9-260 and Regulation 67-506, the Defendants are entitled to stop payment of temporary disability compensation and that shall be effective February 27, 2012, the date the Claimant reached maximum medical improvement.
5. Under §42-9-10, §42-9-20, §42-9-260, and Regulations 67-501 through 510, the Defendants have paid all temporary disability compensation for which they are liable and have no liability for any further temporary disability compensation.
6. Under §42-9-30(21), the Claimant sustained a 35% permanent loss of use to his back as a result of the accident on March 25, 2010.
7. Under §42-9-210, all temporary disability compensation paid to the Claimant for the period after February 27, 2012 constitutes payment towards the permanent partial disability award set forth herein and the Defendants are entitled to credit for all temporary disability compensation paid to the Claimant for the period after February 27, 2012 against liability for further compensation benefits awarded herein.
8. The Claimant is entitled to a lump sum payment pursuant to Regulations 67-1605(A) and 67-1605(E).
9. Under §42-1-40, the Claimant's average weekly wage is \$1,062.94 with a resulting weekly compensation rate of \$689.71.

(R.pp. 17-19, Decision & Order dated June 18, 2012).

From this Decision and Order, the Respondent timely filed a Form 30, Request for Full Commission Review. The Full Commission affirmed the Single Commissioner's Decision and Order in its entirety by Order dated December 5, 2012. (R.p. 21-32). The Respondent appealed the December 5, 2012 Order of the Full Commission to the Court of Appeals. Oral arguments were held before the Court of Appeals on February 20, 2014 and thereafter the Court of Appeals issued Opinion No. 5205 on March 19, 2014 wherein the December 5, 2012 Order of the Full Commission was reversed and remanded to the Commission for an award pursuant to

§42-9-20 of the South Carolina Code. On March 26, 2014, the Petitioners filed a Petition for Rehearing with the Court of Appeals. On July 9, 2014, the Petition for Rehearing was denied however Opinion No. 5202 was withdrawn, substituted and refiled. The Petitioners now petition this Honorable Court for a Writ of Certiorari.

ARGUMENT

1. Did the Court of Appeals exceed its scope of review in concluding that there is not substantial evidence in the record to support the South Carolina Workers' Compensation Commission's Decision and Order dated December 5, 2012?

The Petitioners respectfully assert that in Opinion No. 5202, the Court of Appeals overlooked pertinent evidence in the record and substituted its own judgment for that of the Commission on the factual question of whether the Respondent had additional body parts affected by his back injury. In the December 5, 2012 Decision and Order of the South Carolina Workers' Compensation Commission (hereinafter "Commission"), the Commission found that the Respondent sustained 35% permanent loss of use of the spine (encompassing Claimant's entire spine and including any alleged radiculitis) pursuant to §42-9-30(21). Although the Commission acknowledged that the Respondent alleged his admitted back injury also affected his buttocks, legs, right foot, and right SI joint, the Commission found that the greater weight of the evidence showed only the Respondent's back was affected by the March 25, 2010 injury by accident. As such, the Commission awarded the Respondent substantial compensation for loss of use of his back and did not make an award based on a loss of earnings capacity. In Opinion No. 5202, the Court of Appeals concluded "the Appellate Panel's order was clearly erroneous in view of the substantial evidence in the record that Beckman suffered from radiculopathy as a

result of his back injury". The Court of Appeals reversed the Commission's December 5, 2012 Order and remanded the matter back to the Commission to address the Respondent's eligibility for a loss of earnings capacity award under §42-9-20 of the South Carolina Code.

The Court of Appeals in considering the appeal by the Respondent, should have been limited to deciding whether the Commission's Decision is supported by substantial evidence or is controlled by some error of law. *Ross v. American Red Cross*, 298 S.C. 490, 381 S.E.2d 728 (1989). The Petitioners hereby assert that the Court of Appeals erred by substituting its judgment for that of the Commission as to the weight of evidence on the issue of whether the Respondent has additional affected body parts as a result of his back injury. *Id.* Further, the Petitioners assert that the Court of Appeals overlooked the evidence supporting the Commission's finding that the Respondent did not have any additional body parts affected by the admitted back injury.

The Petitioners hereby submit that there is substantial evidence in the record which would allow a reasonable mind to reach the conclusion the Commission reached in the December 5, 2012 Decision and Order. *See Pratt v. Morris Roofing, Inc.*, 357 S.C. 619, 622, 594 S.E.2d 272, 274 (2004)(Substantial evidence is evidence that in considering the record as a whole would allow reasonable minds to reach the conclusion the administrative agency reached in order to justify its action). As addressed in more detail herein below, the record includes three imaging reports showing mild degenerative disc disease with no significant stenosis or frank impingement; the authorized physician's interpretation of the MRIs; a normal EMG/NCS; consistent normal physical exams of the lower extremities including a steady gait and normal strength throughout the course of medical treatment; video surveillance showing the Respondent's use of his lower extremities at Gold's Gym on the elliptical machine, nautilus machines, and treadmill; as well as a surgical evaluation from Dr. Scott Boyd stating that he does

not appreciate any significant nerve root compromise. (R.pp. 228-232, p. 188, p. 153, pp. 131-192, p. 249 and video, pp. 205-206). There are also findings made by the Commission regarding the Respondent's testimony credibility and the weight to be accorded specific evidence based on the record as a whole. (R.pp. 13-16).

The Petitioners concede that the Commission could have concluded that the Respondent had additional affected body parts as a result of the admitted March 25, 2010 back injury; however, the possibility of two different conclusions does not prohibit the Commission's December 5, 2012 Decision and Order from being supported by substantial evidence. *See Hoxit v. Michelin Tire Corp.*, 304 S.C. 461, 405 S.E.2d 407 (1991) (The possibility of drawing two inconsistent conclusions from the evidence does not prevent the administrative findings from being supported by substantial evidence). The Respondent had subjective complaints of radicular pain during the course of his medical care and Dr. Zgleszewski referenced "radiculitis not otherwise specified" in his medical notes; however, the objective evidence not does support that the Respondent has additional affected body parts as a result of his back injury.

In discussing the evidence in the record to support that the Respondent suffered from radiculopathy, the Court of Appeals cited the report from Dr. Scott Boyd who provided the surgical evaluation on February 27, 2012. The Court of Appeals referenced that Dr. Boyd noted the Respondent suffered pain that radiated into his left leg and he had numbness around his foot. The report of Dr. Boyd actually states the Respondent "describes his pain pattern as that most predominantly of low back pain. His pain does occasionally radiate down into his left leg and he states that he has some numbness around his foot." The Petitioners hereby submit that Dr. Boyd summarized the Respondent's subjective complaints reported to him but Dr. Boyd did not conclude or diagnose the Respondent with radiculopathy or radiculitis. (R. 205). Further, Dr.

Boyd's surgical evaluation states that he does not appreciate any significant nerve root compromise which would explain the Respondent's alleged radicular complaints. (R. 206). Dr. Boyd does not discuss any additional affected body parts in addition to the low back throughout his impressions and plan. (R. 206). Dr. Boyd only discussed objective evidence of a muscular spasm in the lumbar spine. (R. 206). Dr. Boyd further indicated that the Respondent is not a surgical candidate, assigned an 8% impairment of the back, agreed that the Respondent could perform medium physical duty work for an 8-hour day and indicated in the future the Respondent may only benefit from pain medication and muscle relaxers. (R. 206).

In addition to the surgical evaluation from Dr. Boyd, there is further evidence in the record to support the Commission's Decision that the Respondent did not have any additional affected body parts as a result of the back injury. The diagnostic studies reveal that there is no impingement or nerve root compromise. (R. 129 - 130, 228 - 229). The authorized treating physician, Dr. Zgleszewski, reviewed the EMG/NCS and stated that given the EMG/NCS, the Respondent did not have radiculopathy in either leg. (R. 153). Furthermore, Dr. Zgleszewski and Dr. Boyd both provided a physical exam of the Respondent. According to Dr. Boyd, the Respondent appeared to have normal power in his lower extremities and a steady gait. (R. 205). In the medical notes from April 19, 2010 through May 2, 2011, Dr. Zgleszewski noted the Respondent's gait and station to be nonantalgic and further noted that he was able to raise up on his heels and toes. (R. 131- 192). Dr. Zgleszewski further noted that the bilateral lower extremity examination was normal and it remained stable and unchanged throughout the course of treatment (R. 131- 192). Further, the Respondent's lower extremity physical capabilities while using an elliptical machine, treadmill and weights at Gold's Gym were captured on surveillance and submitted into the evidentiary record. (R. 249 and CD video). At the visit prior

to his release, the Respondent reported no leg pain and no pain radiating to his legs (R. 188). Thereafter, despite the Respondent's alleged radiculopathy and pain complaints, there was no medical treatment requested and no medications were prescribed over the year prior to the Single Commissioner Hearing on April 26, 2012. (R. 99, Hearing Transcript page 51, lines 3 - 25).

As the December 5, 2012 Decision and Order Finding of Fact No. 12 states, the Commission was not persuaded by the Respondent's testimony regarding an alleged nine-day episode of having to drag his left foot/leg behind him and having the posture/gait of a mummy. (R.p. 14). The Single Commissioner made findings (which were adopted by the Commission) regarding observations of the Respondent's sitting tolerance being inconsistent with evidence submitted by the Respondent. (R.p. 15). As the Commission has the best opportunity to review such evidence, the weight of this evidence is reserved for the Commission. *See Fox v. Newberry County Memorial Hospital*, 319 S.C. 278, 280, 461 S.E.2d 392, 394 (1995) (The duty to determine facts is placed solely on the Commission and the reviewing court has no authority to determine factual issues).

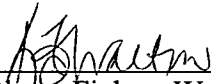
The Petitioners respectfully submit that the evidence outlined above may have been overlooked by the Court of Appeals. Based on the evidence as a whole, the Petitioners hereby submit that the factual findings of the Commission are supported by substantial evidence and therefore the Commission's conclusions must be affirmed. *Ross v. American Red Cross*, 298 S.C. 490, 381 S.E.2d 728 (1989). Although there may be conflicting evidence as to whether the Respondent's back injury had an affect on another body part, when the evidence is conflicting over a factual issue, the findings of the Commission are conclusive. *Hargrove v. Titan Textile Company*, 260 S.C. 267, 290, 599 S.E.2d 604, 611 (Ct.App. 2004). The Petitioners therefore

respectfully request that this Honorable Court grant a Writ for Certiorari to determine whether there is substantial evidence to support the Commission's December 5, 2012 Decision and Order.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Court grant the Petition for a Writ of Certiorari.

RESPECTFULLY SUBMITTED,

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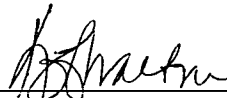
PROOF OF SERVICE

I certify that I have served the revised Petition for Writ of Certiorari and Appendix Index by depositing a copy of each in the United States mail, postage pre-paid, on August 7, 2014 addressed to the following:

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