

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from the South Carolina
Workers' Compensation Commission

SCWCC File No. 1008485

Appellate Case No. 2014-001503

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SC Court of Appeals

Rusty Lowery, Claimant,

Appellant,

v.

Pioneer Associates, Employer, and
Chartis Casualty Co., Carrier, Defendants,

Respondents.

INITIAL BRIEF OF RESPONDENTS

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STATEMENT OF THE ISSUES ON APPEAL

- 1) Whether The Commission Properly Admitted Evidence Related To Drug-Related Transactions And Pending Criminal Charges Of The Claimant As Evidence Proving Ability To Work And Post-Injury Brain Function?
- 2) Whether The Commission Properly Excluded An Unauthenticated Email From Evidence?
- 3) Whether The Commission's Decision That Claimant Sustained A Mild Brain Injury, Rather Than The Physical Brain Damage He Alleged, Is Affected By An Error Of Law?
- 4) Whether The Commission's Decision That Claimant Sustained Permanent Partial Wage Loss, Rather Than The Permanent And Total Disability He Alleged, Is Affected By An Error Of Law?
- 5) Whether the Commission's Decision on Claimant's Performance of Work Post-Accident, Post-Injury Average Weekly Wage, and the Employer's Accommodation of Restriction Is Affected By An Error Of Law?
- 6) Whether The Commission's Decision Denying The Claimant Lump Sum Benefits Is Affected By An Error Of Law?
- 7) Whether The Commission's Decision That Claimant Had Reached Maximum Medical Improvement Is Affected By An Error Of Law?

STATEMENT OF THE CASE

This is an appeal from a workers' compensation case in which the Appellant (Claimant – Rusty Lowery) disputes the extent of injury and benefits as awarded by the Single Commissioner and affirmed by the Full Commission. The Respondents (Employer – Pioneer Associates and Carrier – Chartis Casualty Company) did not file a Notice of Appeal with the Court of Appeals.

Claimant was injured on July 9, 2010 in an admitted accident. The Defendants provided medical treatment, more fully set out below. Subsequent to receipt of a medical note placing the Claimant at MMI, the parties filed hearing requests. The Defendants admitted a neck injury and took the position that the sole disability was to the neck due to a cervical fusion, while the Claimant alleged additional injuries, including a permanent and severe brain injury in order to obtain lifetime disability benefits. The claim was heard before Commissioner Andrea C. Roche on May 22, 2013. Commissioner Roche issued a decision on September 26, 2013, finding that the Claimant had sustained a permanent partial wage loss, but finding a mild brain injury, rather than a permanent and severe brain injury. Claimant's request for a lump sum award was denied. Both sides appealed to the Full Commission.

The Full Commission appeal was heard before Commissioners Taylor, Beck, and James on March 17, 2014. On June 16, 2014, the Full Commission issued a full affirmation of the Single Commissioner's Order. Claimant filed a notice of appeal with this Court on July 11, 2014. The Defendants elected to forego appeal of the Full Commission order.

STATEMENT OF THE FACTS

The sine qua non for understanding this claim is viewing the facts in light of a failed drug screen from March 2011. Prior to the failed drug screen, there was no substantive dispute between the parties: In sum, on July 9, 2010, Claimant sustained injury while working for an electrical company doing utility work, setting poles to build power lines. (APA p. 43) He was struck in the head and sustained some facial fractures and a concussion. (APA p. 48) He was hospitalized. On that date, Claimant underwent a CT scan of the brain that showed some facial fractures but “no acute intracranial abnormality.” (APA p. 53 emphasis added) Notes from the attending physician on the date of injury confirm that Claimant was alert and oriented times three at the hospital with no overt weakness or sensory abnormalities. (APA p. 48) EMS reported patient was alert. (APA p. 46) Claimant scored his pain as a 0/10 the day the accident occurred. (APA p. 46) He scored a 15 on the Glasgow Coma Scale. (APA p. 43) Claimant consulted with neurosurgery before being discharged on July 12, 2010. (APA p. 43)

Defendants provided Claimant with a neurosurgeon (Dr. Cavert McCorkle) for treatment of the fractures. Less than three months after the accident, Dr. McCorkle released Claimant to return to work without restrictions as of September 28, 2010. (APA p. 146) Claimant returned to the same job he was doing prior to the injury. (Tr. 23-25) Dr. McCorkle’s note from September 27, 2010 states as follows:

He is better. His dizziness is improved. He feels he is ready to return to work tomorrow. Occasionally he will have a headache. His balance and vision are doing well. . . . He was given a note to return to work tomorrow. I had a meeting with his case worker and discussed the findings with her also. He most probably has reached his maximum medical improvement and will have a permanent partial impairment of 2% to the whole person as a result of his head injury.

(APA p. 147) In the associated Form 14B, Dr. McCorkle opined that Claimant could return to work without restriction and would not need any future medical treatment.

(APA p. 148)

Claimant went back to the same job for the same employer making the same amount. (Hrg. Tr. 24-25) Claimant's supervisor testified at the hearing that when Claimant returned to work, he "seemed to be fine," and that he was "the same old jovial [person], cutting up." (Hrg. Tr. 25, 47)

Claimant's job involved being the crew leader of a utility truck, and the two-person crew was responsible for setting power poles to build power lines. (Hrg. Tr. 23, 30) The job involved operating the truck, picking up poles, delivering them, setting them, framing the hardware, installing the insulators, or anything else necessary for the power lines to actually be installed on the poles. (Hrg. Tr. 25)

After returning to work from the accident, Claimant worked for the company until March 11, 2011 (nearly 5.5 months) when he was suspended for a positive methamphetamine test. (Tr. 26-27; APA 184) At the time of his suspension, Claimant was nine months removed from the accident.

Given that Claimant did not testify at the hearing before the Single Commissioner, the medical records and exhibits submitted in accordance with the APA make up the Record as it relates to the Claimant's position. There is no record of any medical treatment between September 28, 2010 (the date the Claimant returned to work) and the failed drug screen. Therefore, there is no contemporaneous evidence that Claimant had any complaint of any kind during that time—Mr. Messer testified he fine at work. (Hrg. Tr. 25) Other than the initial hospital records in which the treatment of the

facial fractures and concussion is discussed, there is no record of any medical problem regarding the brain until after the positive methamphetamine test, when, on May 25, 2011, Claimant returned to Dr. McCorkle. (APA p. 71) Claimant's complaints to Dr. McCorkle on May 25, 2011 were made more than 7 months after Dr. McCorkle returned Claimant to full duty heavy work.

Subsequent to the March 11, 2011 positive methamphetamine test, Claimant requested additional medical treatment for headache and neck pain. (APA p. 71) Claimant returned to work after the suspension. (Hrg. Tr. 30) Only after Claimant returned to work from the drug-related suspension did Claimant's supervisor start noticing problems with Claimant's work. (Hr. Tr. 30) The claimant quit work shortly thereafter. (Hrg. Tr. 31) Ultimately, Dr. Chittum performed a cervical fusion with discectomy on January 30, 2012. (APA pp. 78-80) Claimant was placed out of work and put on temporary benefits.

On March 13, 2012, less than sixty days after the cervical fusion, Claimant sold drugs to a confidential informant. (APA p. 197) The next day, Claimant sold methamphetamine to a confidential informant. (APA p. 203) On March 16, 2012, the Claimant sold methamphetamine to a confidential informant. (APA p. 209) It is undisputed that, during these events, Claimant was on a running award of temporary total disability. Claimant was taken into custody by the police in July 2012. (APA pp. 187-191) There is no testimony in the Record contradicting this evidence. In addition to selling drugs, Claimant admitted to taking methamphetamine since his accident. The admission comes from the claimant himself on multiple records properly entered into evidence without objection. (APA pp. 118, 154)

Casey Collier, a SLED agent who participated in the investigation of the Claimant's activities, testified at the hearing in this claim. She testified that, since his arrest, Claimant has also worked as a confidential informant for SLED. (Hrg. Tr. 14) Ms. Collier has personally facilitated those buys using Claimant. (Hrg. Tr. 14) After Claimant's arrest, he agreed to cooperate as a confidential informant under the direction of Ms. Collier. (Hrg. Tr. 15) Claimant was able to facilitate a buy out of Atlanta, Georgia for 1,001 grams of methamphetamines valued at \$38,000. (Hrg. Tr. 15) Ms. Collier also testified that Claimant had several pending warrants and would be arrested. (Hrg. Tr. 14-16) Ms. Collier testified that Claimant was evading the police. (Id.)

Finally, as shown by the APA submissions, the Claimant's opinions in support of a "permanent and severe" brain injury are dated after the Claimant had returned to work for five-and-a-half months, after the Claimant was suspended for a positive drug screen and after the CI reports show he was selling methamphetamines. (See Cl.'s APA pp. 8, 39-42, 124, 131, 146). They universally fail to explain the claimant's three neuropsychological test results, which were all inconclusive at best. They also fail to offer any evidence as to why the claimant has a "permanent and severe brain injury."

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) (citation omitted); see S.C. Code Ann. § 1-23-310 et seq. (Supp. 2011). 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 438, 442

(2000) (the Commission is tasked with finding facts, evaluating the credibility of the witnesses, and assigning weight to the evidence). However,

[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:

- (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; or
- (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).

ARGUMENT

I. Evidence Of The Claimant’s Drug Trafficking Was Properly Admitted.

Claimant’s lengthy argument that the drug charges were improperly entered into evidence is flawed, both procedurally and substantively.

A. Claimant Did Not Preserve The Alleged Errors For Review.

First, the bulk of Appellant’s argument is not preserved for review. Appellant failed to timely and specifically object on all the grounds for error he now seeks to argue, and he has waived any allegations of error not presented to the Commission. Cf. State v. Stahlnecker, 386 S.C. 609, 617-18, 690 S.E.2d 565, 570 (2010) (holding a party’s request for review is limited to the specific grounds of objection presented to the trial court). Furthermore, the objection must be raised contemporaneously with the objectionable evidence. State v. Aldret, 333 S.C. 307, 509 S.E.2d 811 (1999) (“We have routinely held that a party must object at the first opportunity to preserve an issue for review.”)

In his brief, Claimant fails to delineate between the documentary evidence and the testimonial evidence. As to the documentary evidence, the transcript of the hearing before the Single Commissioner reveals one preserved issue only. Namely that the documents related to drug charges were presented as evidence of committing a crime to impeach the Appellant:

We had a pre-hearing discussion where there were some objections to some of the APAs. The Claimant objected to the Defendants APA regarding criminal charges that are pending against the Claimant, and it is the position of the Defendants that those are not being offered to prove that he committed these crimes but they are being offered to prove that he is, in fact, able to earn money and is earning money while he's drawing temporary total disability benefits so I am allowing them for that reason. . .

The Court: Other than that, are there any objections to APAs, jurisdiction, venue, or any other items.

[Claimant's attorney]: No, ma'am.

(Tr. 3:12-4:14) Claimant now makes arguments regarding relevance and Rule 403, which were never presented to the Single Commissioner.

The objections to the testimonial evidence were similarly insufficient. While Claimant objected to Ms. Collier's testimony in the Form 30 (Application for Commission Review), he failed to do object to the bulk of her testimony at the hearing, and, because he failed to object contemporaneously when the testimony was offered, he has waived this issue on appeal. In reviewing Ms. Collier's testimony as a whole, Claimant objected to very little of the testimony. Defendants assert that the following summary shows Ms. Collier's testimony received without objection at the time it was presented:

- Ms. Collier is a SLED agent who works primarily in narcotics investigation and is qualified to testify as an expert in drug enforcement. (Hrg. Tr. 7-8).

- Ms. Collier directed a confidential informant to purchase methamphetamine from Mr. Lowery in March 201[2].¹ (Hrg. Tr. 10).
- Ms. Collier gave the informant \$4000 to purchase drugs from Rusty Lowery, and the informant returned with methamphetamines. (Hrg. Tr. 12).
- Mr. Lowery is selling amphetamines out of his home, which he buys from someone else to re-sale, and he runs a for-profit enterprise. (Hrg. Tr. 12-13).
- Mr. Lowery has pending warrants, is on the run, and would be arrested. (Hrg. Tr. 14).
- Mr. Lowery sold the drugs to the confidential informant. (Hrg. Tr. 21).

This is the testimony that Claimant now objects to; however, it was received into evidence without objection at the time that it was made. Claimant has waived any allegation of error as to this testimony because he failed to preserve the issue.

B. The Alleged Bases Of Error For Inclusion Of The Drug Evidence Are Not Relevant.

Claimant’s arguments relying on the South Carolina Rules of Evidence are wholly inapplicable. “[T]he South Carolina Rules of Evidence do not apply in proceedings before the Workers’ Compensation Commission.” Hamilton v. Bob Bennett Ford, 339 S.C. 68, 528 S.E.2d 667 (2000) (citing S.C. Code Ann. § 1-23-330). As an example, Hamilton states that hearsay testimony may be admissible to the Commission if corroborated, which is not consistent with the Rules of Evidence. As noted in Hamilton, “great liberality is exercised in permitting the introduction of evidence in proceedings under Workmen's Compensation Acts.” 339 S.C at 70, 528 S.E.2d at 668 (citing Ham v. Mullins Lumber Co., 193 S.C. 66, 7 S.E.2d 712 (1940)). In this instance Collier

¹ As shown infra, this is during the time that Claimant was receiving TTD.

corroborated the documents in evidence related to the claimant selling to a CI. Claimant cites Rules 401, 402, 403, 404, and 901. These rules have no bearing on the proceedings before the Commission, and, therefore, cannot be relied upon as bases for allegations of error in the conduct of the hearing.

C. The Drug-Related Evidence Is Relevant.

Despite Claimant's repeated protestations, the drug-related evidence is relevant. Although the Commission is not bound by the Rules of Evidence, the definition of relevance in Rule 401 provides guidance on admissibility of evidence: "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. The benefits available under the Workers' Compensation Act are disability and medical treatment. Therefore, any evidence bearing on Claimant's entitlement to a certain amount of disability or medical treatment is relevant.

Per Section 42-1-120, Disability is "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." As aptly noted in the Claimant's Brief,

Disability in compensation cases is to be measured by loss of earning capacity. Total disability does not require complete helplessness. . . . The generally accepted test of total disability is inability 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."

Watson v. Xtra Mile Driver Training, Inc., 399 S.C. 455, 732 S.E.2d 190 (Ct. App. 2012). Furthermore, neither the language in Watson nor the statutory definition of "employment," exclude illegal employment from this determination. S.C. Code Ann. § 42-1-150. Given that *Claimant alleges permanent and total disability*, with a severe and

permanent brain injury, Claimant alleges a quality of injury so great that he is permanently barred from earning money. Therefore, the threshold question is whether Claimant's work selling drugs is relevant to a determination of Claimant's ability to earn an income post-accident.

As the Single Commissioner correctly determined, Claimant's job selling drugs is relevant in determining his ability to perform services for which there is a reasonably stable market. Over the course of several days, Claimant provided drugs to a confidential informant and received money in exchange for this provision of goods. (APA pp. 197-209) The SLED agent, who was qualified as an expert in drug enforcement without objection, testified that she gave a confidential informant \$4000 to buy drugs from Claimant. (Tr. 12) Claimant bought the drugs from another individual and sold them for profit. (Tr. 13). Per Watson, the test for total disability is not the amount of profit, but whether the Claimant can perform services for which there is a demand in a reasonably stable market. Certainly this is not a legal market, but Claimant was performing a service for which he received payment.

Even after his arrest, when Claimant became a confidential informant and set up a drug buy with dealers out of Atlanta, he was performing a service in a stable market for which he received the potential for reduced charges: Claimant was working for SLED, under an agreement (Hrg. Tr. 15), under the direction of Agent Collier, and performing a service for which there was a stable market. Claimant performed a service that Agent Collier could not perform herself because the dealers "are more comfortable with somebody they know." (Hrg. Tr. 15) Therefore, by rule, Claimant is not totally disabled. Whether the criminal charges can be proved is not relevant. However, Claimant's acts

giving rise to the charges are relevant to determining disability, and Claimant's attempts to exclude the evidence are misplaced.

In addition, Claimant's allegation of permanent and severe brain damage make elements of Claimant's function relevant. In order for the Commission to determine whether there is physical brain damage, the Commission must have evidence, among other things, that the worker is unable to return to suitable gainful employment due to the severity of the damage to the brain. Crisp. v. SouthCo., 401 S.C. 627, 642, 738 S.E.2d 835 (2013) Indeed, in order to award lifetime benefits, there must be severe, permanent impairment of normal brain function, on a level consonant with the physical impairments of paraplegia and quadriplegia. Sparks v. Palmetto Hardwood, Inc., 406 S.C. 124, 128, 750 S.E.2d 61 (2013). Therefore, Claimant's ability to perform services and receive payment are also relevant to the issue of brain injury. For similar reasons as above, given that Claimant was able to sell drugs to an informant and set up a buy from other dealers, the ability to perform services is relevant in determining whether there is physical brain damage.

Finally, Respondents would note that Claimant's drug dealing and subsequent behavior in avoiding arrest is indicative of a significant level of brain function. Contrary to Claimant's assertion that it is speculative to find Claimant was evading arrest (Cl.'s Br. at 16), Claimant's failure to appear at hearing to evade arrest is a (and arguably the only) reasonable inference from the following evidence: Claimant did not appear at the hearing. (Hr. Tr. 6); Agent Collier, for whom Claimant worked (Hr. Tr. 15), testified the Claimant had outstanding warrants, was on the run, and would be arrested. (Hr. Tr. 14). Claimant's ability to understand risk and evade detection certainly speaks to his level of function,

and is, therefore, relevant.

D. Given The Relevance Of The Drug Evidence, No Other Rule Bars Admission To Evidence.

Given all of the above, there is no rule of evidence that precludes admission of the drug-related evidence, and, therefore, both documents and testimony were properly admitted. Claimant erroneously cites two rules in an attempt to exclude the drug evidence.

Claimant citation to Rule 403 is inapposite, for the reasons of issue preservation and applicability discussed supra. However, even if it were not, Rule 403 would not operate to exclude the drug evidence in this proceeding:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

First, the Rule is permissive. Even if the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, exclusion is not required. Therefore, in accordance with the rule in civil cases, the Claimant would have to show an abuse of discretion to successfully prove an error, which has not been done here. “An appellate court reviews Rule 403 rulings pursuant to an abuse of discretion standard and gives great deference to the trial court.” Lee v. Bunch, 373 S.C. 654, 647 S.E.2d 197, 199 (2007). Thus, the question on appeal is not whether Rule 403 could have excluded the evidence, but whether the Commission committed an abuse of discretion. Claimant’s Brief fails to make this argument, and, therefore, it is waived.

Even so, Rule 403 is more properly directed towards evidence submitted to a jury. See Note to SCRE 403. Indeed in ruling on a Rule 403 objection, the objectionable

evidence must be reviewed by the judge. An objection based on Rule 403 grounds is without merit in a proceeding when the judge and factfinder are one and the same and is required to review all proffered evidence. Claimant's Rule 403 argument fails.

Next, Claimant's analogy to Fore v. Griffco of Wampee, Inc., 409 S.C. 360, 762 S.E.2d 37 (Ct. App. 2014) is misplaced. First, based on a review of Fore, the issue preservation issues discussed supra were not at issue in Fore, and, therefore, Fore is inapplicable here. Second, Fore is factually distinguishable from this claim. Fore involved a letter written by Smith, the Director of the Commission's Compliance Division, to the Insurance Fraud Division of the Attorney General's office, which set forth allegations of potential fraud in the workers compensation claim itself. Id. at 3. In sum, the letter set forth that Fore was ostensibly employed as a bail bondsman "off the books." The letter was included in evidence, over Claimant's objections of hearsay, that the letter was an impermissible ex parte communication, and inadmissible as evidence of a pending criminal prosecution. Id. at 5. This Court found the letter should have been excluded on various grounds: hearsay, undue prejudice, violation of the Insurance Fraud Statute (S.C. Code Ann. § 38-55-570(D)), and an apparent due process violation (inability to conduct meaningful discovery because the letter's existence was unknown until 8 days before the hearing). Id. at 9.

The concerns expressed in Fore are not present here. First, the Insurance Fraud Statute is not applicable, as the drug evidence was not part of a report to the Attorney General's Office. Next, the due process/investigative concerns are not relevant. As opposed to any trial by ambush involving a then-unknown fraud investigation, Claimant was ostensibly aware of his arrest on drug charges while he was receiving temporary total

disability. In addition, a hearsay objection was not made in this claim, and even so, the testimony of Agent Collier was sufficiently corroborative of the documents for inclusion into evidence.

Finally, Fore sets forth that “without a determination of the truth of this allegation, we hold the prejudice to Fore from admitting the letter exceeded any probative value to be gained.” Id. at 9. However, in this claim, Agent Collier, a law enforcement agent for the State, corroborated the material contained in the APA submissions, and, therefore, there was a level of corroboration not present in Fore. Also, Fore’s holding indicates that the letter was essentially impeachment material against Fore. That concern is not valid in this claim because 1) Claimant did not testify and 2) the drug-related evidence is specifically relevant to disability, as has always been contended, not the issue of guilt. To the extent that Fore suggests a Rule 403 analysis applies to a judge who is also a factfinder, the Defendants assert that the unfair prejudice analysis is inapplicable. Assuming the basis of Rule 403 is to prevent a factfinder from making a decision on an improper basis, e.g., arousing sympathy or prejudice, when the officer of the Court must review the disputed evidence to determine inclusion or exclusion, the danger of unfair prejudice exists even if the material is excluded from evidence. Therefore, unfair prejudice is simply not relevant in this claim.

E. Claimant Mischaracterizes The Use Of Drug Evidence.

In sum, when Claimant’s legal arguments fail for the reasons stated above, he resorts to subtly mischaracterizing the drug evidence and its use by the Commission. Claimant accuses the Commission of outcome-based decision making rather than deciding a case based on the evidence: “the single commissioner and Appellate Panel

focused on this evidence to justify minimizing Claimant's claim for benefits." (Cl.'s Br. at 13.) "[T]he single commissioner and Appellate Panel presumed Claimant guilty." (Cl.'s Br. at 17.) "The single Commissioner and Appellate Panel perpetuated this unconstitutional burden shifting" (Cl.'s Br. at 17.) "[T]he only reason the single commissioner allowed evidence of drug issues was to find some way to substantiate the denial of this lifetime benefits case." (Cl.'s Br. at 17.) This groundless hyperbole disparages the Commission and is not accurate. In sum, the drug evidence was extremely probative regarding Claimant's ability to provide good and services in exchange for income and other benefits, and Claimant cannot credibly argue otherwise.

II. The Contested Email Was Properly Excluded From Evidence.

Claimant argues that the Single Commissioner erred in excluding an email, but this error has not been preserved for appellate review. Claimant failed to proffer the email when it was not placed into evidence, and, therefore, the email is not properly before the Court of Appeals. State v. Santiago, 370 S.C. 153, 634 S.E.2d 23 (Ct. App. 2006) ("Moreover, a proffer of testimony is required to preserve the issue of whether testimony was properly excluded by the trial judge."). In fact the Commissioner gave claimant's counsel the opportunity to authenticate it to get it into evidence and the witness could not do it. (Hrg. Tr. 43) At that point the attorney made no additional motion to move it into evidence.

Furthermore, the email was not proper documentation with which to impeach the witness. At the hearing, Mr. Messer indicated that he could not authenticate the email as coming from him or being sent on his behalf from someone else. (Hrg. Tr. 43:17-23). The email was not sworn testimony, and without authentication it was actually from

Messer, it was not a prior inconsistent statement. Therefore, the content of the email could not have been used to impeach Mr. Messer's testimony. Finally, the email itself is hearsay, and without corroborative evidence, such as Mr. Messer's testimony, the email was properly excluded and could not have been substantive evidence of the case.

III. The Appellate Panel's Decision That The Claimant Suffered A Mild Brain Injury Is Supported By Substantial Evidence.

On July 9, 2010 the claimant suffered a blow to the head on the job. On that date, Claimant underwent a CT scan of the brain that showed some facial fractures but "no acute intracranial abnormality." (APA p. 53 (emphasis added)). Notes from the attending physician on the date of injury confirm that Claimant was alert and oriented times three at the hospital with no overt weakness or sensory abnormalities. (APA p. 48). EMS reported patient was alert. (APA p. 46)

There was no severe brain injury at the outset.

Claimant was admitted to the hospital on July 9, 2010. (APA p. 48). Notes from the attending physician on the date of injury confirm that Claimant was alert and oriented x 3 at the hospital with no overt weakness or sensory abnormalities. (APA p. 48). EMS reported patient was alert. (APA p. 46) He scored his pain as a 0/10 the day the accident occurred. (APA p. 46) He scored a 15 on the Glasgow Coma Scale. (APA p. 43) Claimant consulted with neurosurgery before being discharged on July 12, 2010. (APA p. 43) Dr. Cavert McCorkle followed Claimant after his discharge. On September 27, 2010, Dr. McCorkle noted that Claimant's balance and vision were doing well with an occasional headache. (APA p. 147).

Claimant returned to work for six months after the date of injury.

Claimant was released to return to full duty work with no restriction in September

2010. (APA p. 148). Claimant went back to the same job for the same employer making the same amount. (Tr. 24-25). Claimant's supervisor testified at the hearing that when Claimant returned to work, he "seemed to be fine," and that he was "the same old jovial [person], cutting up." (Tr. 25, 47). Claimant worked for the company until March 11, 2011 (nearly 5.5 months) when he tested positive for methamphetamine. (APA p 184) The claimant returned to work after the positive drug test. Each opinion procured by the Claimant as to the severity of his brain injury is dated after the positive test and after he was arrested for selling drugs.

Perhaps most telling is there is no contemporaneous evidence of serious brain injury. Each opinion offered by the Claimant on the issue of brain injury is from 2013, nearly three years after the accident, after the Claimant's arrest for selling drugs (while he was receiving TTD) and while the claimant was on the run from police in the month prior to the Single Commission hearing. (Trg. p 14)

The Claimant's experts' recitation of the legal standard from Crisp and Sparks does not substantiate a factual finding of permanent and severe brain damage. Each opinion simply recites that Claimant has permanent and severe physical brain damage, with little explanation of physicality, severity, impairment, or explanation of facts sufficient to equate the severity of injury with that of paraplegia or quadriplegia.

- Physicality – "[o]f or pertaining to the body, as distinguished from the mind or spirit; bodily" and "[o]f or pertaining to material things." Sparks v. Palmetto Hardwood, Inc., 406 S.C. 124, 130, 750 S.E.2d 61 (2013).

- Damage that is permanent and therefore necessarily continues to have effect into the present. Sparks v. Palmetto Hardwood, Inc., 406 S.C. 124, 130–31, 750 S.E.2d 61

(2013).

- As noted in Sparks, permanency and physicality are requirements. Sparks v. Palmetto Hardwood, Inc., 406 S.C. 124, 129, 750 S.E.2d 61 (2013).

- However, the severity of the permanent brain damage is the lynchpin of the analysis. Crisp v. SouthCo., 401 S.C. 627, 642, 738 S.E.2d 835 (2013)

Claimant asks the Court to believe that 1) the permanent, severe brain injury existed as of July 9, 2010; 2) that a neurosurgeon returned Claimant, with a brain injury, to full duty work setting power poles; and 3) that Claimant worked five-and-a-half months full duty with a brain injury in a heavy job, and he coincidentally began having symptoms of brain injury only after a positive drug test for methamphetamine.

Appellant's misinterpret of the legal precedent set forth in Sparks and Crisp. The emphasis in those cases is not on the medical providers' recitation of whether the damage is severe or permanent. Indeed, in a paraplegia or quadriplegia case, i.e., in which the body's extremities do not function, the corollary in a brain injury case would be a similar loss of function. 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. Both of these conditions are by definition severe, permanent physical impairments. Thus, the context implies the General Assembly meant to require similarly severe, permanent impairment of normal brain function in order for an injured worker to be deemed physically brain damaged under § 42-9-10(C).

The facts of this case do not support physical brain damage in the matter contemplated by the legislature. All the claimant's medical opinions we review below

have certain things in common which should cause the Commission to give them little to no weight. First, they were all obtained just weeks before the hearing, almost three years after the accident, in an obvious attempt to make this claim something it is not after their own IME neuropsychologist, Dr. Randolph Waid, failed to deliver the opinion the claimant wanted. (APA p. 124- He diagnosed the claimant was a “mild concussion”-does not find any permanent or severe damage) The claimant’s lack of any credibility must also color these last minute reports. (Except for Dr. Buechler’s, who did not even see the claimant before writing his legal opinion email directly to the Claimant Attorney.) Finally, they all recite a legal standard wholly unsupported by any underlying evidence and based on either faulty information or omissions provided by this claimant.

First, it should be noted there is no evidence that the claimant even asked for treatment for his eyes during the three years since the accident occurred. Defendants never provided treatment as a result and wholly deny his minor eye problems are related to his accident. Defendants first became aware vision was going to be made an issue in **March 2013**. (APA p. 324) The claimant’s attorney amended his Form 50 to include eyes for the first time on April 1, 2013. (APA p. 324) Dr. Keisler saw Claimant on April 8, 2013, after the uncontroverted drug use. There is no indication in the social history or otherwise that Dr. Keisler was made aware of Claimant’s drug use in order to exclude the effect from methamphetamine from her opinion as to causation of visual field loss. (APA pp. 125-131). Defendants assert the opinion is wholly unreliable on that basis alone.

A close read from Dr. Wickliffe’s opinion does not link the visual field loss to the accident. The opinion dated **April 24, 2013**, just days before the hearing, states that Claimant “showed nonspecific visual field loss in both eyes indicating that he has sustained

some physical brain damage of a severe and permanent nature.” (APA p. 131). However, the purported brain damage is not linked to the accident in the note. There is nothing to indicate she was even aware of how the injury occurred. It is equally as reasonable that the “physical brain damage” is related to Claimant’s drug use.

Ultimately, rather than stating the extent of visual field loss, whether it is normal for claimant’s age, the rate of loss, or other fact pertinent to the injury or disability, Dr. Keisler, simply recites a legal conclusion in an attempt to support lifetime benefits. The only treatment recommended for this alleged “permanent severe brain injury” were over-the-counter reading glasses. (APA p. 127). Defendants submit that this recitation of the legal standard does not provide adequate evidence for the Commission and it is no more than a conclusory opinion without supporting facts. The fact she made this legal finding with a recommendation of reading glasses as the only treatment speaks to the weight this document should be given.

Similarly, the recitation of the legal standard by Dr. Buechler does not provide any supporting facts to find a brain injury. (*See* APA p. 146). Dr. Buechler’s treatment started nearly two years after the injury. (APA pp. 101, 146). The social history taken by Dr. Buechler’s office recites that Claimant has no drug history, which is wholly incorrect. (APA p. 102). During the time the claimant treated with Buechler he was arrested and charged with trafficking twice. (APA p. 256) In addition, according to Dr. Buechler’s own notes from April 20, 2012, Claimant’s neurological exam appears largely normal. (APA pp. 102-103). The mini-mental status exam shows that Claimant received 90% of the points possible (27 out of 30), and it is not clear if such a score indicates any cognitive impairment, as scoring as low as 70% on the exam (21 out of 30) indicates a mild cognitive

impairment only. (APA p. 104). The first neuropsychic test conducted by Dr. Buechler's office indicates lack of compliance with testing by the Claimant. (APA pp. 107-109).² Ultimately, Dr. Buechler referred the Claimant to Roger C. Peace for "neurocognitive testing" after he was unable to complete the second test administered. (APA p. 110). Given the passage of time, the lack of reliability in the social history regarding drug use, the largely normal physical exam, and the inconclusive previous test results, Dr. Buechler's opinion in an email to Claimant's attorney on **April 24, 2013** that merely recites the legal standard of "severe and permanent brain damage," when there is no indication what facts support this opinion should be given absolutely no weight as it is stark contrast with the objective test findings he previously made while the claimant was actually in his office. (APA p. 145).

Finally, the letter written by Dr. Shugart supporting the claimant's allegation of a brain injury shows a long standing bias toward the Claimant.³ First, it should be noted Dr. Shugart is his family doctor. The doctor's opinion in the case was written in letter addressed to "Chad" on **April 24, 2013**, days before the hearing. (APA p. 41) Next, Dr. Shugart's letter repeats the rote "permanent and severe" language he obviously was instructed to write. He is an internist who lacks the credentials to make such a finding. (APA pp. 180-181) He makes much of the fact that he saw Claimant both before and after the injury. However, Dr. Shugart omits significant information from his letter. On September 23, 2010, after the incident in this case, a nurse practitioner from Dr. Shugart's

² Both Claimant and Defendants neuropsychological evaluations found the Claimant's testing "resulted in variability of performance" (APA p. 123) and were "non-credible." (APA p. 173). "In sum, due to the large number of failed performance validity indicators, it is clear the Claimant did not provide consistently valid effort during any of the three examinations." (APA p. 173).

³ Dr. Shugart wrote a letter explaining a positive drug test in March 2011, when he had not seen that claimant for nine months prior and prescribed one month of medication at that time. (APA pp. 184-187).

office saw the Claimant for routine complaints related to conjunctivitis. (APA pp. 30-32). There is no indication of brain injury at that time. The Claimant's mental status as recorded on that date shows no "obvious" mental deficits. (APA p. 30-32). Dr. Shugart fails to note that these allegedly obvious signs of brain injury appear only after a positive drug test for methamphetamine. Finally, as noted above, the visit with Dr. Shugart in which Claimant exhibits these "obvious" mental deficits is merely one month before the hearing, three years post-injury. Again, this document should hold no weight as it is obviously nothing more than a last ditch effort to get an unqualified, clearly biased doctor to give a legal opinion that the Claimant's own neuropsychologist would not.

The most comprehensive review of the claimant's mental capacity is from Dr. Williams. (Exh. 12) In his almost 30 page report he details the claimant's extensive "non-credible test taking effort." (APA p. 168) Because of the gross inconsistencies he found in both his own tests and those administered by Dr. Waid, who also acknowledged inconsistencies, Dr. Williams found he was malingering. (APA pp. 123, 171) In fact the test profile derived from Waid's exam of the claimant finds "multiple imbedded validity indicators that fall at levels that empirically are extremely improbable." (APA p. 163) Williams concluded the claimant had a mild concussion, a condition that "is generally believed to self-correct over a period of a few hours to a few days." (APA p. 124) If one reviews the time line of events that is exactly what happened in this instance. The Claimant returned to work full duty heavy work two months after the accident without complaints. (Hrg. Tr. 24 and 25)

For the reasons stated above, the "evidence" asserting brain injury is dubious at best and does not support a finding of a legitimate brain injury by the preponderance of the

evidence in this case. Each opinion simply recites that Claimant has permanent and severe physical brain damage, with little or no explanation of physicality, severity, impairment, or explanation of facts sufficient to equate the severity of injury with that of paraplegia or quadriplegia.

Finally, Claimant did not testify in this case, and there is no testimonial evidence subjected to cross-examination of his condition, ability to work, visual field, concentration, memory, work history. The best evidence we have regarding the way the claimant's feels his alleged brain injury has affected him comes from the claimant's own IME with Dr. Waid, wherein the claimant report only a "*mild* disruption with regard to the activities of daily life." (APA p. 123 (*emphasis added.*)) The preponderance of the evidence, including the claimant's own statement to his own IME doctor does not support severe, permanent impairment of normal function.

IV. The Preponderance Of Evidence Does Not Support Claimant's Allegation Of Permanent and Total Disability.

The only opinion in the file the claimant cannot work in any capacity is from Rock Weldon. Mr. Weldon begins his report by stating, "the file on Mr. Lowery's medical treatment since his head injury on 7/9/2010 was reviewed and evaluated." (APA p. 132) The sole reasonable inference is that Mr. Weldon did not see the claimant to reach his conclusion. In his four page report, he omits any of the findings from Dr. Williams, does not mention the claimant's drug business and does not indicate he knows the claimant returned to work for months after the accident doing the same job. (APA p. 132-136) These facts are essential to reaching a decision as to the claimant's ability to work. Therefore his vocational evaluation should be given little if any weight.

Again he is the only “professional” in the file indicating the claimant cannot work in any capacity. Contrary to the claimant’s suggestion in brief, Drs. Waid, and Buechler do not in any way affirm Weldon’s findings. On the contrary they do not place any restrictions on the claimant at all. Dr. Shugart concludes he cannot “perform his prior duties” but does not indicate the claimant cannot return to work in any capacity. (Exhibit 13-Emphasis added). Dr. Chittum never indicates the claimant cannot work and instead states that based on his FCE results he should be able to return to “light-medium” duty. (APA p. 89) It is noteworthy, that the claimant failed half of the validity tests administered in the FCE. (APA p. 98)

The defendants vocational evaluation was done by Jan Westmoreland on March 14, 2013. It indicated the claimant was capable of returning to work in a light duty capacity. She actually did a job survey of positions she believed he would be able to obtain at the time the interview was conducted that were available. (APA p. 320) Her evaluation took into consideration the restrictions imposed on the claimant at his FCE and subsequently by Dr. Chittum (APA p. 318) These were the only restrictions imposed on the claimant by any medical professional, authorized.

By far the best evidence that the claimant is not permanently and totally disabled comes from his own actions selling drugs post injury while he was getting TTD, which are extremely well documented in the CI reports. (APA pp. 197, 203, 209) In these reports the claimant, weighs drugs, handles firearms, smokes methamphetamines, exchanges drugs for over \$3000 at several locations including his own home. In essence claimant here alleges he cannot work when he was working selling drugs post injury and attempts to benefit from the illegal nature of his work by seeking to keep out that

evidence through a series of wholly inapplicable and inaccurate arguments and objections.

V. The Preponderance Of Evidence Supports The Findings Of A Post-Injury Hourly Wage Of \$15.00 And Employer's Accommodation of Work Restrictions.

The claimant's supervisor returned to testify at the hearing (Donnie Messer). He testified that the claimant could have returned to work for Williams Electric even with his permanent restrictions of light to medium duty. (Hr. Tr. 33-34) He testified he could have worked making "between \$15-\$18 an hour" for them if he had returned. (Hr. Tr. 34) Contrary to Appellants contention, it is apparent from his testimony the employer knew all there was to know about the restrictions on Lowery from a treating doctor. (Light-Medium duty per Chittum-APA p. 33) Messer's testimony is that of an individual who had actually employed the claimant in the past and was willing to consider offering him work now despite him pending charges. (Hr. Tr. 33) It does not get more tangible in terms of objective evidence of what the claimant could have made and done post injury. The only reason there is any "speculation" about this offer is that the claimant never asked/attempted to come back to work after the surgery. The Commission rightly considered this testimonial evidence as the most compelling evidence of earning potential in the record where determining the amount of his wage loss and there was absolutely nothing to counter its veracity entered by the Claimant.

VI. The Preponderance Of Evidence Supports The Finding That The Claimant Performed His Work Duties For Months Post Accident Without Problem.

McCorkle released the Claimant without restrictions on September 27, 2010 (APA p. 147) It is undisputed the claimant returned to heavy work from October 2010-Spring 2011. (Hr. Tr. Pp. 24, 25, 30) During that same time there was not one medical

record entered into evidence by either party indicating the claimant needed treatment. There were no requests or testimony indicating the claimant needed or asked for treatment. Mr. Messer testified he made the same amount as he had previously. (Hr. Tr. P. 26) Messer further testified that if he was having a problem he would have been who he should have reported it to. (Hr. Tr. P. 26) He indicated he “seemed to be fine; he didn’t seem to have any problems” when he first came back to work. (Hr. Tr. P. 25) Mr. Messer admitted that all changed once he tested positive for methamphetamines on March 11, 2012. (Hr. Tr. P. 26) The email of April 17 which was properly excluded for the reasons mentioned previously, would not even contradict this finding as the claimant returned to work some seven months before it was written and the contested finding states, “Claimant was able to return to work *many months* after the accident, and performed his duties as usual. He appeared to be fine and was not having any problems.”(Decision and Order Finding 15-Emphasis added)

VII. The Preponderance Of The Properly Admitted Evidence Supports The Appellate Panel’s Rejection Of The Claimant’s Request for Lump Sum.

The Commission determined the claimant should not be awarded in a lump sum because of his past and present drug use. There are a number of references to the claimant’s involvement with drugs before and drug use after the accident in documents properly in evidence. (Exhibit 2-Exhibits 18 and 20 and APAs 197, 118, 153, 154) Some of these records were entered without any objection from either party. (In the claimant’s own IME from Dr. Waid, the claimant admits to methamphetamine use post injury and previous trafficking convictions. (Exhibit 2, Pg. 118)) The Commissioner was free to take this evidence submitted by the claimant himself and consider it for any finding including the decision he should not be awarded in lump sum.

VIII. Claimant Is Estopped From Arguing That He Is Not At Maximum Medical Improvement.

Claimant's attempts to reverse the finding of MMI is presumably an attempt to re-try the claim, but he is estopped from taking this position. "Judicial estoppel precludes a party from adopting a position in conflict with one earlier taken in the same or related litigation." Hayne Federal Credit Union v. Bailey, 327 S.C. 242, 489 S.E.2d 472 (1997). Claimant's Form 58 essentially requests a finding of permanent and severe brain damage and lists the medical evidence in support of his contention. (R. at __.) Claimant's vocational evaluation states that Claimant is permanently and totally disabled. (APA pp. 132-136) In addition, the Single Commissioner recited the Claimant's position at the outset of the hearing—namely, that the Claimant was permanently and totally disabled and entitled to lifetime benefits. (Hr. Tr. Pp.4–5.) There was no alternative position mentioned that Claimant was not at MMI. Because Claimant initially tried the claim solely based on the position he was permanently and totally disabled, he cannot now reverse course and argue that he is not even at MMI.

He did not argue the claimant was not at MMI before the Single Commissioner because there was not sufficient evidence to substantiate such a claim. Dr. Chittum found the claimant at MMI. (APA P. 89) Dr. Buechler recommended additional neuropsychological testing after his own testing failed to render reliable results. (APA pp. 111, 112) The defendants obtained the recommended testing for the claimant with Dr. Williams. He found the claimant was not suffering from "any significant psychological or cognitive deficits...other than malingering" (APA P. 173) Accordingly, he found no basis "from which to conclude that the claimant is in need of treatment for psychological or cognitive difficulties." (APA P. 173) Even in his later emails to Mr.

Pye, Dr. Buechler never recommended any additional treatment of any type for the claimant. (APA P. 145)

CONCLUSION

The Appellant has taken an indefensible position since the beginning of the adjudication of this claim. He asserts to the Commission and the Court that he deserves special treatment because his chosen profession post-injury was illegal rather than legal. He has made arguments to keep the truth about him out of the record based on laws of evidence that are inapplicable. He sought doctors' opinions years after the accident to give legal conclusions. They have made many arguments keep the objective facts from the Commission while introducing baseless legal conclusions disguised as medical records.

The claimant ran a for profit business out of his home. It does not matter at all what he sold. There is no evidence in the record it was a nonprofit methamphetamine business he maintained, and his drug sales became material the day he asserted he was permanently disabled.


Claimant worked for nearly six months after the accident. That fact is undisputed. He worked without incident until he tested positive for Methamphetamines in March 2011. In April he went out of work complaining of back pain and was sent to Chittum. The Claimant was released by Chittum with light to medium restriction, based on an FCE where the Claimant gave questionable effort. Mr. Messer knew about his restrictions and said they could/would have been able to put him back to work making \$15-\$18 an hour. Therefore not only did the claimant maintain an illegal drug selling business post injury, there is also strong evidence that he did work and could have continued to work for the

insured had he applied.

The claimant has no semblance of permanent, severe or physical brain injury. There is no scintilla of evidence to support the contention the claimant suffered a cognitive impairment that would lead him to meet that high burden established by the courts. To the contrary, the claimant ran his own business and worked for others post injury. The claimant never had a valid neuropsychological test without numerous inconsistencies noted. As a result Dr. Waid himself failed to find he suffered significant impairment; Williams found he was malingering, and Buechler referred him on to neuropsychiatrist after invalid test results.

The opinions obtained by the claimant in the months before the accident offered no medical reasons why the claimant had the “permanent and severe” impairment they all neatly alleged. Universally, they all failed to place permanent work restrictions on the claimant as a result of his “severe and permanent brain injury.” The only thing they mentioned the claimant might need as a result of the “permanent and severe” brain injury were reading glasses. Clearly these doctors knew nothing about what this legal standard meant to the Commission or the Court when they wrote it at the request of the claimant three years post-accident after three questionable neuropsychological tests.

Based on the foregoing, the Respondents ask that the Court of Appeals fully affirm the Decision of the Single Commissioner and Full Commission.


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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from the South Carolina
Workers' Compensation Commission

SCWCC File No. 1008485

Appellate Case. No. 2014-001503

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SC Court of Appeals

Rusty Lowery, Claimant,

Appellant,

v.

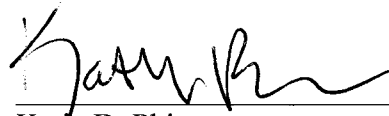
Pioneer Associates, Employer, and
Chartis Casualty Co., Carrier, Defendants,

Respondents.

PROOF OF SERVICE

I certify that I have served the Initial Brief of Respondents and Designation of Matters to be Included in the Record on Appeal on Rusty Lowery by depositing a copy of it in the United State Mail, postage prepaid, on February 9, 2015, addressed to his attorneys of record, David A. Wilson, Esquire, The Law Offices of David A. Wilson, LLC, 200 Whitsett Street, Suite B, Greenville, SC 29601 and Chadwick D. Pye, Esquire, Chadwick D. Pye, LLC, P.O. Box 6346, Spartanburg, SC 29304.

February 9, 2015



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