

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

SCWCC No. 1206447

William M. Rogers, Claimant, Appellant,

v.

Lindstrom Metric, LLC, Employer, and
The Netherlands Insurance Company, Carrier, Respondents.

INITIAL BRIEF OF RESPONDENTS

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SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

- I. DID THE SOUTH CAROLINA WORKERS' COMPENSATION CORRECTLY FIND THAT ROGERS'S LEFT LEG IS THE ONLY BODY PART RELATED TO THIS CLAIM?
- II. DID THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION CORRECTLY FIND THAT ROGERS DID NOT SUSTAIN AN INJURY TO HIS SKIN?
- III. DID THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION CORRECTLY FIND THAT ROGERS'S PREEXISTING DIABETES IS NOT RELATED TO THIS CLAIM?

STATEMENT OF THE CASE

This is an appeal from the South Carolina Workers' Compensation Commission. Appellant William Rogers ("Rogers") filed a Form 50, Notice of Claim, on June 11, 2013, alleging that he sustained injuries by accident arising out of an in the course of his employment, to his left leg, skin, and immune system on or about March 15, 2012. (Form 50, dated June 11, 2013.) Rogers subsequently filed a Form 50, Request for Hearing, on November 20, 2013. The Form 50, Request for Hearing alleged injuries to Rogers's left leg, skin, immune system, diabetes, and kidneys, arising out of an injury on or about March 15, 2012. (Form 50, dated November 19, 2013.) Respondents Lindstrom Metric, LLC and its workers' compensation insurance carrier, The Netherlands Insurance Company (collectively "Lindstrom"), timely filed a Form 51 on December 19, 2013, admitting that an injury by accident took place but disputing the injured body parts and extent of any disability. (Form 51, dated December 19, 2013.)

The claim was called for hearing on February 7, 2014, in front of Commissioner Avery B. Wilkerson, Jr. At the hearing, Rogers took the position that this was an admitted injury to the left leg, and that only the left leg needed to be addressed at the hearing. (Hr. Tr. p. 7, lines 23-25.) In the alternative, Rogers contended that he had suffered other injuries, including an exacerbation of his pre-existing diabetes and an injury to the skin. (*Id.* at 8:1-9:5.) On his Pre-Hearing Brief dated January 15, 2014, Rogers alleged injuries to his left lower extremity, skin, immune system, diabetes, and kidneys. (Rogers's Pre-Hearing Brief, dated January 15, 2014.) Rogers sought payment of causally-related medical treatment and temporary total disability benefits (TTD) from

March 19, 2012 thru March 26, 2012 and from April 30, 2013 to the present and continuing. (Hr. Tr. p. 7, lines 14-20.) Rogers contended that he continued to be written out of work by his family doctor and that he was not able to work as a result of his work-related accident. (Id. at 6:20-7:2.) He also sought continuing treatment with Dr. Lisa Darby. (Id. at 9:6-9.) Rogers's attorney did not disagree that Lindstrom should only be responsible for treatment with Dr. Darby moving forward. (Id. at 17:16-17.)

Lindstrom admitted an injury to Rogers's left leg only. (Id. at 9:14-15.) Lindstrom contended that TTD was only appropriate, if at all, from March 19, 2012 thru March 26, 2012 and April 30, 2013 thru October 21, 2013. (Id. at 9:16-23.) Lindstrom's position was that Rogers reached maximum medical improvement (MMI) on October 21, 2013, with regard to the admitted left leg injury. (Id. at 9:24-10:8.) Lindstrom argued that a finding of MMI, and therefore a termination of TTD benefits required a finding of the involved body parts. (Id. at 10:17-19; 11:15-16; 13:14-19.) Finally, Lindstrom took the position that that diabetes is not a body part under the Act, that Rogers did not have sufficient evidence to prove injury to his kidneys or immune system, and that there was no skin loss. (Id. at 10:20-11:14.)

On March 17, 2014, the Single Commissioner issued his Decision and Order finding that Rogers was entitled to TTD from March 19, 2012 to March 26, 2012 and from April 30, 2013 until October 21, 2013, that Rogers reached MMI on October 21, 2013, and that Rogers only suffered a left leg injury. (Order, dated March 17, 2014, pp. 15-16.) Rogers subsequently filed a Form 30, Request for Commission Review, on March 27, 2014. (Form 30, dated March 27, 2014.) Oral arguments were held in front of the Appellate Panel of the Workers' Compensation Commission on December 16, 2013.

(*See* Order, dated September 4, 2014.) On September 4, 2014, the Appellate Panel issued a Decision and Order affirming the Order of the Single Commissioner in its entirety. (Id.) Thereafter, Rogers filed a Notice of Appeal with this Court. (*See* Notice of Appeal, dated October 6, 2014.)

STATEMENT OF THE FACTS

Rogers worked for Lindstrom for approximately two years running a bolt-threading machine. (Hr. Tr. p 18, lines 13-21.) On the day of the accident, Rogers was running his machine when the “handwheel came off” and hit him in the left leg. (Id. at 20:1-8.) Rogers testified that he has had swelling and pain in his left leg since the date of the accident. (Id. at 20:11-14.) Additionally, he has had cellulitis and discoloration in the left leg. (Id. at 21:1-18.)

Rogers admitted that he had pre-existing diabetes and acknowledged that it had been characterized as uncontrolled. (Id. at 30:4-13.) Rogers testified that he has also seen a kidney doctor and a heart doctor. (Id. at 33:11-15.) He admitted that he has experienced recent problems with blood pressure and diabetes. (Id. at 33:20-22.)

Rogers initially treated with Elaine Noonan, NP, for injuries sustained in his accident on March 15, 2012. On March 19, 2012, Rogers presented to Nurse Practitioner Noonan for a diabetes follow up. She noted that he injured his left leg at work, and that it was tight, swollen, red, and painful. (APA #7, p. 126.) She became concerned that Rogers had a deep venous thrombosis (DVT), and she sent him for a Doppler ultrasound and x-rays. (Id. at 128.) X-rays of Rogers’s left leg and left knee, and an ultrasound of his left leg showed no signs of a DVT. (APA #8 pp. 154-158.)

Rogers followed up with Dr. James Franklin on March 21, 2012. Dr. Franklin noted that Rogers had swelling, redness, and pain in his left leg. (APA #1, p. 1.) Dr. Franklin diagnosed Rogers with Cellulitis and prescribed Doxycycline. (Id. at p. 2.) Dr. Franklin placed Rogers out of work from March 19, 2012 until March 23, 2012. (Id. at p. 4.) Rogers followed up with Dr. Franklin on April 4, 2012. By that point, he was

experiencing decreased pain, and he was able to stand for long periods of time. (Id. at p. 5.) However, the swelling had persisted and Dr. Franklin ordered a follow-up ultrasound. (Id. at p. 6.) This study showed normal compression of the deep veins in Rogers's left leg. (APA #8, p. 157.) By April 16, 2012, Dr. Franklin noted that Rogers had decreased pain and swelling, and that he worked on his feet on a daily basis. (APA #1, p. 10.) Dr. Franklin instructed Rogers to continue taking Doxycycline and follow up with him in 6 weeks. (Id. at pp. 10-11.)

Rogers next treated with Nurse Practitioner Noonan on May 31, 2012, for a diabetes follow up. This note indicates that Rogers's pain level in his left leg was a 1 out of 10. (APA #7, p. 132.) The note also states that his extremities were "normal in appearance, no edema, pulses intact." (Id.) Rogers followed up with Dr. Franklin on June 25, 2012. At this point, Rogers started having problems with his left leg again. (APA #1, p.13.) Dr. Franklin's note indicates that Rogers complained of redness, swelling, and blisters on his lower left leg. (Id.) There were several small ulcerations on the left leg with clear drainage. (Id.) Due to the continued issues, Dr. Franklin referred Rogers to a vascular specialist. (Id. at p. 13-14.)

Rogers presented to Dr. Stephen Chastain at Vascular Medicine on July 6, 2012. Dr. Chastain noted moderate pitting edema on the left calf, small blisters, and a larger area of broken skin. (APA #2, p.64.) He also noted pink coloration around Rogers's ankle. (Id.) Dr. Chastain diagnosed Rogers with leg swelling, tinea pedis, and leg pain. (Id.) Dr. Chastain instructed Rogers to bandage his leg and elevate it as much as possible. (Id.) He also prescribed Doxycycline. (Id.) Rogers followed up with Dr. Chastain on July 24, 2012. By this point, Rogers's swelling and discoloration had improved and the skin had

closed. (Id. at p.65) Dr. Chastain's examination revealed improved coloration, improved swelling, and no drainage or scabs. (Id. at p. 66.) He recommended that Rogers wear knee-high stockings during the day. (Id.) On August 21, 2012, Rogers followed up with Dr. Chastain for persistent swelling. Dr. Chastain's note indicates that Rogers had some swelling in the right leg. (Id. at p. 68.) The note indicates that Rogers believed he may have "bumped" his left leg. (Id.) Dr. Chastain did not notice any signs of worsening Cellulitis and continued to recommend compression stockings. (Id. at pp. 68-69.)

On November 20, 2012, Rogers followed up with Dr. Chastain. Rogers reported that his legs were improving, that he wore his compression stockings daily, and that he did not require any narcotics. (Id. at p. 71.) Dr. Chastain opined that Rogers had improved "about as much as [he] expected him to." (Id.) He noted that Rogers had a chronic condition and would benefit from compression stockings indefinitely. (Id.) In his deposition, Dr. Franklin testified that he felt Rogers's condition was chronic and stable at this point in time. (Franklin dep. p. 14, lines 17-23.) Rogers's next date of service was on December 5, 2012, with Nurse Practitioner Noonan. Nurse Practitioner Noonan noted that his left leg continued to be light pink and swollen, which was chronic since his accident. (APA #7, p. 141.) There were no open sores and no drainage. (Id.) Rogers followed up with Dr. Franklin on December 19, 2012, at which point he did not report any problems with his left leg. (APA #6, pp. 115-117.) Finally, on March 6, 2013, Nurse Practitioner Noonan's assessment of Rogers's left leg was unchanged from the December 5, 2012, date of service. (APA #7, p. 143.)

On April 30, 2013, Rogers presented to Dr. Franklin with complaints of low abdominal pain, vomiting, and a fever. (APA #1, p. 17.) Dr. Franklin was concerned

Rogers had diverticulitis and admitted him to the hospital for further evaluation. (Id. at pp. 17-20.) Rogers was admitted to the hospital on April 30, 2013, and remained in the hospital until May 11, 2013. The diagnoses at the time of Rogers's discharge were sepsis, diverticulitis, and cellulitis of the left leg. (APA #3, pp. 86-94.)

Rogers followed up with Dr. Franklin following the hospitalization on May 17, 2013. Dr. Franklin noted chronic left leg edema, which had improved since his hospitalization. (APA #1, p. 21.) Dr. Franklin referred Rogers back to Dr. Chastain for a follow up appointment. (Id. at p. 22.) Dr. Franklin also began writing Rogers out of work at this time. (Id. at p. 25.) He has continued to write Rogers out of work since his hospitalization. However, he testified in his deposition that he has kept Rogers out of work for a "multitude of factors, one of which is his leg." (Franklin dep. p. 23, lines 13-17.) Rogers followed up with Dr. Chastain on May 22, 2013, for persistent swelling and redness of the left leg. (APA #2, p. 74.) Dr. Chastain diagnosed Rogers with leg swelling and chronic venous insufficiency. (Id. at p. 75.) He continued to recommend daily compression therapy. (Id.)

Dr. Chastain relocated out of state during the course of Rogers's treatment. Thus, he began seeing Dr. Lisa Darby at Vascular Medicine on July 23, 2013. Dr. Darby's note indicates that Rogers's swelling and discoloration were at baseline, and that Rogers still experienced occasional aching sensation and pain in his leg. (Id. at p. 80.) Dr. Darby diagnosed Rogers with chronic venous insufficiency and swelling of the limb. (Id. at p. 81.) She opined that the swelling was secondary to central issues such as medications, kidney disease, or thyroid or cardiac problems. (Id.) Like Dr. Chastain, she recommended Rogers continue using compression stockings. (Id. at p. 82.) Rogers again followed up

with Dr. Darby on October 21, 2013. Dr. Darby again noted swelling in Rogers's leg and felt that it was secondary to central issues. (Id. at p. 172.) She recommended a renal evaluation, cardiology evaluation, and follow up with Dr. Franklin. (Id. at p. 173.) She instructed Claimant to follow up in six months. (Id.) In her deposition, Dr. Darby testified that Rogers reached maximum medical improvement at this point in time. (Darby dep. p. 34, lines 4-10.) Dr. Franklin also testified that Rogers was at maximum medical improvement on October 21, 2013. (Franklin dep. p. 36, lines 3-10.)

Lindstrom submitted records from Dr. Joshua Wellborn and Dr. Franklin, both of Greenville Family Practice, and Elaine Noonan, NP, of the Greenville Health System, into evidence. Records from Dr. Wellborn dated October 22, 2010 and May 16, 2011, indicate that Rogers treated for uncontrolled Type II Diabetes prior to his work-related accident of March 15, 2012. (APA #5, pp. 103-109.) Additionally, a record from Dr. Franklin dated February 13, 2012, indicates that Rogers had uncontrolled diabetes prior to his accident on March 15, 2012. (Id. at p. 110-112.) Finally, a February 27, 2012, note from Nurse Practitioner Noonan indicates that Rogers had an A1c of 11.6% in February of 2012, which indicates uncontrolled diabetes. (APA #7, p. 121.) Additionally, Dr. Lisa Darby and Dr. Franklin testified that Rogers treated for uncontrolled diabetes prior to his work-related accident. (Darby dep. p. 6, lines 4-7; Franklin dep. p. 5, lines 2-9.)

Lindstrom also submitted records from Dr. Willy Tsai with Carolina Nephrology into evidence. These records indicate that Rogers treated with Dr. Tsai on June 17, 2013. Dr. Tsai noted that Rogers had kidney dysfunction that had been present for years, and stated that his chronic kidney disease was at stage 3. (APA #11, pp. 166-168.)

Dr. Lisa Darby was deposed on January 23, 2014. Dr. Darby is board certified in vascular medicine, internal medicine, and vascular lab. (Darby dep. p. 4, lines 21-25.) Dr. Darby reviewed a March 19, 2012, note from Nurse Practitioner Noonan, and testified that Rogers had uncontrolled diabetes at that time. (Id. at 6:8-14.) She also testified that he was treated for uncontrolled diabetes prior to his date of accident. (Id. at 6:4-7.)

Dr. Darby next reviewed a November 20, 2012, note from Dr. Stephen Chastain. She stated that it appeared Rogers was released from treatment for his left leg concerns on that date. (Id. at 17:20-19:5) Dr. Darby reviewed notes from Nurse Practitioner Noonan dated December 5, 2012, and March 6, 2013, along with a note from Dr. James Franklin dated December 19, 2012. After reviewing the notes she stated that it appeared Rogers had chronic swelling in the left leg. (Id. at 20:1-22:17.)

Dr. Darby took over Rogers's care on July 23, 2013. At that point, Dr. Darby believed that the swelling in his legs could be secondary to central issues such as "medicines, his kidney disease, possibly thyroid, cardiac." (Id. at 31:6-13.) She noted that he had pitting edema in the left leg, and she attributed the edema to his overall health picture as well as his comorbidities. (Id. at 31:23-32:4.) Dr. Darby testified that the last time she had seen Rogers was October 21, 2013. (Id. at 32:5-7.) She further testified that Rogers had reached MMI from the blow to his left leg by October 21, 2013. (Id. at 34:4-10.) Dr. Darby testified that the only thing she had left to offer Rogers in the form of treatment is compression stockings and conservative measures. (Id. at 37:2-5.)

Dr. James Franklin was deposed on January 31, 2014. Dr. Franklin is Rogers's primary care physician. He testified that he is board certified in family medicine. (Franklin dep. p. 4, line 14.) Dr. Franklin reviewed a Greenville Family Practice record

dated October 22, 2010, and testified that it appeared that Rogers had uncontrolled diabetes at that time. (Id. at 5:2-9.)

Dr. Franklin testified that by November 20, 2012, Rogers had chronic swelling and discoloration of his left leg. (Id. at 14:16-23.) Based on Dr. Chastain's note of November 20, 2012, Dr. Franklin believed the condition was stable at that time. (Id.) Dr. Franklin also interpreted Dr. Chastain's note as placing Rogers at maximum medical improvement on November 20, 2012. (Id. at 15:22-16:1.) Dr. Franklin reviewed his note from December 19, 2012, and again stated that he felt Rogers's left leg swelling was chronic and stable. (Id. at 16:24-17:16.)

Dr. Franklin testified that he has kept Rogers out of work. He testified that he kept him out of work for a period of time beginning on August 26, 2013, for problems unrelated to his left leg. (Id. at 20:9-21:10.) Dr. Franklin testified that he has continued to keep Rogers out of work for multiple factors. (Id. at 21:19-22:2.) Finally, after reviewing Dr. Darby's note of October 21, 2013, Dr. Franklin believed that Rogers was at maximum medical improvement for his work-related injury. (Id. at 22:3-23:12.)

STANDARD OF REVIEW

The Administrative Procedures Act establishes the rule for judicial review of awards of the Workers' Compensation Commission. Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981). In workers' compensation cases, the South Carolina Workers' Compensation Commission is the trier of fact. Hunter v. Patrick Construction Co., 289 S.C. 46, 344 S.E.2d 613 (1986). The appellate court's review of these findings of fact is limited to determining whether the findings are clearly unsupported by substantial evidence in the record. Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981); Howell v. Pacific Columbia Mills, 291 S.C. 469, 354 S.E.2d 384 (1987). The appellate court is not permitted to re-weigh the evidence and to substitute its own findings of fact for those of the Commission. Brown v. Jordan Oil Co., 291 S.C. 272, 353 S.E.2d 280 (1987). An appellate court can reverse or modify the Commission's decision if it is affected by an error of law or clearly erroneous in view of the reliable, probative, and substantial evidence in the whole record. Fishburne v. ATI Systems Intern., 384 S.C. 76, 681 S.E.2d 595 (Ct. App. 2009) (citing S.C. Code Ann. §1-23-380).

"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." Pierre v. Seaside Farms, Inc., 386 S.C. 534, 689 S.E.2d 615 (2010). Substantial evidence "is something less than the weight of the evidence"; it is "evidence which...would allow reasonable minds to reach the conclusion...the administrative agency reached." De Groot v. Employment Security Commission, 285 S.C. 209, 328 S.E.2d 668 (Ct. App. 1985) (citing Ellis v. Spartan Mills, 276 S.C. 216, 277 S.E.2d 590 (1981)). "Indeed, the possibility of drawing two inconsistent conclusions from the evidence does

not prevent an administrative agency's findings from being supported by substantial evidence." Muir v. C.R. Bard, Inc., 336 S.C. 266, 519 S.E.2d 593 (Ct. App. 1999).

ARGUMENT

I. THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION CORRECTLY FOUND THAT ROGERS'S LEFT LEG IS THE ONLY BODY PART RELATED TO THIS CLAIM.

Rogers contends that the Single Commissioner erred in making a finding regarding the body parts which are related to this claim. Rogers alleges that the Commissioner made a finding regarding permanency when the issue was not before him and that this was a violation of Rogers's due process rights. Additionally, Rogers argues that a finding regarding other body parts was not before the Commissioner and a ruling regarding other body parts was not proper. However, these assertions are not correct.

As an initial matter, Rogers did have notice of the issues to be heard at the hearing. The hearing in this case was set on Rogers's Form 50 Request for Hearing. (*See* Notice of Hearing.) Rogers's Form 50 alleged injuries to his left leg, skin, immune system, diabetes, and kidneys. (Form 50, dated November 19, 2013.) He also requested TTD for "3/21/12-3/26/12 and 4/30/13 to present and continuing." (*Id.*) Additionally, on the Form 58 Pre-Hearing Brief Rogers listed "left lower extremity, skin, immune system, diabetes, [and] kidneys" as injured body parts. (Form 58, dated January 30, 2014.) Therefore, he clearly pled body parts in addition to the left leg. Additionally, in the "Facts in controversy" section of the Form 58 Rogers stated "[w]hether claimant is entitled to temporary total disability benefits from 3/19/12-3/26/12 and from 4/30/13 to present and continuing." (*Id.*)

The South Carolina Workers' Compensation Act provides that injured workers are entitled to receive weekly benefits while they are totally disabled from working. S.C. Code Ann. § 42-9-10 provides that while the "incapacity for work resulting from an

injury is total, the employer shall pay, or cause to be paid, as provided in this chapter, to the injured employee during the total disability a weekly compensation equal to sixty-six and two-thirds percent of his average weekly wages. . . .” The South Carolina Supreme Court has stated the following with regard to workers’ compensation benefits in South Carolina:

Essentially, workers’ compensation benefits accrue along a time continuum: temporary total disability benefits are available from the date of injury through the date of maximum medical improvement; post-MMI benefits may then be awarded either as a permanent total or partial disability, or as a percentage of impairment to a scheduled member. Smith v. NCCI, Inc., 369 S.C. 236, 631 S.E.2d 268 (Ct. App. 2006). Accordingly, the date of maximum medical improvement signals the end of entitlement to temporary total benefits.

Curiel v. Environmental Management Services (MS), 376 S.C. 23, 655 S.E.2d 482 (2007). It is undisputed that a workers’ compensation claimant’s entitlement to temporary total disability benefits terminates as of the date that they reach MMI, because they are no longer temporarily disabled as a result of their work-related injury.

As is discussed above, a claimant’s entitlement to TTD benefits is dependent upon them being temporarily totally disabled from work as a result of a work-related accident. Implicit in Rogers’s request for TTD benefits on a running award (i.e. to present and continuing), is his request for a determination that he is not at MMI from his work-related accident. If Rogers was at MMI he would not be entitled to continuing TTD benefits. In order to determine if Rogers is or is not at MMI as a result of his work-related accident on March 15, 2012, the Commission had to make a determination regarding which body parts were related to the claim. The Commission could not determine whether Rogers was entitled to TTD benefits, without determining whether Rogers was still temporarily disabled as a result of his work-related injury. In turn, the

Commission could not make a finding regarding MMI without making a finding concerning the body parts related to the claim. By placing the issue of continuing TTD benefits at issue at the hearing before the Commission, Rogers placed the issue of what body parts are related to the claim before the Commission.

Rogers cites Bass v. Kenco Group, 366 S.C. 250, 622 S.E.2d 577 (Ct. App.2005), in support of his argument. In that case, the defendants argued that the claimant was not yet entitled to *permanent* disability benefits because he was not yet at maximum medical improvement for all of his injuries. The defendants asserted that a claimant could not be partially at MMI and partially not at MMI. The Court of Appeals disagreed and found that a claimant could be at MMI for one injury but not all injuries. In citing Bass, Rogers misstates Lindstrom's argument. Lindstrom does not contend that a finding of MMI—standing alone—requires a finding regarding the body parts related to the case. However, Lindstrom does contend that a decision regarding TTD benefits requires a finding regarding MMI and the body parts related to an accident. As is stated above, a claimant is only entitled to TTD benefits while they are temporarily disabled as a result of their work-related accident. In order to determine if a claimant is temporarily disabled as a result of a work-related accident, a Commissioner must make a determination regarding the injuries and body parts caused and/or affected by the accident. If the temporary disability is caused by reasons unrelated to the employment, an employer would not be liable for temporary compensation. Therefore, in order to determine if Rogers was entitled to TTD benefits as he requested, the Commission had to determine if he was still temporarily disabled from injuries caused by his work-related accident.

There was testimony in the record that Rogers was written out of work for a multitude of factors. Dr. Franklin, Rogers's family doctor, is the physician that has continued to write Rogers out of work. (See APA #1.) In his deposition, Dr. Franklin testified as follows:

Q: [Mr. Few]: So when you wrote him out of work, was it for problems unrelated to his left leg?

A: [Dr. Franklin]: Well, on this day, I would say the answer to the question is yes.

Q: And in your continued treatment of Mr. Rogers, have you kept him out of work?

A: Yes.

Q: Does it remain that the reason he is out of work is for problems that are unrelated to his left leg?

A: Well, I think it has to do with his leg, as well as other problems.

Q: So is he out of work currently for a multitude of factors?

A: The answer to your question is yes.

Q: Would you say his overall health picture?

A: I think it has to do with multiple issues.

(Franklin Depo at 21:7-24.) Since Rogers has been written out of work due to a multitude of factors, the Commission had to determine if these factors were related the work-related injury. It would have been impossible to make a decision regarding Rogers's request for TTD benefits without considering MMI and related body parts.

The Commission's findings regarding the body parts related to the instant case were not improper and did not violate Rogers's due process rights. Rogers placed the issue before the Commission by requesting TTD on a running award; therefore, he had

notice that the issue would be determined at the hearing. In the same vein, the Commission correctly made a finding regarding related body parts because it had to determine whether Rogers was entitled to ongoing TTD benefits. Thus, the Commission's findings regarding body parts related to the claim were proper.

Finally, Rogers also argues that the Commission made "permanency" findings. The Commission's findings were not "permanency" findings. The Commission did not decide the extent of Rogers's permanent disability caused by his work-related injury. The Commission merely decided which body parts were related to the claim in order to determine if Rogers was entitled to ongoing TTD benefits. The Commission's Finding of Fact number 11 states, "this is a single body part claim involving only Claimant's left leg. Any award of permanent disability should be for the left leg only pursuant to S.C. Code Ann. § 42-9-30. This finding is supported by the preponderance of the evidence." (Order, dated September 4, 2014.) The Commission's Finding of Fact number 13 states, "a determination regarding the extent of permanent disability to the claimant's left leg shall be held in abeyance until further evidence as to impairment/disability is attained [sic]." (Id.) The Commission specifically reserved the issue of "permanency" or permanent disability for a later time. The Commission makes findings on a regular basis regarding the causal relationship of body parts to an accident without determining the extent of permanent disability. The two do not necessarily go "hand-in-hand." It is possible—and was proper in this case—to determine which body parts are related to a claim without determining the extent of permanency.

II. THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION CORRECTLY FOUND THAT ROGERS DID NOT SUSTAIN AN INJURY TO HIS SKIN.

Rogers argues that the Commission erred in finding that Rogers did not sustain an injury to the skin. A claimant has the burden of proving facts that will bring the injury within the workers' compensation law, and such award must not be based on surmise, conjecture, or speculation. Jennings v. Chambers Development Co., 335 S.C. 249, 516 S.E.2d 453 (Ct. App. 1999). In workers' compensation cases, the South Carolina Workers' Compensation Commission is the trier of fact. Hunter v. Patrick Construction Co., 289 S.C. 46, 344 S.E.2d 613 (1986). The appellate court's review of these findings of fact is limited to determining whether the findings are clearly unsupported by substantial evidence in the record. Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981); Howell v. Pacific Columbia Mills, 291 S.C. 469, 354 S.E.2d 384 (1987). "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." Pierre v. Seaside Farms, Inc., 386 S.C. 534, 689 S.E.2d 615 (2010). Substantial evidence "is something less than the weight of the evidence"; it is "evidence which...would allow reasonable minds to reach the conclusion...the administrative agency reached." De Groot v. Employment Security Commission, 285 S.C. 209, 328 S.E.2d 668 (Ct. App. 1985) (citing Ellis v. Spartan Mills, 276 S.C. 216, 277 S.E.2d 590 (1981)). "Indeed, the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence." Muir v. C.R. Bard, Inc., 336 S.C. 266, 519 S.E.2d 593 (Ct. App. 1999).

As Rogers indicates, the Single Commissioner had the opportunity to observe Rogers's left leg at the hearing. (Hr. Tr. pp. 21:19-23:5.) It is often stated that the Single Commissioner is in the best position to observe the credibility of witnesses because they have the opportunity to observe the witnesses' demeanor and the delivery of their testimony. *See Brunson v. American Koyo Bearings*, 395 S.C. 450, 718 S.E.2d 755 (Ct. App. 2011) (quoting *Fishburne v. ATI Systems, Int'l*, 384 S.C. 76, 681 S.E.2d 595 (Ct. App. 2009) ("it is logical for the Appellate Panel, which did not have the benefit of observing the witnesses, to give weight to the Hearing Commissioner's opinion")). The same logic can be applied here. It would be logical for this Court to give weight to the Single Commissioner's decision regarding Rogers's skin because he had the opportunity to observe Rogers's leg at the hearing. The Appellate Panel of the Commission also found that Rogers did not sustain an injury to the skin.

The Single Commissioner noted on the record that there was some discoloration on Rogers's left leg. However, he did not note any *loss* of the skin. There is a difference in discoloration/disfigurement/scarring and a loss of skin. Rogers did not plead scarring or disfigurement, which would not be considered a second body part for general disability purposes under the Act. Rather he pled an injury to the skin, but failed to prove a loss of skin. The Single Commissioner observed Rogers's leg and considered the medical evidence, and he determined that Rogers failed to carry his burden of proving an injury to his skin. Based on the evidence in the record and the Single Commissioner's observation of Rogers's leg, this finding was not in error. The Commission confirmed the ruling of the Single Commissioner. Rogers argues that the finding was improper because it was conclusory and the Commission did not explain "why it did not find injury to the skin."

The Commission in Finding of Fact number 9 clearly stated that Rogers failed to carry his burden of proof *and* based their on the preponderance of the medical evidence. Therefore, this Court should affirm the Commission and find that the skin is not a related body part and that Lindstrom is not responsible for treatment with Dr. Kuhl.

III. THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION CORRECTLY FOUND THAT ROGERS'S PREEXISTING DIABETES IS NOT RELATED TO THIS CLAIM.

Rogers argues that the Commission erred in failing to find that Rogers's preexisting diabetes aggravates his work-related left leg injury. Therefore, the Commission erred in limiting Rogers to a single body part. Both Dr. Darby and Dr. Franklin testified that Rogers was treated for diabetes prior to his work-related accident on March 15, 2012. (Darby dep. p. 6:8-14; Franklin dep. p. 5:2-9.) Additionally, the medical records indicate that Rogers had uncontrolled diabetes prior to his work-related accident. (Defendants' APA #5, pp. 98-103.)

As a preliminary issue, diabetes is not a "body part" under the Act. Therefore, Rogers's diabetes has no bearing on whether or not he is entitled to an award for disability in addition to that provided under S.C. Code Ann. §42-9-30. Rogers argues that §42-9-35 would entitle him to additional benefits. However, this is a misstatement of the law. That code section states:

(A) The employee shall establish by a preponderance of the evidence, including medical evidence, that:

(1) the subsequent injury aggravated the preexisting condition or permanent physical impairment; or

(2) the preexisting condition or the permanent physical impairment aggravates the subsequent injury.

(B) The commission may award compensation benefits to an employee

who has a permanent physical impairment or preexisting condition and who incurs a subsequent disability from an injury arising out of and in the course of his employment for the resulting disability of the permanent physical impairment or preexisting condition and the subsequent injury. However, if the subsequent injury is limited to a single body part or member scheduled in Section 42-9-30, except for total disability to the back as provided in Section 42-9-30(21), the subsequent injury must impair or affect another body part or system in order to obtain benefits in addition to those provided for in Section 42-9-30.

S.C. Code Ann. §42-9-35 (1976).

Rogers argues that §42-9-35(A)(2) allows him to proceed under a general disability statute and not be confined to the single-member section. However, as is stated in subsection (B), this is not accurate. In order to show that aggravation of a preexisting condition results in entitlement to permanent and total disability or a permanent loss in earning capacity, claimants have to show that the subsequent injury impaired or affected “another body part or system.” In the instant case, Rogers cannot and has not proven this element. Rogers has only demonstrated a work-related injury to his left leg. Diabetes is not a “body part or system.” Therefore, the Single Commissioner did not err in finding that Rogers’s preexisting diabetes is not related to this claim and that he has only sustained an injury to the left leg. In this instance, subsection (A)(2) would only allow a Commissioner to consider the effects of Rogers’s preexisting diabetes when determining permanent disability for the left leg.

As is stated above, it is clear that Rogers had uncontrolled diabetes prior to his work-related accident. Therefore, the Commission did not err in finding that Rogers’s diabetes is not related to this accident. Additionally, Rogers cannot prove that his subsequent injury impaired or affected another body part or system. Diabetes is not a

body part or system under the Act. Therefore, the Commission did not err in finding that Rogers has only suffered an injury to one body part, his left leg.

CONCLUSION

For the foregoing reasons, Lindstrom respectfully requests this Court to fully affirm the South Carolina Workers' Compensation Commissions' Order. Specifically, the rulings finding Rogers has only sustained a work-related injury to his left leg and that Lindstrom is only responsible for medical treatment at the direction of Dr. Lisa Darby.

Respectfully submitted,

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March 3, 2015

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

SCWCC No. 1206447

RECEIVED
MAR 06 2015
SC Court of Appeals

William M. Rogers, Claimant, Appellant,

v.

Lindstrom Metric, LLC, Employer, and
The Netherlands Insurance Company, Carrier, Respondents.

CERTIFICATE OF SERVICE

I, Cheri Evans Coon, do hereby certify that I am the Legal Assistant to for Jason A. Griggs, Esquire, attorney for the defendants with **WILLSON JONES CARTER & BAXLEY, P.A.** in Greenville, South Carolina, and that on the 3rd day of March, 2015, I mailed the foregoing **INITIAL BRIEF OF RESPONDENTS** to the following by placing a copy thereof in the United States mail, first class, proper postage affixed thereto:

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