

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Appellate Case No. 2014-001816

RECEIVED

JUN 29 2015

SC Court of Appeals

Clarence Winfrey, Employee, Appellant,

v.

Archway Services, Inc., Employer,
and American Fire & Casualty Insurance
Company, Carrier, Respondents.

INITIAL BRIEF OF APPELLANT

Preston F. McDaniel, Esquire
MCDANIEL LAW FIRM
1315 Elmwood Avenue
Columbia, South Carolina 29201
(803) 771-7211

Attorney for Appellant

TABLE OF CONTENTS

Table of Authorities iii
Statement of Issues of Appeal v
Statement of the Case 1
Statement of Facts 5

Arguments

I. WHERE THE ISSUES BEFORE THE HEARING COMMISSIONER WERE WHETHER THE CLAIMANT HAD SUSTAINED COMPENSABLE INJURY BY ACCIDENT AND WHETHER HE WAS ENTITLED TO REINSTATEMENT OF WEEKLY COMPENSATION BENEFITS AND TO MEDICAL BENEFITS FOR ALL CAUSALLY RELATED INJURIES AND CONDITIONS STEMMING FROM THE ACCIDENT, AND WHERE THE COMMISSION FOUND COMPENSABLE INJURY BY ACCIDENT, REINSTATED ALL BENEFITS AND FOUND THAT THE CLAIMANT WAS NOT AT MAXIMUM MEDICAL IMPROVEMENT, THE FULL COMMISSION PANEL ERRED AS A MATTER OF LAW BY DENYING THE CLAIMANT THE RIGHT TO EVER REQUEST BENEFITS FOR INJURY TO THE HEAD AND BRAIN. 14

II. WHERE THE CLAIMANT WAS FOUND TO BE NOT AT MAXIMUM MEDICAL IMPROVEMENT AND WHERE HE IS REQUIRED TO LIST ALL POSSIBLY AFFECTED BODY PARTS ON HIS REQUEST FOR HEARING, AND WHERE THE DEFENDANTS GAVE NO NOTICE OF THIS DEFENSE, THE FULL COMMISSION PANEL ERRED AS A MATTER OF LAW BY PERMANENTLY DENYING THE CLAIMANT MEDICAL AND/OR COMPENSATION BENEFITS FOR INJURY TO THE BRAIN AND/OR HEAD. 19

III. THE FULL COMMISSION PANEL ERRED AS A MATTER OF LAW BY CONSIDERING THE ISSUE AND DENYING THE CLAIMANT ON A PERMANENT BASIS ANY BENEFITS, MEDICAL OR COMPENSATION, RELATED TO INJURY TO THE HEAD AND/OR BRAIN WHERE THE CLAIMANT HAD REMOVED SUCH ISSUES FROM CONSIDERATION AT THE TIME OF THE HEARING. 21

IV. THE FULL COMMISSION PANEL ERRED IN VIOLATION OF ITS STATUTORY REVIEW/DECISION OBLIGATION BY ALLOWING DEFENSE COUNSEL TO DRAFT ITS OWN FINDINGS OF FACT AND CONCLUSIONS OF LAW ADDRESSING THE ISSUES RAISED FOR REVIEW AS REQUIRED BY LAW AND BY ISSUING AN ORDER THAT WENT BEYOND ITS DIRECTION AND BY ISSUING AN ORDER WRITTEN BY DEFENSE COUNSEL THAT DELETED AND/OR SUBSTANTIALLY MODIFIED UNRELATED BUT SUBSTANTIAL FINDINGS OF FACT AND CONCLUSIONS OF LAW MADE BY THE HEARING COMMISSIONER. . . . 23

Conclusion 30

TABLE OF AUTHORITIES

Cases

Baldwin v. James River Corp.,
304 S.C. 485, 405 S.E.2d 421 (S.C. App. 1991) 29

Brown v. Peoplease Corp.,
402 S.C. 476, 741 S.E.2d, 761 (S.C. App. 2013) 30

Chapman v. Foremost Dairies, Inc.,
249 S.C. 438, 154 S.E.2d 845 (1967) 31

Cokely v. Robert Lee, Inc.,
197 S.C. 157, 14 S.E.2d 889 (1941) 22

Cranford v. Hutchinson Constr.,
399 S.C. 65, 731 S.E.2d. 303 (SC App. 2012) 17

Drake v. Raybestos-Manhattan, Inc.,
241 S.C. 116, 127 S.E.2d 288 (1962) 29

Etheridge v. Joslyn Clark Controls, Inc.,
325 S.C. 532, 482 S.E.2d 577 (SC App. 1997) 18

Gold v. Moragne,
202 S.C. 289, 24 S.E.2d 491 (1943) 22

Hamm v. Mullins Lumber Co.,
193 S.C. 66, 7 S.E.2d 712 (1940) 21, 22

Krell v. SC State Hwy. Dept.,
337 S.C. 584, 118 S.E.2d 322 (1961) 18

Smith v. Mental Health,
335 S.C. 396, 517 S.E.2d, 695 (1999) 17

Walker v. City of Columbia,
247 S.C. 241, 146 S.E.2d 856 (1966) 28

Statutes, Rules and Regulations

SC Code Ann. §1-23-340 28

SC Code Ann. §1-23-350 28

SC Code Ann. §42-1-120 16, 31

SC Code Ann. §42-1-160 8, 16

SC Code Ann. §42-9-10	8, 16, 17, 18, 31
SC Code Ann. §42-9-20	8, 17
SC Code Ann. §42-9-30	8, 17
SC Code Ann. §42-9-120	18
SC Code Ann. §42-9-260	7, 8
SC Code Ann. §42-15-60	7, 8, 12, 16, 18, 31
SC Code Ann. §42-17-40	28
SC Code Ann. §42-17-50	28
Reg. 67-709(E) (2)	29

STATEMENT OF ISSUES ON APPEAL

- I. WHETHER THE FULL COMMISSION PANEL ERRED AS A MATTER OF LAW BY DENYING THE CLAIMANT THE RIGHT TO EVER REQUEST BENEFITS FOR THE HEAD AND BRAIN WHERE THE ISSUES BEFORE THE HEARING COMMISSIONER WERE WHETHER THE CLAIMANT HAD SUSTAINED COMPENSABLE INJURY BY ACCIDENT AND WHETHER HE WAS ENTITLED TO REINSTATEMENT OF WEEKLY COMPENSATION BENEFITS AND TO MEDICAL BENEFITS FOR ALL CAUSALLY RELATED INJURIES AND CONDITIONS STEMMING FROM THE ACCIDENT AND WHERE THE COMMISSION FOUND COMPENSABLE INJURY BY ACCIDENT, FOUND THAT THE CLAIMANT WAS NOT AT MAXIMUM MEDICAL IMPROVEMENT AND REINSTATED ALL BENEFITS.
- II. WHETHER THE FULL COMMISSION PANEL ERRED AS A MATTER OF LAW BY DENYING THE CLAIMANT THE RIGHT TO EVER REQUEST MEDICAL AND/OR COMPENSATION BENEFITS FOR INJURY TO THE BRAIN AND/OR HEAD WHERE THE CLAIMANT IS REQUIRED TO LIST ALL POSSIBLY AFFECTED BODY PARTS ON HIS REQUEST FOR HEARING AND WHERE THE DEFENDANTS GAVE NO NOTICE OF THIS DEFENSE.
- III. WHETHER THE FULL COMMISSION PANEL ERRED AS A MATTER OF LAW FROM CONSIDERING THE ISSUE AND DENYING THE CLAIMANT ON A PERMANENT BASIS ANY BENEFITS, MEDICAL OR COMPENSATION, RELATED TO INJURY TO THE HEAD AND/OR BRAIN WHERE THE CLAIMANT HAD REMOVED SUCH FROM CONSIDERATION AT THE TIME OF THE HEARING.
- IV. WHETHER THE FULL COMMISSION PANEL ERRED IN VIOLATION OF ITS STATUTORY REVIEW/DECISION OBLIGATION BY ALLOWING DEFENSE COUNSEL TO DRAFTS ITS OWN FINDINGS OF FACT AND CONCLUSIONS OF LAW ADDRESSING THE ISSUES RAISED FOR REVIEW AS REQUIRED BY LAW AND BY ISSUING AN ORDER THAT WENT BEYOND ITS DIRECTION AND BY ISSUING AN ORDER WRITTEN BY DEFENSE COUNSEL THAT DELETED AND/OR SUBSTANTIALLY MODIFIED UNRELATED BUT SUBSTANTIAL FINDINGS OF FACT AND CONCLUSIONS OF LAW MADE BY THE HEARING COMMISSIONER.

STATEMENT OF THE CASE

After the Appellant's electrical shock accident which occurred on May 22, 2013, it was immediately reported and the case was accepted by the insurance carrier and compensation benefits were started and paid and medical care was authorized and provided. On September 12, 2013, the Appellant (injured worker/Claimant before the Commission) received a SCWCC Form 15(II) in the mail notifying him that the case was being denied based on an alleged, "good faith investigation" which form further stated the basis was that the Appellant had failed to prove a compensable injury. The Appellant immediately filed a Form 15(III) Request for Hearing to reinstate benefits for improper stop payment. Due to the basis of the denial that being that based on a good faith investigation the Respondents (Defendants below) were denying the claim because the Appellant had not sustained compensable injury under the Act, a Form 50 requesting a determination that the Appellant had sustained injury by accident and the reinstatement of medical care and temporary total disability benefits from the date that those benefits had been stopped pursuant to the Form 15 II. (Form 50, 5/21/13). A responsive Form 51 was filed denying that the Appellant had sustained compensable injury and having

failed to establish compensable injury, denied entitlement to medical care and denied that the Appellant was entitled to temporary total disability benefits. (Form 51, 11/19/13). A hearing was set on January 13, 2014 on the Form 50 and Form 51 (Hearing Notice, 12/16/13). The Appellant's Pre-Hearing Brief and APA Submissions were filed on December 23, 2013 and the Respondents' Pre-Hearing Brief and APA Submissions were filed on January 2, 2014. (Claimant's Pre-Hearing Brief, 12/23/13; Defendants' Pre-Hearing Brief, 1/2/14). A hearing was held on January 13th before Commission Susan S. Barden. (Tr. of Hearing, 1/13/14). Subsequently the Commissioner issued her notes awarding the case and on February 11th issued a clarification note on her Findings in reference to the brain. (Email, 2/11/14).

On February 27, 2014 the Commissioner issued her Order finding that although the Respondents initially in their Form 51 had denied that the Appellant had sustained compensable injury that based on their position at the hearing the Respondents admitted that the Appellant had sustained compensable injury and they agreed that it included injury to the neck and left shoulder but denied that it resulted in the need for medical care to the Appellant's heart and certain other body parts as listed in

the Form 50 as being affected by the injury. The Commissioner found that the Appellant had sustained injury and had established a need for medical care specifically as to the heart and all related problems as being related to the injury. She also found that the Appellant was not at maximum medical improvement and placed the Appellant under his previously authorized treating physicians, Dr. Jeffrey Travis, M.D. and Dr. Lanneau Lide, M.D. for treatment of the Appellant's heart and all causally related problems. She awarded reinstatement of temporary total disability benefits and ongoing medical treatment until the Appellant reached maximum medical improvement. (Order, 2/27/14). In reference to the head and brain, the Commissioner noted that the Appellant was specifically requesting a finding of compensability for the heart only at the time of the hearing and presented no medical evidence in reference to the head or brain and found that there was no evidence of any need for treatment or injury to the head or brain at the time of the hearing. (Order and Award of Commissioner Susan Barden, dated February 27, 2014, Findings #14, #15).

The Respondents filed a Form 30 Request for Review and among other issues alleged that the Hearing Commissioner erred by failing to deny compensability of either a head and/or brain injury. (Form 30, 3/6/14). A Briefing Schedule

was set and the Respondents filed their Appellants' Brief to the Full Commission on April 23, 2014 and the Appellant filed his Claimant/Respondent's Brief to the Full Commission on May 2, 2014. (Claimant's Brief, 5/18/14). A hearing was held on the appeal on May 19, 2014 (Tr. of Full Commission, 5/19/14) and the Commission issued a request for a proposed Order to Respondents' Counsel on June 6, 2014. (Commission Request for Proposed Order, 6/6/14). A proposed Order was submitted and the Order of the Full Commission Panel was filed on July 25, 2014 wherein the Commission affirmed the findings and Decision of the Hearing Commissioner finding compensable injury, finding that the Appellant was not at maximum medical improvement and awarding medical care and temporary total disability benefits until further Order of the Commission, but reversed the Single Commissioner's Findings of Fact and Conclusions of Law related to an alleged head and/or brain injury and denied any entitlement to any benefits, medical or otherwise, for the head and/or brain. From the Decision of the Full Commission reversing the Single Commissioner's Decision in reference to specific areas of the body or body parts, the head and/or brain, this appeal follows.

STATEMENT OF FACTS

As is set out in the Form 50 filed October 21, 2013, the Form 50 was filed due to the fact that the Respondents after having accepted the claim and having provided temporary total disability benefits and medical care had filed a Form 15(II) stopping benefits based on an alleged good faith investigation and stating as the basis that the Appellant had failed to establish compensable injury by accident. As is set out in the Form 50 in the attachment to Form 50, #11 further grounds or unusual aspects of claim:

"The Form 50 was being filed due to this denial and the denial of the claim for failure to prove a compensable injury by accident."

The Form 50 requested three things: that being that the Claimant had sustained compensable injury under the Act; that he was entitled to medical examination and treatment, reinstatement of the medical care that had previously been, "authorized and provided"; and that temporary total disability benefits be reinstated from the date that those had been stopped under the WCC Form 15(II). (Form 50, 10/21/13). There was no request in the Form 50 for a permanent disability award for any general disability (wage loss) or for specific loss of use to any body part or organ. As required by the Act under WCC Form 50 #1, he

listed as, "body parts affected: heart, left hand/arm/shoulder, neck, head (brain), chest. The system is (sic, systemic) electrical shock (all organs, members and bodily parts determined to be related." The Form 50 again under #11 specifically requested that the compensation benefits that had previously been started and paid and that medical care, "medical care was authorized and provided", be reinstated as part of the Order finding the injury to be compensable.

In their responsive Form 51 which is the Respondents' pleading placing the parties on notice of the issues for decision, the Respondents stated:

"Denied the employee sustained an injury or illness on or about the date set forth in the application. The reasons for denial are: claimant has failed to meet his burden of proving that he sustained a compensable injury or illness pursuant to the Act."

In reference to the request for medical care, the Respondents checked that it was denied that the employee needed, "medical care as a result of injury or illness. The reasons for denial are:

Claimant has failed to meet his burden of proving a compensable injury by accident within the course and scope of his employment.

Defendants do not deny that if this claim is found compensable, claimant is in need of additional medical care." (Emphasis added).

Respondents also denied that the Appellant was entitled to temporary total disability benefits. In his Pre-Hearing Brief, Form 58, under "facts in controversy" in reference to injury by accident and in reference to medical care, the Appellant listed the following factual issues:

"4a. Facts in controversy:

Whether the Claimant sustained injury by accident - the facts will establish that on May 22rd, 2013, while working on a rotisserie, Claimant touched a broken wire (480 volts) resulting in a severe electrical shock which entered his left hand running through his left arm, shoulder, neck, heart and chest and entering and exiting through his heart and chest.

c. Medical care from the date that medical care was stopped being authorized and continuing until the Claimant reaches maximum medical improvement and/or further order of this Commission."

As to the legal issues, the Appellant listed:

5. Legal issues involved:

IN CORRELATION WITH RESPONSES UNDER NUMBER 4:

c. The Claimant's entitlement to medical care as provided for in §42-15-60."

In their responsive Form 58 Pre-Hearing Brief, under #4 "Facts in controversy", the Respondents listed the following:

"Defendants have denied this claim pursuant to SC Code §42-9-260. The issue for this hearing is whether or not claimant can meet his burden of proving a compensable claim pursuant to the Act."

Under #5. "Legal issues involved", the Respondents listed the following legal issues:

"§42-9-10, §42-9-20, §42-9-30, and §42-9-260."

(Note: there is no reference to the denial of compensable injury under §42-1-160 and there is no issue raised under §42-15-60. The medical provision section of the Act).

Additionally, under #3 "Type of injury and body part(s)", the Respondents in their Pre-Hearing Brief listed:

"Claimant alleges injury to his neck, left shoulder and heart. Defendants have denied this claim as failing to meet the standards for being a compensable claim."

(Note: there is no mention of the head or neck in the Form 58.)

At the hearing on January 13, 2014, after a Pre-Hearing conference off the Record, the Hearing Commissioner recited the positions of the parties and the purpose of the hearing and stated:

"The purpose of today's hearing is to determine issues raised in Forms 50 and 51." (Tr., p. 4, ll. 17-19).

* * *

"Prior to going on the Record, we held a pre-hearing conference. It is the position of the Claimant that not only did he injure his neck and his left shoulder and arm, which are admitted body parts, that he also sustained a myocardial infarction from the shock, which ultimately resulted in V.S.D. or a hole in his heart. He also contends

that he suffered a head and possibly a brain injury, but because the focus of his treatment has been just about exclusively on the heart, his head and his -- and possible brain injury have not been explored or properly and thoroughly evaluated. So he seeks a finding of compensability of not only the neck and the left shoulder, which the Defendants admit, and those are the only admitted body parts, I want to emphasize that, the neck and the shoulder, but he also believes and contends and would content that the medical evidence supports his finding by more than a greater weight of the evidence standard, but he at least meets that standard, and he also injured his heart and his head. He seeks temporary total disability benefits from September 15, 2013 to the present and continuing. He seeks reimbursement for all those expenses he has incurred thus far with regard to the evaluation and treatment of his injured body parts. He seeks an Order requiring the Defendants to provide treatment with Dr. Travis, who is his treating cardiovascular surgeon, as well as Dr. Lide, his cardiologist. Drs. Travis and Lide were initially authorized before benefits were denied. And if this claim is compensable, the Defendants do not -- and obviously defense believed this claim is not compensable in regard to the heart and brain, but if it is found compensable, the Defendants would agree that Dr. Travis and Dr. Lide would be appropriate providers and that they are familiar with the Claimant's condition and they have treated him and they initially were selected by the Defendants. As the Claimant has not reached maximum medical improvement, any determination of permanency would be premature. . . ." (Tr., p. 8, l. 24 - p. 10, l. 14).

The Commissioner issued notes for her decision and requested Appellant's Counsel draft a proposed Order. Subsequently after request to clarify her notes for a decision, the Commissioner sent an email to the parties that is part of the Commission Record addressing whether or

not the brain or an alleged injury to the brain was in any way an issue at the hearing, the Commissioner sent the following note:

"I reviewed my handwritten notes for this case, which state that the 'main thing' Preston asked for (and why he filed the 50) was for the heart, as you both already had a temporary benefits hearing on the issue with Commissioner Beck. Looking at my notes, I perhaps was in error to adjudicate the brain injury, because it is rather clear that Preston did not want to pursue the issue at the hearing; if he wanted it adjudicated at the hearing, he clearly would have put up some sort of evidence. Further, I would have specifically asked if the issue was to be held in abeyance. I fear it is all a misapprehension on my part. Therefore, out of an abundance of caution, I am allowing Preston to add, 'denied at this juncture' (or words to that effect) because claimant specifically requested a finding of compensability for the heart. As Preston filed the pleading, he does get to determine which issues are on the, 'table'". (Emphasis added where both bold and underlining appear.) (Commissioner email, 2/11/14).

In Commissioner Barden's Award, in reference to entitlement to either temporary total disability benefits or medical care based on injury to the brain and/or the head, the Commissioner made the following Findings of Fact:

"14. The Claimant is specifically requesting a finding of compensability for the heart and no medical evidence was presented that Claimant sustained or even may have sustained a head or brain injury. I therefore find that at this point he has not met his burden of proof with regard to any injury to the head/brain, and any benefits

for the head/brain are denied at this juncture.

15. While the head and brain are listed as bodily parts involved under #3 in the Pre-Hearing Brief, the Claimant also notes in his Pre-Hearing Brief that this is a systemic electrical shock and requests treatment for, "all organs, members and bodily parts **determined to be related.**" I note from the testimony and records of Dr. Greenfield that the Claimant had tenderness in the left arm and shoulder and was diagnosed with muscle shock. In her deposition she stated that this tenderness found on examination is more indicative of actual injury to those areas than just the pain that is caused by a heart attack. Dr. Lide in his treatment notes and specifically on September 17, 2013 recorded that, "we tried this patient on Neurontin last month when he appeared to have peripheral neuropathy secondary to electrocution at work. Dr. Lide also recorded on the August 13th visit that he was having numbness in his great toe and suggested this neurological symptom was due to the electrical shock he experienced rather than the myocardial infarction. Thus, if any problems are opined to have stemmed from the electrical shock injury which is outside of the area and expertise of Dr. Lide and Dr. Travis, those doctors may request referral for him to other physicians for evaluation and treatment but the Defendants retain the right to contest whether those are related to the accident and to select the physicians for treatment of any causally related problems." (Order and Award of Commissioner Susan Barden, dated February 27, 2014).

She also made the specific Finding that:

"12. Claimant has not reached maximum medical improvement."

Under Conclusions of Law, in addition to the

Conclusions of Law finding that the Appellant had sustained compensable injury by accident and citing the law as to her decision to reinstate temporary total disability benefits, in reference to medical care, the Commissioner made the following Conclusion of Law applicable to the medical issues:

"3. Under SC Code §42-15-60 the determination is made as to the provision of medical care."

After the Briefs and hearing before the Full Commission Panel, the Full Commission Panel issued a, "Request for a Proposed Decision and Order" on June 6, 2014 wherein the Full Commission made as its only Finding and decision:

"The Commissioners considered the matter and **affirm in part and reverse in part** the Decision and Order of the Single Commissioner.

* * *

"The Panel denies the brain injury based in insufficient evidence."

In its actual filed Order, the Full Commission reiterated as its Findings of Fact the Findings of Fact of the Single Commissioner but inserted numerous Findings in reference to the pleadings, the Pre-Hearing Briefs, Notice of Issues to be Decided at the hearing, all in reference to allegations that the Appellant was seeking, "compensation"

for injury to the brain/head". See specifically Findings of Fact #14 through #28, which are Findings in addition to those made by the Hearing Commissioner. Again, the Full Commission's only specific Finding in its instructions was that there was, "insufficient evidence" to establish injury to the brain or head.

Under Conclusions of Law, the Full Commission made Conclusions of Law in reference to medical care that the Appellant is entitled to medical care for his heart condition and that he, "may be entitled to additional medical treatment for other causally related conditions subject to the Findings of Fact as stated herein" but that the Appellant was not entitled to any medical care, "for any alleged head and/or brain injury." The Full Commission Order also sets forth additional Conclusions of Law in reference to what the hearing notes stated, the Appellant's right to amend a Form 50, the Appellant's right to file a Pre-Hearing Brief, the Appellant's right and any parties right to request a continuance for additional discovery, none of which were in their directions/instructions for an Order. (Appellate Panel Decision and Order, Conclusions of Law, dated July 25, 2014). (Again, the only directive in the Full Commission request was for an Order finding that there was, "the Panel denies the brain injury based in

insufficient evidence".

ARGUMENTS

- I. WHERE THE ISSUES BEFORE THE HEARING COMMISSIONER WERE WHETHER THE CLAIMANT HAD SUSTAINED COMPENSABLE INJURY BY ACCIDENT AND WHETHER HE WAS ENTITLED TO REINSTATEMENT OF WEEKLY COMPENSATION BENEFITS AND TO MEDICAL BENEFITS FOR ALL CAUSALLY RELATED INJURIES AND CONDITIONS STEMMING FROM THE ACCIDENT, AND WHERE THE COMMISSION FOUND COMPENSABLE INJURY BY ACCIDENT, FOUND THAT THE CLAIMANT WAS NOT AT MAXIMUM MEDICAL IMPROVEMENT AND REINSTATED ALL BENEFITS, THE FULL COMMISSION PANEL ERRED AS A MATTER OF LAW BY DENYING THE CLAIMANT THE RIGHT TO EVER REQUEST BENEFITS FOR THE HEAD AND BRAIN.

In this case, the Full Commission agreed and affirmed the Decision of the Hearing Commissioner that the Appellant had sustained compensable injury by accident; that he was entitled to reinstatement of temporary total disability benefits and medical benefits that had previously been authorized and provided; and agreed that the Appellant was not at maximum medical improvement. In reference to any medical care and/or injury to the brain or head, the Hearing Commissioner found that there was no evidence that the Appellant was in need of any medical care or benefits or that an injury to the brain or head had been established. She went on to find in that same Finding of Fact that the Appellant was entitled to all medical care that had been being provided by Drs. Travis and Lide as being causally related to the original work-related accident and provided that if those doctors were of the opinion that any medical care or

condition was related to the accident that was outside of their expertise, that they could refer the Appellant to the appropriate treating medical providers for treatment of those problems and reserved the right of the Respondents to deny treatment and to have a hearing on whether or not the Appellant was entitled to that medical care as being causally related to the injury. However, the Decision of the Full Commission reversed the Hearing Commissioner's Order and denied the Appellant any benefits for an alleged, "head and/or brain injury". This decision can only be read to be an attempt by the Commission to make a permanent denial of any temporary compensation, medical care or if ever requested permanent compensation to these two areas, parts or organs of the body.

Where an injured worker is found not to be at maximum medical improvement and has not made a request for compensation benefits, neither this Court nor the Supreme Court has ever entered a Decision denying the Appellant medical or temporary total disability benefits or other benefits under the Act. Such decision by the Commission is both contrary to the Act and the opinions of our Appellate Courts and is premature and not ripe for decision.

Before maximum medical improvement, there are two types of benefits to which a claimant is entitled or may be

entitled under the Act; temporary total disability benefits and medical care benefits.

Temporary total disability benefits are payable under SC Code §42-1-120 and §42-9-10. Under SC Code §42-1-120, disability is defined as the,

"incapacity because of injury to earn the wages which the employee was receiving at the time of the injury"

Under SC Code §42-9-10, where the,

"incapacity for work resulting from the injury is total, the employer shall pay . . . to the injured employee during the total disability a weekly compensation"

In other words, under the Act when the disability results from the injury by accident as defined under SC Code §42-1-160, the Claimant is entitled to temporary total disability.

Under SC Code §42-15-60, the employer is required to provide medical, surgical, hospital and other treatment:

"During any period of disability resulting from the injury . . . any medical care or treatment that is considered necessary by the attending physician unless otherwise ordered by the Commission." (Emphasis added).

Therefore, in reference to the provision of medical care, the Respondents are required to provide any medical care "during the disability resulting from the injury" that is considered to be necessary by the attending physician or as ordered by the Commission, subject to the requirement that

the doctor must state that the medical care is necessary and is related to the injury, to a reasonable degree of medical certainty.

Both this Court and the Supreme Court have held that a determination of a claimant's right to compensation for either permanent loss of earning capacity under §42-9-10 or §42-9-20 or a loss of use to a member, organ or bodily part under §42-9-30, is not ripe until the claimant has reached maximum medical improvement. Smith v. Mental Health, 335 S.C. 396, 517 S.E.2d, 695 (1999); Cranford v. Hutchinson Constr., 399 S.C. 65, 731 S.E.2d. 303 (SC App. 2012).

While a request for permanent wage loss or loss of use compensation was not an issue before the Commission in this case under the pleadings, neither this Court nor the Supreme Court have ever held or placed any limitation on a claimant's right to seek medical care for injuries alleged to be related to the original work-related injury or to limit a claimant's right to compensation benefits prior to maximum medical improvement, which is what the Commission's Decision does in this case.

Both this Court and the Supreme Court have repeatedly held that were a claimant after reaching maximum medical improvement comes before the Commission and either a final decision on compensation is made or the claimant has injuries

that he knew about but for which he did not ask for compensation at a hearing, the Claimant may not re-litigate those issues. Krell v. SC State Hwy. Dept., 337 S.C. 584, 118 S.E.2d 322 (1961); Etheridge v. Joslyn Clark Controls, Inc., 325 S.C. 532, 482 S.E.2d 577 (SC App. 1997). In other words, where a claimant has reached maximum medical improvement and has a hearing on compensation, if a claimant does not raise a known condition or present evidence to establish an entitlement to permanent compensation, he is barred thereafter from re-litigating that issue. However, where a claimant has an undiagnosed or undisclosed condition or a missed diagnosed condition, even where he has specifically sought and/or received compensation, he is not barred from seeking medical care or compensation for that unknown or undiagnosed condition. Mauldin v. Dyna-Color Jack Rabbit, 308 S.C. 18, 416 S.E.2d 639 (1992). Therefore, where the Commission in this case found that the Claimant had sustained compensable injury under the Act and was not at maximum medical improvement, under the provisions of §42-15-60 in reference to the provision of medical care and under §42-9-10 and §42-9-120 concerning temporary compensation and under a liberal construction of the Act which the Commission is required to do, the Commission erred by trying to deny on a permanent basis the Claimant benefits under the Act should

the medical doctors find that the Claimant had sustained a compensable injury to his head or brain. Therefore where the Appellant was found not to be at maximum medical improvement, the Claimant was under medical care, there was no request for nor was the issue of permanent compensation benefits before the Commission, the Decision of the Full Commission denying the Appellant on a permanent basis any benefits, either compensation or medical, for injury to his head and/or brain resulting from the awarded injury by accident is not based on any legal authority and is an erroneous decision under our law and should be reversed.

II. WHERE THE CLAIMANT WAS FOUND NOT TO BE AT MMI AND IS REQUIRED TO LIST ALL POSSIBLY AFFECTED BODY PARTS ON HIS REQUEST FOR BENEFITS AND WHERE THE DEFENDANTS GAVE NO NOTICE OF THIS DEFENSE, THE FULL COMMISSION PANEL ERRED AS A MATTER OF LAW BY PERMANENTLY DENYING THE CLAIMANT MEDICAL AND/OR COMPENSATION BENEFITS FOR INJURY TO THE BRAIN AND/OR HEAD.

The Form 50 in this case was filed in response to a Form 15(II) filed by the Respondents stopping payment of benefits in a previously accepted case on the basis that the Appellant had failed to prove compensable injury. The Form 50 requested a determination and alleged that the Appellant had sustained injury by accident as defined within the Workers' Compensation Act; that he was entitled to medical care as a result of the compensable injury; and that he was entitled to temporary total disability benefits as a result of the

compensable injury. The only defense raised by the Respondents in their responsive Form 51 pleading was that the Respondents denied that the Appellant had sustained an injury or illness on or about the date set out in the Form 50 and that the Appellant had failed to meet his burden of proof by proving that he had sustained, "a compensable injury or illness pursuant to the Act." The Respondents denied medical care and temporary total disability benefits on the basis of their denial that the Claimant had sustained compensable injury by accident. In the Appellant's Pre-Hearing Brief, Form 58, the Appellant specifically asked for a determination that he had sustained compensable injury by accident on May 22, 2013; that he was entitled to a resumption of temporary total disability benefits that had been stopped under the Form 15 II filed by the Respondents; and that he was entitled to,

"medical care from the date that medical care was stopped being authorized and continuing until the Claimant reaches maximum medical improvement"

The Respondents in their responsive Form 51 as to the issues to be decided or addressed cited that the only factual issue to be determined was,

"whether or not the claimant can meet his burden of proving a compensable claim pursuant to the Act".

There is simply no defense raised nor any allegation made that the Respondents would contest a specific body part or medical care or seek a determination that the Claimant was permanently barred from seeking further benefits at any time in reference to a body part or part of the body that was alleged to be affected by the accident.

Both the Supreme Court and this Court have held that a party is required to be given notice of the issues that he will be required to meet at hearing. Hamm v. Mullins Lumber Co., 193 S.C. 66, 7 S.E.2d 712 (1940); Chapman v. Foremost Dairies, Inc., 249 S.C. 438, 154 S.E.2d 845 (1967). In this case, the Appellant was simply not given any notice by the Respondents prior to the hearing that they were challenging the request for benefits on any basis other than that the Appellant had not proved that he had sustained compensable injury by accident under the Act. (Emphasis added).

III. THE FULL COMMISSION PANEL ERRED AS A MATTER OF LAW BY CONSIDERING THE ISSUE AND BY DENYING THE CLAIMANT ON A PERMANENT BASIS ANY BENEFITS, MEDICAL OR COMPENSATION, RELATED TO INJURY TO THE HEAD AND/OR BRAIN WHERE THE CLAIMANT HAD REMOVED SUCH FROM CONSIDERATION AT THE TIME OF THE HEARING.

In addition to the head and/or brain not being specifically raised as an issue by either the Form 50 Request for Hearing or in the Appellant's Pre-Hearing Brief or as a defense in the Form 51 at the hearing, the Hearing

Commissioner recited the Appellant's request for a finding that he had sustained a compensable injury and that he was entitled to a resumption of the payment of temporary total disability benefits and medical benefits. The Commissioner further set out in her Statement of Issues before her that the Appellant was not seeking any benefits (specifically medical) at that time for injury to the head or brain because the focus of the medical care up until that time had been on the Appellant's severe injury to his heart. If these facts alone are insufficient to remove the issue from hearing, subsequent to the hearing, the Hearing Commissioner noted in an email that the Appellant had clearly indicated that he did not wish to go forward and was not requesting any benefits for the head and/or brain as of the date of the hearing.

The Workers' Compensation Act shall be liberally construed in favor of benefits to the injured worker. Cokely v. Robert Lee, Inc., 197 S.C. 157, 14 S.E.2d 889 (1941); Hamm v. Mullins Lumber Co., supra. Under that principle, the Supreme Court has held that a claimant may withdraw an issue from consideration by the Commission at a hearing held on the claimant's claim. Gold v. Moragne, 202 S.C. 289, 24 S.E.2d 491 (1943). The Appellant had withdrawn any issue from consideration by the Hearing Commissioner and the Full

Commission's Decision reversing her Findings of Fact and Conclusions of Law in that regard should be reversed.

IV. THE FULL COMMISSION PANEL ERRED IN VIOLATION OF ITS STATUTORY REVIEW/DECISION OBLIGATION BY ALLOWING DEFENSE COUNSEL TO DRAFTS ITS OWN FINDINGS OF FACT AND CONCLUSIONS OF LAW ADDRESSING THE ISSUES RAISED FOR REVIEW AS REQUIRED BY LAW AND BY ISSUING AN ORDER THAT WENT BEYOND ITS DIRECTION AND BY ISSUING AN ORDER WRITTEN BY DEFENSE COUNSEL THAT DELETED AND/OR SUBSTANTIALLY MODIFIED UNRELATED BUT SUBSTANTIAL FINDINGS OF FACT AND CONCLUSIONS OF LAW MADE BY THE HEARING COMMISSIONER.

The Full Commission Panel requested a proposed Order and its only specific Finding was that the, "Panel denies the brain injury based in insufficient evidence." Whereas the Commission issued an Order wherein that specific Finding itself was modified by Respondents' Counsel to read that their conclusion and finding was that they denied the, "Claimant's head and/or brain injury".

In addition, without direction to do so the Commission's final Order as drafted by Counsel for the Respondents deleted or substantially modified unrelated but substantial Findings of Fact and Conclusions of Law made by the Hearing Commissioner, specifically including inserting numerous Findings in reference to the pleadings, the Pre-Hearing Briefs, Notice of Issues to be Decided at the hearing, all in reference to allegations that the Appellant was seeking, "compensation" for injury to the, "brain/head". See

specifically Findings of Fact #14 through #28 which are Findings in addition to those made by the Hearing Commissioner. Again, the Full Commission's only specific Finding in its instructions was that there was, "insufficient evidence" to establish injury to the brain.

Under Conclusions of Law, the Full Commission made Conclusions of Law in reference to medical care that the Appellant is entitled to medical care for his heart condition and that he, "may be entitled to additional medical treatment for other causally related conditions subject to the Findings of Fact as stated herein" but that the Appellant was not entitled to any medical care, "for any alleged head and/or brain injury." The Full Commission Order sets forth other Conclusions of Law in reference to what the Hearing Notice stated, the Appellant's right to amend a Form 50, the Appellant's right to file a Pre-Hearing Brief, the Appellant's right and any parties' right to request a continuance for additional discovery, none of which were in their directions/instructions for an Order. Again the Full Commission's only decision was to "affirm in part and reverse in part the Decision and Order of the Single Commissioner" and its only instruction as to the reversal was:

"The Panel denies the brain injury based in insufficient evidence."

Further Defense Counsel deleted and/or substantially modified unrelated but substantial findings of fact and conclusions of law made by the Hearing Commissioner specifically including but not limited to deleted Findings such as Hearing Commissioner Finding #16:

"For purposes of the hearing before the undersigned, Claimant is very credible! I base this finding on my observations of Claimant's demeanor and on the delivery of his testimony."

and substantially modified Findings such as Hearing

Commissioner Finding #15 (see Full Commission #29):

"(Deleted). . . While the head and brain are listed as bodily parts involved under #3, the claimant also notes in his Pre-hearing Brief that this is a systemic electrical shock and requests treatment for, "all organs, members and bodily parts determined to be related.") . . . We note from the testimony and records of Dr. Greenfield that the Claimant had tenderness in the left arm and shoulder and was diagnosed with muscle shock. In her deposition she stated that this tenderness found on examination is more indicative of actual injury to those areas than just the pain that is caused by a heart attack. Dr. Lide in his treatment notes and specifically on September 17, 2013, recorded that, 'we tried this patient on Neurontin last month when he appears to have peripheral neuropathy secondary to electrocution at work. Dr. Lide also recorded on the August 13th visit that he was having numbness in his great toe and suggested this neurological symptom was due to the electrical shock he experienced rather than the myocardial infarction. Thus, if any

problems are opined to have stemmed from the electrical shock injury which is outside of the area and expertise of Dr. Lide and Dr. Travis, those doctors may request referral for him to other physicians for evaluation and treatment but the Defendants retain the right to contest whether those are related to the accident and to select the physicians for treatment for any causally related problems."

and substantially modified Hearing Commissioner Finding of Fact #19:

"Claimant to receive temporary total disability benefits from September 15, 2013 through the present and continuing...."

Full Commission Finding of Fact #32 modified this Finding to:

"Due to the compensable injury to his heart,
Claimant shall receive temporary"

and added Findings outside of the request for a proposed Order such as Full Commission Finding of Fact #27:

"We decline to leave the claim open for possibly unlimited future hearings to determine compensability of presently alleged body parts as it would be grossly prejudicial to Defendants."

Appellant's Counsel knows of and would submit there is no federal, state or local administrative or judicial appellate review tribunal, such as this Court, where the consensus decision of a multiple member panel charged with reviewing legal and factual decisions affecting the rights of parties is drafted by a party for the panel/tribunal; and especially where no specific findings of facts and

conclusions of law on each issue raised for review is made by the panel.

The Claimant/Appellant has no problem with nor questions the time-honored tradition of a singular judge or commissioner requesting that the prevailing party present a proposed Order for the Judge's or Commissioner's consideration and if the Court or Commissioner feels that the Order is in accordance with his or her decision in the case to adopt that Order as written. However, the issue that was presented in this case and with which Appellant's Counsel has great concern is that numerous legal and factual issues were appealed to the Full Commission and the three-member panel of the Full Commission affirmed the Hearing Commissioner's decision in all regards except as to one specific finding. They then asked a party to write its consensus decision addressing that Decision and signed an Order that deleted specific findings unrelated to that one reversal issue, substantially altered other findings, added numerous findings addressing issues outside of that instruction, basically reversing statutory and regulatory provisions and the rights of the parties under those provisions and made numerous additional Conclusions of Law.

The law requires that the Full Commission write its Order and it abdicated that responsibility and gave it to the

prevailing party to write its consensus, again consensus, order. A review of that Order and the directions of the Full Commission Panel will clearly establish that the Order of the Full Commission went far beyond the direction of the Full Commission.

The Commission asked Defense Counsel to draft the Appellate Panel Order but made no specific factual or legal conclusions in that form request and requested only:

"The Commissioners considered the matter and **affirm in part and reverse in part** the Decision and Order of the Single Commissioner.

* * *

"The Panel denies the brain injury based in insufficient evidence."

S.C. Code §1-23-340, 350 and §42-17-40 and 50, all require the Commission to make their own, "Findings of Fact and Conclusions of Law separately stated", on each issue before it for decision. S.C. Code §1-23-340 provides specifically that, the proposal for Decision:

"shall contain a statement of the reasons therefore and of each issue of fact or law necessary to the proposed Decision, prepared by the person who conducted the hearing or one who has read the Record." (Emphasis added).

The Commission is the fact-finding body and its decisions, if supported, are binding on appeal. Walker v. City of

Columbia, 247 S.C. 241, 146 S.E.2d 856 (1966); Baldwin v. James River Corp., 304 S.C. 485, 405 S.E.2d 421 (S.C. App. 1991).

In addition to the statutory requirements, the Commission's own Regulations, Reg. 67-709(E)(2) require the Commission Appellate Panel to record its findings on appeal on vote sheets:

"The Commissioners together shall agree upon a modification if any and record their Findings of Fact and Conclusions of Law on a vote sheet." (Emphasis added).

In addition to the requirements set out in the statutes and the Commission's own Regulations, the Supreme Court held in Drake v. Raybestos-Manhattan, Inc., supra (as reaffirmed on numerous occasions in its subsequent decisions) that the,

"Duty to determine factual issues is solely on the Commission and the Courts have no authority to determine such issues except in jurisdictional matters, and such duty requires that not only must Findings of Fact be made upon essential factual issues but they must be sufficiently definite and detailed to enable the Appellate Court properly to determine whether the Findings of Fact are supported by the evidence and that the law has been properly applied to them." (Emphasis added).

Here again, the Supreme Court has specifically held that it is the responsibility of the Commission to make its Findings of Fact and Conclusions of Law and to set those

out in the Record in its Orders.

In this case, the Full Commission Order contained numerous deleted, altered and additional Findings of Fact and Conclusions of Law without any instruction or support in the Record that those came from the Full Commission. Who decided to make those additional findings; the Commission or the Defense Attorney to bolster his case on appeal? This is a denial of the Appellant's right to substantive and procedural due process and this process cannot be affirmed. (To the extent that this Court's decision in Brown v. Peoplelease Corp., 402 S.C. 476, 741 S.E.2d, 761 (S.C. App. 2013) allows for this procedure, the Appellant would seek to argue against precedent at hearing.)

CONCLUSION

For all the foregoing reasons, the Decision of the Full Commission holding that the, "Single Commissioner's Findings of Fact and Conclusions of Law related to the alleged head and/or brain injury are REVERSED" and the Decision ordering that the, "Claimant's alleged head and/or brain injury is hereby denied" should be reversed and the Decision of the Hearing Commissioner be reinstated and/or this matter should be reversed and remanded to the

Commission with instructions to enter an Order finding that any decision as to the Appellant's entitlement to medical care and/or compensation benefits for any injury to any bodily part, system, organ or member other than those for which compensation and medical benefits are currently being paid pursuant to the Hearing Commissioner's Order is premature and subject to further Order of the Commission pursuant to SC Code §42-15-60 and §42-9-10 and §42-1-120 at least until maximum medical improvement.

Respectfully submitted,



Preston F. McDaniel
MCDANIEL LAW FIRM
1315 Elmwood Avenue
Columbia, South Carolina 29201
(803) 771-7211

Attorneys for Appellant

June 26, 2015