THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS COMPENSATION COMMISSION

Appellate Case No. 2015-000177

JUDY SANCHEZ.....Employee,
Appellant,

v.

PERRY INTERNATIONAL, EMPLOYER AND
THE HARTFORD,
CARRIER.....Respondents

INITIAL BRIEF OF RESPONDENTS

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STATEMENT OF THE CASE

This matter originally came before the South Carolina Workers Compensation Commission ("Commission") pursuant to Defendants' Form 21 pay compensation request. Defendants submitted Claimant reached maximum medical improvement for a compensable neck injury she sustained arising out of and in the course of her employment with Perry Ellis on July 27, 2009 while lifting a box of belts to fill an order. Defendants admit Claimant is entitled to permanent partial disability compensation for loss of use of the cervical spine based on the medical impairment ratings and work restrictions imposed by the authorized medical providers. Defendants assert they are not liable to pay permanent disability benefits for Claimant's right carpal tunnel syndrome. Despite the fact that Defendants paid for the treatment related to that condition, there is no evidence that Claimant's carpal tunnel syndrome is related to her specific mechanism of injury on July 27, 2009.[1]

At the hearing, Claimant contended that she was not at maximum medical improvement (MMI) and was in need of additional medical treatment for ongoing neck pain. Claimant also contends that she developed causally related numbness and tingling in her left arm and hand in May of 2012 that requires additional medical evaluation and treatment. She also alleges a compensable psychological overlay injury, as well as an aggravation of her pre-existing diabetes, both of which require further evaluation and treatment at the Defendants expense.

In the alternative, Claimant asserted that if she is deemed to have reached maximum medical improvement, then she is permanently and totally disabled based on either a greater than 50% loss of use to her spine per § 42-9-30 (21) or the total destruction of her earning capacity under § 42-9-10. Although Claimant has continued to work at Perry Ellis in her pre-accident

[1] *See McIntire v. Winn Dixie Greenville, Inc.*, 275 S.C. 323, 270 S.E.2d 440 (S.C. 1980) (holding payment of medical bills cannot be used for admission of liability unless the circumstances surrounding the payment indicated an admission of liability rather than an act of benevolence.)

position with accommodations since November of 2011, Claimant argued her employment is merely "benevolent" or "sheltered."

In reply, Defendants again asserted that Claimant's compensable causally related conditions are limited to her neck. They further argued that Claimant has not sustained greater than 50% loss of use of her spine, or is otherwise entitled to permanent and total disability based on a "sheltered employment" theory. Defendants conceded that Claimant may be entitled to further pain management evaluation pursuant to the direction of Dr. Patel, but argued the spinal cord stimulator was not medically necessary based on the fact that Claimant continues to work full time with permanent light duty work restrictions and without taking any prescription medications.

This matter was heard before Commissioner Susan Barden on January 8, 2013. By Order dated March 28, 2013 Commissioner Barden found, *inter alia*, the following: (a) Commissioner Barden rejected Defendants' arguments that they are not responsible for PPD relative to Claimant's carpal tunnel release; (b) denied that Claimant's acute onset of left arm pain in May 2012, nearly three years after her accident, was a causally related consequence of her acute neck injury; (c) denied compensability for the alleged psychological and diabetes; (d) found that Claimant is not permanently and totally disabled under §42-9-10 or presumed totally disabled based on greater than 50% loss of use of the spine under §42-9-30; (f) awarded Claimant PPD to the back and right arm for her compensable neck and right carpal tunnel conditions; and (g) found Claimant is entitled to further pain management evaluation with a provider to be designated by the Defendants.

Thereafter, Claimant timely appealed to the Full Commission Appellate Panel. Although Claimant's Form 30 alleges numerous exceptions, her appeal can essentially be tailored to the

following: (a) did the Commissioner err in finding that Claimant is not permanently and totally disabled and (b) did the Commissioner err in finding that Claimant's left arm condition is not compensable. The Appellate Panel affirmed Commissioner Barden's Order with modifications and the current Appeal to this Court ensued. [2]

EVIDENCE OF THE CASE

Hearing Testimony

Claimant testified on her own behalf. She testified that she is 52 years old and has a high school education. (Hr'g Tr. 15:20 – 16:1, January 8, 2013.) Claimant has received mathematics training with a prior employer. (Hr'g Tr. 16:4-12.) Claimant testified that she worked for Employer as a Finish Ready Merchandise ("FRM") Operator. (Hr'g Tr. 20:22-24.) She stated that her job duties generally included getting the merchandise ready for shipping. (Hr'g Tr. 21:22-23.)

Claimant testified she was injured on July 27, 2009. (Hr'g Tr. 23:18-24.) On that day, Claimant stated that she was working in the Order Filling Department. (Hr'g Tr. 24:1.) She testified that she was working in a small space that required a great deal of bending and stooping. (Hr'g Tr. 24:10-25.) Claimant's injury was designated as a "double crush" injury affecting the right side of her neck and right arm. (*See* Claimant's APA #5, p. 45; Defendants' APA #1, p. 2, 4-5, 11, and 13.)

Claimant testified that she has pain in her neck starting at her shoulder and going up the right side of her neck to around her right ear. (Hr'g Tr. 38:15-20.) Claimant had a fusion

[2] During pendency of the Appeal to the Full Commission, Claimant filed a Motion to Admit additional evidence into the record, specifically, purported authorization from the carrier to evaluate the alleged left arm condition. Claimant argued that such authorization constituted waiver of the carrier's denial of the left hand/arm condition. Defendants initially opposed the Motion on procedural grounds, as well as refuted Claimant's waiver arguments. Defendants later withdrew their objection and filed a Motion to Admit the actual substantive evidence generated by the left arm/hand evaluation, which they contend further supports the hearing commissioner's denial of the condition. The parties then entered into a Consent Order to admit the evidence.

surgery with Dr. Bucci for her neck pain. (Hr'g Tr. 51:25 – 52:2.) Claimant also stated that she has problems with her right arm, which include pain in her right hand and numbness in her fingers. (Hr'g Tr. 43:9-14.) She stated that the pain will occasionally move to her right forearm and that her index finger is numb. (Hr'g Tr. 43:15-25.) Claimant underwent a carpal tunnel release on her right hand in conjunction with her cervical spine surgery. (Hr'g Tr. 51:24 – 52:2.) Claimant was released at maximum medical improvement by Dr. Bucci on October 20, 2011. (Defs.' APA #1.) Claimant was released a second time at maximum medical improvement by Dr. Patel on November 9, 2011. (Defs.' APA #2.)

Claimant stated that she suffered an acute onset of pain with her left side in May 2012. (Hr'g Tr. 47:8-10.) However, Claimant testified that this onset of pain did not occur at work. (Hr'g Tr. 73:12-21.) In fact, Claimant indicated that she ". . . just woke up the morning of May 21, 2012 with pain in [her] left arm." (Hr'g Tr. 73:12-15.) She reported her left side pain that day to her supervisor. (Hr'g Tr. 48:7-10.)

Claimant testified that she returned to work in November 2011. (Hr'g Tr. 27:22.) Upon her return, Claimant stated she performed the same job as an FRM Operator. (Hr'g Tr. 29:6.) Her job duties generally include handling garments for shipping. (Hr'g Tr. 29:24-30:4.) She admitted Perry Ellis has made accommodations for her work restrictions. (Hr'g Tr. 31:2-5.) Specifically, she has a co-worker who lifts boxes in excess of her 10 pound lifting restriction. Id. Claimant testified that Perry Ellis hired a "new guy" to "pick all of the heavy lifting for *us*." Id. Claimant also testified that she herself has modified the way she folds garments by placing them on a box so she does not have to bend her neck down. (Hr'g Tr. 33:15- 34:22.) Claimant acknowledged that she has received good performance evaluations since returning to work. (Hr'g Tr.74:21-24.)

Nathan Lucas, the Human Resource manager for Perry Ellis' Seneca distribution facility, also testified at the hearing regarding Claimant's work status. (Hr'g Tr. 77:9-10.) Mr. Lucas acknowledged he is aware of Claimant's lifting restrictions imposed by Dr. Patel. (Hr'g Tr. 78:3-16.) Based on the lifting restrictions, Mr. Lucas testified that Claimant is able to perform 70% to 75% of her pre-accident job duties as an FRM Operator. (Hr'g Tr. 79:7-22.) Mr. Lucas confirmed that Perry Ellis plans to accommodate Claimant's work restrictions indefinitely. (Hr'g Tr. 82:8-25.)

Medical Evidence

Claimant presented to Upstate Medical Associates on August 3, 2009 complaining of ". . . pain in neck and right shoulder pain from bending over @ work x 1 week." (Cl.'s APA #12, p. 68.) Claimant followed up on August 10, 2009 and complained of ". . . *right* shoulder soreness and neck soreness and stiffness from injury at work." (Cl.'s APA #12, p. 73.) Claimant followed up again on August 24, 2009 and complained of pain in her neck and upper back. (Cl.'s APA #12, p. 80.) She stated that she ". . . had to reach over her heads [sic] that strained her right shoulder and neck." Id.

On October 20, 2009, Claimant presented to Oaktree Medical Centre and Dr. Divina with complaints of "right side pain." (Cl.'s APA #13, p. 85.) Dr. Divina stated that Claimant's symptoms were ". . . localized to the neck on the right." (Cl.'s APA #13, p. 86.) Further, Claimant denied any numbness or tingling or radiation of pain to her fingertips. (Cl.'s APA #13, p. 87.)

Claimant underwent an MRI on January 25, 2010. (Cl.'s APA #10, p. 57.) During that MRI, Dr. Phelan noted that Claimant has "[n]eck pain with history of workman's compensation injury on 7/27/09, pain is located in the right side of the neck." Id. On February 2, 2010,

Claimant saw Dr. Divina and stated that ". . . the right side of her neck is still hurting some." (Cl.'s APA #13, p. 92.) Claimant followed up with Dr. Divina on April 26, 2010 and complained of an onset of tingling and numbness in her right index and middle fingers. (Cl.'s APA #13, p. 94.)

Claimant underwent cervical spine surgery performed by Dr. Michael Bucci on May 11, 2011, specifically, discectomy, nerve root decompression, and fusion at C5-6 to alleviate her radicular symptoms. (Defs.' APA #1 p. 8.) Claimant also had a right carpal tunnel release performed by Dr. Bucci. Id.

Dr. Kistler performed an EMG/NCV on October 11, 2011. (Defs.' APA #3, p. 30.) This EMG/NCV revealed a "[n]ormal EMG/NCV study without evidence of cervical root, plexus or peripheral nerve injury or denervation, peripheral neuropathy or median or ulnar nerve root entrapment . . . ." Id.

On October 20, 2011, Dr. Bucci noted ". . . she does not have any recurrent surgical pathology and the preoperative neurological changes have resolved. (Defs.' APA #1, p. 2.) She does have residual neck and arm pain and she will be referred to Dr. Patel for any treatment suggestion in this regard." Id. Dr. Bucci determined that Claimant reached MMI on October 20, 2011. (Defs.' APA #1, p. 1.) Further, Dr. Bucci stated that Claimant should be referred to pain management, and he assigned a 10% impairment to her spine and a 10% impairment to her hand. Id.

On November 9, 2011, Dr. Patel noted that Claimant was still having some ongoing pain in her neck and right shoulder but that she was essentially at MMI. (Defs.' APA #2, p. 15.) On November 23, 2011, Dr. Patel released Claimant at MMI as of November 9, 2011. (Defs.' APA

#2, p. 14.) Dr. Patel also recommended an FCE be performed to determine any work restrictions. Id.

Claimant underwent an FCE on December 13, 2011. (Defs.' APA #4.) During this FCE, the evaluator noted that Claimant self-limited on 52% of the 21 tasks she was asked to complete. Id. If self-limiting exceeds 20%, then psychological and/or motivational factors are affecting the test results. Id. Further, he noted that the performance on the self-limiting tasks indicates a minimum rather than a maximum ability. Id. Therefore, the assigned 20-lb. limit through the FCE indicates a minimum amount for Claimant.

On January 31, 2012, Dr. Marsh conducted an IME of Claimant and issued a report. (Cl.'s APA #6.) In that IME, Dr. Marsh notes that Claimant experiences pain in the right side of the neck with radiation to the right shoulder. (Cl.'s APA #6, p. 47.) However, he makes no mention of any left-sided pain. (Cl.'s APA #6.) Furthermore, Dr. Marsh notes that Claimant had a satisfactory outcome post right carpal tunnel release. (Cl.'s APA #6, p. 48.) He also indicates that Claimant is at MMI and shows no objective documentation of residual carpal tunnel syndrome. (Cl.'s APA #6, p. 48-49.) Dr. Marsh indicated that Claimant should be assigned a 0% extremity impairment rating for her carpal tunnel syndrome. (Cl.'s APA #6, p. 49.)

Dr. Hodge saw Claimant on May 14, 2012 and noted that Claimant complained of right sided neck and shoulder pain. (Cl.'s APA #7, p. 51.) Claimant also saw Dr. Brabham on July 9, 2012. (Cl.'s APA #14.) During that evaluation, Claimant noted that after her accident she was ". . . experiencing a considerable degree of pain in her neck, as well as right shoulder stiffness and pain." (Cl.'s APA #14, p. 96.) Dr. Brabham makes no mention of left sided pain. (Cl.'s APA #14.)

Pursuant to Commissioner Barden's Order, Defendants referred Claimant for pain management evaluation with Dr. David Shallcross, who evaluated the denied left arm/hand condition. Defendants authorized EMG and nerve condition studies, which according to Dr. Shallcross, is an "abnormal electro-diagnostic evaluation consistent with a moderate left carpal tunnel syndrome." (Defs.' Exhibit 1 to Motion to Admit additional evidence to complete record on Appeal to the Commission.) Dr. Shallcross never attributed Claimant's left arm/hand pain, numbness, and tingling to cervical radiculopathy.

LEGAL ANALYSIS AND ARGUMENT

Standard of Review

The South Carolina Administrative Procedures Act governs judicial review of a decision of the Workers' Compensation Commission. *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 134, 276 S.E.2d 304, 306 (1981). Pursuant to the Administrative Procedure Act, an appellate court's review is limited to deciding whether the Appellate Panel's decision is supported by substantial evidence or is controlled by some error of law. *Grant v. Grant Textiles*, 372 S.C. 196, 200, 641 S.E.2d 869, 871 (2007); S.C. Code Ann. § 1-23-380(A)(5.)(2014). Under this standard, the Appellate Panel's decision must be affirmed if supported by substantial evidence in the record. *Sharpe v. Case Produce, Inc.*, 336 S.C. 154, 160, 519 S.E.2d 102, 105 (1999). A reviewing 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)(d)(e); *see also*, *Hall v. United Rentals, Inc.*, 371 S.C. 69, 636 S.E.2d 876 (Ct.App. 2006). However, a reviewing court may reverse or modify a decision of the Appellate Panel only if the findings, inferences, conclusions, or decisions of the panel are "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." S.C.Code Ann. § 1-23-380(A)(5)(e)(Supp.2006; *Bass v. Kenco Group*, 366 S.C.

450, 622 S.E.2d 577 (Ct.App. 2005).

Substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the administrative agency reached in order to justify its action. *Pratt v. Morris Roofing, Inc.*, 357 S.C. 619, 622, 594 S.E.2d 272, 274 (2004). The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence. *DuRant v. S.C. Dep't of Health & Envtl. Control*, 361 S.C. 416, 604 S.E.2d 704 (Ct.App. 2004).

The Appellate Panel is the ultimate fact finder in Workers' Compensation cases and is not bound by the single commissioner's findings of fact. *Etheredge v. Monsanto Co.*, 349 S.C. 451, 454, 562 S.E.2d 679, 681 (Ct. App. 2002). The final determination of witness credibility and the weight assigned to the evidence is reserved to the Appellate Panel. *Shealy v. Aiken County,* 341 S.C. 448, 535 S.E.2d 438 (2000). Where there are conflicts in the evidence over a factual issue, the findings of the Appellate Panel are conclusive. *Mullinax v. Winn-Dixie Stores, Inc.,* 318 S.C. 431, 458 S.E.2d 76 (Ct.App. 1995)("Where the medical evidence conflicts, the findings of fact of the [Appellate Panel] are conclusive.").

The appellate court is prohibited from overturning findings of fact of the Appellate Panel unless there is no reasonable probability the facts could be as related by the witness upon whose testimony the finding was based. *Liberty Mut. Ins. Co. v. South Carolina Second Injury Fund,* 611 S.E.2d 297, 363 S.C. 612 (Ct.App. 2005) *cert. denied.* The Appellate Panel's factual findings will normally be upheld; however, findings may not be based upon surmise, conjecture, or speculation, but must be founded on evidence of sufficient substance to afford a reasonable basis for it. *Tiller v. Nat'l Health Care Ctr. of Sumter,* 334 S.C. 333, 513 S.E.2d 843 (1999).

I. THE COMMISSION CORRECTLY DENIED COMPENSABILITY OF CLAIMANT'S LEFT CARPAL TUNNEL SYNDROME.

Claimant initially believed that her left arm/hand condition may stem from her neck (radiculopathy). Claimant's counsel sent Dr. Bucci a cover letter and "check the box" type questionnaire several months after she was released from care to address causation. Dr. Bucci merely indicates in his response the left arm/hand symptoms are "causally related;" he does not specify whether they are radicular symptoms stemming from the neck, a distinct pathology/injury directly to the arm/hand, or both. (Cl's APA p. 44.) Likewise, it is not precisely clear from the face of the questionnaire what records, if any, Dr. Bucci reviewed and relied upon to render his conclusion. Most importantly, Dr. Bucci never physically examined Claimant or took an interval history prior to completing the check the box questionnaire. As such, the Commission was certainly within their discretion as the fact finding body to view Dr. Bucci's opinion skeptically. *See Potter v. Spartanburg School District* 7, 395 S.C. 17, 716 S.E.2d 123 (Ct.App. 2011)("[a]lthough medical evidence is entitled to great respect the panel is not bound by the opinions of medical experts and may disregard medical evidence in favor of other competent evidence in the record.").

Ultimately, the Commission rejected Dr. Bucci's causation opinion based, in part, on the dearth of contemporaneous medical records documenting left sided complaints following Claimant's neck injury that would be consistent with a left cervical radiculopathy. The Commission did not just issue a conclusory finding to that effect; rather, it made detailed references to the medical records to support its conclusion following a careful and exhaustive review of the evidence. (*See generally* Commission Order Findings of Fact # 15-19.) The Commission recounts the course of Claimant's treatment following her accident and correctly finds that ALL of claimant's symptoms and complaints were *right-sided.*

Claimant nitpicks the details of the Commission's findings for the slightest of discrepancies to impugn the denial of her left arm/hand condition. Specifically, Claimant contends the Commission incorrectly assumed that Dr. Bucci did not review Claimant's cervical MRI before making his causation opinion. She reasons this erroneous assumption was the only basis for the Commission's rejection of Dr. Bucci's opinion; therefore, the Commission's denial of compensability for the left arm/hand is not justified.

However, even if Dr. Bucci never reviewed the MRI scan, other substantial evidence in the record (lay and medical) supports the Commission's denial of the left arm condition, including, but not limited to, the following:

(a) The medical record in this case is replete with references to **right** sided issues only;

(b) Claimant herself acknowledged at the hearing she never experienced left arm/hand symptoms until May 21, 2012, approximately 7 days after her final doctors' visit related to this claim and nearly three years after her work accident. She confirmed that she literally woke up that morning with numbness, tingling and pain and did not experience these issues while performing job duties;

(c) Claimant's left hand/arm symptoms were diagnosed as carpal tunnel syndrome, not cervical radiculopathy, by the current treating physician, Dr. Shallcross, during the pendency of her appeal to the Commission;

(d) As noted previously, the Commission was justifiably skeptical of Dr. Bucci's check the box questionnaire, which is the ***only*** evidence supporting causation, because the basis of the opinion and diagnosis of the condition were not clear on its face; AND

(e) Perhaps most significantly, Dr. Bucci's opinion was rendered without the benefit of a physical examination and the taking of an interval history. Indeed, Claimant was released from care by Dr. Bucci on October 20, 2011 (APA p. 2) and he never treated or evaluated Claimant prior to completing the check the box questionnaire on July 6, 2012 (APA p. 44.)

Assuming *arguendo* the Commission erred in its finding that Dr. Bucci did not review Claimant's cervical MRI scan, it was nevertheless justified in rejecting Dr. Bucci's causation opinion in favor of the aforementioned. *See Potter v. Spartanburg School District 7, supra.* Claimant is essentially asking this Court to re-weigh the preponderance of the evidence, which is obviously contrary to the applicable standard of review.

The record in this matter, not surprisingly, contains conflicting evidence regarding compensability of Claimant's left arm/hand condition. As a result, making any definitive findings of fact in this case required the Commission to endorse some evidence and discard other evidence. The Commission need not reconcile or discredit all conflicting evidence, although the Commission chose to do so in this instance. As such, even mistaken inferences documented in its Order are not error if the essential findings of fact are otherwise supported by substantial evidence. *See DuRant v. S.C. Dep't of Health & Envtl. Control, supra* (The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence.)

In sum, substantial evidence supports the Commission's conclusion that Claimant's left arm and hand are not compensable. This finding was based upon the evaluative/treatment records of every provider whose records were submitted into evidence- a total of at least SEVEN medical providers.

Claimant counters that the absence of reference to complaints about her left side, arm, and/or hand are because these symptoms did not begin until after all of her care was complete, nearly three years after her accident. Ironically, this argument mitigates against causation. Even the most liberal application of the *post hoc ergo propter hoc* ("after this therefore because of this") logical fallacy could not justify causation under these circumstances. The Commission's findings on this issue should be affirmed.

II. SUBSTANTIAL EVIDENCE SUPPORTS THE COMMISSION'S PERMANENT PARTIAL DISABILITY AWARD REGARDELSS OF THE FUNCTIONAL CAPACITY EVALUATION RESULTS.

The Commission found that Claimant sustained a 22% loss of use of her spine as a result of her work injury. Claimant alleges this was error because the Commission misinterpreted the results of Claimant's functional capacity evaluation ("FCE") and dismissed its veracity for objectively determining Claimant's work capacity. Claimant's arguments hinge on a distinction between the report's "Summary" conclusions (APA p. 33.) and the actual test results as recorded by the evaluator in the body of the report. (APA pp. 34-43.) Claimant contends that a correct assessment of the FCE results would have yielded a higher disability award. She prays for remand to the Commission on this issue.

From the outset, Defendants note that by delving into the minutiae of the FCE results, Claimant is again asking this Court to reweigh evidence, which is inapposite to the applicable standard of review. *Hall v. United Rentals, Inc.*, 371 S.C. 69, 636 S.E.2d 876 (Ct.App. 2006) ("A reviewing court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact."). Claimant now raises the same *factual* arguments to this Court that she made in her Appeal to the Appellate Panel from the single commissioner's Order. The Appellate Panel was not persuaded and affirmed the single commissioner's findings

and award. Even if this Court was inclined to believe that the Commission's assessment of the FCE report was mistaken, the Court still could not substitute its judgement for the Commission's as to the *weight* to ascribe to it in the context of the record as a whole. *Hall, supra.* As such, the debate over the Commission's assessment of the FCE report is immaterial to the real issue presented- whether substantial evidence supports the Commission's award.

Clearly, the FCE report was not the only evidence the Commission considered in making its PPD award. The Commission made a detailed recitation of facts and findings regarding Claimant's subjective complaints of pain and limitations, biographical factors, and medical evidence. Claimant's impairment rating from Dr. Bucci was only 10%. Yet, the Commission found a 22% loss of use. The impairment rating from Dr. Bucci, in conjunction with Claimant's testimony, constitutes substantial evidence supporting the Commission's award. In *Bundrick v. Powell's Garage*, the Court held: "[u]nless the question of the extent of partial loss of use under Code § 42-9-30 is so technically complicated as to require exclusively expert testimony, lay testimony is admissible. The extent of loss of use need not be shown with mathematical precision. Nevertheless, the award may not rest on surmise, conjecture, or speculation; it must be founded on evidence of sufficient substance to afford it a reasonable basis." 248 S.C. 496, 151 S.E.2d 437 (1966). In *Linen v. Ruscon Construction Company*, the Court affirmed the Commission's partial disability as supported by substantial evidence where such award was based on the medical impairment rating and Claimant's subjective testimony. 286 S.C. 67, 332 S.E.2d 211 (1985). Likewise, the Commission's disability award in this case is supported by substantial evidence in the record other than the FCE report.

III. SUBSTANTIAL EVIDENCE SUPPORTS THE COMMISSION'S FINDING THAT CLAIMANT'S EMPLOYMENT IS NOT SHELTERED OR GRATUITOUS AND THAT SHE IS NOT OTHERWISE PERMANENTLY AND TOTALLY DISABLED.

Claimant argues she should be awarded permanent and total disability per S.C. Code Ann. § 42-9-10 because her current employment with Perry Ellis is "sheltered" or "gratuitous." More specifically, she contends that she would be unemployable due to her injury if she were to lose her job for some reason. The Commission disagreed, finding that Claimant returned to work in her pre-accident position as an FRM Operator in November 2011 where she has continued to work interrupted to the present. Further, the Commission found that Claimant is able to perform 75% of her pre-accident job duties within her job restrictions. She utilizes lifting assistance from a co-worker and other job modifications to perform the remaining 25% of her job duties. Defendants submit these undisputed facts in the record constitute substantial evidence that Claimant is gainfully employable. *See Colvin v. E.I. Du Pont De Nemours Co.*, 227 S.C. 465, 88 S.E.2d 581 (1955) (extent of injured workers disability is a question of fact for the Commission's determination and will not be reversed if supported by competent evidence.)

It is imperative to note initially that no South Carolina court has specifically endorsed the so-called "sheltered employment" theory of recovery for permanent and total disability. The generally accepted test for total disability in South Carolina is the "inability to perform services other than those that are "so limited in quality, dependability, or quantity that a reasonable stable labor market for them does not exist." *Wynn v. Peoples Natural Gas*, 238 S.C. 1, 118 S.E. 2d 812 (1961). Further, Defendants have been unable to find any South Carolina case affirming an award of total disability under §42-9-10 where the claimant was actually gainfully employed. *C.f. Colvin, supra* (evidence that claimant has been able to earn *occasional* wages or perform certain kinds of gainful work does not necessarily rule out a finding of total disability.)

Other jurisdictions have addressed what is known as the "Benevolent Employer Doctrine," which is akin to the theory Claimant advances in this case. Regarding job

modifications/accommodations, Florida law holds that reasonable job modifications for the purpose of accommodating an injured or partially disabled employee will not place the job outside of the definition of gainful employment. *See Cooper v. Escambia County School Bd.*, 734 So. 2d 1072, 1073 (Fla. Dist. Ct. App. 1st Dist. 1999)("The modifications the employer made in the claimant's job to accommodate her disability do not, as a matter of law, render it sheltered employment so as to place this job outside of 'gainful employment'"); *See also*, *Goodwill Indus. v. Heard*, 863 So. 2d 389, 390-391 (Fla. Dist. Ct. App. 1st Dist. 2003).

Applying these principles of law to the instant case, Defendants submit that a reasonably stable labor market exists for Claimant's services– specifically, her current employment with Perry Ellis where she has been working continuously with reasonable accommodations since November 2011. Again, Claimant returned to her pre-accident job as an FRM Operator. She executed a WCC Form 17 agreeing to the termination of temporary total disability status and acknowledging her ability to return to work (Commission File made part of record.) She is currently earning a higher hourly wage than she was the time of her accident, (Hr'g Tr. 72:7-17.) and she has received good performance reviews (Hr'g Tr 81:21-82:7). There is no evidence that her superiors have expressed disgruntlement or resentment over accommodating her restrictions. Perry Ellis has no plans to terminate her employment and can accommodate her restrictions indefinitely. (Hr'g T. 82: 8-24.) The possibility of intervening events and changes in the market make it impossible to guarantee Claimant's continued employment beyond the foreseeable future, but an award of total disability based on such prospects would be nothing more than surmise, speculation, and conjecture, which is forbidden under our law. *See Tiller*, *supra.* For these reasons, Claimant's current employment is "reasonably stable" in every sense of the notion.

Next, Claimant's employment is neither "sheltered," nor "gratuitous." Substantial evidence in the record establishes that she is performing valuable services to Perry Ellis' operations. Nathan Lucas testified her work restrictions of no lifting greater than 10-15 pounds still inherently allow her to perform up to 75% of the normal job duties of an FRM Operator. This fact alone is substantial evidence that Claimant's employment with Perry Ellis is meaningful. Perry Ellis has provided assistance to all their FRM Operators by hiring an employee for heavy lifting and other tasks. (Hr'g Tr. 31:2-5.) Claimant confirmed she has modified the way she folds garments to alleviate pain from flexing her neck. (Hr'g Tr. 33:15-34:16.) Finally, she has modified her job to limit reaching overhead to hang garments. (Hr'g T 32:11-33:8.) These are good faith reasonable accommodations/modifications that enable Claimant to maintain gainful employment, and they should not be construed as a cynical ploy by Perry Ellis to avoid a permanent and total disability claim, nor should they be construed as unconditional acts of benevolence. In the unlikely event the former scenario materializes, Claimant would certainly have other remedies at law, including, but not limited to, causes of action under the Americans with Disabilities Act and/or retaliatory discharge. As a result, Claimant's employment status is virtually on the same footing as it was prior to her accident.

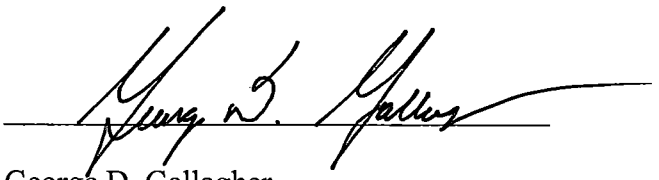
Claimant points to a letter from defense counsel offering to settle her claim in conjunction with an employment separation agreement as evidence that her continued employment is precarious, thereby justifying an award of total disability. First, the resignation issue was broached solely for the purpose of attempting the settle the claim. As a practical matter, the reason employment separations are typically negotiated in conjunction with clincher settlements is because carriers are loathe to pay premium consideration for a release of their ongoing/future medical exposure while an employee is still on their risk for further injury and an

entirely new claim. The fact that Perry Ellis and Hartford would request this common consideration as a condition of clinchering the claim in no way suggests that Claimant's employment is "sheltered," even if that theory were cognizable in South Carolina.[3] This is the case especially when a representative from Perry Ellis specifically disavowed any intentions or plans to terminate Claimant's employment. Nathan Lucas testified that Perry Ellis plans to accommodate Claimant's restrictions indefinitely. (Hr'g T 82:8-24.) The Commission obviously found this testimony from Nathan Lucas credible in rejecting the Claimant's sheltered employment arguments, and it is not the Court's province to discount Nathan Lucas's testimony. *See Shealy v. Aiken County, supra.* Therefore, substantial evidence supports the Commission's finding that Claimant's employment is not sheltered.

[3] Defense counsel admittedly conveyed the conditions of the settlement offer clumsily in an attempt to induce settlement and certainly regrets the poor choice of phrasing.

CONCLUSION

For all the aforementioned reasons, The Commission's Decision and Order dated December 29, 2014 should be AFFIRMED in its entirety.



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS COMPENSATION COMMISSION

Appellate Case No. 2015-000177

JUDY SANCHEZ.....EMPLOYEE,
APPELLANT,

V.

PERRY INTERNATIONAL, EMPLOYER AND
THE HARTFORD,
CARRIER.....RESPONDENTS

PROOF OF SERVICE

I certify that I have served the **Initial Brief of Respondent**, **Designation of Matter** and Certificate of Counsel on Judy Sanchez by depositing a copy of it in the United States Mail, postage prepaid, on **September 18, 2015,** addressed to his attorney of record, Steven M. Krause, Law Offices of Steven M. Krause, 207 East Calhoun Street, Anderson, SC 29621.

September 4, 2015

Respectfully submitted,

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September 18, 2015

Via Hand Delivery
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1015 Sumter Street, Suite 200
Post Office Box 11629
Columbia, SC 29201

RE: ***Judy Sanchez v. Perry Ellis International***
WCC No.: 0919206 *Claim No.: YKY 87315 C*
DOA: 7/27/2009 *Our File No.: 2071-12016*

Dear Ms. Kitchings:

Enclosed for filing please find the original and one (1) copy of the Initial Brief of the Respondents, Designation of Matter to Be Included in the Record on Appeal and Proofs of Service on behalf of Perry Ellis International, and The Hartford in the above-referenced matter. Please return a certified copy to our courier.

By copy of this letter, I am serving a copy of the Initial Brief of the Respondents and Designation of Matter upon Appellant's counsel of record.

Very truly yours,

George D. Gallagher

GDG/hrv
Enclosure
cc: Steven M. Krause, Esquire