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THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
APPELLATE PANEL, WORKERS' COMPENSATION COMMISSION

Appellate Case No. 2015-000493
WCC No. 11119343

Thomas Chad Hilton. . . . . Petitioner,

v.

Flakeboard America Limited and
Liberty Mutual Insurance Company. . . . . Respondents.

AMICUS BRIEF:
INJURED WORKERS' ADVOCATES

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TABLE OF AUTHORITIES

Cases

Statutes & Other Authorities

INTEREST OF AMICUS

Injured Workers' Advocates is a nonprofit association of attorneys dedicated to protecting the rights of South Carolina workers who have been victims of occupational injury or disease. IWA works to achieve this goal in several ways, including occasionally participating in litigation. See *Jervey v. Martint Envtl.*, 406 S.C. 210, 750 S.E.2d 90 (2013) (noting IWA's appearance as amicus curiae) and *James v. Anne's Inc.*, 390 S.C. 188, 701 S.E.2d 730 (2010) (same).

Petitioner's attorney, Andrew N. Safran, is an IWA member, but he was not involved in the decision to author this amicus brief and he did not contribute to the brief's contents.

ARGUMENT

IWA takes no position on the question whether the order Thomas Hilton received from the appellate panel of the Workers' Compensation Commission is an order that must be reviewed immediately in order to provide an adequate remedy. This Court is familiar with the relevant statute's language and the parties have addressed this topic in their briefs.

IWA is concerned with an issue that is related, but different. There is an emerging practice of the appellate panel vacating decisions from a hearing commissioner and remanding claims for a de novo hearing. This is not rampant, but it is also not isolated.

While there are surely circumstances when a remand from the appellate panel will be appropriate, the Workers' Compensation Act envisions the panel making its own decisions rather than sending the parties back for a "do over"—sometimes with no explanation for why a "do over" is necessary or desired. That view is also supported by this Court's precedents.

IWA collected eleven (11) of these "vacate and remand" orders through a survey of its membership. These orders are attached to this brief as exhibits.

For the most part, these orders do not offer any explanation why the panel remanded the case instead of deciding it based on the existing record. There *are* exceptions—two of the cases, Exhibits 7 and 9, involved circumstances where one of the parties proposed a remand to the panel—but those orders are the minority. Most of these cases involved the losing party appealing adverse rulings on issues like maximum medical improvement, degree of permanent disability, or rulings involving the admission of evidence. In nearly all of them, there is no reason the panel could not make a decision and resolve the dispute.

This practice of vacating and remanding, without explanation, seems to violate the parts of the Workers' Compensation Act that envision the appellate panel making its own judgments. The panel review statute explains the commission is to review a workers' compensation award and, if appropriate, reconsider the evidence, receive further evidence, rehear the parties, and *amend the award.* S.C. Code Ann. § 42-17-50 (2015) (emphasis added). The statute does not grant the panel permission to summarily quash a hearing commissioner's order and tell the parties to try the case again, from scratch, and without any guidance. That is "punting" a case rather than deciding it.

This view of the Workers' Compensation Act is supported by this Court's precedents. A party uses a "Form 30" to request review by the appellate panel, see 8 S.C. Code Ann. Regs. 67-701, and both this Court and the Court of Appeals have forcefully articulated that the appellate panel's review of a case is strictly limited to the issues raised on the Form 30. *Creech v. Ducane Co.*, 320 S.C. 559, 564, 467 S.E.2d 114, 117 (Ct. App. 1995); *Green v.*

City of Columbia, 311 S.C. 78, 80, 427 S.E.2d 685, 687 (Ct. App. 1993); *Ham v. Mullins Lumber Co.*, 193 S.C. 66, 71-74, 7 S.E.2d 712, 715-16 (1940). Unless a party requests a remand from the panel or identifies an issue that logically implicates the need to remand, sending a case back for a full retrial seems to violate this principle. These precedents stand for the proposition that the panel must decide the case as the parties bring it to them. The panel cannot manipulate a case if it believes the case should consist of something different.

This idea finds expression in other precedents. This Court has observed that the appellate panel is the "fact finder" in a workers' compensation case. This is true even though the panel's status as fact finder is somewhat paradoxical because the panel does not personally view the witnesses and hear the full presentation of a claim. *Rhame v. Charleston Cty. Sch. Dist.*, 412 S.C. 273, 278 n.3, 772 S.E.2d 159, 161-62 n.3 (2015).

If the panel *is indeed* the fact finder, this further supports the idea that the panel should be deciding cases rather than sending them back. A decision to vacate and remand looks like the panel is abdicating the role of fact-finder instead of embracing it.

Administrative agencies are also held to a higher standard when it comes to the contents of their decisions. For example, a court order granting summary judgment is not required to contain findings of fact and conclusions of law, but administrative agencies *must* issue detailed final decisions or the orders will be deemed invalid. Compare Rule 52(a), SCRCP (findings and conclusions not required for certain court decisions) with S.C. Code Ann. § 1-23-350 (2015) and *Able Communications v. SC Pub. Serv. Comm'n*, 290 S.C. 409, 410, 351 S.E.2d 151, 152 (1986). An order that vacates and remands is obviously not a final order, but if the order has no explanation, it is insulated from judicial review—forever.

CONCLUSION

The practice of vacating and remanding, with little or no reason being given, seems to be an emerging trend. IWA is a relatively small organization—we have 190 members as of the date of this brief—but IWA was able to locate several of these decisions, most of which were issued in the last 3 years. There are surely other orders of this type. Many litigants at the commission are not represented by an IWA member.

Hopefully this information is helpful to the Court's review. Again, IWA takes no position on the question presented, which centers on appealability. While there are surely circumstances when a remand from the appellate panel will be appropriate, the Workers' Compensation Act envisions the panel making its own decisions rather than sending the parties back for a "do over" with no explanation for why a "do over" is necessary or desired.

Respectfully submitted,

Blake Hewitt w/ express permission.

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IWA President

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SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
APPELLATE PANEL
DATED: 10/22/14
ANN STEVENSON V. WALMART
SCWCC FILE NO.: 1303465
COMMISSION PANEL: TAYLOR, BARDEN, BECK, CHAIR
COURT REPORTER – JILL VICKERS, 803.252.3445

CARTER A. MARTLING **CLAIMANT/APPELLANT**

JOHNNIE W. BAXLEY, III **DEFENDANT/RESPONDANT**

THIS MATTER was heard before the South Carolina Workers' Compensation Commission Appellate Panel during the term of last review. The Defendants filed a Form 21 to stop payment of TTD on October 31, 2014 and the Claimant responded with a properly Filed Form 22 on November 8, 2013. Additionally, the Claimant filed a Form 50 on November 8, 2013 and requested the issues be heard at the same time to which the Defendants Filed a Form 51. A hearing was set before the Single Commissioner on December 19, 2013 to determine issues set forth on the Forms 21 and 22. To date, no hearing has been set on the issues set forth on the Forms 50 and 51 and they remain undetermined. The Single Commissioner issued an Order on March 5, 2014 pursuant to the Form 21/22 hearing and found the following:

FINDINGS OF FACT

1. That the Order instructions were sent to the parties on January 17, 2014.
2. That Claimant's APAs are not marked and numbered.
3. That Employee, Employer, and Carrier are subject to and bound by the terms and provisions of the South Carolina Workers' Compensation Act, as amended, with Ann Stevenson as Employee-Claimant and Wal-Mart Stores, Inc. as Employer and New Hampshire Insurance Company as Carrier, Defendants.
4. That Claimant was an employee of the above-named Employer on and prior to February 16, 2013, on which date she did sustain an injury to the right knee and right shoulder arising out of and in the course of her employment, and proper notice was given to Employer. This was an accepted claim as to the right knee and right shoulder, and Claimant has received appropriate medical benefits and is presently receiving temporary compensation.
5. That the average weekly wage of Employee Ann Stevenson at the time of the above-described accident was $2,212.05, making the maximum compensation rate of $743.72 applicable in this matter.

6. That Claimant's testimony during the hearing was argumentative. I find that her testimony regarding her memory loss, mistakes at work, work restrictions, chiropractic care, and medical treatment was quite argumentative.

7. That Claimant's testimony was exaggerated based on her doctor's evaluation of her condition to her right knee and right upper extremity or shoulder. After carefully listening to Claimant's testimony during the hearing, and reviewing all of the submitted reports, deposition, and exhibits, I find that Claimant's testimony is exaggerated, not credible, and unreliable. Her complaints regarding to her symptoms are out of proportion to the objective medical evidence, and I find her complaints to be exaggerated. Her testimony regarding medical treatment, work restrictions, and other parts of this claim are not reliable and not credible.

8. That the only admitted body parts are the right shoulder and right lower extremity (knee). These are the only body parts being adjudicated on the Defendants' Form 21 hearing. The Claimant has asserted other body parts, but those have all been denied by Defendants, and the undersigned is not addressing those denied body parts in this order.

9. That Claimant does not believe the doctors listened to her complaints, especially Dr. Merritt. I find that those beliefs by Claimant are not supported by the medical evidence.

10. That Dr. Merritt's deposition was very informative, and his opinion is given great weight. Dr. Merritt specifically referenced Claimant's self-limiting behavior (page 26, lines 1-25) and that three different MRIs have been performed in the course of Claimant's treatment (See page 28; page 30, lines 12-25). Dr. Merritt has serious questions about Claimant's motivation to treat, motivation to get back to work, and whether her complaints were legitimate or physical in nature.

11. There are a host of medical records and testimony which call Claimant's motivation and the legitimacy of her complaints into serious question. I give greater weight to the medical reports. I also give less weight to the testimony of Claimant based upon these concerns and my judgment of her testimony at the hearing.

12. The IME report from Dr. Elvington proffered by Claimant was late and was not admitted for consideration at the hearing due to the fact that it was late and nobody had or knew when the report would be forthcoming.

13. Future medical care as recommended on the Form 14B completed by Dr. James Merritt (See APA 22 – "possible pain management if pain continues & is not controlled with OTC medications") applies in this case pursuant to *Dodge v. Bruccoli*.

14. That based on the greater weight of testimony, Claimant reached maximum medical improvement ("MMI") on October 10, 2013, for the injuries resulting from the February 16, 2013 accident.

15. That the testimony and records of Dr. Merritt are given greater weight in this matter.

16. That Defendants were entitled to stop payment of temporary total compensation effective October 10, 2013, and are entitled to a credit for the overpayment of temporary total compensation since October 10, 2013, against the award for permanent partial disability ordered herein. Any overpayment should be returned to the carrier.

17. That Claimant has sustained a six percent (6%) permanent partial disability to the right lower extremity (knee) and five percent (5%) permanent partial disability to the right shoulder (even though the rating is to the right upper extremity, the injury was to the shoulder) as a result of the accidental injury on February 16, 2013. This finding is based on the medical evidence and the testimony of the Claimant, although the Claimant's testimony was given little weight because of the credibility problems discussed above.

18. That Claimant has failed to prove that she is entitled to any further medical benefits, any award for serious disfigurement or any other compensable element under the law, other than the award for disability as ordered herein.

CONCLUSIONS OF LAW

Accordingly, as provided in § 42-17-40, SC Code Ann. (1976), as amended, it is the determination of this Commission that:

1. Under § 42-1-130, Claimant was a covered employee at the time in question; and under § 42-1-140, Defendant/Employer was a covered employer under the Act.

2. Under § 42-1-160, Claimant did sustain an injury to her right knee and right shoulder by accident arising out of and in the course and scope of her employment on February 16, 2013.

3. Under §§ 42-9-10 and 42-1-120, Claimant was entitled to compensation for a period of temporary total disability until October 10, 2013, the date on which Claimant reached maximum medical improvement.

4. Under § 42-15-60, Claimant was entitled to medical, surgical, hospital and other authorized treatment until October 10, 2013, the date on which Claimant reached maximum medical improvement.

5. Under § 42-9-30, Claimant has sustained a six percent (6%) permanent partial disability to the right lower extremity (knee) and five percent (5%) permanent partial disability to the right shoulder.

6. Under § 42-9-210, Defendants are entitled to a credit for the overpayment of temporary total compensation since October 10, 2013.

END

UPON REVIEW of the Claimant's timely filed Form 30 seeking review by the Appellate Panel, review of the record on appeal, and consideration of oral arguments and briefs, we issue the following:

IT IS HEREBY ORDERED, that the Order of the Single Commissioner dated March 5, 2014 be vacated and that the matter be remanded to the Hearing Commissioner for a DE NOVO hearing to determine issues set forth on both the Defendants' Form 21 and the Claimant's Form 50.

COMMISSION PANEL

The Hon. Susan S. Barden

The Hon. T. Scott Beck

The Hon. Alsha Taylor

CERTIFICATE OF SERVICE

This is to certify that the undersigned has on this date served a copy of this order in the above entitled action upon all parties to this case by sending an electronic copy hereof by electronic mail addressed to the attorneys for said parties; or if there is an unrepresented party(ies), by depositing a copy hereof, postage paid in the United States mail, first class, addressed to the unrepresented party(ies) and to the attorney(s) for the represented party(ies).

By Eugenia Hollmon on October 22, 2014

BCCD 4/30/09

APPELLATE PANEL

DECISION AND ORDER

OF THE

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

W.C.C. FILE NO. 0612658 and 0710608

STANLEY N. BRUCE, — EMPLOYEE, CLAIMANT/RESPONDENT,

- V -

SESSIONS PAYROLL MGMT. INC. and MITSUBISHI POLYESTER FILM, — EMPLOYERS,

AND

LUMBERMENS UNDERWRITING ALLIANCE and TOKIO MARINE & NICHIDO INS. CO., LTD., — CARRIER, DEFENDANTS,

OF WHICH: TOKIO MARINE & NICHIDO INS. CO. are — APPELLANTS.

Appellate Panel Review held in Columbia, South Carolina on February 24, 2009 per notices timely and properly served on all parties of interest.

Appellate Panel Decision and Order filed April 29, 2009.

APPEARANCES:

Claimant/Respondent represented by Kathryn Williams, Esquire, of Greenville, South Carolina.

Defendants/Respondents/Lumbermens Underwriting Alliance represented by Benjamin M. Renfrow, Esquire, of Greenville, South Carolina.

Defendants/Appellants/Tokio Marine & Nichido Ins. Co., LTD represented by Adrianne L. Turner, Esquire, of Columbia, South Carolina.

STATEMENT OF CASE

The parties were heard by Commissioner J. Alan Bass on February 28, 2008 in Columbia, South Carolina. On June 27, 2008, he issued the following Order:

> It is ordered that defendants Mitsubishi and Tokio Marine shall provide the following:
>
> 1. All causally related medical evaluation and treatment expenses from June 15, 2006 to the present and continuing, including but not limited to evaluation and treatment at Roger C. Peace Brain Injury Program, and with such further treatment to be directed by Dr. Carol Kooistra. Dr. Kooistra is the authorized treating physician and is entitled to payment of her past and continuing medical bills.
>
> 2. Temporary total disability compensation at the rate of $609.09 per week from August 28, 2007 to the present and continuing until further Order of the Commission or agreement of the parties. All such payments shall be made to claimant through his attorney's office or as directed by his attorney.

Within the statutory period, counsel for Tokio Marine & Nichido Fire Insurance Co., Ltd. filed an Application for Review in the case setting forth her reasons, copies of which were furnished to all interested parties prior to oral argument presented before the Appellate Panel on February 24, 2009. All proffered testimony has been taken. Such, together with all documentary evidence, has been delivered by oral argument to the individual members of the Appellate Panel and has since been under study and consideration.

By appeal, Mitsubishi/Tokio Marine & Nichido Fire Insurance Co., Ltd. respectfully submits the following:

1. The single commissioner erred in failing to determine that the doctrine of res judicata as well as appropriate application of the case, statutory and regulatory law governing determination of average weekly wage and compensation rate precluded any redetermination of the Claimant's average weekly wage and

corresponding compensation rate where this issue was subject to prior adjudication and unappealed Order of the Commission?

2. The single commissioner erred in finding that the Claimant suffered a physical brain injury as the result of the June 15, 2006 work related accident at Mitsubishi.

3. The single commissioner erred in finding that the Claimant suffered compensable injury to any body part other than his neck as a result of the June 15, 2006 incident at Mitsubishi and, further, in failing to find that the Claimant has attained maximum medical improvement as relates to the June 15, 2006 incident with only partial, if any, permanent impairment to his neck and Claimant is not now nor has he ever been disabled from working due to injuries he sustained as a result of the June 15, 2006 incident at Mitsubishi.

4. As an alternative argument to those set forth hereinabove, Defendant Mitsubishi would asset that the single commissioner erred in denying Defendant Mitsubishi's motion to have the record held open for the deposition of Dr. John Absher.

In an Appellate Review, the Panel shall, pursuant to S.C.Code Ann. §42-17-50 (1985), review the Award, weigh the evidence as presented at the initial hearing and, if good grounds be shown therefore, make its own Findings of Fact and reach its own Conclusions of Law consistent with or inconsistent with those of the Hearing Commissioner.

After careful review in the instant case, the Appellate Panel of the Full Commission has determined the findings of fact, conclusions of law and order by the Single Commissioner are not supported by the evidence presented. The Appellate Panel of the Full Commission does hereby vacate the order of the Single Commissioner in its entirety and does hereby remand this case to the Jurisdictional Commissioner for a *de novo* hearing of this claim.

ORDER

IT IS, THEREFORE, ORDERED the Decision and Order of the Single Commissioner filed June 27, 2008 is hereby vacated in its entirety by the Appellate Panel of the Full Commission, and this claim is remanded to the hearing level to be scheduled for a *de novo* hearing before the next available Jurisdictional Commissioner.

AND IT IS SO ORDERED.

S. C. WORKERS' COMPENSATION COMMISSION

Andrea C. Roche, Commissioner

VACATE AND REMAND:

CONCUR:

David W. Huffstetler, Commissioner

G. Bryan Lyndon, Commissioner

(L:\0612658.acr.app)

KW
ALT
BNR

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereof, postage paid, in the United States mail addressed to the attorney or attorneys for said parties.

This 29 day of April, 2009.

By Janet Godfrey Griggs
Administrative Assistant to the Commissioner

DECISION AND ORDER
OF THE
APPELLATE PANEL
OF THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

COMMISSION PANEL: ANDREA C. ROCHE, CHAIR; SUSAN S. BARDEN; T. SCOTT BECK

SCWCC FILE NO.: 0513463

Eran Lollis,

Claimant

v.

Williamston Rescue Squad,

Employer, and

State Accident Fund,

Carrier, Defendants.

Hearing held in Columbia,
South Carolina on July 15th, 2013
Per notice timely and properly served upon all Parties of Interest.

Appearances: Kathryn Williams, Attorney for Claimant/ Respondent

Wesley J. Shull, Attorney for Defendants/ Appellants

Filed: 10-28-13
Reservice 11-7-13

STATEMENT OF THE CASE

This matter originally came before the Commission on Claimant's Form 50 Hearing request on January 7th, 2010. Subsequent to the Hearing, but prior to the Single Commissioner issuing his Decision and Order, Defendants filed a Motion to add additional and newly discovered evidence. The Single Commissioner denied this Motion by Order dated May 5th, 2010. On May 6th, 2010, the Single Commissioner issued a Decision and Order addressing the merits of the claim.

Defendants appealed both the Decision and Order of May 5th, 2010 addressing the Motion and the Decision and Order of May 6th, 2010 addressing the merits. The Full Commission dismissed the appeal of the May 5th, 2010 Decision and Order addressing the Motion as interlocutory by way of a Decision and Order of the Full Commission dated June 21st, 2010. Prior to the Full Commission conducting a Hearing on the appeal of the Decision and Order of the Single Commissioner of May 6th, 2010 addressing the merits, Defendants appealed the Decision and Order of the Full Commission of June 21st, 2010 to the Court of Common Pleas for Anderson County.

Upon receipt of notice of the Appeal of the Decision and Order of the Full Commission of June 21st, 2010 to the Court of Common Pleas, the Commission held in abeyance the Appeal of the Decision and Order of May 6th, 2010 addressing the merits, pending the outcome of the appeal before the Court of Common Pleas. Claimant filed a Motion to Dismiss with the Court of Common Pleas. By Order dated October 23rd, 2012, the Court of Common Pleas remanded Defendants' Motion to the Full Commission to be considered concurrently with the Appeal of the Decision and Order of May 6th, 2010 addressing the merits.

On July 15th, 2013, the Appellate Panel held a Hearing to determine all issues raised in the Appeal of the Decision and Order of May 6th, 2010 addressing the merits and the issues on remand from the Court of Common Pleas addressing Defendants' Motion. The

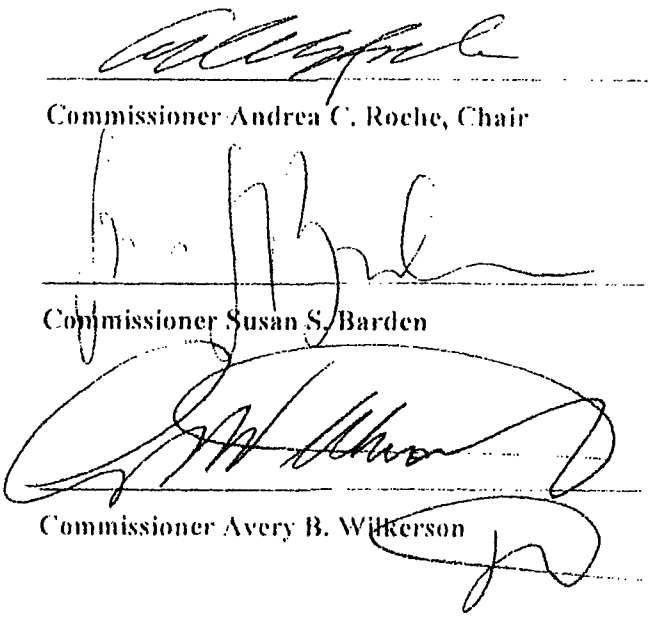
Appellate Panel considered the matter and Vacate and Remand for a Hearing de novo before the Jurisdictional Commissioner.

ORDER

IT IS THEREFORE ORDERED that the Decision and Order of the Single Commissioner dated May 5th, 2010, the Decision and Order of the Single Commissioner dated May 6th, 2010, and the Decision and Order of the Full Commission dated June 21st, 2010 are hereby Vacated.

IT IS FURTHERMORE ORDERED that this matter is Remanded to the Jurisdictional Commissioner to conduct a Hearing de novo on the issues in dispute.

AND SO IT IS ORDERED!



Commissioner Andrea C. Roche, Chair

Commissioner Susan S. Barden

Commissioner Avery B. Wilkerson

Columbia, South Carolina

CERTIFICATE OF SERVICE

This is to certify that the undersigned has on this date served a copy of this order in the above entitled action upon all parties to this case by sending an electronic copy hereof by electronic mail addressed to the attorneys for said parties; or if there is an unrepresented party(ies), by depositing a copy hereof, postage paid in the United States mail, first class, addressed to the unrepresented party(ies) and to the attorney(s) for the represented party(ies).

By Valerie Deller on October 28, 2013

DECISION AND ORDER

OF THE

APPELLATE PANEL

OF THE

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

~~COMMISSION PANEL: THE HONORABLE GENE MCCASKILL, CHAIR; THE~~ HONORABLE ANDREA C. ROCHE.; THE HONORABLE AISHA TAYLOR

SCWCC FILE NO.: 1001704

JEROME SUMTER,

Claimant

v.

EMS CHEMIE, INC.,

Employer, and

HARTFORD INSURANCE CO.,

Carrier, Defendants.

Hearing held in Columbia,

South Carolina on April, 30, 2013

Per notice timely and properly served upon all Parties of Interest.

Appearances: **Lee Gremillion for Defendants/Appellants**

Max C. Sparwasser for Claimant/ Respondents

Filed: 7-16-13

STATEMENT OF THE CASE

On, the single Commissioner issued his Decision and Order containing the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. *That all parties to this proceeding are subject to and bound by the terms and provisions on the South Carolina Workers' Compensation Act.*

2. *That the Claimant sustained an injury to his right hand by accident arising out of and in the course of his employment on February 26, 2010.*

3. *That the injury began as a burn injury to the hand but progressed into carpal tunnel syndrome and he had carpal tunnel release surgery on August 17, 2011.*

4. *That the Claimant has not reached MMI and the Claimant is entitled to additional medical treatment. Neither Dr. Healy nor Dr. Millins, who are both authorized doctors, have released Mr. Sumter at maximum medical improvement.*

5. *That additional testing is needed in order for Mr. Sumter to be at maximum medical improvement. Additional treatment recommended by Dr. Healy is outlined on APA page 43.*

6. *That the Defendants are responsible for all causally-related medical expenses to date.*

7. *That the Claimant has depression secondary to his physical injury as noted on APA pages 42-43.*

8. *Thant an evaluation is to be provided by a psychologist to determine what if any treatment is necessary for depression.*

9. *That the defendants stop pay application is denied.*

RULINGS OF LAW

1. *Under Section 42-1-160, Claimant sustained an injury to his right hand by accident arising out of and in the course of his employment.*

2. *Claimant is entitled to additional medical treatment necessary to lessen the period of his disability. S.C. Code § 42-15-60; Dodge v. Bruccoli, Clark, and Layman, Inc., 518 S.E. 2d 593 (S.C. 1999); Dykes v. Daniel constr. Co., 202 S.E. 2d 646 (S.C. 1974)*

3. *Under Section 42-15-20, proper notice of the injury was given to his employer.*

4. *Under Section 42-15-40, a claim was filed in a timely manner.*

5. *Under Section 42-15-60, Claimant is entitled to future medical treatment for his right hand.*

6. *Under Section 42-15-60, Claimant is entitled to future medical treatment for his depression.*

ORDER AND AWARD

1. *The Defendants shall provide further treatment for Claimant's right hand.*

2. *The Defendants shall provide further treatment for Claimant's depression.*

3. *The Defendants shall provide continued treatment as recommended by Dr. Healy to include any additional testing necessary.*

4. *The Defendants shall provide an evaluation by a psychologist to determine what, if and, treatment is necessary for his depression.*

5. *The Defendants shall be responsible for all causally related medical costs, including mileage, prescriptions, and other benefits provided under the Workers' Compensation Act.*

ISSUES ON APPEAL

Employer filed a Form 30 Request for Commission Review on December 20, 2012. Claimant raised the following questions as grounds for appeal:

1. The Hearing Commissioner erred in Finding of Fact Number Four (4) by finding that Claimant has not reached MMI and that he is entitled to additional medical treatment, the error being that such finding is not supported by substantial evidence and is contrary to the medical records put into evidence.
2. Hearing Commissioner erred in Finding of Fact Number Five (5) by finding that Claimant is entitled to additional testing in order to obtain MMI, the error being that such finding is not supported by substantial evidence and is contrary to the medical records put into evidence.
3. Hearing Commissioner erred in Finding of Fact Number Six (6) by finding that Defendants are responsible for all causally-related medical expenses to date, the error being that such finding is not supported by substantial evidence and is contrary to the medical records put into evidence.
4. Hearing Commissioner erred in Finding of Fact Number Seven (7) by finding that Claimant has depression secondary to the physical injury; the error being that such finding is not supported by substantial evidence.
5. The Hearing Commissioner erred in Finding of Fact Number Eight (8) by finding that Claimant is entitled to an evaluation by a psychologist, the error being that such finding is not supported by substantial evidence.

6. Hearing Commissioner erred in Finding of Fact Number Nine (9) by finding that Defendants Stop-Pay Application is denied, the error being that this finding is not supported by substantial evidence.
7. The Hearing Commissioner erred in Conclusion of Law Number Two (2) by concluding that Claimant is entitled to additional medical treatment pursuant to S.C. Code Section 42-15-60, Dodge v. Bruccoli, 518 S.E.2d 593 (S.C. 1999), and Dykes v. Daniel Construction Co., 202 S.E.2d 646 (S.C. 1974), the error being that this conclusion is inconsistent with all of the evidence in the record.
8. The Hearing Commissioner erred in Conclusion of Law Number Five (5) by concluding that Claimant is entitled to future medical treatment for his right hand, the error being that this conclusion is inconsistent with all of the evidence in the record.
9. The Hearing Commissioner erred in Conclusion of Law Number Six (6) by concluding that Claimant is entitled to future medical treatment for his depression, the error being that this conclusion is inconsistent with all of the evidence in the record.
10. The Hearing Commissioner erred in Ordering that Defendants shall provide further treatment for Claimant's right hand, the error being that this Order is not supported by substantial evidence and is inconsistent with the evidence in the record.
11. The Hearing Commissioner erred in Ordering that Defendants shall provide further treatment for Claimant's depression, the error being that this Order is not supported by substantial evidence and is inconsistent with the evidence in the record.
12. The Hearing Commissioner erred in Ordering that Defendants shall provide continued treatment as recommended by Dr. Healy, the error being that this Order is not supported by substantial evidence and is inconsistent with the evidence in the record.
13. The Hearing Commissioner erred in Ordering that Defendants shall provide an evaluation by a psychologist, the error being that this Order is not supported by substantial evidence and is inconsistent with the evidence in the record.
14. The Hearing Commissioner erred in Ordering that Defendants are responsible for all causally-related medical costs, including mileage, prescriptions and other benefits provided under the Worker's Compensation Act, the error being that this Order is not supported by substantial evidence and is inconsistent with the evidence in the record,.

FINDINGS OF THE FULL COMMISSION

The South Carolina Workers' Compensation Full Commission Appellate Panel considered the matter and Vacates and orders a Hearing *de novo* by the Jurisdictional Commissioner.

ORDER

IT IS THEREFORE ORDERED that,

the Decision and Order of the Single Commissioner in this matter is Vacated and the matter is Remanded to the Jurisdictional Commissioner for a Hearing *de novo.*

AND SO IT IS ORDERED!

Commissioner McCaskill, Chair

Commissioner Roche

Commissioner Taylor

Columbia, South Carolina

CERTIFICATE OF SERVICE

This is to certify the undersigned has this date served this order in the above entitled action upon all parties to this cause by sending an electronic copy hereof by electronic mail addressed to the attorney or attorneys for said parties or by depositing a copy hereof, postage paid, in the United States mail addressed to any unrepresented party.

By Valerie Deller on July 16, 2013

DECISION AND ORDER OF THE APPELLATE PANEL

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

W.C.C. FILE NO: 1202332

ELLIOTT BARBER, **EMPLOYEE, CLAIMANT/RESPONDENT,**

-V-

CANDIES CONSTRUCTION CO., LLC, **EMPLOYER,**

AND

GRANITE STATE INSURANCE CO., **CARRIER, DEFENDANTS/APPELLANTS,**
AND

CUSTOM COATED COMPONENTS, LLC, **UNINSURED EMPLOYER,**

AND

THE SOUTH CAROLINA UNINSURED EMPLOYERS' FUND. **DEFENDANTS.**

Appellate Panel Review held in Columbia,
South Carolina on July 22, 2014,
per notices timely and properly served
on all parties of interest.

Appellate Panel Decision and Order filed on
October 2nd, 2014

VACATED AND REMANDED

APPEARANCES

Elliott Barber, Claimant/Respondent represented by Ryan T. LeBlanc, Esquire of Joye Law Firm, LLP, of North Charleston, South Carolina

Candies Construction Company, LLC, and Granite State Insurance Company, Defendants/Appellants represented by William Thomas Bacon, IV, Esquire, of Collins & Lacy, L.P., of Charleston, South Carolina

The South Carolina Uninsured Employers' Fund, Defendant represented by Lisa Glover, Esquire, of Columbia, South Carolina.

Custom Coated Components, LLC, Defendant is unrepresented and failed to appear.

STATEMENT OF THECASE

This matter was heard before the Single Commissioner in Charleston, South Carolina on November, 11, 2013, pursuant to notice timely and properly given to all parties of record. The initial hearing was conducted before the Single Commissioner on September 19, 2013. The Hearing was postponed to November 11, 2013, in order to allow the owner of Custom Coated Components, LLC ("Custom"), Earnest Candies, thirty (30) days to hire legal representation since he was not represented and his company did not have coverage for the alleged accident. On November 11, 2013, Mr. Earnest Candies, on behalf of Custom, waived his right to legal representation for this case.

The main issue for determination was whether an employer/employee relationship existed at the time of the alleged accident between either Candies Construction Company, LLC ("Candies") and the Claimant, or Custom and the Claimant. The Claimant stipulated the activities that led to his alleged injuries were outside the normal scope of his employment with both Candies and Custom. However, the Claimant alleged a direct benefit to either or both employers and thus the injury should be found compensable. If an employer/employee relationship existed, then the Claimant requested a finding of injury to his neck, left shoulder, and left upper extremity as well as his entitlement to temporary total disability benefits and causally related medical treatment.

Candies denied the Claimant was an employee at the time of the alleged accident stating the actions leading to his alleged injuries were outside the scope and course of his employment with Candies. Candies further alleged the Claimant was committing a crime at the time of the alleged accident and thus

his theft would have removed him from the course and scope of any employment. Candies requested the Single Commissioner find the Claimant was stealing and refer him to the Attorney General for investigation of insurance fraud.

Ernest Candies took the position the Claimant was not working for either company at the time of the alleged accident, that they were simply taking scrap metal, selling it and dividing the money as "pocket change" for the weekend.

By Order dated February 28, 2014, the Single Commissioner found the Claimant was an employee within the scope and course of his employment with Candies at the time of the January 4, 2012 accident. Candies, and their carrier Granite State, were ruled the responsible parties for the claim and the other parties were dismissed. The Claimant was awarded TTD from the date of accident to present and continuing, as well as causally related medical treatment. On March 18, 2014, Candies and Granite State filed a Form 30, Request for Commission Review, challenging the Single Commissioner's Decision and Order. The following issues were raised on appeal:

1. The Hearing Commissioner erred in Finding of Fact #8, the Claimant testified the same on direct examination as in cross-examination. I find the Claimant very credible. He is not hiding anything from his past. He admitted to past jail time history, etc., when the same is not supported by the preponderance of the evidence in the record.
2. The Hearing Commissioner erred in Finding of Fact #9, Candies Construction Co., LLC raised an argument that a crime had been committed during the time of the accident. The defense requested referral to the Attorney General's office for fraud. This defense fails as the owner, Mr. Ernest Candies, was part of the process and finally testified that he believed was not stealing at the time of the accident, when the same is not supported by a preponderance of the evidence in the record.
3. The Hearing Commissioner erred in Finding of Fact #10, Elliot Barber's testimony - credible. He testified that he was paid cash no matter what the job he worked. Testified regarding his jobs and descriptions. Mr. Barber believed he was an employee of Candies,

at the time of the accident, while removing metal. His pay was about the same as he was making while working for Candies, when the same is not supported by the preponderance of the evidence in the record.

4. The Hearing Commissioner erred in Finding of Fact #11, I believe a nexus exists between Mr. Barber and Candies Construction Co., LLC and that he was an employee of Candies Construction the whole time, when the same is not supported by the preponderance of the evidence in the record.

5. The Hearing Commissioner erred in Finding of Fact #12, I base this finding off of the testimony of Mr. Barber and Mr. Candies that he was employed with Candies Construction and not Custom Coated Components at the time of the accident, when the same is not supported by the preponderance of the evidence in the record.

6. The Hearing Commissioner erred in Finding of Fact #13, the Uninsured Employers Fund is not a responsible party to this claim, when the same is not supported by the preponderance of the evidence in the record.

7. The Hearing Commissioner erred in Finding of Fact #14, Mr. Candies asked Mr. Barber to help him remove equipment form the Custom Coated warehouse. Mr. Barber agreed, when the same is not supported by the preponderance of evidence in the record.

8. The Hearing Commissioner erred in Finding of Fact #16, Pursuant to the South Carolina Supreme Court's holding in Hicks v. Piedmont Storage, 335 S.C. 46, 515 S.E.2d 532 (SC 1999), when the work of injured employee is outside the course of his employment, the work needs to benefit the company, not an individual, in order for the Claimant to be entitled to compensation under the SC Workers' Compensation Act, when the same is not supported by the preponderance of the evidence in the record.

9. The Hearing Commissioner erred in Finding of Fact #17, in the case at hand, Mr. Barber testified that he was told by Mr. Candies that the job of removing equipment from the Custom Coated warehouse was so the employer could make enough money to make

payroll at Candies Construction, as well as, so he would not have to pay taxes on the equipment. Furthermore, the Claimant was to be paid his hourly rate at Candies Construction since he was still on Candies Construction's time, when the same is not supported by the preponderance of the evidence in the record.

10. The Hearing Commissioner erred in Finding of Fact #19, as noted earlier, I find Mr. Barber to be credible and Mr. Candies not to be credible. Therefore, I place more weight with Mr. Barber's testimony than Mr. Candies, when the same is not supported by the preponderance of the evidence in the record.

11. The Hearing Commissioner erred in Finding of Fact #20, as such, since the money used from scrapping the equipment was to help make payroll at Candies Construction, I find that Candies Construction has benefited from this job. Coupled with the fact that this job led to the Claimant's injury, Candies Construction is the responsible party in this action, when the same is not supported by the preponderance of the evidence in the record.

12. The Hearing Commissioner erred in Finding of Fact #21, Custom Coated Components is not a responsible party in this action and thus has no liability toward the Claimant's work-related injury, when the same is not supported by the preponderance of the evidence in the record.

13. The Hearing Commissioner erred in Finding of Fact #23, during the week, Ernest Candies, and others, would go directly to the plant of Custom Coated Components to remove metal, if it were a work day, when the same is not supported by the preponderance of the evidence in the record.

14. The Hearing Commissioner erred in Finding of Fact #25, Mr. Candies initially testified that they were stealing metal from the plant. He later corrected himself regarding the theft of the material. He testified that he believed he owned the metal even though he was in foreclosure with the bank, when the same is not supported by the preponderance of the evidence in the record.

15. The Hearing Commissioner erred in Finding of Fact #29, credibility of Ernest Candies is in question - pays everybody cash, no records, no W-2s, no 1099s, when the same is not supported by the preponderance of the evidence in the record.

16. The Hearing Commissioner erred in Finding of Fact #30, I find that an employer/employee relationship existed between Mr. Ernest Candies and Mr. Elliot Barber. Specifically, I find that said relationship existed, only, between Candies Construction Co., LLC and Mr. Elliot Barber at the time of the accident, when the same is not supported by the preponderance of the evidence in the record.

17. The Hearing Commissioner erred in Finding of Fact #31, I find that a work-related injury occurred on January 4, 2012, when the same is not supported by the preponderance of the evidence in the record.

18. The Hearing Commissioner erred in Finding of Fact #32, I find that the work-related accident caused injuries to the Claimant's neck, left shoulder, and left upper extremity, when the same is not supported by the preponderance of the evidence in the record.

19. The Hearing Commissioner erred in Fining of Fact #33, I base this finding on the fact that both Mr. Barber and Mr. Candies admitted to the accident taking place. In addition, a qualified, licensed, medical physician has opined to a reasonable degree of medical certainty that the accident on January 4, 2012 directly caused the injuries to Mr. Barber's neck, left shoulder, and left upper extremity, when the same is not supported by the preponderance of the evidence in the record

20. The Hearing Commissioner erred in Fining of Fact #34, I find that Candies Construction and Granite State are responsible for any and all past, causally-related medical treatment and will reimburse Mr. Candies for any causally-related medical bills he has paid, when the same is not supported by the preponderance of the evidence in the record.

21. The Hearing Commissioner erred in Finding of Fact #35, I find that Candies Construction and Granite State are responsible for future medical treatment to the neck, left shoulder,

and left upper extremity, when the same is not supported by the preponderance of the evidence in the record.

22. The Hearing Commissioner erred in Finding of Fact #36, I would find that the AWW = $440.00 with a corresponding CR = $293.48. This is based on the testimony of the Claimant and the Employer – paid more on some jobs than others, when the same is not supported by the preponderance of the evidence in the record.

23. The Hearing Commissioner erred in Finding of Fact #37, The Claimant is entitled to TTD benefits from June 25, 2012 to present and continuing, when the same is not supported by the preponderance of the evidence in the record.

24. The Hearing Commissioner erred in Finding of Fact #38, I would refer the Employer to the Attorney General's office. I suspect employer fraud, when the same is not supported by the preponderance of the evidence in the record.

25. The Hearing Commissioner erred in Conclusions of Law #1, Under Section 42-1-130, the Claimant was a covered employee with Candies Construction Company, LLC, at the time in question, when the same is based upon erroneous legal conclusions.

26. The Hearing Commissioner erred in Conclusions of Law #2, Under Section 42-1-140, the Defendant employer, Candies Construction Company, LLC, was a covered employer under the Act, when the same is based upon erroneous legal conclusions.

27. The Hearing Commissioner erred in Conclusions of Law #3, Under Section 42-1-140, the Defendants employer, Custom Coated Components, LLC, was subject to the Act and uninsured. This is to be addressed in a separate Order, when the same is based upon erroneous legal conclusions.

28. The Hearing Commissioner erred in Conclusions of Law #4, Under Section 42-1-160, the Claimant sustained a compensable injury by accident, arising out of the course and scope of his employment, to his neck, left shoulder, and left upper extremity on January 4,

2012, while working for Candies Construction Company, LLC, when the same is based upon erroneous legal conclusions.

29. The Hearing Commissioner erred in Conclusions of Law #5, Under Section 42-1-40, the Claimant's average weekly wage is $440.00, with a corresponding compensation rate of $239.48, when the same is based upon erroneous legal conclusions.

30. The Hearing Commissioner erred in Conclusions of Law #6, Under Regulation 67-503, the Claimant is entitled to temporary, total disability benefits from June 25, 2012 to present and continuing, when the same is based upon erroneous legal conclusions.

31. The Hearing Commissioner erred in Conclusions of Law #7, Under Section 42-15-60, the Claimant is entitled to any causally-related medical treatment for his work-related injuries. The Defendant employer, only Candies Construction Company, LLC, is responsible for all past, causally-related medical treatment as a result of the work accident the Claimant sustained on January 4, 2012 and shall reimburse the Claimant for any out-of-pocket expenses he may have incurred as a result of this work accident, when the same is based upon erroneous legal conclusions.

32. The Hearing Commissioner erred in Ordering the Claimant, Elliot Barber, sustained a compensable, work-related injury to his neck, left shoulder, and left upper extremity on January 4, 2012, when the same is not supported by the preponderance of the evidence in the record and is based upon erroneous legal conclusions.

33. The Hearing Commissioner erred in Ordering the Defendant, Candies Construction Company, LLC, is the employer in this claim and therefore responsible for any causally-related medical treatment the Claimant, Elliot Barber received and will need to receive as a result of his work accident, when the same is not supported by the preponderance of the evidence in the record and is based upon erroneous legal conclusions.

34. The Hearing Commissioner erred in Ordering the Defendants, Custom Coated Components, LLC and the Uninsured Employers Fund are not responsible parties for this

claim, when the same is not supported by the preponderance of the evidence in the record and is based upon erroneous legal conclusions.

35. The Hearing Commissioner erred in the Claimant's, Elliot Barber, average weekly wage is $440.00 with a corresponding compensation rate of $293.48, when the same is not supported by the preponderance of the evidence in the record and is based upon erroneous legal conclusions.

36. The Hearing Commissioner erred in Ordering the Claimant is entitled to temporary total disability benefits from June 25, 2012 to present and continuing, when the same is not supported by the preponderance of the evidence in the record and is based upon erroneous legal conclusions.

37. The Hearing Commissioner erred in Ordering Ernest Candies be referred to the Employer to the Attorney General's office for employer fraud, when the same is not supported by the preponderance of the evidence in the record and is based upon erroneous legal conclusions.

38. The Hearing Commissioner erred in preventing counsel for Candies Construction Company and Granite State from eliciting testimony from the Claimant regarding, among other things, his knowledge of the business operations of Candies and then making findings of employment, compensability and credibility when there was insufficient evidence to support such findings.

STANDARD OF REVIEW

In an appellate review, the Appellate Panel shall, pursuant to S.C. Code Ann. §42-17-50 (1985), review the award, weigh the evidence as presented at the initial hearing and, if good grounds be shown therefore, make its own Findings of Fact and reach its own Conclusions of Law consistent with or inconsistent with those of the Single Commissioner.

FINDINGS OF FACT

The following factual findings are based upon the records contained in the Workers' Compensation files, the stipulations of the parties, the testimony rendered at the hearing, the APA submissions, and any other evidentiary submissions:

1. The February 28, 2014 Decision and Order is hereby vacated and this matter is remanded to the jurisdictional Commissioner for a hearing de novo.

CONCLUSIONS OF LAW

The following legal conclusions are based upon the records contained in the Workers' Compensation files, the stipulations of the parties, the testimony rendered at the hearing, the APA submissions, and any other evidentiary submissions:

1. The February 28, 2014 Decision and Order is hereby vacated and this matter is remanded to the jurisdictional Commissioner for a hearing de novo.

ORDER

IT IS HEREBY ORDERED the Appellate Panel vacates the February 28, 2014 Decision and Order and this matter is remanded to the jurisdictional Commissioner for a hearing de novo.

AND IT IS SO ORDERED on this 2nd **day of** October **, 2014.**

Commissioner Gene McCaskill

I Concur:

Commissioner Susan S. Barden

Commissioner Aisha Taylor

CERTIFICATE OF SERVICE

This is to certify that the undersigned has on this date served a copy of this order in the above entitled action upon all parties to this case by sending an electronic copy hereof by electronic mail addressed to the attorneys for said parties; or if there is an unrepresented party(ies), by depositing a copy hereof, postage paid in the United States mail, first class, addressed to the unrepresented party(ies) and to the attorney(s) for the represented party(ies).

By Kim Falls on October 2, 2014

DECISION AND ORDER

OF THE

APPELLATE PANEL

OF THE

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

COMMISSION PANEL: THE HONORABLE AISHA TAYLOR, CHAIR; THE HONORABLE AVERY B. WILKERSON, JR.; THE HONORABLE MELODY JAMES

SCWCC FILE NO.: 1200479

Dallas Paul Bessinger,

Claimant,

v.

RNM Builders 7 Associates, LLC, et. al and J&L Construction,

Employer, and

FirstComp Insurance,

Carrier, Defendants.

Hearing held in Columbia,

South Carolina on October 15th, 2013

Per notice timely and properly served upon all Parties of Interest.

Appearances: Steven D. Haymond, for Claimant/ Respondent

Jerry L. Finney, for Defendant/ Respondent

R. Daniel Addison, for Defendant/ Respondent

Dewana R. Looper for Defendant/ respondent

Amy V. Cofield, for Defendant/ Appellant

Filed: _____

STATEMENT OF THE CASE

The instant proceeding was initiated by Claimant's Form 50 Request for Hearing dated January 26, 2012 to determine issues as set forth on the Form 50 and Form 51 Employer's Answer to Request for Hearing submitted separately by Defendant Employer and Defendant Carrier. And to determine which Employer or Carrier, if any, were liable for compensation, if any due.

Defendant/Carrier filed a timely response to the Form 50 alleging that it is not the proper Carrier in the claim on the basis that the owners of J&L Construction, Defendant/Employer, fraudulently obtained workers' compensation coverage. Defendant/Carrier contends that the coverage, procured based on fraud and misrepresentations, was *void ab initio* and, therefore, there was no policy to cover the accident.

The Uninsured Employers' Fund asserted that the Defendant/Carrier's policy was effective and provided coverage based on the Defendant/Carrier's failure to follow certain procedures to cancel a policy based on misrepresentations.

Defendant/Employer, *pro se,* conceded that the accident did occur but asserted that the Defendant/Carrier's policy was valid and should provide coverage for the claim. Defendant/Employer also denies fraud related to the policy.

On December 18, 2012, the single Commissioner issued her Decision and Order containing the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. *Under §42-3-180, the single Commissioner has jurisdiction over the parties to hear the issues in dispute.*

2. *Claimant sustained a compensable accident on January 4, 2012, while an employee of J&L.*
3. *RNM Builders was the upstream contractor.*
4. *RNM Builders did not have workers' compensation coverage in place on January 4, 2012.*
5. *Claimant injured his left hip, right arm, and back in the January 4, 2012 accident.*
6. *Claimant is entitled to TTD from January 4, 2012 until April 4, 2012.*
7. *Claimant's average weekly wage is five hundred twenty and 00/100 dollars ($520.00), yielding a compensation rate of three hundred forty six and 68/100 dollars ($346.68).*
8. *Based on the evidence presented, Claimant has not yet reached MMI and is in need of additional medical treatment.*
9. *Claimant is entitled to reimbursement and/or payment of past casually-related medical expenses for his compensable body parts.*
10. *Claimant is entitled to ongoing medical treatment at least until he reaches MMI in accordance with S.C. Code §42-15-60.*
11. *Claimant's accident occurred at approximately 10:30 am on January 4, 2012.*
12. *That Wilkie and Loughery applied for the policy with FirstComp later that afternoon with knowledge that the accident had already occurred.*
13. *That Wilkie and Loughery failed to disclose Claimant's January 4, 2012 accident, when obtaining the policy of insurance from FirstComp later the same day.*
14. *That due to Wilkie's and Loughery's fraudulent activity, the policy issued by FirstComp was void ab initio.*
15. *That since neither J&L nor RNM had workers' compensation coverage, UEF is responsible for the claim but maintains any rights to seek reimbursement granted to it by virtue of South Carolina law.*

CONCLUSIONS OF LAW

1. *Under §42-3-180, the single Commissioner has jurisdiction over the parties to hear the issues in dispute.*
2. *Under §42-1-130, Claimant Dallas Paul Bessinger was a covered employee.*
3. *Under §42-1-140, J&L Construction was a covered employer.*

4. *Under §42-3-150, there was an employer/employee relationship between Claimant and J&L Construction.*
5. *Under §42-17-20, venue in Calhoun County, South Carolina was proper and agreed to by the parties.*
6. *Under §1-23-320(b) and Regulation 67-607, notice of hearing was timely and properly served on all parties of interest.*
7. *Under §42-1-160, Claimant, Dallas Paul Bessinger, sustained a compensable injury by accident arising out of and in the course of his employment.*
8. *Under §42-1-40, Claimant's average weekly wage is $520.00 yielding a compensation rate of $346.68.*
9. *Under §42-9-30, Claimant is entitled to temporary total disability for the injury from the date of his accident, January 4, 2012 through April 4, 2012.*
10. *That the policy of insurance from FirstComp was procured by fraud and misrepresentations by Claimant's Employer and is, therefore, void ab initio and provides no coverage over the injury in this case. Under South Carolina law, a contract may generally be rescinded where a party has been induced by fraud into entering into the agreement. (See Commission's file for single Commissioner's additional support for this finding).*

ORDER AND AWARD

Claimant sustained a compensable injury to his left hip, right arm, and back on January 4, 2012, for which he is entitled to reimbursement and/or payment of past casually-related medical expenses; ongoing medical treatment pursuant to S.C. Code §42-15-60 at least until Claimant reaches MMI; and temporary total disability for the injury from the date of his accident, January 4, 2012 through April 4, 2012 at the compensation rate of $346.68. It is further ordered that the policy issued by FirstComp to J&L was void ab initio and no coverage existed at the time of Claimant's January 4, 2012 injury. Accordingly, it is ordered that the UEF provide Claimant's benefits under the Act in accordance with this order.

ISSUES ON APPEAL

The South Carolina Uninsured Employers' Fund (UEF) filed a Form 30 Request for Commission Review on December 28, 2012. UEF requested the Commission review the single Commissioner's Decision and Order to address 7 questions of law or fact regarding the Commissioner's findings. The Form 30 with attachment is contained in the Commission's file.

RULINGS OF LAW OF THE FULL COMMISSION

1. This matter was heard before the South Carolina Workers' Compensation Full Commission Appellate Panel during the last term of Review pursuant to S.C. Code § 42-17-50.
2. The Commissioners reviewed the award of the single Commissioner and find that good grounds have been shown for the Commission to reconsider the evidence, receive further evidence, and rehear the parties or their representatives pursuant to S.C. Code § 42-17-50.
3. The Commission **Vacates** the Decision and Order of the single Commissioner and **Remands** the matter to the Jurisdictional Commissioner for a hearing de novo to reconsider the evidence, receive further evidence, and rehear the parties or their representatives.

ORDER

IT IS THEREFORE ORDERED that the Decision and Order of the single Commissioner is **Vacated** and this matter is **Remanded** to the Jurisdictional Commissioner for a hearing de novo to reconsider the evidence, receive further evidence, and rehear the parties or their representatives.

AND SO IT IS ORDERED!

Commissioner Melody L. James, Chair

Commissioner Aisha Taylor

Commissioner Avery B. Wilkerson, Jr.

Columbia, South Carolina

CERTIFICATE OF SERVICE

This is to certify that the undersigned has on this date served a copy of this order in the above entitled action upon all parties to this case by sending an electronic copy hereof by electronic mail addressed to the attorneys for said parties; or if there is an unrepresented party(ies), by depositing a copy hereof, postage paid in the United States mail, first class, addressed to the unrepresented party(ies) and to the attorney(s) for the represented party(ies).

By Kim Falls on April 17, 2014

APPELLATE PANEL

DECISION AND ORDER

OF THE

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

WCC FILE NO. 1205924

DAVID LEMON, EMPLOYEE, CLAIMANT/APPELLANT,

vs.

MT. PLEASANT WATERWORKS, EMPLOYER,

AND

S.C. STATE ACCIDENT FUND, CARRIER, DEFENDANTS/RESPONDENTS.

Appellate Panel Review held in Columbia, South Carolina on April 20, 2015, upon notices timely and properly served upon all parties of interest.

Appellate Panel Decision and Order filed

September 11th, 2015

REMANDED

APPEARANCES:

Claimant represented by Carl H. Jacobson, Esquire, of Uricchio, Howe, Krell, Jacobson, Toporek, Theos & Keith, PA, Charleston, South Carolina.

Defendants represented by Matthew A. Schonfeld, Esquire, of Willson Jones Carter & Baxley, P.A., Mount Pleasant, South Carolina.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This claim involves an admitted work accident and related injury which occurred on March 8, 2012. As a result of this injury, Defendants admitted injury to the lower back only and provided causally related medical treatment for the same. Claimant alleges causally related injuries to the lower back and both legs. A hearing on permanency was held before Commissioner T. Scott Beck on September 11, 2014.

At the single Commissioner hearing, it was Defendants' position that Claimant's entitlement to permanency was limited to permanent partial disability to the back in an amount less than 50% pursuant to § 42-9-30(21). In the alternative, if Claimant was found to be permanently and totally disabled, Defendants asserted entitlement to a credit of 321 weeks of benefits against such an award, 199 weeks of which were paid to Claimant in the form of TTD and PPD relating to prior injuries while working with the same employer, Mount Pleasant Waterworks, pursuant to §42-9-170.

It was Claimant's position that as a result of injuries to the lower back and both legs he has been rendered permanently and totally disabled under §42-9-10. Claimant further asserted that §42-9-170 does not apply to the facts of this case, so with respect to credit against an award of permanent and total disability, Claimant argued that Defendants should only be entitled to credit for TTD paid on the present claim, which by the date of hearing before the single Commissioner was 122 weeks.

On January 7, 2015, a Decision and Order was issued by the single Commissioner containing the following findings of fact, conclusions of law and order/award:

FINDINGS OF FACT

IT IS FOUND AS A FACT:

1. I find, based upon the greater weight of the evidence, the Claimant is permanently and totally disabled pursuant to S.C. Code §42-9-10. The Claimant has sustained permanent injuries to more than one body part, namely, his back and both legs. As such, his claim for permanency is not restricted to the schedule of benefits as provided by S.C. Code §42-9-30. Singleton v. Young Lumber. 114 S.E. 2d 837 (S.C. 1960). The primary injury to the back has affected the use of both legs. This has been documented by both authorized treating physicians, Dr. Aymond and Dr. Due. This finding is further supported by the Claimant's testimony that he continues to have low back pain and pain radiating into both legs and feet. The Claimant further testified as to the loss of balance and limitations with respect to his back, legs and feet. The Defendants have introduced no medical evidence or testimony to rebut the evidence that the Claimant has sustained permanent injuries to more than one body part.

2. I find that the Claimant is entitled to lifetime causally related medical care.

3. I find that this is Claimant's fifth (5th) work accident as an employee of Mt. Pleasant Waterworks, and he has received disability compensation for prior injuries as follows: 3/04/2009 back injury, 3 weeks of TTD; 4/26/2010 & 4/13/2011 right shoulder injuries, 25.4286 weeks of TTD, and 75 weeks PPD per settlement; 10/3/2011 back injury, 20.5714 weeks of TTD, and 75 weeks of PPD per settlement. By date of hearing, Claimant will have received 122 weeks of TTD for the current injury. As of the date of this proceeding on September 11, 2014, the Defendant was entitled to 321 weeks of credit. Any additional payments of temporary total disability since the date of the Hearing are to be applied as a credit for the Defendants. I specifically find that I need not look any further than the plain language of S.C. Code §42-9-170.

4. I find that the award is to be paid in a lump sum.

5. I find that the Claimant is entitled to Utica- Mohawk Mills v. Orr language in this

order. I find that the Claimant has intentions to file for Social Security disability and that the pursuant to James v. Anne's he is entitled to an award for a lump sum with the insertion of Utica-Mohawk Mills v. Orr language. Defendants have not stated any objection to the payment of the lump sum award or the insertion of the Utica language.

6. The Claimant sustained an admitted injury to his back that occurred on May 8, 2012 and the average weekly wage is $636.04 yielding a weekly compensation rate of $424.05. The Claimant has reached maximum medical improvement as of February 28, 2014. (APA 4).

7. The Claimant's current diagnosis includes, sacroiliac pain, lumbar facet, arthalgia, and post laminectomy lumbar radiculopathy. (APA 1).

8. The Claimant currently requires ongoing medical treatment and the authorized treating physician is Dr. Thomas Due and the Claimant will probably need future medical treatment, including, but not limited to medications, epidurals, facet injections, sacro-Ivac injections, spinal stimulator, back brace, physical therapy, diagnostic imaging (MRI's), and surgical consultations. (APA 4).

9. The Claimant underwent back surgery on October 31, 2012 by Dr. Aymond in which he had a lumbar fusion at the L4-5, L5-S1 levels and implementation of fusion cages. (APA 49).

10. The Claimant continues to experience chronic pain for which he has been prescribed pain medication that causes him to become drowsy, causes loss of memory and impaired judgement.

11. According to Dr. Due, the Claimant's limitations include: "unable to lift more than ten (10) pounds, no sitting/standing more than 2 hours, no crawling, climbing, pulling, pushing, narcotic medications may cause judgement impairment unable to operate machinery."

(APA 4).

12. The Defendant's vocational expert ultimately conceded that all of the jobs that she identified in her Labor Market Survey that the Claimant could perform required online applications and that it would be difficult for the Claimant to apply for these jobs because of his limited computer skills. Additionally, the expert conceded that the Claimant would most probably have to miss more than four (4) days of work per month because of his physical condition and that by definition, an individual who misses more than four (4) days per month from work, would be deemed to be vocationally disabled.

13. In contrast to the Defendant's vocational expert's equivocal testimony, the Claimant's vocational expert, David Price, unequivocally found that the Claimant is permanently and totally disability and is not a candidate for vocational rehabilitation. (EX 1).

CONCLUSIONS OF LAW

Accordingly, as provided in Section 42-17-40 of the South Carolina Worker's Compensation Act, it is the determination of this Commissioner that:

1. §42-9-10 provides for permanent total disability benefits; and

2. §42-15-60 governs the payment of medical benefits; and

3. §42-9-170 provides that the maximum exposure for the payment of disability benefits is 500 weeks for the multiple claims filed by an employee with the same employer. The maximum number of disability is 500 weeks. I specifically find that there is no need to look any further than the plain language of §42-9-170 to determine the number of weeks of credit the Defendant is entitled to receive.

ORDER AND AWARD

IT IS THEREFORE ORDERED that the Defendants shall pay all medical expenses that

are causally related to the Claimant's compensable injuries and shall continue to provide medical treatment by Dr. Thomas Due, the authorized treating physician, and shall provide lifetime causally related medical, including medications, epidurals, facet injections, sacro-Ivac injections, spinal stimulator, back brace, physical therapy, diagnostic imaging (MRTs), and surgical consultations.

IT IS FURTHER ORDERED that the Defendants shall pay permanent total disability benefits to the Claimant at the weekly comp rate of $424.05 and that said payments shall be made in a lump sum payment, giving the Defendants credit for the 321 weeks that had accrued at the time of the Hearing and for any additional payments of temporary total disability benefits since the date of the Hearing. The Claimant is entitled to Utica, language in the final order. The specific allocation of weeks, taking into consideration attorney's fees and expenses, with the appropriate Utica v. Orr/James v. Anne's language can be done by supplemental order.

AND IT IS SO ORDERED.

Claimant timely appealed from the portions of the Decision and Order dated January 7, 2015, that relate to credit awarded to Defendants under §42-9-170.

Based on his brief and oral arguments, the thrust of Claimant's argument on appeal is that §42-9-170 does not apply to the facts of this claim and it was therefore error for the single Commissioner to order credit to Defendants for 199 weeks of TTD and PPD paid on prior claims while Claimant was with the same employer, Mount Pleasant Waterworks. Specifically, Claimant argues that the 199 weeks of credit awarded would have been proper had his present permanent injury been under §42-9-30 or the second paragraph of §42-9-10 (which is §42-9-10(B)). However, Claimant insists that he sustained permanent and total disability under §42-9-10(A), therefore the credit should not apply.

In response, Defendants argue that the ordering of credit under §42-9-170 was proper, pointing out that Claimant was deemed to have sustained permanent injury and resulting disability to both legs, a fact and conclusion that is not disputed by Claimant, therefore making Claimant's award of permanent and total disability proper under §42-9-10(B). In light of the lack of specificity in the single Commissioner's Decision and Order with respect to which paragraph of §42-9-10 applies to Claimant's award, Defendants argue that the full Commission should makes its own findings of fact based on the evidence, pursuant to the authority granted under §42-17-50, and find that Claimant was properly awarded permanent and total disability benefits under §42-9-10(B).

On appeal, the parties agree the relevant and operative statutory provision, the applicability of which is in dispute, is §42-9-170(B), which states:

> If an employee receives a permanent injury as specified in Section 42-9-30 or the second paragraph of Section 42-9-10 after having sustained another permanent injury in the same employment, he is entitled to compensation for both injuries, but the total compensation must be paid by extending the period and not by increasing the amount of weekly compensation, and in no case exceeding five hundred weeks. If an employee previously has incurred permanent partial disability through the loss of a hand, arm, shoulder, foot, leg, hip, or eye and by subsequent accident incurs total permanent disability through the loss of another member, the employer's liability is for the subsequent injury only, except that the employee may receive further benefits as provided under the provisions of Section 42-9-35. This subsection is effective on July 1, 2008.

All proffered testimony has been taken. Such, together with all documentary evidence and oral argument, has been delivered to the individual members of the Appellate Panel and has since been under careful consideration.

STANDARD OF REVIEW

In an Appellate Review, the Appellate Panel shall, pursuant to S.C. Code Ann. §42-17-50, review the award, weigh the evidence as presented at the hearing and, if good grounds be shown therefore, make its findings of facts and reach its own conclusions of law consistent or

inconsistent with those of the Hearing Commissioner. *See Green v. Raybestos-Manhattan, Inc.*, 250 S.C. 58, 156 S.E.2d 318 (1967); *see also Lowe v. An-Can Transport Services, Inc.*, 283 S.C. 534, 324 S.E.2d 87 (Ct. App. 1984).

FULL COMMSSION APPELLATE PANEL DECISION

After a thorough review of the evidence, including the hearing testimony, medical evidence, exhibits, other documentary evidence submitted by the respective parties pursuant to the Administrative Procedures Act, the Commission File in this matter, and arguments of counsel, WE, THE APPELLATE PANEL, REMAND TO THE SINGLE COMMISSIONER FOR:

1. A determination of the particular subsection of §42-9-10 used for the award of the present case.

2. A determination of the statutes under which the prior awards were issued.

3. Any facts, analysis, conclusions of law, or order provisions that the single Commissioner should deem necessary in the analysis of the §42-9-170 credit issue.

ORDER/AWARD

IT IS HEREBY ORDERED that this claim is hereby remanded to Commissioner T. Scott Beck for a determination of the matters set forth above.

IT IS SO ORDERED.

Commissioner Melody L. James, Chair

Commissioner Avery B. Wilkerson

Commissioner Aisha G. Taylor

CERTIFICATE OF SERVICE

This is to certify that the undersigned has on this date served a copy of this order in the above entitled action upon all parties to this case by sending an electronic copy hereof by electronic mail addressed to the attorneys for said parties; or if there is an unrepresented party(ies), by depositing a copy hereof, postage paid in the United States mail, first class, addressed to the unrepresented party(ies) and to the attorney(s) for the represented party(ies).

By Kim Falls on September 11, 2015

DECISION AND ORDER
OF THE
APPELLATE PANEL
OF THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

COMMISSION PANEL: THE HONORABLE ANDREA C. ROCHE, CHAIR; THE HONORABLE H. GENE MCCASKILL; THE HONORABLE SUSAN S. BARDEN

SCWCC FILE NO.: 1115169

Kelly Bub,

Claimant

v.

Safe Fit Walk- in Tub Company, LLC,

Employer, and

S.C. Uninsured Employers' Fund,

Carrier, Defendants.

Hearing held in Columbia,
South Carolina on January 23, 2013
Per notice timely and properly served upon all Parties of Interest.

Appearances: Jonathan J. Shanks for Claimant/ Appellant

Lisa C. Glover, Attorney for Defendants/ Respondents SC UEF

The Uninsured Employer did not appear

Filed: 3-27-13

STATEMENT OF THE CASE

Claimant filed a WCC Form 50 on October 26, 2011, alleging injuries by accident to her right upper extremity, left upper extremity, right shoulder, left shoulder, lip, multiple lacerations/ abrasions, teeth, head, brain, back, spine, right lower extremity, and left lower extremity, arising out of and in the course of her employment with Safe Fit Walk-In Tub, LLC on September 3, 2011. Claimant contended an average weekly wage of $500.00. Claimant requested medical treatment and payment of temporary disability. The uninsured employer did not file a Form 51 or make an appearance on its own behalf. The South Carolina Uninsured Employer's Fund filed a Form 51 on November 18, 2011 denying the claim on the basis that Claimant's injuries did not occur within the course and scope of her employment. A Hearing was held on June 12th, 2012 before the Honorable Derrick L. Williams. On September 13, 2012, the single Commissioner issued his Decision and Order containing the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. *I do not find that Claimant's testimony believable in this case, based on the nature of this accident, her job duties, and the evidence as a whole. (Sic.) I do not believe her version of what she alleges happened on the date of this accident, in terms of showing up to work in a bikini and shorts to pass out flyers on a Saturday. Though she was the only "live" witness, this mere fact does not outweigh the totality of her testimony and all of the evidence in this case. When I view the record as a whole, including her own testimony as to normal business attire and working conditions, it unfathomable that on this one Saturday she was set to hand out flyers, in a bikini, while riding a moped. My impressions stated herein are limited to the testimony I heard and my observations of Claimant's demeanor on the date of the Hearing.*

2. *I do find the deposition testimony of Sylvia Royal and Mack Hearron to be admissible in this case. While I do not ascribe great weight to Mr. Hearron's testimony, Ms. Royal's testimony is instructive and persuasive as to the events and facts that were to occur on the day of the accident.*
3. *While not necessarily dispositive on the ruling in this case, I do find the deposition testimony Ms. Sylvia Royal relevant and persuasive in this case. (Sic.) She testified credibly to the events on this date, and I believe her testimony much more than the Claimant. She testified that they were going to the Claimant's mother's house to drop off some money and then go to the beach. She was clear that there were not working or going to hand out flyers for the company. However, even without her testimony, I do not believe the Claimant's version of what she was doing on this day of the moped accident.*
4. *Based on the evidence as a whole, I do not find that the Claimant has met her burden of proving a compensable injury by accident within the course and scope of her job duties. Claimant was using the moped for her personal benefit and personal use, and the evidence is thin (to say the least) that she was doing anything in furtherance of her employer's business. This finding is based on the testimony and record when reviewed as a whole.*
5. *All benefits under the South Carolina Workers' Compensation Act are hereby denied.*

RULINGS OF LAW

1. *The burden of proof applicable to a claim for Workers' Compensation Benefits is the preponderance of the evidence. The Claimant must establish by a preponderance of the evidence the facts that will entitle her to an award. Walsh v. U.S. Rubber Co., 120 S.E.2d 685 (1961); Herndon v. Morgan Mills, Inc., 143S.E.2d 376 (1965). The Claimant did not meet her burden of proof in establishing her claim by a preponderance of the evidence that she was injured in the course and scope of her employment as outlined in section 42-1-160.*

ORDER AND AWARD

Based upon the above Findings of Fact and Conclusions of Law it is hereby ORDERED, ADJUDGED AND DECREED the Claimant, Kelly Bub, failed to prove by a preponderance of the evidence that she suffered compensable injuries while in the course and scope of employment as outlined in section 42-1-160. It is further, ORDERED, ADJUDGED, AND DECREED the Claimant, Kelly Bub's claim for benefits under the South Carolina Workers' Compensation Act is DENIED AND DISMISSED with prejudice subject to her appellate rights.

ISSUES ON APPEAL

Claimant filed a Form 30 Request for Commission Review on September 14, 2013. Claimant raised the following questions as grounds for appeal:

1. *Did the Single Commissioner err in finding, as a matter of fact, that the Claimant did not suffer from a compensable accident which arose out of and in the course of her employment with Safe Fit Walk-In tub company, LLC?*
2. *Did the Single Commissioner err in not finding, as a matter of fact, that safe Fit Walk-In Tub Company, LLC had four or more full or part time employees and was thus subject to the South Carolina Workers' Compensation Act and was operating without workers' compensation insurance coverage?*
3. *Did the Single Commissioner err in not finding, as a matter of fact, that the medical care as documented in the Claimant's testimony and APA exhibits was reasonable and necessary and was not the direct result of her work related accident?*
4. *Did the Single Commissioner err in finding, as a matter of fact, that the claimant's testimony was not credible?*
5. *Did the Single Commissioner err in finding, as a matter of fact, that Sylvia Royal's testimony was credible?*

6. *Did the Single Commissioner err in finding, as a matter of fact, that Mack M. Herron's testimony was credible and that any weight should have been ascribed to his testimony?*
7. *Did the Single Commissioner err in concluding, as a matter of law, that the depositions of Mack M. Herron and Sylvia Royal were admissible even though there was no evidence offered into the record meeting the requirements of SCRCP 32(a)(3)(A) through (E), the rule of which required criteria to be met, or evidence to be presented, in order to justify the admissibility of depositions?*
8. *Did the Single Commissioner err in concluding, as a matter of law, that the deposition of Sylvia Royal was admissible even though there was no evidence offered into the record meeting the requirements of SC Regulation 67-613, the regulation which requires criteria to be met, or evidence to be presented into the record, in order to justify the admissibility of the witness deposition?*
9. *Did the Single Commissioner err in concluding, as a matter of law, that Claimant's procedural due process rights to confront and cross examine Mack M. Herron and Sylvia Royal were not violated when their deposition testimony was admitted over her objections, where she was unable to confront and cross examine the stated party and witness at the time of the hearing?*
10. *Did the Single Commissioner err, as a matter of law, in not affording the Claimant an opportunity to respond to and present evidence and argument under § 1-23-320(3) by being allowed to confront and or cross examine Mack M. Herron and Sylvia Royal?*

FULL COMMISSION FINDINGS OF FACT

Following a Hearing before the above-mentioned appellate panel of the Workers' Compensation Commission, the Full Commission makes the following findings of fact:

1. The witnesses, Mack M. Herron and Sylvia Royal, were not subpoenaed by the Defendants to appear and testify at the Hearing, and no other excuse was offered for their absence at the Hearing.

FULL COMMISSION RULINGS OF LAW

Following a Hearing before the above-mentioned appellate panel of the Workers' Compensation Commission, the Full Commission makes the following rulings of law:

1. It was improper under S.C. Rules of Civ. Procedure Rule 32(a) and 25A S.C. Code Regs. 67-613(A) to admit the transcripts of the depositions of Mack M. Herron and Sylvia Royal into evidence at the Hearing when neither witness had been subpoenaed to appear and testify at the Hearing and failed to do so, and no other excuse was offered for their absence at the Hearing.

ORDER

IT IS THEREFORE ORDERED that, due to the improper admission of evidence into the record, the Decision and Order of the Single Commissioner filed on September 13, 2012 is hereby VACATED and the issues raised on the Claimant's Form 50 and Defendant's Form 51 are hereby REMANDED to the jurisdictional Commissioner to conduct a new Hearing DE NOVO.

AND SO IT IS ORDERED!

Commissioner Gene McCaskill

Commissioner Andrea C. Roche

Commissioner Susan S. Barden

CERTIFICATE OF SERVICE

This is to certify the undersigned has this date served this order in the above entitled action upon all parties to this cause by sending an electronic copy hereof by electronic mail addressed to the attorney or attorneys for said parties or by depositing a copy hereof, postage paid, in the United States mail addressed to any unrepresented party.

By Valerie Deller on March 27, 2013

Jonathan J. Shanks
Lisa C. Glover
Safe Fit Walk-in Tub Corp. LLC (Req & cert)

BEFORE THE SOUTH CAROLINA

WORKERS' COMPENSATION COMMISSION

WCC FILE NO. 0811461

Charles Rudder, Employee, Claimant/Appellant, vs. Michelin North America, Inc., Employer, and Arch Insurance Company, Carrier, Defendants/Respondents.	)	**ORDER OF APPELLATE PANEL**

The Appellate Panel Review was held in Columbia, South Carolina on May 22, 2012.

The parties were heard on September 8, 2011 in Anderson, South Carolina by Commissioner Avery Wilkerson. On February 8, 2012, Commissioner Wilkerson entered the following Order:

> **IT IS HEREBY ORDERED** that as a result of Claimant's accidental injury occurring on July 30, 2008, he has sustained 10% permanent partial disability to the right arm, for which he is entitled to 22 weeks of compensation, at the compensation rate of $661.29 per week for an award of $14,548.38.
>
> **IT IS FURTHER ORDERED** that as a result of Claimant's accidental injury occurring on July 30, 2008, he has sustained 5% permanent partial disability to the left shoulder, for which he is entitled to 15 weeks of compensation, at the compensation rate of $661.29 per week for an award of $9,919.35.
>
> **IT IS FURTHER ORDERED** that Claimant reached maximum medical improvement on March 31, 2009, and Defendants are not liable for any additional medical, surgical, hospital or other medical treatment to Claimant after said date, until and unless further ordered by this Commission.
>
> **IT IS FURTHER ORDERED** that Claimant's claims related to the right shoulder, left arm, neck, cervical, thoracic, and lumbar spine, headache complex, anxiety, and depression are denied.
>
> No hearing costs are assessed in this instance.

IT IS SO ORDERED.

Within the statutory period, counsel for claimant filed an application for review in the case setting forth the grounds of appeal, copies of which were furnished to all parties of interest prior to oral argument presented before the Appellate Panel.

Based upon the review of the record by the Appellate Panel, there is conflicting evidence in the record whether the Single Commissioner reviewed the entirety of the evidence in this case prior to issuing his decision. Out of an abundance of caution, it is appropriate to remand this case for a *de novo* hearing before the next jurisdictional Commissioner, but the case may not be heard by Commissioner Wilkerson.

IT IS HEREBY ORDERED that the February 8, 2012 Order of the Single Commissioner is vacated.

IT IS FURTHER ORDERED that this matter be reset for hearing *de novo* before the next jurisdictional Commissioner, who shall consider all the evidence, except that such case may not be heard by Commissioner Wilkerson.

IT IS SO ORDERED.

CERTIFICATE OF SERVICE
This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereof, postage paid, in the United States mail addressed to the attorney or attorneys for said parties.
This 31 day of July, 2012
By Valerie D Fielder
Administrative Assistant to the Commissioner
Jeffrey S. Jones
Dana C. Mitchell

July 31, 2012
Columbia, South Carolina

Melody L. James, Commissioner

Andrea C. Roche, Commissioner

T. Scott Beck, Commission Chair

DECISION & ORDER
BEFORE THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
WCC FILE NUMBER 0819248

JOHNNY LUKE BROWN,
Claimant/Respondent,

vs.

HAAS ENVIRONMENTAL, INC.,
Employer,

HARTFORD UNDERWRITERS INSURANCE COMPANY,
Carrier,

Defendants/Appellants.

Appellate Panel Review
Columbia, South Carolina
November 18, 2014

Appellate Panel Decision & Order filed

on May 18, 2015

AFFIRMED IN PART and REVERSED IN PART and REMAND

Malcolm M. Crosland, Jr., Esquire, on behalf of Claimant-Respondent

E. Courtney Gruber, Esquire, on behalf of Employer/Carrier-Appellants

This matter was heard before the Appellate Panel of the South Carolina Workers' Compensation Commission on November 18, 2014, pursuant to a Form 30 timely filed by the Appellants on February 24, 2014. This matter was originally heard before the Single Commissioner in Summerville, South Carolina, on July 9, 2013, and this was an appeal from that Order filed on February 19, 2014.

In the Order filed February 19, 2014, the Hearing Commissioner made the following Findings of Fact, Conclusions of Law, and Order following an evidentiary hearing:

FINDINGS OF FACT

After due consideration of the claimant's defense, and after reviewing all of the evidence contained in the record, the following findings of fact as required by S.C. Code Anno., § 42-17-40, 1976, as amended, are set forth:

FIRST: The South Carolina Workers' Compensation Commission has jurisdiction over this claim with venue being proper in Charleston County. The Claimant was a covered employee and the employer was a covered employer under the act. The employee/employer relationship existed at the time of the claimant's injury by accident.

SECOND: This claim was heard before the undersigned Commissioner on July 9, 2013, in accordance with notices timely and properly served upon all parties of interest.

THIRD: The claimant sustained an admitted injury by accident, arising out of the course and scope of his employment on December 3, 2008, when he was exposed to a caustic chemical which caused chemical burns to various parts of his body. Proper and timely notice of the claimant's accident was provided to the employer.

FOURTH: At the time of the claimant's compensable injury by accident he had an average weekly wage of $437.00 per week making for an applicable compensation rate of $291.34.

FIFTH: As a result of the claimants compensable injuries he has received necessary and proper medical treatment, surgeries and

therapies and diagnostic testing, which has tended to lessen his disability from the following medical providers and facilities:

1. Joseph M. Still Burn Clinic
2. Thomas Duc, M.D.
3. Doctors Hospital
4. Stephen Boatwright, M.D.
5. George Sandoz, M.D.
6. Dyna Lowndes-Rosen
7. Ocean Spine & Neurological Institute
8. Grand Strand Specialty Assocs.
9. Industrial Therapy Plus
10. Carolina Neurological Clinic

The causally related treatment provided to the claimant by these medical providers and facilities has been related and made necessary because of the claimant's compensable injuries and has tended to lessen the claimant's disability. The treatment provided by these medical providers and facilities shall be the responsibility of the defendants, including reimbursement to the claimant for mileage and out of pocket causally medication expenses.

SIXTH: The claimant reached maximum medical improvement on March 12, 2013, when he was last treated by Dr. Steven Boatwright of Strand Regional Specialties. At the time the claimant reached maximum medical improvement he had sustained full thickness 10% (Claimant's APA p.160) total body surface area burns to his bilateral legs, buttock, arms, calves of his lower extremities and right hand. His burns were caused by exposure to chemicals. The Claimant underwent numerous surgeries to treat his severe burn injuries including skin grafts and the application of cadaver skin to his right and left lower legs, left forearm, left elbow, and right forearm. The Claimant's treatment for his burns was protracted and involved several different medical specialists including dermatologist specializing in burn injuries, neurologists, pain management physicians and psychiatric evaluation for chronic pain induced Post Traumatic Stress Disorder (PTSD) anxiety and depression.

SEVENTH: By WCC Form 14B dated June 19, 2013 the claimant's treating pain management physician, Dr. George Sandoz found he has sustained 4% impairment to his left leg would require additional pain medication and, because of his burn injuries, was permanently restricted to the following environmental conditions at work:

1. No extreme heat;
2. Avoid abrasive chemicals;
3. Avoid prolong exposure to the sunlight;
4. Limited physical labor;
5. Frequent breaks to address itching, pain and/or fatigue;
6. No tight fitting closing;
7. Limited range of motion;
8. Limited exposure to dusty or smoky environments;
9. Limited periods of prolonged standing; and
10. Limited interactions with others in social situations if scar are visible.

EIGHTH: In addition to his burn related injuries the Claimant sustained a post-traumatic stress disorder, depression and anxiety, which were diagnosed and documented by his treating physicians at the Joseph M. Still Outpatient Burn Clinic, Dr. Thomas A Due, Jr., and Dr. George Sandoz of Grand Strand Specialty Associates. (Claimant's APA p.216) Dr. Sandoz stated in his June 14, 2013 report "patient is disabled secondary to the chemical burn that has given him chronic pain syndrome and post traumatic stress syndrome disorder. At this moment Mr. Brown is required to undergo therapy provided by the pain management doctors with an injection and medication" (APA p. 216). The claimant's diagnosis of post traumatic stress disorder was confirmed by the psychiatrist the defendant's authorized the claimant to see, Dr. Dyana Lowndes-Rosen. Dr. Lowndes-Rosen's report of December 7, 2009 supports the diagnosis of post traumatic stress disorder and its relationship to the claimant's burn injuries. I am aware Dr. Lowdnes-Rosen elected not to treat the claimant as a result of behavior issues, however, Dr. Lowndes-Rosen's notes do not indicate she rescinded her diagnosis of post traumatic stress disorder even though she elected not to treat him.

NINETH: The claimant experiences left anterior lower legs symptoms and weakness in the left lower leg. These symptoms have been diagnosed as "late affect from burn injury." The claimant's lower left leg symptoms have caused his left leg to fail. The Claimant uses a cane as a result of the weakness of his lower left leg.

TENTH: The Claimant's testimony was replete with reports of chronic severe pain at various locations. The claimants severe burn injuries to multiple body parts combined with his left weakness, chronic pain, PTSD, depression and anxiety have all contributed to his permanent total disability status. I make this finding based solely on a voluminous medical records submitted into the records and Dr. George Sandoz's deposition testimony which supports the claimants contention he has chronic pain caused by his chemical burn injuries. (Sandoz's Depo. p.L19-23).

ELEVENTH: The Defendant's have requested I issue a credibility finding in regards to the claimant's testimony. I decline to issue such a finding as the claimant's credibility did not contribute to my decision. I base my findings of fact and conclusion's of law and decision on the medical evidence submitted into the records including Dr. Sandoz's deposition testimony. While I understand the medical record regarding the claimant's burn injury and subsequent medical treatment do contain subjective complaints of pain and other symptoms provided by the claimant, there are no medical findings or opinions that contradict these subjective complaints. It is obvious to the undersigned that the type of burn injuries the claimant sustained are more than capable of more than generating both chronic pain and the claimant's diagnosed psychiatric conditions of PTSD, anxiety and depression.

TWELVETH: Based upon the claimant's severe burn injuries to multiple body part including his left leg, right leg, left arm, right arm, left buttock, right buttock, his well documented chronic pain, his accident related post traumatic stress disorder, depression and anxiety all contribute to the claimant's total and permanent disability status. I find that the claimant is permanently and totally disabled §42-9-10 (A), S.C. Code of Laws, 1976, as amended. This finding is based upon the medical records submitted into evidence by the parties, the significant and severe permanent environmental restrictions placed upon the claimant, the claimant's full scale IQ of 66 which places him in the mildly mental retarted range. I also find the vocational assessment of the claimant performed by David R. Price, M. Ed., to be persuasive. The claimant's occupation at the time of this accident involved heavy physical demands. I agree with Mr. Prices' assessment that the claimant's combination of symptoms makes it highly unlikely the

claimant is capable of getting a job offer. In an open economy I do not believe there is a reasonable demand for his service. I, like Mr. Price, "do not consider him competitive and do not believe he has the ability to sustain over the long-term any employment he might obtain." (Claimant's APA p. 229).

THIRTEENTH: I do not find there is sufficient evidence in the record to casually relate the claimant's alcohol dependency and illicit drug use to his work-related injury.

FOURTEENTH: The Claimant is in need of additional medical care and treatment which would tend to lessen his period of disability, including ongoing pain management as well as a psychiatric evaluation AND treatment for his post traumatic stress disorder, anxiety and depression.

CONCLUSIONS O F LAW

Accordingly, as provided in S.C. Code Anno., § 42-17-40, 1976 as amended, it is the determination of this Commission as follows:

FIRST: Under §42-15-20, proper and timely notice of the claimant's accident was provided to the employer.

SECOND: Under §42-1-130, the Claimant was a covered employee at the time of his accident on December 3, 2008.

THIRD: Under §42-1-40, the Defendant/Employer was a covered employer under the act.

FOURTH: Under §42-1-40, average weekly wage is defined.

FIFTH: Under §42-1-160, the Claimant sustained a compensable injury by accident arising out of and in the course of the scope of his employment on December 3, 2008, resulting in permanent impairment, disability and loss of use of the Claimant's skin at his right left, left leg, right arm, left arm, right buttock, left buttock as well as post traumatic stress disorder, anxiety and depression. A direct injury is not required for disability or loss of use. Roper v. Kimbrell's of Greenville, 99 S.E. 2nd 52 (1957) all related, consequences of an injury are compensable. Whitfield v. Daniel Construction Co., 83 S.E. 2nd 460 (1954); Mullinax v. Winn Dixie Stores, 458 S.E.2nd 76 (Ct. App. 1995).

SIXTH: A mental injury resulting from physical injuries is compensable under the Act. It is not necessary that it result from

unusual or extraordinary conditions of employment. Kennedy v. Williamsburg County, 242 S.C. 477, 131 S.E. 2nd 512 (1963).

SEVENTH: The Claimant must establish facts that entitle him to an award by the preponderance of the evidence. Walsh v. U.S. Rubber Co., 120 S.E.2d 685 (S.C. 1961); Herndon v. Morgan Mills, Inc., 143 S.E.2d 376 (S.C. 1965). The Claimant has met his burden of proving his claim by the preponderance of the evidence.

EIGHT: Under § 42-15-60, the Claimant is entitled to all medical care, treatment, therapy, consultations, diagnostic studies, and other attendant care related to his injury, which tends to affect the care, provide relief and/or tends to lessen the claimant's period of disability. Dodge v. Brucolli, et al. 514 S.E. 2nd 593 (S C App. 1999).

NINETH: Under § 42-9-10, the Claimant is entitled to receive compensation for his permanent and total disability. Total disability does not require complete helplessness. The inability to perform common labor is total disability for one who is not qualified by training or experience for any other employment. The generally accepted test of total disability is the inability to perform services other than those that are also limited in quality, dependability or quantity, that a reasonably stable market for them does not exist. Winn v. Peeples Natual Gas Co., 118 S. E. 2nd 812 (1961); Coleman v. Quality Concrete Products 142 S. E. 2nd 43 (1965).

TENTH: The Claimant is entitled to payment of the balance of his award, with the Defendant's given credit for all temporary total disability benefits previously paid, commuted and paid pursuant to the commutation value tables published by the South Carolina Workers' Compensation Commission.

ORDER AND AWARD

Based on the above findings' of fact and conclusions of law, it is hereby:,

ORDERED, ADJUDGED AND DECREED the Claimant, Johnny Brown, sustained compensable injuries by accident to his right leg, left leg, right arm, left arm, right buttocks, left buttocks, post traumatic stress disorder, anxiety and depression arising out of and in the course and scope of his employment with Haas Environmental, Inc., on December 3, 2008; and, it is further,

ORDERED, ADJUDGED AND DECREED the Claimant Johnny Brown has received necessary and proper medical care,

treatment and surgeries from the following medical providers and facilities:

1. Joseph M. Still Burn Clinic
2. Thomas Duc, M.D.
3. Doctors Hospital
4. Stephen Boatwright, M.D.
5. George Sandoz, M.D.
6. Dyna Lowndes-Rosen
7. Ocean Spine & Neurological Institute
8. Grand Strand Specialty Assocs.
9. Industrial Therapy Plus
10. Carolina Neurological Clinic

Therefore, all of this medical treatment, therapy, injections, consultations, diagnosis procedures, medications, surgeries, hospitalization, rehabilitation and other attendant care shall be the responsibility of the Defendant's, including reimbursement to the Claimant for out of pocket mileage and medications; and, it is further

ORDERED, ADJUDGED AND DECREED that the Claimant, Johnny Brown is entitled to receive from the Defendants 500 weeks of compensation at his applicable compensation rate of $291.34 per week with the Defendants being given credit for any weeks of temporary total disability benefits paid to the claimant. The lump sum settlement paid to the Claimant by the Defendants shall remain in his Attorney's trust account until the Conservatorship is established through the appropriate court. However, because of the claimant's mental status a conservator shall be appointed for the Claimant by the appropriate court to ensure proper management of the claimant's lump sum benefits. This award shall be paid to the claimant in a lump sum pursuant to the commuted values table published by the South Carolina Workers' Compensation Commission; and, it is further

ORDERED, ADJUDGED AND DECREED, the Claimant, Johnny Brown, is entitled to such causally related medical treatment

as he would be entitled pursuant to §42-15-60 including pain management and psychiatric evaluations; and, it is further

AND IT IS SO ORDERED.

No hearing costs are assessed.

A Form 30 appeal was timely filed on February 24, 2014, by the Defendants/Appellants based on the following grounds:

1. The Single Commissioner erred in finding as a fact and concluding as a matter of law that the Claimant sustained by psychiatric injury as a result of this accident, the error being that the finding is not supported by the substantial evidence in the record.

2. The Single Commissioner erred in finding as a fact and concluding as a matter of law that the Claimant is permanently & totally disabled, the error being that such a finding is not supported by the substantial evidence in the record.

3. The Single Commissioner erred in finding as a fact and concluding as a matter of law that the Claimant is permanently & totally disabled as a result of the combined effects of burns to multiple body part combined with left weakness, chronic pain, PTSD, depression, and anxiety, the error being that the findings of PTSD, depression, and anxiety are not supported by the substantial evidence in the record.

4. The Single Commissioner erred in finding as a fact and concluding as a matter of law that Dr. Steven Boatwright had on March 12, 2013, issued an impairment rating for 10% total body surface, the error being that the wording of Finding of Fact 6 is misleading in that Dr. Boatwright's 14B actually listed the injury as a 10% total body

surface area burn but stated that the Claimant had sustained only 3% impairment as a result of this injury.

The parties submitted briefs timely and in accordance with the instructions of the Workers' Compensation Commission, and oral argument was held on November 18, 2014.

Based on a review of the evidence in the case, the briefs filed by both parties, and the arguments of counsel, the Appellate Panel hereby issues the following Findings of Fact:

FINDINGS OF FACT

1. The South Carolina Workers' Compensation Commission has jurisdiction over this claim, with venue being proper in Charleston County. The Claimant was a covered employee and the Employer was a covered employer under the Act. The employee/employer relationship existed at the time of the Claimant's injury by accident.

2. This claim was heard before the Single Commissioner on July 9, 2013, in accordance with notices timely and properly served upon all parties of interest.

3. At the time of the Claimant's compensable injury by accident, he had an average weekly wage of $437.00 per week making for an applicable compensation rate of $291.34.

4. The Claimant sustained a compensable injury by accident on December 3, 2008.

5. The Claimant reached maximum medical improvement on March 12, 2013, when he was last treated by Dr. Steven Boatwright of Strand Regional Specialties. At the time the Claimant reached maximum medical improvement, he had sustained full thickness 10% (Claimant's APA p. 160) total body surface area burns to his bilateral legs, buttock, arms, calves of his lower extremities, and right hand. His burns were caused by exposure to chemicals. The Claimant underwent numerous surgeries to treat his severe burn injuries, including skin grafts and the application of cadaver skin to his right and left lower legs, left forearm, left elbow, and right forearm. The Claimant's treatment for his burns was protracted and involved several different medical specialists, including dermatologists specializing in burn injuries, neurologists, pain management physicians, and psychiatric evaluation for chronic pain induced Post Traumatic Stress Disorder (PTSD) anxiety and depression.

6. As a result of the Claimant's compensable injuries, he has received necessary and proper medical treatment, surgeries, and therapies and diagnostic testing, which has tended to lessen his disability from the following medical providers and facilities:

a. Joseph M. Still Burn Clinic

b. Thomas Duc, M.D.

c. Doctors Hospital

d. Stephen Boatwright, M.D.

e. George Sandoz, M.D.

f. Dyana Lowndes-Rosen

g. Ocean Spine & Neurological Institute

h. Grand Strand Specialty Assocs.

i. Industrial Therapy Plus

j. Carolina Neurological Clinic

The causally related treatment provided to the Claimant by these medical providers and facilities has been related and made necessary because of the Claimant's compensable injuries and has tended to lessen the Claimant's disability. The treatment provided by these medical providers and facilities shall be the responsibility of the Defendants, including reimbursement to the Claimant for mileage and out-of-pocket causally medication expenses.

7. We do not find there is sufficient evidence in the record to casually relate the Claimant's alcohol dependency and illicit drug use to his work-related injury.

8. The Single Commissioner's Findings of Fact Seven and Nine as to the affect, extent, and characterization of the impairment to the left leg and their causal connection with this work-related accident are vacated.

9. The Single Commissioner's Findings of Fact Eight, Ten, Eleven, Twelve, and Fourteen which relate to the psychiatric condition of PTSD are not supported by the preponderance of the evidence in the record and are, therefore, reversed.

10. The Single Commissioner's Finding of Fact Twelve as it relates to a finding of permanent and total disability is vacated.

11. Any Findings of Fact referencing permanent and total disability not specifically referenced herein are vacated.

12. The evidence in the record does not support a finding of PTSD and, therefore, any such Findings of Fact referencing PTSD not specifically referenced herein are reversed.

13. Any Findings of Fact referencing impairment or disability to the left leg or affect, extent, and/or characterization of the left leg not specifically referenced herein are vacated.

14. That the preponderance of the evidence in the record does not support a finding that the Claimant sustained any psychiatric injury or PTSD as a result of this work-related accident nor that any such pre-existing condition was aggravated by this work-related accident.

15. That the medical evidence in the record is not sufficient to establish that the Claimant sustained any psychiatric injury or PTSD as a result of this work-related accident.

Based on the foregoing Findings of Fact, the following Conclusions of Law are appropriate:

CONCLUSIONS OF LAW

1. Under §42-15-20, proper and timely notice of the Claimant's accident was provided to the Employer.

2. Under §42-1-130, the Claimant was a covered employee at the time of his accident on December 3, 2008.

3. Under §42-1-40, the Defendant/Employer was a covered employer under the Act.

4. Under §42-1-40, average weekly wage is defined.

5. Under §42-1-160, injury by accident is defined.

6. All other Conclusions of Law previously referenced in the Single Commissioner's decision are reversed and/or vacated.

ORDER

Based on the Findings of Fact and Conclusions of Law above, arguments, and briefs submitted by counsel, the Appellate Panel hereby finds as follows:

That the preponderance of the evidence in the record does not support a finding that the Claimant sustained a compensable psychiatric injury or PTSD as a result of this injury, and therefore, the Single Commissioner's Decision & Order referencing same is reversed;

The portion of the Single Commissioner's Decision & Order, which finds that the Claimant is permanently and totally disabled, is vacated and remanded for additional findings as to permanency;

That the Single Commissioner's findings as to the affect, extent, and characterization of the left leg or causal connection with the work-related accident, are vacated and remanded for additional findings;

That this matter is remanded to the jurisdictional commissioner for further findings as to any affect, extent, and/or characterization this work-related injury might have had on the left leg and as to the degree of permanent disability resulting from this injury.

No hearing costs or penalties are assessed in this matter.

AND IT IS SO ORDERED!

S.C. WORKERS' COMPENSATION COMMISSION

By: _____
Melody L. James
Chair

CONCURRING:

By: _____
T. Scott Beck
Commissioner

By: _____
Gene McCaskill
Commissioner

CERTIFICATE OF SERVICE

This is to certify that the undersigned has on this date served a copy of this order in the above entitled action upon all parties to this case by sending an electronic copy hereof by electronic mail addressed to the attorneys for said parties; or if there is an unrepresented party(ies), by depositing a copy hereof, postage paid in the United States mail, first class, addressed to the unrepresented party(ies) and to the attorney(s) for the represented party(ies).

By Eugenia Hollmon on May 18, 2015

APPELLATE PANEL DECISION AND ORDER

OF THE

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

W.C.C. FILE NO.: 1217409

Reginald Warner — EMPLOYEE, CLAIMANT/RESPONDENT

VS.

Gallman Personnel Services, Inc. — EMPLOYER,

AND

Zurich American Insurance Company c/o Gallagher Bassett Services, Inc. — CARRIER, DEFENDANTS/APPELLANTS,

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Appellate Panel Review held in Columbia, South Carolina, on July 21, 2014 per notices timely And properly served upon all parties of interest.

Appellate Panel Decision and Order Filed:

September 26, 2014

APPEARANCES: Claimant/Appellant represented by Stephen B. Samuels, Esquire

Defendants/Respondents represented by C. Barrett Burley

STATEMENT OF THE CASE

Claimant has alleged an injury to his head, neck, and back due to a work-related accident on November 29, 2012. Claimant alleged that he slipped on oil while walking on a concrete floor landing on his head and/or back. Defendants admitted that Claimant sustained an injury to his head and have provided medical treatment with Dr. John Baker and Dr. William Rambo. Dr. Rambo indicated that Claimant reached maximum medical improvement on December 10, 2012. However, Defendants continued to provide follow up care with Dr. Baker following Dr. Rambo's release. Dr. Baker has not released Claimant from his care. Defendants have further denied that Claimant sustained any compensable injuries to the neck or back based on the opinion of Dr. Sweet and have denied Claimant sustained injuries to his brain.

Claimant filed a Form 50 on April 27, 2013. Claimant has alleged injuries to his head, back, neck, right leg, right hip, and brain. Claimant was specifically seeking treatment for his alleged neck and back injuries and an order that Dr. Steven Poletti be the authorized treating physician. Claimant alleged that Dr. David Rogers and Dr. Poletti issued opinions finding medical causation for Claimant's back and/or neck. Claimant also sought treatment for an alleged traumatic brain injury. A hearing in this matter was set for July 22, 2013. That hearing was continued so that Defendants could obtain an IME from Dr. Sweet and conduct the depositions of Drs. Poletti and Rogers. The continuance was granted until August 27, 2013. Despite attempts to depose Drs. Poletti and Rogers, Dr. Rogers was unavailable until November 2013 and Dr. Poletti was unavailable until January 2014. Defendants renewed their motion for a continuance based on the unavailability of Drs. Poletti and Rogers and were denied.

The Hearing Commissioner conducted a hearing on August 27, 2013 and submitted a request for a proposed Decision and Order. Claimant stated at the hearing that the specific purpose of the hearing was "...we are specifically asking for treatment for the neck and back...." (Hr'g Tr. p. 6). Claimant further indicated that the issue of physical brain injury was not before the Hearing

Commissioner at that time. (see Hr'g Tr. p. 11). In his request for a proposed Decision and Order, the Hearing Commissioner made only three (3) basic findings throughout: (1) Claimant was not at MMI; (2) Dr. Baker was the treating physician for the alleged head injury; and (3) Claimant was entitled to further evaluation for his alleged neck and back injuries. The Hearing Commissioner made absolutely no findings of compensability, especially for the neck, back, or brain.

However, despite the request by the Hearing Commissioner, a proposed Decision and Order was submitted by Claimant on or about December 19, 2013. In that proposed Decision and Order, Claimant included language that found the head, neck, back, and brain compensable in direct contravention to the Hearing Commissioner's requested findings and the stated purpose of the hearing. Additionally, the proposed Decision and Order included treatment for the neck, back, head and brain when the Hearing Commissioner only included an evaluation for the neck and back and ongoing treatment with Dr. Baker (that was already underway). Thereafter, Defendants objected to the proposed Decision and Order as it excluded, disregarded, and otherwise did not follow the Hearing Commissioner's request for the proposed Decision and Order.

In reply, Defendants submitted their own proposed Decision and Order on or about January 8, 2014 that tracked directly with the Hearing Commissioner's proposed Decision and Order. Despite the inconsistencies and inaccuracies in Claimant's proposed Decision and Order, the Hearing Commissioner signed and filed Claimant's Decision and Order on January 17, 2014. Thereafter both parties filed a Form 30. Defendants specifically appealed issues contained on the request for a proposed Decision and Order as those were issues specifically found by, and raised before, the Hearing Commissioner. A hearing was held before the undersigned commissioners on Defendant Form 30.

For reasons set forth below, we **VACATE** the Hearing Commissioner's Decision and Order and **REMAND** this case for a *de novo* hearing.

ISSUES RAISED ON APPEAL

The following issues are the issues directly raised on Defendants' Form 30 in response to the Hearing Commissioner's *request* for a proposed Decision and Order.

I. Did the Hearing Commissioner err in Finding of Fact #11 by finding that Claimant has not reached maximum medical improvement?

II. Did the Hearing Commissioner err in Finding of Fact #16 by not allowing the parties to take the depositions of Drs. Poletti, Rogers, and Sweet?

III. Did the Hearing Commissioner err in Finding of Fact #13 by giving the greatest weight to Dr. Baker's opinion based solely on the fact that Claimant has treated with Dr. Baker for the longest period of time?

IV. Did the Hearing Commissioner err in Finding of Fact #15 by finding that any cash paid to Claimant was for medical treatment only?

V. Did the Hearing Commissioner err in Finding of Fact #18 that Defendants shall provide Claimant with an evaluation and causally related treatment for his alleged neck and back injuries?

VI. Did the Hearing Commissioner err in Conclusion of Law #4 that Defendants shall provide Claimant with an evaluation for his alleged neck and back injuries?

VII. Did the Hearing Commissioner err in Finding of Fact #17 that Defendants are only permitted 15 days from the date of an un-appealed Order to find an authorized treating physician for the evaluation of Claimant's alleged neck and back injuries?

In addition, Defendants noted the following issues with the proposed Decision and Order submitted by Claimant and ultimately signed by the Hearing Commissioner.

I. Did the Hearing Commissioner err by including Findings of Fact that include a compensable injury to the head and/or brain?

II. Did the Hearing Commissioner err in Finding of Fact #5 that "limited weight" be given to Dr.

Rambo's April 16, 2013 Form 14B because there was no medical examination on that date?

III. Did the Hearing Commissioner err in Finding of Fact #11 that Claimant suffers from "photophobia consistent with post-concussive syndrome"?

IV. Did the Hearing Commissioner err in Finding of Fact #12 that Claimant sustained compensable injuries to his head, neck and back with an effect on his buttocks and legs?

V. Did the Hearing Commissioner err in Finding of Fact #14 by outlining specific treatment that is inconsistent with the proposed order instructions and outside of the scope of the hearing?

VI. Did the Hearing Commissioner err in Conclusion of Law #4 by finding that additional medical treatment for the back, neck, head and brain will tend to lessen the period of disability which is inconsistent with the proposed order instructions and outside of the scope of the hearing?

VII. Did the Hearing Commissioner err in Conclusion of Law #6 by finding that Claimant sustained compensable injuries to the head, brain, neck, and back which is inconsistent with the proposed order instructions and outside of the scope of the hearing?

VIII. Did the Hearing Commissioner err in his Award by finding that Claimant suffered compensable injuries to his back, neck and brain with an order for specific treatment to begin immediately which is inconsistent with the proposed order instructions and outside of the scope of the hearing?

IX. Did the Hearing Commissioner err in his Award by finding that a prior continuance was predicated upon authorization of back and neck treatment when a prior continuance was not predicated upon authorization of back and neck treatment?

SINGLE COMMISSIONER FINDINGS OF FACT

1. Claimant sustained an admitted injury by accident arising out of and in the course of his employment when he slipped and fell on an oily floor on November 29, 2012.

2. Claimant was knocked unconscious when his head hit the floor. The supervisor at Metal and

Wire reported to Gallman Personnel that they "called Fairfield EMS because they found Reggie on the floor and he was unresponsive." [APA page 72]. Warner suffers from retrograde amnesia and does not remember the accident itself.

3. Claimant was admitted as an in-patient to Providence Hospital on November 9, 2012 in "guarded" condition. The admission note confirms: "This patient had a severe illness/injury which resulted in subdural hematoma. Life and organ supportive interventions where urgently initiated to prevent significant deterioration of this patient's condition." [APA page 8].

4. After his release from the hospital, Warner was seen by Dr. Rambo on December 10, 2012. Dr. Rambo noted the initial CT showing some subdural blood at the frontal pole, but noted a repeat CT was read as showing no blood. He documented complaints of constant headache. The impression was "Possible concussion after a fall at work on approximately 11/29/12." He recommended Warner be evaluated by a neurologist if the headache persists. The report concluded "This was discussed with his case manager." [APA page 83]. As noted on the pain diagram filled out on December 10, 2012, at Dr. Rambo's office, Warner suffered from pain, numbness or tingling in his right wrist, both legs, buttocks and low back to head. [APA page 86].

These same complaints were documented by Dr. Baker. Dr. Baker diagnosed:

- Acute post-traumatic headache
- Occipital neuralgia
- Displacement of cervical intervertebral disc without myelopathy
- Lumbar disc disease
- Post-concussion syndrome.

[APA pages 57-59].

Warner's complaints are also consistent with Dr. Poletti's July 1, 2013 physical

examination. The physical examination revealed "limited motion in his neck . . . pain with extension and forward flexion. His reflexes are decreased throughout. He does have positive straight leg raising. He has dysesthesia in the posterolateral aspect of his buttocks, hip, and leg."

The clinical findings were objectively confirmed by MRI studies which showed "a central disc protrusion at the C5-6 level with what is described as annular tearing and posterior disc bulging, which is in contact with the spinal cord. This is a central protrusion. In the lumbar spine there is a disc herniation at the L5-S1 level with retrolisthesis or spinal instability consistent with greater than 5 mm of sagittal plane translation." [Claimant's Supplemental APA pages 74-75].

5. Limited weight is given to the 14B purportedly completed by Dr. Rambo on April 16, 2013. The 14B states Warner is at MMI and "will not need future medical care." [APA page 88]. This is inconsistent with the previous recommendation by Dr. Rambo for a neurologist to treat the headaches. [APA page 83]. There is no corresponding medical examination for that date, thus no foundation for the change of opinion.
6. Warner requires a cane for ambulation due to balance problems. [Tr. page 38, line1- page 39, line 11]. The cane was prescribed by Dr. Baker. [C-2]. Dr. Sweet confirmed Warner "walked with a cane slowly and would not walk without a cane. . . . His gait was very antalgic." [Defendants' Supplemental APA pages 93-95].
7. I would give the greatest weight to Dr. Baker as he has treated the Claimant the longest. Dr. Baker prescribed the cane and has continuously written Warner out of work for his injuries. Dr. Baker referred Warner back to Dr. Rambo for evaluation of the central annual tears in the lumbar and cervical disks. Dr. Rambo refused the referral. Dr. Baker has prescribed medication and other modalities to treat Warner's injuries, most of which have been denied by Defendants. Defense Counsel stated, "Baker is only authorized for the head." [Tr. Page

28, lines 18-19].

8. Dr. Rogers diagnosed Warner with "a work-related fall injury occurring November 29, 2012 resulting in...closed head injury with resulting post-concussive syndrome. Mr. Warner demonstrates significant cognitive, affective, and somatic symptomatology consistent with this diagnostic." [APA pages 65-71]. This diagnosis is consistent with the observations and diagnosis made by Dr. Baker. [APA pages 57-59].

9. Dr. Raymond Sweet, a neurosurgeon, evaluated Warner on August 13, 2013. Dr. Sweet documented symptoms of "depression, dizziness, fatigue, sleep loss, weight gain, nervousness, ringing in the ears, visual changes, blurred vision [and] double vision . . . Also positive for numbness and tingling pain neck, shoulders, hips, legs, feet, lower back. He has weakness in the legs, memory problems, balance difficulties, back problems and dizziness." [Defendants' Supplemental APA pages 93-95].

Dr. Sweet recommended "a thorough neuropsychological, psychological evaluation."

10. The medical records consistently show evidence of neck and back injuries affecting the legs, and of a traumatic brain injury with resulting post-concussive syndrome. Warner's complaints and symptoms have been consistent throughout his treatment and mirror his testimony at the hearing.

11. Due to photophobia consistent with post-concussive syndrome, Warner must wear dark glasses. He wore the glasses throughout the hearing. They are prescription glasses worn since the accident because the "light irritates my eyes, especially my right one." [Tr. Page 34, lines 25-page 34, line 17]. Dr. Sweet reported "the light bothers his eyes and complains of back pain, neck pain, as well as anxiety." Dr. Sweet noted "He had sunglasses on, which he did not want to remove, and kept his head forward, looking down. . . . He was awake, as noted a little slow, but oriented x3."

12. Based on the totality of the evidence, with the greatest weight being given to Dr. Baker's

reports, Claimant sustained work-related injuries to his head, neck and back with an affect on his buttocks and legs.

13. Claimant has not reached maximum medical improvement.

14. Additional treatment will tend to lessen his period of disability. He requires treatment for:

A. Neck injury with a central disc annual tear and bulging disc contacting the spinal cord.

B. Back with herniated disc at L5-S1 with retrolisthesis and spinal instability.

C. Head injury resulting in occipital neuralgia.

D. Post-concussive syndrome resulting in headaches, photophobia, memory problems, balance difficulties, and dizziness.

15. As Claimant has been written out of work continuously by Dr. Baker, he is disabled within the meaning of the Act and is entitled to temporary total disability compensation on a running award until further Order of the Commission.

16. This is not a minor head injury case as noted in Form 58 filed by Defendants.

17. As Claimant is not at MMI, determinations of permanency and physical brain damage are premature.

18. Order instructions were sent to the parties on September 6, 2013.

SINGLE COMMISSIONER CONCLUSIONS OF LAW

1. Claimant sustained an injury by accident arising out of and in the course of his employment on November 29, 2012, within the meaning of S.C. Code Ann. § 42-1-160 (2009).

2. Disability is defined as "Incapacity because of injury to earn wages which the employee was receiving at the time of injury in the same or any other employment." Reg. 67-502. Employer offered no suitable employment within his capacity to Claimant. As he is still disabled due to his injury, he is entitled to temporary compensation until further order of the Commission. § 42-9-10; 42-9-190.

3. The Workers' Compensation Act "requires employers to pay temporary total disability to an employee who has 'been out of work due to a reported work related injury' for eight days." Martin v. Rapid Plumbing, 369 S.C. 278, 631 S.E.2d 547 (Ct. App.2006), *quoting* S.C. Code § 42-9-260(A) (Supp. 2006).

4. Medical treatment is to be provided so long as it tends to lessen the period of disability. § 42-15-60; Dodge v. Bruccoli, Clark, and Layman, Inc., 518 S.E.2d 593 (S.C. 1999); Dykes v. Daniel Constr. Co., 202 S.E.2d 646 (S.C. 1974). Additional medical treatment for the back, neck, head and brain will tend to lessen the period of disability.

5. The employer's representative shall provide and pay for medical care while a claimant is receiving or entitled to receive temporary compensation benefits. Reg. 67-509. Medical, surgical, hospital and other treatment which will tend to lessen the period of disability within the judgment of the Commission shall be provided by the employer. For good cause shown, the Commission may order such further medical, surgical, hospital or other treatment as may in the discretion of the Commission be necessary. S.C. Code Ann. § 42-15-60 (2007). When the Employer refuses to provide medical treatment, the Commission has authority to designate the treating physician. Id.; Martin v. Rapid Plumbing, 369 S.C. 278, 631 S.E.2d 547 (Ct. App.2006)

6. Claimant sustained work-related injuries to his head (closed head injury with post-concussive syndrome) neck and back with an effect on his buttocks and legs. S.C. Code Ann. § 42-1-160 (2007).

FULL PANEL FINDINGS OF FACT

1. Claimant stated at the hearing that the specific purpose of the hearing was "...we are specifically asking for treatment for the neck and back...." (Hr'g Tr. p. 6).

2. Claimant further indicated that the issue of physical brain injury was not before the Hearing Commissioner at that time. (Hr'g Tr. p. 11).

3. In his request for a proposed Decision and Order, the Hearing Commissioner made only three basic findings throughout: (1) Claimant was not at MMI; (2) Dr. Baker was the treating physician for the alleged head injury; and (3) Claimant was entitled to further evaluation for his alleged neck and back injuries.
4. The Hearing Commissioner made no findings in his request related to compensability, especially for the neck, back, or brain.
5. Despite Claimant limiting the scope of the hearing and indicating that the question of a head and/or brain injury was not before the court, Claimant submitted, and the Hearing Commissioner adopted, an Order which purported to provide benefits for a head and/or brain injury.
6. The Hearing Commissioner erred in, but not limited to, Findings of Fact 2, 4, 8, 9, 10, 11, 12, 14, 15, 16, and 17 as the findings contained therein exceed the limited scope of the hearing and the evidence before the Hearing Commissioner.
7. The Hearing Commissioner erred in, but not limited to, Conclusions of Law 4, 5, and 6 as those conclusions contain matters that far exceed the limited scope of the hearing and the evidence before the Hearing Commissioner.
8. As a procedural matter, Claimant has asserted that Drs. Poletti and Rogers should be named the authorized treating physician based on unauthorized care and treatment Claimant sought with these doctors.
9. Claimant presented medical records and asked the Hearing Commissioner to issue rulings based on medical reports and findings issued by Drs. Poletti and Rogers.
10. By allowing medical records from Drs. Poletti and Rogers into the record without any ability or opportunity to cross examine or challenge the witnesses or the records, Defendants have been unfairly and grossly prejudiced and Defendants' due process rights have been violated.
11. Defendants have an absolute due process right to cross examine adverse witnesses.

12. This right includes witnesses that are present only by deposition or other form of documentary evidence.

13. In this case, Drs. Rogers and Poletti testified by way of medical records without appearing at the hearing.

14. Defendants were unequivocally denied the opportunity to cross-examine Drs. Rogers or Poletti about their medical records and opinions because Claimant did not bring them to the hearing and neither doctor made themselves available for a deposition.

15. The Hearing Commissioner should have either postponed the hearing to allow the depositions of Claimant's selected physicians, should have kept the record open for the submission of the deposition transcripts of Drs. Rogers or Poletti, or should have ordered that Claimant produce Drs. Rogers and Poletti at the hearing to allow Defendants the right to cross examine the witnesses.

16. The Hearing Commissioner erred by not allowing Defendants to properly defend this claim through cross examination of Claimant's purported medical experts.

FULL COMMISSION CONCLUSIONS OF LAW

1. If an application for review is made to the Commission within fourteen days from the date when notice of the award shall have been given, the Commission shall review the award and, if good grounds be shown therefor, reconsider the evidence, receive further evidence, rehear the parties or their representatives and, if proper, amend the award. S.C. Code Ann. § 42-17-50.

2. In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses. *See* ICC v. Louisville & N. R. Co., 227 U.S. 88, 93-94 (1913); Willner v. Committee on Character & Fitness, 373 U.S. 96, 103-104 (1963); Greene v. McElroy, 360 U.S. 474, 496-497 (1959); Goldberg v. Kelly, 397 U.S. 254 (1970).

ORDER

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Hearing Commissioner's Decision and Order is **VACATED** in its entirety.

IT IS FURTHER ORDERED THAT this matter shall be **REMANDED** to Commission for a *de novo* hearing on the evidence.

IT IS FURTHER ORDERED THAT Defendants are permitted, and the Commission must allow, cross-examination of Claimant's witnesses either through deposition or live testimony.

IT IS FURTHER ORDERED THAT, following the *de novo* hearing, the Commission must issue a Decision and Order that is (1) consistent with the evidence presented at the hearing and (2) consistent with the scope of the hearing as set out by the parties.

IT IS SO ORDERED.

Commissioner Barden, Chair

WE CONCUR:

Commissioner Taylor

Commissioner McCaskill

CERTIFICATE OF SERVICE

This is to certify that the undersigned has on this date served a copy of this order in the above entitled action upon all parties to this case by sending an electronic copy hereof by electronic mail addressed to the attorneys for said parties; or if there is an unrepresented party(ies), by depositing a copy hereof, postage paid in the United States mail, first class, addressed to the unrepresented party(ies) and to the attorney(s) for the represented party(ies).

By Kim Falls on September 26, 2014

CONCLUSION

The practice of vacating and remanding, with little or no reason being given, seems to be an emerging trend. IWA is a relatively small organization—we have 190 members as of the date of this brief—but IWA was able to locate several of these decisions, most of which were issued in the last 3 years. There are surely other orders of this type. Many litigants at the commission are not represented by an IWA member.

Hopefully this information is helpful to the Court's review. Again, IWA takes no position on the question presented, which centers on appealability. While there are surely circumstances when a remand from the appellate panel will be appropriate, the Workers' Compensation Act envisions the panel making its own decisions rather than sending the parties back for a "do over" with no explanation for why a "do over" is necessary or desired.

Respectfully submitted,

Blake Hewitt w/ express permission.

Mary E. Jordan
IWA President

Gary Christmas
HOWELL AND CHRISTMAS

Ronald J. Jebaily
Suzanne H. Jebaily
JEBAILY LAW FIRM

Stephen Samuels
SAMUELS LAW FIRM

Andrea Roche
MICKLE & BASS

David Pearlman
THE STEINBERG LAW FIRM

Michelle Powers
POWERS LAW

John S. Nichols
Blake A. Hewitt
BLUESTEIN NICHOLS
THOMPSON & DELGADO

Linda McKenzie
BOWEN MCKENZIE BOWEN