RECEIVED
NOV 12 2015
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Appellate Case No. 2015-000808

James Osment..Appellant,

v.

The Timken Company, Employer,
and Phoenix Insurance Company, Carrier..Respondents.

FINAL BRIEF OF APPELLANT

John David Hawkins
South Carolina Bar No.5891
Charles Logan Rollins
South Carolina Bar No. 78395
George Randall Taylor
South Carolina Bar No. 10151
The Hawkins Law Firm
P.O. Box 5048
Spartanburg, SC 29304
(864) 574-8801

ATTORNEYS FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES....ii

STATEMENT OF ISSUES ON APPEAL....1

STATEMENT OF THE CASE....2

STATEMENT OF THE FACTS....3

ARGUMENT....5

I. APPELLANT IS ENTITLED TO A GENERAL DISABILITY AWARD UNDER SOUTH CAROLINA WORKERS' COMPENSATION LAW....5

A. Because The Only Way A Finding That Appellant Sustained An Injury To Only One Body Part Is To Draw Inferences Against The Appellant, Substantial Evidence Supports Only One Conclusion: That Appellant's Admitted Injury To His Knee Has Affected Another Body Part Or System....5

B. The Etiology of Appellant's Right Hip And Back Pain Is Inextricably Connected To His Walking On Concrete Floors At Timken And His Altered Gait....13

II. THE SUBSTANTIAL EVIDENCE RULE REQUIRES REVERSAL OF FINDINGS BASED UPON INFERENCES DRAWN AGAINST THE APPELLANT....21

A. Appellant Did Not Reject An Antalgic Gait Theory....21

B. The Single Commissioner Incorrectly Attributed The Medical Records Upon Which Her Decision Primarily Rested....23

III. EVEN IF APPELLANT IS NOT ENTITLED TO A GENERAL DISABILITY AWARD, IT WAS ERROR TO AWARD ONLY 60% PERMANENT PARTIAL DISABILITY TO THE RIGHT LOWER EXTREMITY....25

CONCLUSION....26

TABLE OF AUTHORITIES

Cases

Beckman v. Sysco Columbia, 408 S.C. 501, 508 759 S.E.2d 750, 754 (Ct. App. 2014) 6, 10, 12

Crisp v. South Co., 401 S.C. 627, 641, 738 S.E.2d 835, 843 (2013) 5

Grant v. Grant Textiles, 372 S.C. 196, 201, 641 S.E.2d 869, 872 (2007) 6

Hamilton v. Martin Color-Fi, Inc., 405 S.C. 478, 748 S.E.2d 76 (Ct. App. 2013), reh'g denied (Sept. 27, 2013), ... 7, 8

Nicholson v. S.C. Dept. of Soc. Svcs., 411 S.C. 381, 769 S.E.2d 1 (2015) 5, 6

Statutes and Regulations

S.C. Code Ann. § 42-9-10 .... 2, 11, 12, 26

ISSUES ON APPEAL

1. DID THE WORKERS' COMPENSATION COMMISSION ERR IN FINDING THAT APPELLANT WAS NOT ENTITLED TO A GENERAL DISABILITY AWARD UNDER THE ACT?

2. DOES THE SUBSTANTIAL EVIDENCE RULE REQUIRE REVERSAL OF FINDINGS BASED ON INFERENCES DRAWN AGAINST THE CLAIMANT?

3. DID THE WORKERS' COMPENSATION COMMISSION ERR IN FINDING THAT APPELLANT WAS ONLY ENTITLED TO AN AWARD OF 60% PPD GIVEN THE OVERWHELMING EVIDENCE AS TO THE EFFECTS OF THIS INJURY?

STATEMENT OF THE CASE

This is an appeal by James Osment (Appellant) from a decision of the South Carolina Workers' Compensation Commission finding that Appellant is not entitled to additional benefits under the South Carolina Workers' Compensation Act (the "Act"), including permanent and total disability pursuant to S.C. Code Ann. § 42-9-10 as a result of injury and permanent impairment to a second body part in addition to the admitted injury to Appellant's right lower extremity, and further finding that Appellant is only entitled to an award of 60% permanent partial disability (PPD) to the right lower extremity. The original case was set for hearing before Commissioner Susan S. Barden on September 26, 2014. Commissioner Barden issued an Order on November 24, 2014 in which Appellant was denied his request for additional benefits under the Act, and in which Appellant was only awarded 60% PPD to the right lower extremity.

Thereafter, Appellant filed a request for review with the Commission's Appellate Panel. On April 1, 2015, the Appellate Panel issued its Decision and Order fully affirming the Single Commissioner's decision to deny additional benefits and award only 60% PPD to the right lower extremity.

STATEMENT OF THE FACTS

This appeal involves an admitted injury to Appellant's right knee which occurred on May 20, 2010. Respondents provided medical treatment for the injury with Appellant being treated in succession by orthopedic specialists Dr. Walter Grady and Dr. Anthony Sanchez. Ultimately, Appellant required a total knee arthroplasty ("TKA") which was performed by Dr. Sanchez at Spartanburg Regional Medical Center on October 12, 2011. (R. pp. 229-235) Following the TKA, Appellant continued under the care of Dr. Sanchez and reached MMI for his injured right knee on August 22, 2012 at which time Dr. Sanchez gave permanent work restrictions of no kneeling or crawling and assigned a 50% permanent impairment rating to the right lower extremity. (R. p. 258)

Appellant continued follow up treatment with Dr. Sanchez after reaching maximum medical improvement ("MMI") for his right knee. Appellant testified that his right knee was never pain free following the TKA, and, as Appellant spent more time walking and standing on the concrete floors at Timken, he experienced increased pain and problems with his right knee, and he began to develop pain and problems with his back and right hip. (R. pp. 105-106, 110-111, 141) Appellant was provided with a golf cart to transport himself around the Timken plant, but a reduction in the number of golf carts available for use in the Appellant's department at Timken led to Appellant being required to walk on the concrete floors on his injured leg/knee more frequently. (R. pp. 107-109)

Appellant's right knee, back, and right hip became so problematic that Dr. Sanchez

wrote Appellant out of work indefinitely on September 9, 2013. By that time, it had become apparent that Appellant could no longer tolerate the walking on concrete floors. (R. pp. 279-281, 300) By all accounts, Appellant, age 64, was a good and valuable employee who had worked for Timken for 37 years. (R. p. 36, Order of the Single Commissioner, Finding of Fact # 8)

The Authorized Treating Physician, Dr. Anthony Sanchez, submitted his written opinions that Appellant's back and right hip problems were causally connected to the admitted knee injury. (R. pp. 302-305) No other expert opinion provides any etiology for Appellant's right hip and back issues. Dr. Sanchez went on to assign a permanent impairment rating of 20% to the right hip (R. p. 305); accordingly, Appellant has permanent impairment ratings to two body parts, and the only expert opinion stated to a reasonable degree of medical certainty that both body parts were injured as a result of Appellant's admitted work-related accident. (R. p. 302-303) Additionally, the Vocational Evaluation Report of J. Adger Brown dated April 30, 2014 concludes that Appellant is permanently and totally/vocationally disabled. (R. p. 313) There is no vocational expert opinion other than that of Adger Brown.

ARGUMENT

I. APPELLANT IS ENTITLED TO A GENERAL DISABILITY AWARD UNDER SOUTH CAROLINA WORKERS' COMPENSATION LAW

A. BECAUSE THE ONLY WAY A FINDING THAT APPELLANT SUSTAINED AN INJURY TO ONLY ONE BODY PART IS TO DRAW INFERENCES AGAINST THE APPELLANT, SUBSTANTIAL EVIDENCE SUPPORTS ONLY ONE CONCLUSION: THAT APPELLANT'S ADMITTED INJURY TO HIS KNEE HAS AFFECTED ANOTHER BODY PART OR SYSTEM.

The South Carolina Supreme Court has recently rearticulated the guiding principle that must color any decision made under the Workers' Compensation Act: "Workers' compensation law is to be liberally construed in favor of coverage in order to serve the beneficent purpose of the Workers' Compensation Act; only exceptions and restrictions on coverage are to be strictly construed. Nicholson v. S.C. Dept. of Soc. Svcs., 411 S.C. 381, 769 S.E.2d 12 (2015). In addition, "the claimant has the burden of proving facts that will bring the injury within the workers' compensation law, and such award ***must not* be based on surmise, conjecture or speculation**." Crisp v. South Co., 401 S.C. 627, 641, 738 S.E.2d 835, 843 (2013). Relying on the "liberal construction" principle that undergirds the South Carolina workers' compensation system, the Court, in Nicholson, reasserted that "it does not require claimant to prove her injury is entirely unique to her employment, for any other interpretation would seriously undermine the law of workers' compensation. For example, a chef may cut himself with a knife, or a carpenter may fall off a ladder just as easily while at home rather than at work. However, this possibility alone does not remove such an

accident from the scope of compensation if the accident *occurred* at work. Alleging an accident is not unique to employment, without more, is not a viable basis for denying compensation." Id. at 21-22. Finally, "[w]here there are no disputed facts, the question of whether an accident is compensable is a question of law." Grant v. Grant Textiles, 372 S.C. 196, 201, 641 S.E.2d 869, 872 (2007).

In the instant case, the Respondants have not denied that Appellant has injuries to his hip or back. The only question is whether said injuries are a result of his admitted work-related accident. In Beckman v. Sysco Columbia, 408 S.C. 501, 508, 759 S.E.2d 750, 754 (Ct. App. 2014), the Court of Appeals found that the claimant was entitled to an award under the general disability model because an award to claimant's back alone was "not supported by substantial evidence. Instead, the evidence in the record indicates Beckman suffered from a radiculopathy as a result of his back injury." The Court then referenced medical records that stated that, although there was no objective testing to demonstrate radiculopathy in either leg, the record also noted that such diagnostic tools could be "imperfect" for "determining radiculopathy." Id. Similar to the "idiopathic injury" line of cases, the "two body part" line of cases culminating in the Beckman opinion require reliance upon expert opinion when determining the compensability of an injury.

That is, if it is asserted that a claimant's fall is "idiopathic" but the only medical opinion in the record states that there is no evidence of an internal breakdown in, for example, the knee of a claimant who falls, then the injury must be found compensable.

Similarly, when determining whether a claimant has sustained a work-related injury that affects a second body part, such a defense must also rest upon the opinions of medical experts. In the case at bar, the only medical opinion in the record consists of orthopedic expert (and the Appellant's Authorized Treating Physician *selected by the Respondents*) Dr. Anthony Sanchez, who opined, most probably and to a reasonable degree of medical certainty, that Appellant's right hip and back injuries are causally related to his admitted work-related injury to his knee. (R. pp. 302-303). Also, Appellant has permanent impairment ratings from Dr. Sanchez of 50% to the right lower extremity (R. p. 258) and 20% to his right hip (R. p. 305). Thus, Appellant has a second body part, in addition to his admitted knee injury, that has been rated and causally connected to his workplace injury by his authorized treating physician.

In Hamilton v. Martin Color-Fi, Inc., 405 S.C. 478, 748 S.E.2d 76 (Ct. App. 2013), reh'g denied (Sept. 27, 2013), the claimant had seen four physicians, who each gave opinions about maximum medical improvement and impairment. The claimant alleged the Commission erred by giving less weight to the fourth opinion—the one that the claimant wished to receive the most weight. The Court held:

> South Carolina jurisprudence makes clear the Appellate Panel determines the weight of the evidence. The Appellate Panel had all four doctors' reports available to them and decided the reports of Drs. Green, Fulton, and Gee were more convincing than Dr. Moore's. Nothing in the record suggests this determination was beyond their scope or flawed. The Appellate Panel makes the final determination on credibility. Accordingly, the Appellate Panel did not err in finding Hamilton had reached MMI.

Hamilton v. Martin Color-Fi, Inc., 405 S.C. 478, 485-86, 748 S.E.2d 76, 80 (Ct. App. 2013), reh'g denied (Sept. 27, 2013). In the present case, the Appellate Panel has placed Dr. Sanchez's opinion on one side of the scale and literally nothing (i.e., the absence of reference to back and hip injuries in Appellant's family doctor's records) on the other and determined that the empty side of the scale is heavier.

No contrary evidence to Dr. Sanchez's opinion was ever produced by Respondents, and the Appellate Panel did not rely on any medical opinion providing any alternative theory to substantiate the ruling that Appellant sustained only a scheduled member injury to his leg. Instead, the Appellate Panel relied upon the records of Appellant's family physician—which did not reference the existence or etiology of Appellant's hip or back injuries. In the Decision and Order filed on November 24, 2014, the Single Commissioner found as follows: "I give the greatest weight in this case—of all the evidence—to [Appellant's] first family doctor record post accident (March 2014—4 years after the date of the accident in issue, and 6 months prior to the date of the hearing) and [Appellant's] follow—up visit with his family doctor one week later. Notwithstanding the family physician's detailed list of all [Appellant's] problems/complaints, nowhere to be found in these records is there any documentation of back or hip pain." (R. p. 37, Order of the Single Commissioner, Finding of Fact #11)

In affirming the Single Commissioner, the Appellate Panel determined that, since Appellant's family physician's records did not reference hip and back injuries, Appellant

could not have work-related back and hip injuries. The Appellate Panel's logic can be stated in a simple syllogism thus:

> If work-related back and hip injuries exist, they are always reflected in the records of a person's family physician (Major Premise)
>
> Appellant's family physician's records do not reference work-related back or hip injuries (Minor Premise)
>
> Therefore, Appellant did not sustain back or hip injuries (Conclusion).

From the standpoint of formal logic, therefore, the Appellate Panel's ruling is based upon a finding that Appellant's injuries are not compensable under a general disability model because Appellant has not been able to prove a negative by the preponderance of the evidence; i.e., because the Appellant's family doctor's records do not show that he complained of back and hip injuries, therefore, he did not have back and hip injuries.

Since it is not a demonstrable fact that orthopedic injuries are always reflected in the notes of a person's family physician (especially when a person is treating with an orthopedic specialist for those conditions), in order to disagree with the expert opinion of the only physician to give an opinion about the etiology of Appellant's hip and back injuries, one must engage in either 1) speculation (which is not a sustainable basis for a ruling of the Commission) or 2) one must make an inference that the reason that a person's family physician's records do not reflect his hip and back complaints is that he did not make such complaints. Of necessity, such an inference would be an inference that is drawn against a

claimant—which is equally impermissible for a workers' compensation claim. No conclusion that violates the rules of logic that undergird the concept of what we call, in the broadest, metaphysical, sense "evidence" could ever legally constitute "substantial evidence."

Based upon *Beckman v. Sysco Columbia*, 408 SC 501, 759 SE 2d 750 (Ct. App. 2014), in cases involving injury to multiple body parts, claimants are entitled to seek an Award under the General Disability Model. The "two body part" line of cases which culminated in the Beckman decision does not allow the Commission simply to disregard the opinions of a claimant's treating, expert physician when those opinions constitute the only credible evidence of record. In the present case, only one expert opinion in the record expressly addresses the question at issue in this case, and it is the opinion of Dr. Sanchez, the authorized treating physician who was selected by the Respondents. Dr. Sanchez's opinions are clear and unequivocal. The injuries to both the back and the hip are causally related to Appellant's workplace accident on May 20, 2010. (R. pp. 302-305) Even if Appellant had a pre-existing injury to his back, Dr. Sanchez is still of the opinion that the workplace accident on May 20, 2010 aggravated or exacerbated any prior or pre-existing injury (R. pp. 348-349). In addition, Dr. Sanchez has opined that Claimant has a 20% impairment to the hip. (R. p. 305)

Finally, since Dr. Sanchez has already issued an impairment rating of 20 % to the hip, together with 50% to the right lower extremity, the Appellant now has two rated body

parts. This, together with the Vocational Evaluation of Adger Brown, opining that Appellant is permanently and totally disabled (R. p. 313), the fact that Dr. Sanchez wrote Appellant out of work indefinitely with no return to work expected (R. p. 301), thereby forcing Appellant to elect to take early retirement (at a reduced Social Security benefit because he was not yet at age 65), require the conclusion that the Appellant is permanently and totally disabled under S.C. Code Ann. § 42-9-10.

The Appellant's admitted knee injury, the total knee replacement, the subsequent problems experienced with his injured right knee and complications caused by Appellant having to walk on the concrete floors at Timken are the major factors for Appellant being taken out of work by Dr. Sanchez on September 9, 2013. (R. pp. 261, 281, 300) Prior to this date, Dr. Sanchez had repeatedly noted that walking on concrete floors at Timken was problematic for Appellant. (R. pp. 247, 250, 253, 256, 258, 259, 261, 262, 271, 274, 276, 281, 285, 287) Thus, the actual effect of the subject knee injury and its aftermath had a far greater occupational impact upon Appellant than is reflected by such a lowly Award as 60% permanent partial disability to the right lower extremity. It is entirely reasonable to suggest that under the facts of this case, an Award of 75% to 90% is more than justified if the Court should find that Appellant is not permanently and totally disabled.

Regardless of any Stipulations at the hearing, the record in this case is filled with evidence to show that Appellant has multiple body parts affected by the injury on May 20, 2010, and he has permanent impairment ratings of 50 percent for the right lower extremity

and 20 percent for the hip. With ratings for two body parts from Dr. Sanchez and the vocational evaluation of Adger Brown, opining that claimant is permanently and totally disabled, it would serve no useful purpose to remand the case for further proceedings. Respondents offered no expert medical opinion, vocational opinion, or other evidence to dispute Appellant's disability under the economic model. Therefore, Appellant should be found to be permanently and totally disabled under Section 42-9-10 as a matter of law.

The Order of the Appellate Panel is in error because it relies on, at worst, speculation, or, at best, on an inference drawn against the Appellant. If an inference is to be drawn, it must be drawn in Appellant's favor, and doing so would negate the family physician records and make the only competent evidence in the record Dr. Sanchez's causation opinion. Because Dr. Sanchez's opinion is that Appellant's knee injury led to his hip and back injuries, the only possible conclusion, under Beckman, is to find that Appellant sustained an injury that affected a second body part. Because the evidence in the record regarding Appellant's inability to obtain employment in any capacity is uncontradicted, if he sustained an injury to a second body part, he must be found disabled under § 42-9-10. The medical records of Dr. Sanchez show that because of the subject injury, the Appellant was forced to give up his employment with Timken (R. pp. 279, 281, 285, 287, 288, 300, 301) and the Vocational Evaluation Report of J. Adger Brown dated April 30, 2014 concludes that Appellant is permanently and totally disabled. (R. p. 313)

It should be noted that Appellant's visits to his family doctor on March 19, 2014 and March 26, 2014 were primarily because of Appellant experiencing chest pains, the sign of a potential heart attack, which later resulted in Appellant having to treat with Dr. Cherry, a cardiologist, who performed surgery to place stent(s) in Appellant's coronary arteries to relieve his symptoms. (R. pp. 505-512) One should therefore find it reasonable that no mention is made of back or right hip pain in the records of the family doctor for March 2014 as these two office visits involved a far more serious and potentially life-threatening condition, making it most unlikely that either doctor or patient would mention or discuss a medical condition (back and right hip pain) that is being treated by another specialist.

Finally, the Single Commissioner mentions that Appellant made no complaint of his right hip/back during his last visit with his family doctor prior to the hearing in this matter. (R. p. 38, Order of the Single Commissioner, Finding of Fact #14). Close examination of the medical record cited reveals that this was not a visit with his family doctor, but, instead, was a visit with his cardiologist Dr. Stephen Cherry, so, of course, no mention was made of problems with the right hip or back. (R. pp. 513-514)

B. THE ETIOLOGY OF APPELLANT'S RIGHT HIP AND BACK PAIN IS INEXTRICABLY CONNECTED TO HIS WALKING ON CONCRETE FLOORS AT TIMKEN AND ALTERED GAIT.

Appellant's orthopedic problems subsequent to the TKA on October 12, 2011 have always been associated with walking on the concrete floors at Timken. This was documented in Appellant's chart with Dr. Sanchez on 4-23-2012. (R. p. 247). After full day

at work, Appellant was experiencing "fullness and swelling in his knee." He was also experiencing pain with prolonged sitting and pain at night. (R. pp. 247-249)

By his next visit with Dr. Sanchez on 6-04-2012, Appellant's tolerance for walking had decreased to ¼ mile, a 50 percent decrease in a span of approximately 6 weeks. He was still experiencing occasional swelling at work "especially on concrete floors." (R. p. 250) Among a number of problems listed by Dr. Sanchez on 6-04-2012 were "painful right total knee arthroplasty and mechanical complication of internal orthopedic device, implant or graft and acute knee pain." At this office visit, Appellant was given restrictions of no climbing and no prolonged walking. (R. pp. 250-252)

By 7-11-12, Appellant's walking tolerance had rebounded to ½ mile, but he still had swelling "... at the end of the day and at work when walking on a concrete floor." (R. p. 253) Appellant's next office visit with Dr. Sanchez was on August 22, 2012, at which time Dr. Sanchez documented Appellant's tolerance for walking at only 100 yards. Dr. Sanchez further documented that "walking on concrete floors makes his symptoms much worse." Appellant was utilizing ice treatments at night to attempt to relieve the "throbbing sensation" in his knee. It was at this visit on 8-22-2012 that Dr. Sanchez opined that Appellant had reached maximum medical improvement. Dr. Sanchez used the AMA guidelines and assigned a 20% impairment to the whole person and a 50% impairment rating to the right lower extremity. It was also at this office visit that Dr. Sanchez wrote in Appellant's chart "I do believe that concrete floors are not in his best interest." (R. pp. 256-258)

When Appellant next visited Dr. Sanchez on 11-21-2012, Dr. Sanchez noted that Appellant had occasional soreness and swelling with prolonged activity with a walking tolerance of 200 yards. It was also noted that Appellant has an "ache at night" and "occasional thigh pain." Dr. Sanchez wrote in Appellant's chart "I do believe ... the concrete floors are exacerbating his symptoms." (R. pp. 259-261)

Appellant next followed up with Dr. Sanchez on 1-11-2013. At this office visit, Dr. Sanchez noted as follows: "He does have some pain as he works on concrete floors but last Friday he had a fair amount of pain in his knee as well as some swelling *with radiation of pain into his groin that did seem to migrate posteriorly and into his low back.*" (emphasis added) Dr. Sanchez further noted that Appellant has pain with ambulation as well as night pain. This office visit is the first to document the development of pain associated with the back and the right hip since the TKR. Appellant was advised there may be a radicular component to his pain but, the increased problems were of a magnitude that a "workup" for CBC, sed rate and a CRP was warranted to rule out infection and Appellant was to return in two weeks for his next follow-up instead of what had been the customary six weeks to three months for follow-ups. (R. pp. 262-264)

Appellant's next office visit was on 2-20-2013 at which time Dr. Sanchez noted that Appellant was experiencing "global pain as well as swelling." Dr. Sanchez sent Appellant for a bone scan to assess his prosthesis and an AP pelvis radiograph was warranted at his next follow-up. (R. pp. 266-268)

On 4-03-2013, Dr. Sanchez noted continued problems with pain “electric type sensation intermittently as well as burning anteriorly,” and limited tolerance for walking with worsening of symptoms when “working on concrete floor”. (R. pp. 271-273)

On 7-08-2013, Dr. Sanchez noted that Appellant was now experiencing occasional numbness in his [right] foot, pain at night and increased difficulty at work. Dr. Sanchez also noted that he believes Appellant's work is aggravating his symptoms and that he will likely need a job change. (emphasis added) (R. pp. 274-276)

On 9-09-2013, Dr. Sanchez noted that Appellant continued to experience general soreness, was experiencing cramping sensation in his calf as well as occasional shooting sensation. Appellant had walking tolerance of one-quarter mile at work but with "significant soreness afterwards." "He is presently performing office work, however, he has difficulty with that as well." Dr. Sanchez further noted in Appellant's chart as follows: "I believe his work is exacerbating his symptoms at present and he is felt to be a candidate for permanent disability with respect to his knee. I do not believe he can return to work at his present employment." (emphasis added) (R. pp. 279-281) Dr. Sanchez then wrote Appellant out of work indefinitely on 9-09-2013. (R. p. 300)

It was at this point in time, that the Respondents attempted to find appropriate sedentary/light-duty work for Appellant, but they never effectively communicated a valid offer of employment to Appellant. Instead, Respondents have only the letter of Barbara Griffin (the adjuster for the Carrier) dated September 23, 2013 addressed to Dr. Sanchez

with a copy to Appellant as evidence of any available work. (R. p. 552) However, no specific job was offered to Appellant by way of this letter, and no one from the employer ever communicated an offer of medically acceptable sedentary/light-duty work to Appellant.

Appellant followed up next with Dr. Sanchez on 10-28-2013. At this visit, Dr. Sanchez documented that Appellant's "low back is starting to hurt more recently ... [with] radiation of the pain down his right leg to his ankle." The shooting sensation into his leg had lessened since Appellant had been out of work, but had not resolved. The chart again notes that Appellant is unable to return to work on account of having to walk on concrete floors. Dr. Sanchez further indicated plans to obtain an MRI of the LS spine with referral to Dr. Terzella for further evaluation and treatment of his back pain with radicular symptoms. Dr. Sanchez further noted that Appellant was permanently out of work at this time. (emphasis added) Also, it was noted in Appellant's chart that Dr. Sanchez would obtain right hip X rays if Appellant's groin pain continues. (R. pp. 285-287) Also, on 10-28-2013, Dr. Sanchez issued a second and final "out of work" note, indicating that Appellant was out of work indefinitely with no return to work expected. (emphasis added) (R. p. 301) When Appellant returned to Dr. Sanchez for his next follow up on 1/03/2014, Dr. Sanchez noted continued intermittent pain in Appellant's right groin. Although Dr. Sanchez had requested an MRI to evaluate Appellant's lumbar spine, the Carrier had denied the request. Dr. Sanchez reiterated the fact that Appellant was unable to tolerate walking on concrete. Dr. Sanchez did note that X ray of right hip revealed "narrowing of the superior dome of

acetabulum compared to previous radiographs and compared to the left hip." Appellant was recommended for a hip injection under Fluoroscopy for both diagnostic and therapeutic purposes. (R. pp. 288-290).

The Appellant returned for his next follow up with Dr. Sanchez on 3-19-2014. Dr. Sanchez noted that Appellant's symptoms are unchanged with low back pain radiating to his foot and occasional groin pain together with occasional numbness in his leg. Dr. Sanchez again reiterated Appellant's need for an MRI to assess lumbar nerve roots. (R. pp. 291-293). In his deposition, Dr. Sanchez testified that the carrier denied both the MRI for the lower back and the hip injection under Fluoroscopy which are designed to rule out potential causes of pain in the knee. (R. p. 358, line 10-p. 360, line 22) On the 5-28-2014 office visit, Dr. Sanchez noted that Appellant was still experiencing right hip and back pain. Intermittent spasm and occasional thigh pain were noted along with groin pain. (R. pp. 294-296). At the Appellant's follow up on 8-27-2014 Dr. Sanchez noted a decrease in knee pain as Appellant was no longer standing for long periods on concrete. Pain was noted in the right hip and back together with pain running down from the back along the posterior aspect of the right leg and foot. Numbness in the right foot was noted. Thigh pain and groin pain were also mentioned. Overall, the knee pain was some better since Appellant was no longer working. (R. pp. 297-299).

All of the foregoing synopses of Appellant's treatment history with Dr. Sanchez clearly demonstrate the development of Appellant's problems with his back, right hip and

right foot are related to his injured right knee and total knee replacement and that these problems surfaced over time with Appellant's increase in activity, and, in particular, his walking/prolonged standing on the concrete floors at Timken.

Appellant's TKA procedure was problematic to say the least. In his deposition taken on May 23, 2014, Dr. Sanchez testified as to the normal regimen of care and follow up frequency subsequent to total knee replacement surgery as follows: "Well, a routine follow up would be two weeks post-op, six weeks post-op, three months post op, six months post-op and then once a year. And then if they have any problems, then we see 'em back more frequent in between." (R. p. 323, lines 20-24). Appellant was having so much difficulty following his procedure that he was having to see Dr. Sanchez for follow up at a frequency of every two to three months more than 2 years after his surgery. (R. pp. 224-299)

Dr. Sanchez also noted in his deposition that he sees patients who work/walk on hard floors which makes their knees feel worse. This experience with other patients together with the information reported by Appellant was ample information for Dr. Sanchez to conclude that the concrete floors at Timken were exacerbating Appellant's symptoms. (R. p. 329, lines 7-17)

In his deposition, Dr. Sanchez testified as to the opinions he expressed in response to the questionnaire submitted by Appellant's attorneys. Dr. Sanchez testified "...it was my opinion that [the injured knee that was still bothering him] was [...] aggravating his [. . .] or led to his hip and back symptoms, or exacerbated a previous problem. (emphasis added) (R.

p. 348, lines 13-17) Dr. Sanchez further testified "[. . .]it sounds to me like his work injury exacerbated something he already had going on. So if he had an injury, he already had a problem, and then he had an injury, and he starts walking with a limp. He's got a reason to potentially have more symptoms after the injury that he had." (R. p. 349, lines 14-19) Dr. Sanchez further testifies "And even after his replacement, he continued to have [knee] pain. So he continued to walk with an altered gait, which has ultimately exacerbated these...symptoms in his [. . .] back and leg." (emphasis added) (R. p. 350, line 24-p. 351, line 3) Appellant's knee replacement has certainly been problematic. As Dr. Sanchez testified, "...he's [Appellant] never been pain free in that knee, ever." (R. p. 351, lines 23-24) Although Dr. Sanchez noted arthritic changes had developed in Appellant's right hip since the time of his surgery in 2011 and the X-rays taken in January, 2014, Dr. Sanchez was able to state to a reasonable degree of medical certainty that Appellant's hip problems are aggravated and worsened by his altered gait. (R. p. 355, lines 1-24)

Even assuming, arguendo, that Appellant had prior back problems as evidenced by the medical records of Dr. McElhaney (R. pp. 374-383), Dr. Sanchez was still able to testify to a reasonable degree of medical certainty that Appellant's back problems are aggravated by his altered gait/limp. (R. p. 357, lines 6-12) Dr. Sanchez also testified that Appellant cannot do full time sedentary work and again reiterated that the hip and back problems are related to his knee injury. (R. p. 362, lines 16-25, and p. 366, lines 12-21)

II. THE SUBSTANTIAL EVIDENCE RULE REQUIRES REVERSAL OF FINDINGS BASED UPON INFERENCES DRAWN AGAINST THE APPELLANT

A. APPELLANT DID NOT REJECT AN ANTALGIC GAIT THEORY.

Contrary to the finding of the Commission, the Appellant did not reject antalgic gait as the cause of his back and right hip pain during his hearing testimony. Instead, Appellant adamantly maintained that his back and right hip became problematic by his walking on the cement [concrete] floors at Timken. (R. p. 141, lines 2-19) At no time during the hearing did Appellant ever testify that he did not walk with a limp. In fact, Appellant testified that "My knee, when I walked a good distance, it would swell and start stiffening up." (R. p. 110, lines 3-4) Appellant further testified that in those situations, his knee pain would go to eight to nine on a scale of ten. (emphasis added) (R. p. 110, lines 7-9) It is inconceivable that anyone could walk with a normal gait and not limp as a natural tendency to favor an injured leg in an attempt to minimize such a high level of pain. Indeed, this is the only reasonable inference that can be drawn from the testimony and facts of this case. Again, all inferences must be drawn to favor the injured worker. This inference is also consistent with the deposition testimony of Dr. Sanchez which attributes antalgic gait/limp to the development/exacerbation of these other symptoms (i.e. pain in the hip and back) (R. p. 348, line 2-p. 351, line 3)

Appellant further testified that his knee, back and hip were giving so much trouble from having to walk on cement floors that when he got home from work, he was through for

the day and he would sit down and apply ice to his knee. (R. p. 111, lines 7-11) Appellant testified that he started having to walk more on the cement floors at work around January 2013, and his back and hip started bothering him a whole lot. (R. p. 105, line 17-p. 106, line 3) Appellant explained his increased walking at work in large part due to the number of golf carts available for use in the Maintenance Department. The number of golf carts available in Maintenance was reduced from three to two. (R. p. 107, line 1-p.109, line 17) The reduction in golf carts from three to two is an uncontroverted fact. The Appellant did not have a golf cart reserved for his exclusive use, so he would be without a golf cart if a call came in for maintenance while both carts were in use by others elsewhere in the Timken Plant. By all accounts, the Timken facility is quite large and contains approximately 16 acres under roof. (R. p. 392, lines 1-9) Raymond Sarratt testified at the hearing that the Timken facility is 660,000 square feet in size. (R. p. 161, lines 18-19) Obviously, if Appellant was without a golf cart and had an urgent job to take care of in a remote area of the plant, he would have had to walk a considerable distance.

As Appellant testified, two men from the Maintenance Department were routinely using one of the two golf carts in the Green [another area of the plant]. This would leave only one cart, which, according to Appellant, would be shared between Raymond Sarratt, John White and Steve Owens. (R. p. 109, lines 11-13) If one of these three individuals were using the other golf cart, Appellant would then be without a cart for his use.

Although the Commission found Raymond Sarratt's testimony to be more credible than that of Appellant's regarding the golf carts, this finding cannot be reconciled with the actual testimony of both Appellant and Mr. Sarratt. In fact, Mr. Sarratt admits what Appellant asserted in his testimony – that the golf carts were not always parked in the area close to Appellant's office. (R. p. 155, lines 14-19) Mr. Sarratt also admitted that Appellant had told him that the golf carts were not always available [for Appellant's use]. (R. p. 156, lines 16-21)

Raymond Sarratt's testimony, in fact, corroborates that of the Appellant in regard to how much walking Appellant was often required to engage in. Mr. Sarratt admitted that Appellant has a strong work ethic and that if there was a problem in the plant, the Appellant would want to go address the problem as soon as possible. (R. p. 160, line 4-p.161, line 17) Since a golf cart was not always available for Appellant and Appellant needed to address problems that arose, he had no option but to walk on the concrete floors to the location where the problem had occurred—thereby aggravating his injuries.

B. THE SINGLE COMMISSIONER INCORRECTLY ATTRIBUTED THE MEDICAL RECORDS UPON WHICH HER DECISION PRIMARILY RESTED

The Single Commissioner based her findings on credibility primarily upon the absence of any mention of problems with the hip and back in the records of Appellant's family physician for office visits on March 19, 2014 and March 26, 2014. In reaching her decision, the Single Commissioner gave the greatest weight of all evidence in the case to these records.

(R. p. 37, Order of the Single Commissioner, Finding of Fact #11). The March 19th and 26th, 2014 visits to his family doctor were primarily for chest pains which Appellant was experiencing, a very serious matter and indication of possible heart problems. (R. pp. 505-512) The only possible inference to be drawn from absence of mention of back/hip problems in these records is that no one is going to be thinking about mentioning ongoing back and hip problems that are already being treated by an orthopedic specialist when one goes to his family doctor complaining of chest pains. Interestingly, the Single Commissioner also relied upon the "so-called records" of Appellant's family physician from April 1, 2014 as reason to doubt Claimant's credibility and therefore deny compensability to the back and hip. *These medical records are not from the Appellant's family physician, but rather from the Appellant's cardiologist, Dr. Stephen Cherry, who just happens to be in the same medical group as the family physician.* (R. pp. 513-514) It should not be surprising, therefore, that Appellant did not discuss back and hip problems with his cardiologist. Thus, the three most important medical records cited by the Single Commissioner for casting doubt on Appellant's credibility and ruling against Appellant on the issue of compensability to the back and hip are easily explained away. *The Single Commissioner's Findings of Fact #s 11, 12, 13 and 14, therefore, are clearly contrary to the substantial evidence in the case.* (R. pp. 37-38)

In order to reach her conclusion, the Single Commissioner was *required* to have drawn inferences from the lack of mention of back/hip problems in the three above-

mentioned records that 1) Appellant would, *of absolute necessity*, have mentioned back/hip problems to his family doctor if Appellant was having back/hip problems when he was seeking treatment for chest pain, and 2) Appellant's family doctor, *of absolute necessity*, would have recorded the back/hip complaints of a patient whom he suspected was having potentially life-threatening heart problems. To find that Appellant's problems with his hip and back do not exist because they are not mentioned in medical records of the family physician and cardiologist cannot rise to the level of substantial evidence.

III. EVEN IF APPELLANT IS NOT ENTITLED TO A GENERAL DISABILITY AWARD, IT WAS ERROR TO AWARD ONLY 60% PERMANENT PARTIAL DISABILITY TO THE RIGHT LOWER EXTREMITY

Substantial evidence simply does not support an award of only 60% permanent partial disability to the Appellant's right lower extremity. It is well established, Appellant's TKA has been very problematic. Appellant has consistently experienced substantial pain with his right knee and knee replacement. Dr. Sanchez testified that Appellant has never been pain free in his right knee [since the TKA]. (R. p. 351, lines 10-24) When Appellant reached MMI on 8-22-2012, Dr. Sanchez assigned a 50% permanent impairment rating to the right lower extremity and gave permanent work restrictions to avoid kneeling or crawling. Over time, as Appellant continued walking and working on the concrete floors at Timken, his pain levels increased, and although he developed pain in other parts of the body, including the back and right hip, the right knee was always the main focal point of his pain and limitations.

At the hearing, Appellant testified that "My knee, when I walked a good distance [at work], it would swell and start stiffening up." Appellant further testified that his pain level with regard to his knee would go to a level of eight to nine on a scale of ten. He testified that he had pain with his other body parts such as his back and hip, but the pain was mostly with his knee. (R. p. 110, lines 2-12)

As Adger Brown's vocational report was introduced without objection and constitutes the only credible evidence of Appellant's earning capacity, it is an uncontested fact that Appellant has suffered a complete destruction of earning capacity. (R. p. 313) Even if he cannot meet a general disability model because he cannot prove that his injury affects a second body part, substantial evidence requires a higher rating to his lower extremity because of the extreme effects the injury has had upon Appellant.

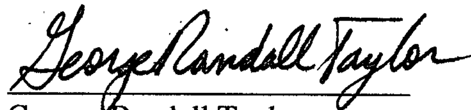
CONCLUSION

Because Appellant's complete destruction of earning capacity is uncontradicted, if it is determined that his admitted accident resulted in an injury that affected more than one body part, he must be found permanently and totally disabled under Section 42-9-10.

In sum, Appellant must be found disabled under Section 42-9-10 as a matter of law because no contrary evidence has been produced to dispute his disability under the economic model. Respondents have never sought to introduce additional medical evaluations, a vocational evaluation, or any other evidence for this claim and have waived any right to have the claim remanded for additional factual findings. At the very least, Appellant asserts that

the doctrines of waiver and laches must prevent this case from being remanded with Respondents being allowed an opportunity to generate the expert opinions and other evidence that was necessary to support their positions in the first place.

Respectfully submitted,



George Randall Taylor
South Carolina Bar No. 10151
John David Hawkins
South Carolina Bar No.5891
Charles Logan Rollins
South Carolina Bar No. 78395
The Hawkins Law Firm
P.O. Box 5048
Spartanburg, SC 29304
(864) 574-8801

ATTORNEYS FOR APPELLANT

November 9, 2015

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED
NOV 12 2015
SC Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

APPELLATE CASE NO. 2015-000808

James Osment..Appellant,

v.

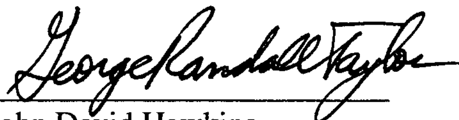
The Timken Company and Phoenix Insurance Company..................................Respondents.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Appellant complies with SCACR Rule 211 (b).

November 9, 2015

Respectfully submitted,



John David Hawkins
South Carolina Bar No. 05891
Charles Logan Rollins
South Carolina Bar No. 78395
George Randall Taylor
South Carolina Bar No. 10151
The Hawkins Law Firm
P.O. Box 5048
Spartanburg, SC 29304
(864) 574-8801

ATTORNEYS FOR APPELLANT

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED
NOV 12 2015
SC Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

APPELLATE CASE NO. 2015-000808

James Osment...Appellant,

v.

The Timken Company and Phoenix Insurance Company.................................Respondents.

PROOF OF SERVICE

I certify that I have served one bound copy of the Final Brief of Appellant on The Timken Company and Phoenix Insurance Company, via hand delivery, on November 9, 2015, to their attorney of record, J. South Lewis of Willson Jones Carter & Baxley, PA, 872 Pleasantburg Drive, Greenville, South Carolina 29607.

November 9, 2015

Respectfully submitted,

John David Hawkins
South Carolina Bar No. 05891
Charles Logan Rollins
South Carolina Bar No. 78395
George Randall Taylor
South Carolina Bar No. 10151
The Hawkins Law Firm
P.O. Box 5048
Spartanburg, SC 29304
(864) 574-8801

ATTORNEYS FOR APPELLANT