THE STATE OF SOUTH CAROLINA
In the Court of Appeals

W.C.C. FILE NO. 1205879

APPELLATE CASE NO. 2015-001702

JAMES DENT, Appellant,

vs.

EAST RICHLAND COUNTY PUBLIC SERVICE DISTRICT, Employer, and STATE ACCIDENT FUND, Carrier, Respondents.

FINAL BRIEF OF RESPONDENTS

PAGE P. SNYDER, ESQUIRE
S.C. BAR NO. 100239
ATTORNEY FOR RESPONDENTS
P.O. BOX 102100
COLUMBIA, SC 29210
(803) 896-5896

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STATEMENT OF THE FACTS

The Appellant suffered an admitted injury to his lower back on May 1, 2012. While in the course and scope of his employment, Appellant attempted to move a manhole cover when he felt a sharp pain. (R. p. 175, lines 7-9). First, Appellant treated with Dr. Paula Belmar at Sentinel Health Partners. (See R. pp. 61-67, R. pp. 133-145). Over the course of her treatment of the Appellant, Dr. Belmar prescribed pain medication and made referrals for a spine x-ray, physical therapy, lumbar spine MRI, and a neurosurgical consultation. (*Id*). On June 25, 2012, the Appellant underwent a lumbar spine MRI as ordered by Dr. Belmar. This MRI revealed a neoplasm in the lung. ((R. p. 147) The Appellant followed up with an oncologist and was diagnosed with small cell lung cancer sometime after the June 25, 2012 MRI. Appellant's cancer treatment consisted of chemotherapy and radiation therapy. (R. p. 129) He testified at the hearing that his cancer was in remission and that his last session of chemotherapy was in December 2013. (R. p. 160, lines 17-20).

With regard to his back injury, Dr. Belmar referred Appellant to a back specialist. On July 25, 2012, the Appellant began treatment with Dr. Brett Gunter of Columbia Neurosurgical Associates. (See R. pp. 123-132). Dr. Gunter ordered another MRI of the lumbar spine, this time with and without contrast. (R. p. 132). Records indicate the June 25, 2012 MRI was too poor quality for surgical evaluation and planning, and the new MRI would allow Dr. Gunter to better evaluate Appellant's lower back pain. (R. pp. 131-132). This MRI dated August 28, 2012 showed moderate spinal stenosis at L3-4 and L4-5 levels. (R. p. 129, R. p. 146). At his August 29, 2012 visit, Dr. Gunter indicated that he suffered from lumbar spondylosis with moderate stenosis. (R. p. 129).

Dr. Gunter ordered two lumbar epidural steroid injections which were administered by Dr. Eva Rawl. (R. pp. 125-128) At the hearing, Appellant testified that the injections provided relief for about two weeks and then the effect of the injections wore off. (R. p. 177, lines 6-18) Dr. Gunter also referred the Appellant to a work hardening program; however the evaluation for the program terminated prematurely due to the development of shortness of breath and pain. (R. p. 123, R. pp. 69, 82, R. pp. 178-79) Ultimately, Dr. Gunter placed Appellant at maximum medical improvement on May 8, 2013, assigning a permanent impairment rating of 10% to the whole person and released Appellant to work at a medium duty level. (R. p. 123) He also opined that the Appellant may require non-steroidal anti-inflammatory drugs for future medical treatment. (*Id.*)

Records from Appellant's treatment at Progressive Physical Therapy were also submitted into evidence. (R. pp. 68-87) Appellant attended physical therapy from January 6, 2013 to July 1, 2013. (*Id.*) It appears this treatment was periodically interrupted due to unrelated family issues. (R. pp. 20-21).

Appellant submitted into evidence a one-time independent medical examination performed by Dr. Leonard Forrest of Southeastern Spine Institute in Mt. Pleasant, South Carolina. This exam took place on July 8, 2013 and lasted approximately one to one and one half hours. R. pp. 92-97, R. p. 182, lines 19-21) Dr. Forrest opined that Appellant suffered a permanent impairment of 21% to the whole person as a result of the May 1, 2012 work accident. (R. p. 97). As to future medicals, Dr. Forrest opined that the Appellant would need continued pain medication and "additional medications may or may not be needed." (R. p. 96) He did not find surgery "playing a role for the work-

related situation" and he did not have much optimism as to the benefits of further injections. (*Id.*) Lastly, the Appellant offered a vocational evaluation performed by Harriet Fowler. (R. pp. 98-120) The Respondents did not submit a vocational evaluation because they assert that this is a single member claim under S.C. Code Ann. § 42-9-30(21) and the Appellant is barred from an award based upon the economic model of S.C. Code Ann. §§ 42-9-10 and 42-9-20. It appears that the vocational evaluation submitted by the Appellant more heavily relies upon a statement from the physical therapist dated July 1, 2013, rather than the opinion of the authorized treating physician as to the Appellant's capacity for work. (R. pp. 98-120, R. p. 85)

Aside from the medical records from the authorized providers and the Appellant's own medical and vocational opinions, the only other evidence is the testimony of the Appellant. Appellant testified as to his work history, medical treatment for both his work injury and small cell lung cancer, and his own opinions as to his injury and disability. Appellant also testified as to his employment status at the time of his injury. Appellant stated he was participating in the state's TERI program at the time of his injury and he had been enrolled in the TERI program for the two years before his work accident. (R. p. 197, lines 11-25) Appellant continued to state he "figured" he would retire at the end of his TERI program. (*Id.*)

In short, the Appellant sustained a compensable work injury on May 1, 2012 to the lower back. He received conservative treatment in the form of physical therapy, pain medication, and two lumbar epidural steroid injections. Further treatment modalities were not provided as the Appellant stated to his authorized treating physician and to the Single Commissioner that he was not interested in surgical intervention. (R. p. 124, R. p.

177, lines 21-25) The authorized treating physician, a neurosurgeon, recommended a work hardening program. Appellant completed an evaluation for work hardening with his physical therapist and it was determined he was not a candidate for this program. (R. p. 82) This was due to the Appellant's shortness of breath and complaints of pain. (R. p. 123) Physical therapist Deborah Antley also stated she thought it unnecessary to complete the evaluation because the Appellant intended to retire after the close of his workers' compensation claim and did not plan to return to work. (R. p. 82). The authorized treating physician placed him at maximum medical improvement on May 8, 2013, approximately one year after his date of injury.

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act establishes the standard of review for decisions by the South Carolina Workers' Compensation Commission. *Lark v. Bi-Lo, Inc.,* 276 S.C. 130, 134-35, 276 S.E.2d 304, 307 (1981). An Appellate panel may reverse or modify the Workers' Compensation Commission's decision only if the Appellant's substantial rights have been prejudiced because the decision is affected by an error of law or is clearly erroneous in view of the reliable, probative, or substantial evidence on the whole record. *Thompson v. South Carolina Steel Erectors*, 369 S.C. 606, 632 S.E.2d 874 (S.C. Ct. App. 2006). Our Supreme Court has defined substantial evidence as evidence that, in viewing the record as a whole, would allow reasonable minds to reach the same conclusion. *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981). "[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by

substantial evidence." *Palmetto Alliance, Inc. v. S.C. Pub. Serv. Comm'n*, 282 S.C. 430, 319 S.E.2d 695, 696 (1984).

ARGUMENT

1. **DID THE WORKERS' COMPENSATION COMMISSION ERR IN FAILING TO FIND THAT THE APPELLANT IS PERMANENTLY AND TOTALLY DISABLED PURSUANT TO SECTIONS 42-9-10 OR 42-9-30(21)?**

The Single Commissioner did not err in failing to find that the Appellant is permanently and totally disabled pursuant to S. C. Code Ann. §42-9-10 or §42-9-30(21). The Single Commissioner's conclusion that the Appellant sustained thirty five percent (35%) permanent disability to the back is fully supported by the record. Each of the Single Commissioner's thirty-two findings of facts related to the Appellant's medical treatment and disability are supported by a citation to either APA submissions or the testimony of the Appellant. The Single Commissioner clearly considered all of the evidence in reaching her decision, even referencing the opinions of all of the physicians and experts submitted, and chose to rely more heavily upon some evidence than others. While Appellant characterizes the Single Commissioner's decisions-making as implication and speculation, Respondents believe that the Single Commissioner reviewed, interpreted and weighed the entire body of evidence, citing to both parties' APA submissions and the Appellant's testimony, before reaching a conclusion.

It is the burden of the Appellant to prove that they are permanently and totally disabled pursuant to S.C. Code Ann. §42-9-10. *Coleman v. Quality Concrete Products, Inc.*, 245 S.C. 625, 630, 142 S.E.2d 43, 45 (1965). The Commissioner, in viewing the record as a whole, did not find that the Appellant met his burden in proving that he is permanently and totally disabled as a result of his work injury.

The Appellant relies upon *Beckman v. Sysco Columbia, LLC* in asserting that he is entitled to recover under S. C. Code Ann. §42-9-10.[1] *Beckman v. Sysco Columbia, LLC*, 408 S.C. 501, 759 S.E.2d 750 (Ct. App. 2014). This case is distinguishable because in *Beckman*, the injured worker received a permanent impairment rating which encompassed his injury to his back and his sacroiliac joint. *Beckman v. Sysco Columbia, LLC*, 408 S.C. 501, 501, 759 S.E.2d 750, 751 (Ct. App. 2014). In the present case, no impairment has been assigned to any other body part, including either of the Appellant's lower extremities. Per *Singleton v. Young Lumbar Company*, "where the injury is confined to the scheduled member, and there is no impairment of any other party of the body because of such injury, the employee is limited to the scheduled compensation..." *Singleton v. Young Lumbar Company*, 236 S.C. 454, 471, 114 S.E.2d 837, 846 (1960).

The Appellant alleges that there is no evidence in the record to support the Commission's opinion that he can perform medium work. In fact, the authorized treating physician and the only medical doctor in the record to see the Appellant with any regularity opines that he is qualified to perform medium duty work. (R. p. 123) Any argument that this opinion of the Commission is not supported by the record can be dismantled by looking at the Respondents' first page of its submission of evidence. The matter of the physical demand category which the Appellant may be able to perform relies solely upon physical ability. These categories are outlined and defined by the Department of Labor's Dictionary of Occupational Titles. There is no reference to academic or vocational abilities in these definitions.

[1] *Beckman v. Sysco Columbia, LLC* is currently pending before the South Carolina Supreme Court. The matters were briefed and oral arguments were held at the Supreme Court on November 3, 2015.

There is not a work-hardening report or a functional capacity evaluation in evidence. Physical therapist, Deborah Antley, indicated in two separate letters that since the Appellant has been approved for disability and does not plan to return to work, the information gained from a functional capacity evaluation would be of limited use. (R. pp. 82, 85) The Commission was left to make a determination based upon the evidence in the record and the Single Commissioner's Findings of Fact indicate that she reviewed the opinions of Dr. Gunter, Dr. Forrest and Deborah Antley in making her determination that the Appellant can work medium duty. (See R. pp. 6, 8)

The vocational evaluation submitted by the Appellant places greater weight on the opinion of a one-time independent medical evaluation of a doctor three hours out of town over the neurosurgeon who spent more with the Appellant. Her evaluation seems incomplete as she does not consider the possibility that he is able to work medium duty. The Single Commissioner opined that the Appellant could work medium duty and this issue was affirmed by the three other commissioners at the Appellate Panel level. The Single Commissioner directly addresses the weight she gave to the vocational evaluation in Finding of Fact ¶25.

As to the argument that the Appellant is permanently and totally disabled pursuant to S. C. Code Ann. §42-9-30(21), there is a single opinion that the Appellant has sustained 50% or greater loss of use of his back. (R. p. 92) The fact that the Commission relied more heavily upon the opinion of the authorized treating physician than that of a one-time evaluation is not an error or law or fact, but rather a determination reached after reviewing the entirety of the evidence in the record.

2. **DID THE WORKERS' COMPENSATION COMMISSION ERR AS A MATTER OF LAWW IN FINDING THAT THE APPELLANT'S DISABILITY IS MORE A RESULT OF SMALL CELL LUNG CANCER THAN HIS WORK-RELATED BACK INJURY?**

The Workers' Compensation Commission did not err in finding that the Appellant's disability is more a result of his lung cancer rather than his work-related back injury as there are numerous indications in the record to support this finding. First, the Appellant testified that he has problems with memory due to the chemical therapy received for his lung cancer. (R. pp. 160, lines 21-25, 161, lines 1-24) The Appellant went on to testify that he no longer drives. (R. p. 187, lines 5-6) He testified that he was scared he would "fall out," and that he was worried about fainting, but that his inability to drive did not stem from his back injury and that he "can mash the pedals pretty good." (R. p. 187, line 16-22) Additionally, the Appellant's own vocational evaluation begins by referencing the Appellant's memory problems as a result of radiation and chemotherapy. (R. p. 98) It states that the Appellant's wife reports that the Appellant constantly repeats himself and asks the same questions repeatedly. (*Id.*) The Appellant's wife reports that the two of them "do drills" before having to recollect with attorneys. (*Id.*) Additionally, the first reason stated for why the Appellant could not complete work hardening was dyspnea, or shortness of breath. (R. p. 85)

With the above information in evidence, the Commissioner found Dr. Forrest's opinion that the Appellant's lung cancer played no role in his ability to work unpersuasive. (R. pp. 7-8) The Commissioner is charged with reviewing all the evidence and making a determination as to weight of that evidence. It is clear that the Commissioner found that the opinion of Dr. Forrest was not persuasive in light of the body of evidence. This opinion was affirmed by the Appellate Panel.

CONCLUSION

For the foregoing reasons, Respondents contend that the Order of the Appellate Panel South Carolina Workers' Compensation Commission should be affirmed.

Respectfully submitted.

Page B. Snyder, Esquire
Attorney for Respondent
State Accident
SC Bar No. 100239
P.O. Box 102100
Columbia, SC 29221
(803) 896-5896
psnyder@saf.sc.gov

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I certify that I have served the Respondents' Final Brief on Appellant on December 23, 2015 by depositing a copy of it in the United States Mail, postage prepaid, to 1315 Elmwood Avenue, Columbia, South Carolina 29201.

STATE ACCIDENT FUND

BY: Erin Farthing

ERIN FARTHING, ESQUIRE
S.C. BAR NO. 76151
ATTORNEY FOR RESPONDENT
P. O. BOX 102100
COLUMBIA, SC 29210
(803) 896-5896