THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM SPARTANBURG COUNTY
COURT OF COMMON PLEAS

HONORABLE ROGER L. COUCH, CIRCUIT COURT JUDGE

CASE NO.: 2008-CP-42-3202

Claude Potter, Employee, ...Appellant,

v.

Spartanburg School District 7, Employer and
S.C. School Boards Self Insurance Trust Fund,
Carrier,.....Respondents.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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May 9, 2012

STATEMENT OF THE CASE

On December 19, 2003, the Appellant Claude Potter ("Claimant") fell from a ladder while working for Respondent Spartanburg School District 7 ("School District"). The School District began paying the Claimant weekly temporary total disability benefits and provided medical care.

By Form 50 dated January 6, 2006, the Claimant alleged he sustained compensable injuries to his "brain, shoulder, back, hip, leg and head" when he fell from the ladder. In his initial Form 50, the Claimant only requested additional medical examination and treatment for "head, brain and emotional/depression." (ROA p. 44-45).

By Form 51 dated February 9, 2006, the School District admitted that the Claimant sustained an injury to his head, leg and back but denied any compensable brain injury. (ROA p. 43).

By Consent Order dated April 26, 2006, the School District agreed to refer the Claimant to Dr. David Tollison for evaluation and treatment. (ROA p. 27-28).

Subsequent to the Claimant's evaluation by Dr. Tollison, the School District filed another Form 21 dated September 27, 2007 requesting a hearing to determine the amount of compensation to be paid to the Claimant. (ROA p. 35-40).

By Form 58 dated August 30, 2007, the School District denied that the Claimant sustained any compensable permanent brain damage. The School District also denied that the Claimant was permanently and totally disabled. (ROA p.41).

By Form 58 dated November 21, 2007, the Claimant alleged injuries to

"brain, shoulder, back and emotional." (ROA p. 33).

The evidentiary hearing was held before Commissioner David Huffstetler on December 4, 2007. By Decision and Order of the South Carolina Workers' Compensation Commission filed January 8, 2008, the hearing commissioner held that the Claimant sustained a compensable injury by accident to his right leg. Noting that the Claimant returned to his normal job and wages subsequent to his surgery to his right leg and continued to work until the time of his mandatory retirement at age sixty-five (65), the hearing commissioner found that the Claimant reached maximum medical improvement on March 14, 2007 with a 30% permanent partial disability to the right leg. The hearing commissioner made specific findings of fact that the Claimant was not disabled from his job by reason of his injuries and he did not suffer any physical brain damage causally related to the admitted accident. (ROA p. 23-25).

The Claimant appealed his case to the Appellate Panel of the South Carolina Workers' Compensation Commission ("Full Commission"). (ROA p. 29-32). The Full Commission heard oral arguments on April 30, 2008 resulting in the Appellate Panel Decision and Order of the South Carolina Workers' Compensation Commission filed May 30, 2008. (ROA p. 8-15).

The majority of the Full Commission affirmed the findings and conclusions of the hearing commissioner with some additional findings. The majority of the Full Commission also found as a matter of fact that, although he did suffer a psychological overlay from his injury, the Claimant did not sustain any permanent partial disability of a result of the psychological overlay.

Commissioner J. Alan Bass affirmed the finding that the Claimant reached maximum medical improvement on March 14, 2007 with only a 30% loss of use of the right leg. Commissioner Bass also confirmed that the Claimant was not disabled from his job by reason of his injuries. Commissioner Bass voted to reverse the finding of the hearing commissioner that Randolph Waid was unqualified to render an opinion concerning brain damage and the finding that the Claimant did not suffer any brain damage causally-related to the admitted accident.

The Claimant filed his Notice of Intent to Appeal with the circuit court on June 12, 2008. The Honorable Roger L. Couch heard the appeal on June 29, 2009 and issued an Order filed August 18, 2009. (ROA p. 1-7).

In this Order, the circuit court found that the exceptions raised by the Claimant "involve questions of fact and are properly directed to the Commission who are the ultimate fact finders." (ROA p. 6). The circuit court specifically found that there was substantial evidence in the record to support the specific findings of fact made by the Commission. The circuit court further found that the decision of the Full Commission was not affected by any error of law. Accordingly, the circuit court affirmed the findings and conclusions of the Full Commission in their entirety.

The Claimant filed his Notice of Appeal to the Court of Appeals on September 11, 2009.

By Opinion No.4890 filed September 14, 2011, the Court of Appeals affirmed the "decision of the circuit court affirming the Appellate Panel findings of fact and conclusions of law." Specifically, the Court of Appeals noted that the "Appellate

Panel, as the ultimate fact finder, was within its discretion to rely on McLeod [1] in determining the weight Dr. Waid's opinion should be afforded."

The Claimant filed a Petition for Rehearing dated September 27, 2012 arguing that the Court of Appeals and all the lower courts should "accept the expertise of Dr. Randolph Waid with regard to the Petitioners' brain damage." (Petition for Rehearing p.1, para. 2).

On September 28, 2012, the Claimant filed an Amended Petition for Rehearing asking for an *en banc* hearing.

By Order filed December 21, 2011, the Court of Appeals denied the Claimant's Petition for Rehearing but substituted Opinion No. 4890 filed September 14, 2011 with Opinion of the same number filed December 21, 2011. The substituted Opinion did not change the ultimate holding in the case.

The Claimant filed yet another Petition for Rehearing dated January 3, 2012 regurgitating the same arguments as set forth in the first Petition for Rehearing and Amended Petition for Rehearing.

The Court of Appeals denied this Petition for Rehearing by Order filed January 26, 2012. Although implicit in the Order denying Petition for Rehearing, the Court of Appeals confirmed by letter dated February 16, 2012 that the request for an *en banc* hearing was also "rejected."

The Claimant did not mail his Petition for Writ of Certiorari until March 15, 2012.

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[1] McLeod v. Piggly Wiggly Carolina Co. 280 S.C. 466, 313 S.E.2d 38 (Ct. App. 1984).

STATEMENT OF FACTS

On December 19, 2003, the Claimant fell from a ladder and fractured his right femur and sustained a small cut above one eye. (ROA p. 120). He was treated initially at Spartanburg Regional Healthcare and ultimately referred to Dr. Mark Visk to repair the right leg surgically. (ROA p. 131). Radiological studies performed on the day of the accident revealed negative results for cervical spine and pelvis. (ROA p. 122-127). A Ct Scan of the head showed only a "small amount of supratentorial blood." (ROA P. 127). The Claimant was "awake, alert and oriented x3." (ROA p. 127). Both upper extremities were "assessed with no abnormalities." (ROA P. 129-130).

Several days later, another CT Scan of the brain revealed "no new hemorrhage or mass-effect on the study." (ROA p. 135). The radiologist noted that the previously noted subdural hemotoma had resolved. (ROA P. 135). The radiologist also noted "mild prominence of the subarachnoid spaces around the convexities of the brain and the ventricular system indicating some mild cortical volume loss presumably *associated with aging*." (ROA p. 135) (emphasis added).

The Claimant's primary treating physician related to the right leg fracture was Dr. Mark Visk. He followed the Claimant from December 19, 2003 until April 11, 2006. (ROA p. 82-95). As related to the femur fracture, Dr. Visk released the Claimant at MMI on December 16, 2004 with a 20% permanent impairment to the right lower extremity and discharged the Claimant from active care. (ROA p.92).

The Claimant followed up with Dr. Visk on April 11, 2006 "just to see if anything has changed." (ROA P. 93). Dr. Visk released the Claimant to return "on a

prn basis." (ROA P. 93).

Approximately a year after he began receiving treatment from Dr. Visk, the Claimant was referred to Dr. Thomas A. Collings for neurological consultation. On November 3, 2004, Dr. Collings made the following findings:

1. Disequilibrium probably on the basis of generalized peripheral polyneuropathy which probably is ***not related to his trauma***.

2. Vertigo related to trauma on 12/18/03 ***which has resolved***.

3. Mild closed head injury with three minute loss of consciousness and fracture femur, ***all of which seems to have resolved***. (ROA p. 97) (emphasis added).

Another year later, the Claimant was referred back to Dr. Collings by his attorney. At this point in time, September 12, 2005, the Claimant had already been evaluated by psychologist Randolph Waid and Dr. Seastrunk, to whom he was sent by his attorney for an Independent Medical evaluation ("IME"). (ROA p. 98). After examining the Claimant and reviewing the reports and opinions of Dr. Seastrunk and Waid, Dr. Collings opined as following:

> I do not feel that Mr. Potter has any significant ongoing neurologic difficulty from the fall on 12/18/03...Patient will be seen here on an as need basis. (ROA p. 98-100).

By agreement of the parties, the Claimant was referred to Dr. David Tollision at Carolina Center for Advanced Management of Pain for psychological evaluation and treatment. (ROA p. 101). Dr. Tollison treated the Claimant from June 29, 2006 through March 14, 2007. Although he reviewed the records of psychologist Waid, Dr. Tollison did not opine that the Claimant sustained any "physical brain damage." (ROA p. 101-114).

Dr. Tollison released the Claimant on March 14, 2007 at psychological MMI and invited the Claimant to return to him in the future as needed. (ROA p. 113). Dr. Tollison did not prescribe any medications for the Claimant. (ROA p. 113). The Claimant admitted that he agreed to return to Dr. Tollison if he ever needed to. (ROA p. 66, 113). The Claimant admitted under cross-examination that he never felt the need to return to Dr. Tollison for any treatment. (ROA p. 65-66).

While still being treated by Dr. Visk, the Claimant returned to work with the School District on October 18, 2004. He worked his regular job with the School District from October 18, 2004 with no lost time attributed to injuries related to the accident until his mandatory retirement on February 1, 2006 at age sixty-five (65). (ROA p. 60-61, 67-68, 80-81).

After retiring from the School District, the Claimant continued to work in the HVAC business working as much as he wants to each day. (ROA p. 68).

Based upon the opinions of the treating physicians, the Full Commission held:

> 16) Greater weight is given to the opinion of the treating physician Dr. Mark Visk with respect to Claimant's injuries and body parts involved and appears that the only body part with resulting impairment from the admitted accident is the right leg.
>
> ...
>
> 18) The injuries sustained by the Claimant as a result of the admitted accident on December 19, 2003 based upon the medical evidence and other evidence presented, resulted in permanent and partial disability of 30% to the right leg. (ROA p. 11, paras. 16, 18).

Although the findings and conclusions of the Full Commission are amply supported by the reliable, probative and substantial evidence in the record, the Claimant sought a finding that he is entitled to a finding of permanent and total

disability, a finding of disability of multiple body parts and a finding that he sustained "physical brain damage" related to the accident. The evidence simply does not support such findings or awards.

More importantly, the evidence ***does*** support the findings of fact of the Full Commission. The circuit court was bound by these findings of fact as was the Court of Appeals based upon the standard of review in appeals from decisions of the Workers' Compensation Commission.

ARGUMENT

I. THE CLAIMANT'S PETITION FOR WRIT OF CERTIORARI IS NOT TIMELY AND MUST BE DISMISSED.

Rule 242, SCACR, provides that a petition for writ of certiorari shall be filed and served within thirty days after the Court of Appeals rules on a petition for rehearing. The Court of Appeals filed its Order denying Petition for Rehearing on December 21, 2011. The Claimant's Petition for Writ of Certiorari was not filed until March 15, 2012-well past the thirty day window. The Petition for Writ of Certiorari should be denied as being untimely.

The Claimant filed an intervening Petition for Rehearing between December 21, 2011 and March 15, 2012 but the South Carolina Appellate Court Rules do not provide for multiple petitions for rehearing. An appealing party should not be allowed to expand his time limits by filing successive, virtually identical petitions such as the Claimant did in the present case. Accord Quality Trailer Prods. v. CSL Equip. Co. 349 S.C. 216, 562 S.E.2d 615 (2002) (holding that successive Rule 59 motions do not toll the time for filing an appeal); Coward Hund Constr. Co. v. Ball Corp. 336 S.C. 1,

518 S.E.2d 56 (Ct. App. 1999) (same).

The Claimant did not toll the time for filing his Petition for Writ of Certiorari by filing multiple Petitions for Rehearing with the Court of Appeals. Accordingly, the Petition for Writ of Certiorari should be denied.

II. SHOULD THE SUPREME COURT SUBSTITUTE ITS JUDGMENT FOR THAT OF THE APPELLATE PANEL OF THE WORKERS' COMPENSATION COMMISSION AS TO THE WEIGHT OF THE EVIDENCE ON QUESTIONS OF FACT?

Even if timely filed, the Claimant's Petition for Writ of Certiorari does not set forth any "special or important reasons" warranting the Supreme Court's exercise of its "sound judicial discretion." See SCACR 242 (b). The Claimant is simply unhappy with the rulings he has received from the hearing commissioner, the appellate panel, the circuit court and the Court of Appeals. The Claimant is essentially urging this court to ignore decades of clear precedence regarding standard of review in workers' compensation cases. Rather than answer some ambiguity in the law, the Claimant's position will do nothing more than create an unnecessary conflict with otherwise clear existing case law.

The substantial evidence rule of the Administrative Procedures Act governs the standard of review in a Workers' Compensation decision. Corbin v. Kohler Co., 351 S.C. 613, 571 S.E.2d 92 (Ct. App. 2002); Gray v. Club Group, Ltd., 339 S.C. 173, 528 S.E.2d 435 (Ct. App. 2000); Lake v. Reeder Constr. Co., 330 S.C. 242, 498 S.E.2d 650 (Ct. App. 1998). In an appeal from the Workers' Compensation

Commission, the appellate court may not substitute its judgment for that of the Commission as to the weight of the evidence on questions of fact. Hamilton v. Bob Bennett Ford, 336 S.C. 72, 518 S.E.2d 599 (Ct. App. 1999); Stephen v. Avins Constr. Co. , 324 S.C. 334, 478 S.E.2d 74 (Ct. App. 1996); S.C. Code Ann. §1-23-380(A)(6)(d) (Supp. 2001); see also Etheredge v. Monsanto Co., 349 S.C. 451, 562 S.E.2d 679 (Ct. App. 2002) (stating court may reverse or modify Commission's decision if substantial rights of appellant have been prejudiced because administrative findings, inferences, conclusions or decisions are affected by other error law). This court's review is limited to deciding whether the Commission's decision is unsupported by substantial evidence or is controlled by some error of law. See Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981); Gibson v. Spartanburg Sch. Dist. No. 3, 338 S.C. 510, 526 S.E.2d 725 (Ct. App. 2000); see also Lyles v. Quantum Chem. Co. (Emery), 315 S.C. 440, 434 S.E.2d 292 (Ct. App. 1993) (in reviewing decision of Workers' Compensation Commission, Court of Appeals will not set aside its findings unless they are not supported by substantial evidence or they are controlled by error of law).

Substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the Commission reached in order to justify its action. Etheredge, 349 S.C. at 456, 562 S.E.2d at 684-82; Broughton v. South of the Border, 336 S.C. 488, 520 S.E.2d 634 (Ct. App. 1999). The Commission is the ultimate fact finder in Workers'

Compensation cases. Muir v. C. R. Bard, Inc., 336 S.C. 266, 519 S.E.2d 583 (Ct. App. 1999). The final determination of witness credibility and the weight to be accorded evidence is reserved to the Commission. Shealy v. Aiken County, 341 S.C. 448, 535 S.E.2d 438 (2000); Parsons v. Georgetown Steel, 318 S.C. 448, 535 S.E.2d 366 (1995); Gibson, 338 S.C. at 517, 526 S.E.2d at 729. The findings of an Commission are presumed correct and will be set aside only if unsupported by substantial evidence. Anderson v. Baptist Med. Ctr., 343 S.C. 487, 541 S.E.2d 526 (2001); Hicks v. Piedmont Cold Storage, Inc., 335 S.C. 46, 515 S.E.2d 532 (1999). It is not within the province of the appellate court to reverse findings of the Commission which are supported by substantial evidence. Broughton, 336 S.C. at 496, 520 S.E.2d at 637.

Based upon its review of the evidence, the Commission in the present case held that the Claimant reached maximum medical improvement on March 14, 2007 with a 30% permanent partial disability to his right leg. The Commission found further that the Claimant did not suffer physical brain damage. The issue before the circuit court and the Court of Appeals was whether the substantial evidence in the record supports these findings.

The reliable, probative and substantial evidence in the record supports the Commission's findings of fact and conclusions law. The burden of proof is on the Claimant to prove his case. McCuen v. BMW Mfg. Corp., 383 S.C. 19, 677 S.E.2d 28 (Ct. App. 2009). He failed to do so. The Commission has the discretion to disregard an expert's opinion and rely on other competent evidence. Shealy v. Aiken County,

341 S.C. 488, 455, 535 S.E.2d 438, 442 (2000).

As he attempted to do in his numerous briefs filed with the circuit court and the Court of Appeals, the cites the case of Means v. Gates, 348 S.C. 161, 588 S.E.2d 921 (Ct. App. 2001) in an attempt to supplement the record. The Means v. Gates opinion has no relevance to this appeal.

In Means, the trial court in a civil automobile accident case excluded the testimony of Waid because Waid was not treating the plaintiff and his testimony was not relevant. The Court of Appeals reversed finding the testimony relevant because the defendant raised the issue that the plaintiff was malingering. The Court of Appeals also held Waid's testimony to be relevant on the issue of whether the plaintiff suffered from "chronic pain syndrome." The issue of the existence of physical brain damage and the cause of same was not an issue in Means.

Additionally, the Court of Appeals only held that Waid's testimony was admissible given the specific allegations and issues in that case. Just because Waid was accepted as an expert in Means does not mean that he must be accepted as an expert in every field in every case in every tribunal thereafter.

Importantly, the plaintiff in Means offered the following credentials of Waid:

> Dr. Waid has a bachelor's degree in general psychology from Temple University, a master's degree in psychology from the University of Richmond, and a doctorate in clinical psychology from the University of North Texas following an internship at the Medical University of South Carolina in Charleston ("MUSC").
>
> Dr. Waid worked as the director of psychological services at a private psychiatric facility in Dallas, Texas before returning to Charleston in 1982 to join MUSC's faculty in the departments

> of psychiatry and neurology. In 1989, he became the director of MUSC's assessment center, where he ran a clinic providing assessments for conditions such as chronic pain, neurological disorders, and psychiatric disorders. In 1998, Dr. Waid became a clinical associate professor in psychiatry and neurology at MUSC and opened a private practice in Mount Pleasant. Dr. Waid is not a medical doctor and is not licensed to prescribe medications. Means, 348 S.C. at 166, 558 S.E.2d at 924.

In the present case, the Claimant offered nothing. All the record reveals is that Waid's letterhead lists him as a "Licensed Clinical Psychologist" and "Ph. D." (ROA p. 143, 144). The Claimant did not even go to the trouble of confirming any of the Waid's specific credentials. The record in this case contains no evidence of Waid's qualifications to render an opinion as to the existence or cause of brain damage.

The Claimant argues now that the Court of Appeals erred in affirming the Commission because the Commission gave "no weight at all" to the opinion of Waid. This is simply not true.

The Commission did not exclude Waid's testimony. It merely gave greater weight to the opinions of the treating medical doctors. This approach is completely consistent with the ruling in Means when the Court of Appeals stated:

> Any flaw in Dr. Waid's analysis would go to the weight and credibility of his testimony, not is admissibility ...Id. At 170, 558 S.E.2d at 926.

The Claimant's Petition for Writ of Certiorari is misplaced. The opinions in present case, Means and Howle v. PYA/Monarch, Inc., 288 S.C. 586, 344 S.E.2d 157 (Ct. App. 1986) are consistent.

Howle stands for the proposition that "a psychologist, *once qualified as an expert witness by reason of education, training, and experience,* is competent to

testify as to diagnosis, prognosis, and causation of mental and emotional disturbance." Howle, 288 S.C. at 594, 344 S.E.2d at 161. (emphasis added).

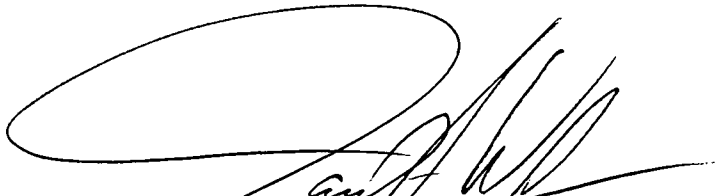
The opinions in the present case, Means and Howle do not stand for the proposition that all psychologists may testify in all cases about all subjects. These opinions also do not stand for the proposition that a psychologist's opinion regarding the existence of physical brain damage and causation must be accepted as fact. The finder of fact still has the discretion to weigh the evidence.

Furthermore, the Claimant's argument in its Petition for Writ of Certiorari is not the same one argued before the Court of Appeals. Accordingly, this argument is not preserved. See Anonymous v. State Bd. Of Med. Examiner, 329 S.C. 371, 496 S.E.2d 17 (1998); Camp v. Springs Mtg. Corp., 310 S.C. 514, 426 S.E.2d 304 (1993) (issue not preserved for appeal where the Court of Appeals did not address the issue and petitioner did not petition for rehearing for the court to consider it).

CONCLUSION

The Appellant Claude Potter fails to demonstrate any special or important reason for the Supreme Court to grant a Writ of Certiorari in the present case. This is a run-of-the-mill workers' compensation case. The Commission weighed the evidence and ruled against the Claimant. The substantial evidence in the record supports the findings of fact and conclusions of law of the Commission as the circuit court and Court of Appeals correctly found.

The Respondent respectfully request that the Petition for Writ of Certiorari be denied.



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PROOF OF SERVICE

I certify that I have served the Return to Petition for Writ of Certiorari on Appellant by depositing a copy to them in the United States Mail, Postage prepaid, on May 9, 2012 addressed as follows:

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Respectfully submitted,

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May 9, 2012

The Honorable Daniel E. Shearouse
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Re: Claude Potter v. Spartanburg School District 7
Case No.: 2008-CP-42-3202

Dear Mr. Shearouse:

Enclosed please find the original and seven copies of the Return to Petition for Writ of Certiorari in the above-captioned case along with the original and one copy of Proof of Service on opposing counsel. Please return a filed copy of the Return and Proof of Service to me in the enclosed self-addressed stamped envelope.

If you have any questions or concerns, please feel free to contact me.

Respectfully,

David A. Wilson

DAW/ccb
Enclosures
Cc: Mike Farry, Esquire
Kim Woodall
Andrew Poliakoff, Esquire