

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM THE SOUTH CAROLINA  
WORKERS' COMPENSATION COMMISSION

**SC Court of Appeals**

WCC File No. 1307602

Verma Tedder, Employee ..... Claimant, Appellant,

vs.

Darlington County Community Action Agency, Employer,  
and State Accident Fund, Carrier, ..... Respondents.

**INITIAL BRIEF OF APPELLANT**

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## TABLE OF AUTHORITIES

### CASES

<u>Bass v. Kenco Group</u> , 366 S.C. 450 (Ct. App. 2005) .....	8
<u>Brown v. Greenwood Mills, Inc.</u> , 366 S.C. 379 (Ct. App. 2005)(cert. denied) .....	8
<u>Burnette v. City of Greenville</u> , 401 S.C. 413 (Ct. App. 2012) .....	12,13,16
<u>Gadson v. Mikasa Corp.</u> , 368 S.C. 214 (Ct. App. 2006) .....	7
<u>Gibson v. Spartanburg Sch. Dist. #3</u> , 388 S.C. 510 (Ct. App. 2000) .....	8
<u>Hallums v. Hallums</u> , 296 S.C. 195 (1988) .....	17
<u>Historic Charleston Holdings, LLC v. Mallon</u> , 381 S.C. 417 (2009) .....	17
<u>Janasik v. Fairway Oaks Villas Horizontal Prop. Regime</u> , 307 S.C. 339 (1992) .....	17
<u>Jervey v. Martint Env'tl., Inc.</u> , 396 S.C. 442 (S.C. App. 2012).....	18
<u>Jordan v. Dixie Chevrolet, Inc.</u> , 218 S.C. 73 (1950) .....	9
<u>Kinsey v. Champion American Service Center</u> , 268 S.C. 177 (1977) .....	9
<u>Lorick v. S.C. Electric &amp; Gas Co.</u> , 245 S.C. 513 (1965) .....	9
<u>Muir v. C.R. Bard, Inc.</u> , 336 S.C. 266 (Ct. App. 1999) .....	18
<u>Porter v. Spartanburg Sch. Dist. 7</u> , 395 S.C. 17 (Ct. App. 2011) .....	12
<u>Scott v. Havnear Motor Co.</u> , 226 S.C. 580 (1955) .....	9
<u>Shuler v. Gregory Elec.</u> , 366 S.C. 435 (Ct. App. 2005) .....	8
<u>Smith v. Union Bleachery/Cone Mills</u> , 276 S.C. 454 (1981) .....	9
<u>Strickland v. Strickland</u> , 375 S.C. 76 (2007).....	17
<u>Waters v. S.C. Land Resources Conservation Comm'n.</u> , 321 S.C. 219 (1996) .....	8

STATUTES

South Carolina Code Ann. §1-23-380 .....7  
South Carolina Code Ann. §42-9-30 .....4  
South Carolina Code Ann. §42-9-210 .....18  
South Carolina Code Ann. §42-9-260 .....18  
South Carolina Code Ann. §42-15-80 .....3

OTHER AUTHORITIES

S.C. Code Ann. Regs. 67-612 .....9

**STATEMENT OF ISSUES ON APPEAL**

- A. DID THE COMMISSION ERR IN FAILING TO FIND CLAIMANT IS TOTALLY AND PERMANENTLY DISABLED?**
  - 1. DID THE COMMISSION ERR IN FAILING TO ADMIT OR CONSIDER THE CLAIMANT'S VOCATIONAL REPORT?**
  - 2. DID THE COMMISSION ERR IN FINDING THE FUNCTIONAL CAPACITY REPORT "INVALID", AND IN FAILING TO FIND CLAIMANT SUFFERED FROM PHYSICAL RESTRICTIONS?**
  
- B. DID THE COMMISSION ERR IN AWARDING THE DEFENDANTS OVER A YEAR OF CREDIT?**

## I. STATEMENT OF THE CASE

This is a Workers' Compensation claim involving an admitted accident; decided by the Workers' Compensation Commission on Defendants' Form 21 request to stop payment and determine permanency.

Claimant sustained admitted injuries to her left leg and back when, while employed by the Darlington County Community Action Agency supervising children on the playground, one of the children caused the Claimant to fall to the ground on her left side. Claimant's authorized treating orthopaedic, Dr. Robert E. Elvington, Jr., found her at maximum medical improvement for her left knee on December 5, 2013, (APA No. 5, p. 113), and her authorized treating orthopaedic, Dr. W.S. Edwards, Jr., found Claimant at maximum medical improvement for her back on July 3, 2014, (APA No. 5, p. 111).

Defendants filed a Form 21 request to stop payment of temporary total disability benefits and determine permanency on September 5, 2014. (Form 21, 09/05/14). By notice dated September 24, 2014, the Commission scheduled a hearing on the Form 21 before Commissioner Wilkerson for October 29, 2014. (Hrg. Not. 09/24/14). That hearing was continued to allow for mediation ultimately held on February 23, 2015. (Cont. Req. 10/22/14). Thereafter, by notice of March 5, 2015, the Defendants' Form 21 hearing was set for a second time for May 5, 2015 before Commissioner Taylor. (Hrg. Not. 03/05/15).

On April 17, 2015, the Claimant filed her pre-hearing brief and served a Notice of APA Submissions on Defendants. (Brf. and Not. of Sub. 04/17/15).

The second scheduled hearing was continued at the Defendants' request; Defendants' counsel being unavailable for hearing due to his commitments in the

Legislature. (Cont. Req. 04/23/15). By notice of May 4, 2015, the case was set for hearing for a third time for June 17, 2015 before Commissioner Taylor. (Hrg. Not. 05/04/15). Again that hearing was continued at the Defendants' request due to a hearing conflict. (Cont. Req. 05/04/15). By notice of May 5, 2015, the hearing was scheduled a fourth time for June 18, 2015 before Commissioner Taylor. (Hrg. Not. 05/05/15). Again that hearing was continued at the request of the defense. (Postponement Not. 06/17/15). On June 23, 2015 the hearing was scheduled for a fifth occasion for July 6, 2015 before Commissioner Barden. (Hrg. Not. 06/23/15). Again the hearing was continued at the request of the defense. (Hrg. Not. 06/29/15). Finally, the hearing was scheduled on a sixth occasion on June 29, 2015 for a hearing on August 20, 2015. (Hrg. Not. 06/29/15).

On July 27, 2015, prior to the August 20, 2015 hearing, the Defendants filed a Motion to Compel the Claimant to submit to an evaluation by their vocational expert. (Def.'s Mot. To Compel 07/27/15). Defendants made this Motion after their Form 21 had been pending for over forty-six (46) weeks and just over three (3) weeks before the case was scheduled to be heard, after having been scheduled six (6) times.

Claimant opposed the Motion to Compel, arguing that S.C. Code §42-15-80 requires that the Claimant submit to examination by a qualified "physician or surgeon" and that a vocational expert was neither. (Cl. Opp. to Motion to Compel 07/29/15). Single Commissioner Barden responded on August 7, 2015 by denying the Defendants' Motion to Compel, but also ruling sua sponte that "If Claimant chooses not to submit to Defendants' evaluation, neither party's vocational report will be considered by the undersigned Commissioner." (Order 08/07/15). The Commissioner made this ruling despite the fact that Defendants did not move to exclude Claimant's vocational report and

despite the fact that the Claimant's vocational expert had been provided to the Defendants on April 17, 2015, over four (4) months before the hearing of August 20, 2015.

Claimant moved that the Commissioner reconsider that ruling at the hearing on August 20, 2015. (Order 11/23/15). The Single Commissioner denied the Claimant's Motion for Reconsideration; ruling: "Claimant's unwillingness to submit to a Vocational Evaluation for the Defendants causes the undersigned not to consider the Vocational Report contained in Claimant's APA No. 8." (Order p. 18, Finding No. 5). Claimant's APA No. 8 was proffered for the record.

The case was finally tried on August 20, 2015 before Commissioner Susan Barden on a Form 21 that had been filed on September 5, 2014, nearly a year before.

At the hearing, the defense argued that Defendants should be entitled to stop temporary total disability benefits and an award should be made pursuant to §42-9-30. Claimant argued that she was totally and permanently disabled.

On November 23, 2015, the Single Commissioner issued an Order awarding ten (10%) percent permanent partial disability to the knee and eight (8%) percent permanent partial disability to the spine, for a total of 43.5 weeks of compensation. The Commission also awarded credit back to the Form 21 filed on September 8, 2014, which, as of the date of the Order, represented 63 weeks of credit. Thus, the Commission's award allowed 63 weeks of credit on a 43.5 week award based upon a hearing request filed over a year before the Order.

Indeed, it is the position of the defense that, pursuant to the award, the Claimant owes the State Fund Four Thousand One Hundred Three and 71/100 (\$4,103.71) Dollars.

The Claimant appealed to the Workers' Compensation Commission Appellate

Panel. A divided Panel affirmed; adopting the Single Commissioner's findings. (Order 04/30/16).

This appeal followed.

## II. STATEMENT OF FACTS

The Claimant, a teacher's aid for sixteen (16) years with the Darlington County Community Action Agency, suffered an admitted injury on March 29, 2013 when, while supervising young children on the way to the playground, one of the children caused the Claimant to fall to the ground on her left side.

The Claimant initially saw McLeod Urgent Care, (APA No. 1, pp. 1-19), and underwent a course of physical therapy, (APA No. 3, pp. 29-38), and thereafter saw McLeod Occupational Health, (APA No. 4, p. 58), from which she was referred to Pee Dee Orthopaedic. (APA No. 4, p. 73).

She was initially seen at Pee Dee Orthopaedic by Dr. Robert Elvington, who diagnosed a medial meniscus tear of the left knee, (APA No. 5, p. 83), and ultimately performed left knee arthroscopy and partial medial meniscectomy on September 4, 2013. (APA No. 5, p. 91).

The Claimant worked under a light duty restriction until, on August 29, 2013, she began receiving temporary total disability benefits in anticipation of her surgery.

After the surgery, on September 12, 2013, Dr. Elvington restricted the Claimant to no lifting or carrying over 10 pounds, no prolonged standing, walking, climbing, stooping, or crawling. (APA No. 5, p. 92). Dr. Elvington's restrictions were attributable to her left knee, as he indicated on September 12, 2013 "We will address the patient's right knee symptoms at a later date." (APA No. 5, p. 92).

Since the left knee surgery, the Employer has not offered work within her restrictions, (Tr. p. 36, lines 2-6; p. 37, lines 17-20; p. 38, lines 2-3), and she has applied for, and received, State Disability Retirement and Social Security Disability. (APA Nos. 11, 12).

On December 5, 2013, Dr. Elvington released the Claimant at maximum medical improvement for her left knee, rated her permanent physical impairment at three (3%) percent to the left knee, and continued the same restrictions. (APA No. 5, p. 113).

The Claimant was also seen at Pee Dee Orthopaedic with regard to her low back pain. After a lumbar MRI, on April 17, 2014, Dr. W.S. Edwards, Jr. concluded:

Though she has diffuse degenerative changes that were exacerbated by her work injury of last year, she was reassured that there is no evidence of any need for surgical intervention or serious pathology. (APA No. 5, p. 110).

Thereafter, he released her with a 5% impairment to her spine on July 3, 2014. (APA No. 5, p. 111).

A Functional Capacity Evaluation was performed by Tracy Hill, P.T., on September 12, 2014 who opined that the Claimant had limitations consistent with those set by Dr. Elvington, of lifting no more than three pounds floor to waist, eight pounds 12 inch to waist, ten pounds waist to shoulder and that she was limited to limited sedentary to limited light work. (APA No. 7, pp. 124, 126).

A vocational evaluation was performed by J. Adger Brown, Jr. on September 19, 2014 who opined that the Claimant was a fifty-three year old female with an Associate of Arts degree in early childhood education from Florence-Darlington Technical College,

had been working as a teacher's assistant with the Darlington Community Action Agency since 1997. (APA No. 8, p. 151).

Mr. Brown noted that the Claimant had been awarded state disability retirement, which has as its basic standard the inability to return to former employment, and that she also has applied for and is receiving social security disability benefits because of her inability to physically perform the work the work that exists in a regional or national economy within her age, education, work experience, and physical limitations. Mr. Brown, therefore, reached the conclusion that the Claimant is totally disabled. (APA No. 8, pp. 152-153).

### III. ARGUMENT

#### A. THE COMMISSION ERRED IN FAILING TO FIND CLAIMANT IS TOTALLY AND PERMANENTLY DISABLED.

The Single Commissioner erred in failing to find Claimant was totally and permanently disabled, in spite of the uncontradicted expert opinions of the treating orthopaedic, Dr. Robert Elvington, the functional capacity evaluator, Ms. Tracy Hill, P.T., and the vocational expert, J. Adger Brown, Jr.

It is well established that questions of law decided by the Workers' Compensation Commission, such as the decision as to whether to admit evidence, are decided de novo by this Court. See S.C. Code §1-23-380(5)(d).

Judicial review of the Workers' Compensation Commission Appellate Panel's factual findings based upon evidence, once admitted, is generally governed by the substantial evidence standard. See Gadson v. Mikasa Corp., 368 S.C. 214, 221 (Ct. App.

2006). In particular, the Appellate Panel's factual findings must be affirmed if supported by substantial evidence in the record. See Shuler v. Gregory Elec., 366 S.C. 435, 440 (Ct. App. 2005). Substantial evidence is not a mere scintilla of evidence or evidence viewed from one side. Substantial evidence is such evidence, when the whole record is considered, as would allow reasonable minds to reach the conclusion the Commission reached. Waters v. South Carolina Land Resources Conservation Comm'n., 321 S.C. 219, 467 S.E.2d 913 (1996).

A reviewing court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. S.C. Code Ann. §1-23-380(A)(5)(d)-(e)(Supp. 2006); see also Shuler v. Gregory Elec., 366 S.C. 435, 440 (Ct. App. 2005). Thus, where there are conflicts in the evidence over a factual issue, the findings of the Appellate Panel are conclusive. Brown v. Greenwood Mills, Inc., 366 S.C. 379, 393 (Ct. App. 2005)(cert. denied).

However, a reviewing court may reverse or modify a decision of the Appellate Panel if the findings, inferences, conclusions, or decisions of the panel are "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." S.C. Code Ann. §1-23-380(A)(5)(e)(Supp. 2006); See also Bass v. Kenco Group, 366 S.C. 450 (Ct. App. 2005).

For example, if the evidence is undisputed, the appellate court may rule as a matter of law. See, Gibson v. Spartanburg Sch. Dist. #3, 338 S.C. 510, 518 (Ct. App. 2000)(finding "where, as here, the facts are undisputed, the question of whether an accident is compensable is a question of law"). Also, when the evidence gives rise to but one reasonable inference, the question becomes one of law for the courts to decide. See

Jordan v. Dixie Chevrolet, Inc., 218 S.C. 73 (1950)(finding “upon admitted or established facts the question of whether an accident is compensable is a question of law and this is not an invasion of the fact finding field of the commission on the part of the court.”). See, also, Scott v. Haynear Motor Co., 226 S.C. 580 (1955); Lorick v. S.C. Electric & Gas Co., 245 S.C. 513 (1965); Kinsey v. Champion American Service Center, 268 S.C. 177 (1977); Smith v. Union Bleachery/Cone Mills, 276 S.C. 454 (1981).

Here, the Commission committed errors of law in refusing to admit or consider certain evidence and in making findings of fact contrary to the uncontradicted evidence of the record.

In particular, the Single Commissioner erred in refusing to consider, or even to admit into evidence, the Claimant’s uncontradicted vocational report, or to find as a matter of fact that the Claimant suffered from restrictions as a result of the injury, in light of the uncontradicted evidence contained in the opinions of her authorized treating orthopaedic, Dr. Robert Elvington, and the Functional Capacity Evaluator, Tracy Hill, P.T.

**1. The Commission erred in failing to admit or consider the Claimant’s vocational report.**

The Claimant’s vocational report was served on the Defendants as part of Claimant’s Notice of Submissions on April 17, 2015, over four (4) months prior to the hearing. Workers’ Compensation Regulation 67-612 titled “Admission of Expert Report as Evidence” requires the admission of an expert’s report if it was provided to the moving party more than ten (10) days before the scheduled hearing. See R.67-612(B)(2). The Commission excluded that report from evidence contrary to the law.

**2. The Commission erred in finding the Functional Capacity Report "invalid", and in failing to find Claimant suffered from physical restrictions.**

The Commission failed to find Claimant suffered from physical restrictions as a result of her injuries, in spite of the uncontradicted evidence in the record.

In particular, on September 12, 2013, Dr. Robert Elvington, Claimant's authorized treating orthopaedist, found:

She can return to work with no prolonged walking or standing, no climbing, stooping or crawling and no lifting or carrying greater than 10 pounds.

We will address the patient's right knee symptoms at a later date.  
(APA No. 5, p. 92).

Dr. Elvington went on to treat Claimant's right knee which was not a related condition, however, her restrictions never changed. (APA No. 5, p. 113).

Claimant's restrictions were confirmed by a Functional Capacity Evaluation performed by Ms. Tracy Hill, P.T., on September 12, 2014. (APA No. 7, pp. 124, 126).

The Functional Capacity Evaluation, Claimant's APA No. 7, p. 124, found that the Claimant was limited to lifting 3 to 10 pounds at various heights on an occasional basis; carrying 11 pounds with 2 hands; carrying 7 pounds in the right hand and 7 pounds in the left hand. It further recommended that she avoid standing/walking for more than 35 minutes at any given time; and noted that she is unable to walk at a normal pace. (APA No. 7, pp. 124, 126).

The Single Commissioner disregarded the Functional Capacity Evaluation as she found its findings "invalid". (Ord. 11/23/15, p. 17, Finding No. 20).

In particular, the Single Commissioner interpreted the Functional Capacity Evaluation test results herself and disregarded the evaluator's conclusions as "invalid" based on her own interpretation the results of one element of the evaluation; a grip strength test of the Claimant's left hand which the report indicated:

... did not demonstrate a bell shaped curve which may be an indicator of submaximal effort and the coefficients of variation of the underlying data may be an indicator of varied effort since both the coefficients of variation at position 2 were not within the acceptable 15% limit.  
(APA No. 7, p. 143).

The Single Commissioner relied on her own interpretation of that one test result to determine that the Functional Capacity Evaluation was "invalid" in its entirety.

The Functional Capacity evaluator, Tracy Hill, P.T., never opined that her evaluation was invalid. In fact, to the contrary, Ms. Hill opined that: "The result of the Functional Capacity Evaluation performed on this date indicate that she can meet the demands of limited sedentary to limited light work." (APA No. 7, p. 124). That expert opinion is uncontradicted in the record.

Moreover, the functional capacity evaluator specifically opined in her report that the Claimant's tests on left flexion and extension, left lateral and right lateral flexion, left straight leg raising and right straight leg raising, were valid. (APA No. 7, p. 130). Further, the functional capacity evaluator performed tests for Waddell's signs which the expert found were all negative, i.e. not significant for "non-organic" pain. (APA No. 7, p. 144). In addition, the evaluator noted that Claimant had "difficulty maintaining speed of the treadmill" on a treadmill test, (APA No. 7, p. 146), recommended that "she avoid

standing/walking for more than 35 minutes at a given time," and noted that "she is unable to walk at a normal pace". (APA No. 7, p. 124).

In sum, the expert found that: "The results of the Functional Capacity Evaluation performed on this date indicate that she can meet the demands of limited sedentary to limited light work." (APA No. 7, p. 124). The Commissioner disregarded this uncontradicted expert opinion, in favor of her own interpretation of the test as "invalid".

In the recent case of Burnette v. City of Greenville, 401 S.C. 413 (Ct. App. 2012), this Court cautioned this Commissioner, and the Commission, against interpreting test results, and reminded the Commission that it was "permitted to disregard medical evidence only when other competent evidence existed in the record." See Burnette at 427-428 (citing Potter v. Spartanburg Sch. Dist. 7, 395 S.C. 17, 23 (Ct. App. 2011)).

In Burnette, this Court reversed a decision by the instant Commissioner which found that a Claimant had not suffered a back injury based, in part, on the Commissioner's interpretation of MRI findings. The Court found:

**Particularly disturbing is the finding that the 2008 MRI showed 'only' a 'minimal' protrusion with no nerve root displayed or impingement, and comparatively, no greater pathology of any significance, (if any), than the MRI of 2004 ... Because no evidence indicates this opinion originated from a medical provider, yet it appears in the Single Commissioner's Order, we are forced to conclude it is the medical opinion of the Single Commissioner, adopted by the Commission.**  
Burnette, 401 S.C. 417, 428. (emphasis added).

Here, as in Burnette, the medical opinion that the Functional Capacity Evaluation report is "invalid" is that of the Single Commissioner, rather than any medical provider.

As in Burnette, the Single Commissioner ignored, (and, here, also excluded), uncontradicted expert opinions in favor of her own interpretation of test results.

Also, as in Burnette, the Single Commissioner heavily focused, instead, on what she viewed as credibility issues. See Burnette, at 426. In particular, the Commissioner found:

Prior to the surgery to repair the torn meniscus in Claimant's left knee, Claimant's gait was 'mildly antalgic'. I give this record great weight, as Claimant ambulated laboriously into and of the hearing room with a cane that, contrary to Claimant's testimony, no doctor prescribed. (Ord. 11/23/15 p. 15, Finding 10).

Thus, the Single Commissioner disregarded the authorized treating orthopaedic surgeon's opinions as to Claimant's restrictions, (APA No. 5, p. 92), as well as the Functional Capacity Evaluation and its restrictions, and observations of the Claimant's difficulty walking. (APA No. 7, pp. 124, 126).

Instead, she focused "great weight" on pre-surgery notes by the Claimant's occupational health physician, Dr. Richard T. Ferro, that indicated on April 12 and May 2, 2013, that the Claimant's gait was "mildly antalgic." (APA No. 6, pp. 13, 15). Therefore, the Commissioner reasoned the Claimant was uncredible because she "ambulated laboriously" at the hearing.

In so doing, the Commissioner ignored the restrictions placed on the Claimant, post- surgery on the left knee, by Dr. Elvington. (APA No. 5, p. 92, 113). She ignored the Functional Capacity Evaluation which indicated Claimant was "unable to walk at a normal pace", and was "noted to have difficulty maintaining the speed of the treadmill," during testing. (APA No. 7, pp. 124, 126).

The Single Commissioner also ignored the records of Lowe's Physical Therapy which contain, between May 13, 2013 and June 20, 2014, (APA No. 3, pp. 33-57), numerous references to Claimant's difficulty with left lower extremity range of motion, stability and ambulation. See, e.g., **05/13/13 note** (APA No. 3, p. 33)("L knee worse than right → light duty ... cautious when moving knee ... Knee slightly swollen; when standing Pt shifts weight onto R LE."); **09/23/13 note** (APA No. 3, p. 44)("Hesitant to put weight on (L) LE ... Pt presents  $\bar{c}$  ↑ p!, ↓ ROM and ↓ stability s/p meniscal repair"); **10/10/13 note** (APA No. 3, p. 48)("Strength hasn't been tested Eval 2° to ↑ c/o pain, pt still ambim  $\bar{c}$  SPC [single point cane]"); **10/23/13 note** (APA No. 3, p. 49)("NMR [neuromuscular re-education] to improve gait"); **04/25/14 note** (APA No. 3, p. 54)("→ numbness/tingling L>R all the time on (L) intermittent (R) ... motivated ... Majority of Motion coming from thoracic and hips").

In fact, on May 7, 2014, the therapist at Lowe's Physical Therapy indicated "L knee buckled on steps - almost fell ↓ steps". (APA No. 3, p. 56).

In spite of this evidence, the Commissioner put "great weight" on a note, pre-surgery, in May of 2013 that indicated the Claimant was "mildly antalgic" as proof that the Claimant's altered gait at the hearing was, in fact, artifice.

Similarly, the Single Commissioner also placed weight on a medical history form which the Claimant completed on May 21, 2013, prior to surgery and prior to seeing McLeod Occupational Health for the first occasion. (Order pp. 15-16, Finding No. 14). On that form, the Claimant responded "no" to a question asking "Do you need any accommodations, job modification and or structural changes to your work are due to a health-related condition?" (APA No. 4, p. 58). The Commission relied on this response

to demonstrate that the Claimant did not, in fact, require work restrictions as she alleged at trial. (Order pp. 15-16, Finding No. 14).

The Single Commissioner failed to note that after that intake form was completed, on the visit of the same date, the occupational health doctor limited the Claimant to lifting 25 pounds or less, no bending, no climbing, and referred her for MRIs and continued physical therapy. (APA No. 4, p. 61). Nor did the Commissioner consider that the results of those MRIs ultimately resulted in Dr. Elvington recommending and performing surgery on the Claimant's left knee and his setting restrictions which the Employer admitted they could not accommodate.

The Single Commissioner went on to find that the Claimant was not credible because she testified at the hearing that she did not have right knee problems prior to the accident. (Ord. p. 16, Finding No. 19; Tr. p. 32, lines 22-23).

This testimony, in the Commissioner's view, was indicative of an attempt to mislead the Commission because she viewed it as contradictory to the Claimant's deposition testimony. At deposition the Claimant testified at length about prior injury to her right knee and the resulting Workers' Compensation claim. (Dep. Tedder p. 16, line 16 - p. 21, line 6). During that deposition, the Claimant also testified:

Q. Were you still having problems with your right knee before you were injured in this accident?

A. No.

Q. Had your right knee completely healed?

A. Yes.

(Claimant dep. p. 20, lines 11-16).

Moreover, the fact that the Claimant currently has right knee problems was not in dispute, and the causation of that right knee condition was not in issue.

Thus, even though Claimant's current right knee problems are well-established through the Claimant's testimony at trial, at deposition, and in the medical records; even though the causation of Claimant's right knee problems were not in issue, and even though Claimant testified at length at deposition about a prior right knee injury and Workers' Compensation claim with problems that resolved before the instant accident, the Commissioner found that the Claimant's failure to mention the prior, resolved, and irrelevant right knee claim, (to which she had previously testified at deposition), was damning to the Claimant's credibility, and, moreover, formed a basis for the Commissioner to ignore the undisputed evidence contained in the Vocational Report and Functional Capacity Evaluation establishing the Claimant's restrictions.

Nevertheless, the Single Commissioner still found that the Claimant had a ten (10%) percent impairment to her left lower extremity, (which was over three (3) times the three (3%) percent rating set by her authorized treating surgeon), as well as eight (8%) percent to the spine (which was over one and a half (1½) times the rating from her authorized treating surgeon).

In sum, here, as in Burnette, Claimant presented uncontradicted expert opinions. Here, in spite of the specific admonitions this Commissioner received from the Court of Appeals in Burnette, this Commissioner again either excluded, deemed "invalid", or simply ignored the uncontradicted evidence in favor of her own interpretations of test results, and her zeal for credibility determinations, contrary to the law and the substantial evidence in the record.

**B. The Commission erred in awarding the Defendants over a year of credit.**

The Single Commissioner erred in awarding the Defendants credit for over a year of temporary total disability benefits, back to the filing of the Defendants' Form 21, in spite of the fact that the hearing was set and continued on six (6) different occasions over the course of a year at the Defendants' request.

In equity, the State Fund should be barred by the doctrines of waiver and laches from seeking to recover credit for an overpayment that was produced by their own delay.

Waiver is the "voluntary and intentional relinquishment or abandonment of a known right." Strickland v. Strickland, 375 S.C. 76, 85, 650 S.E.2d 465, 470 (2007). The party claiming waiver must show the other party possessed, at the time, actual or constructive knowledge of his rights or of all the material facts upon which they were dependent. Janasik v. Fairway Oaks Villas Horizontal Prop. Regime, 307 S.C. 339, 344, 415 S.E.2d 384, 387-88 (1992). "The doctrine of waiver does not necessarily imply that the party asserting waiver has been misled to his prejudice or into an altered position." Id. at 344, 415 S.E.2d at 388.

Laches is an equitable doctrine that our courts have defined as "neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done." Historic Charleston Holdings, LLC v. Mallon, 381 S.C. 417, 432, 673 S.E.2d 448, 456 (2009)(quoting Hallums v. Hallums, 296 S.C. 195, 198, 371 S.E.2d 525, 527 (1988)). "To establish laches as a defense, a party must show that the complaining party unreasonably delayed its assertion

of a right, resulting in prejudice to the party asserting the defense of laches.” *Id.* “Whether laches applies in a particular situation is highly fact-specific, so each case must be judged on its own merits.” *Muir v. C.R. Bard, Inc.*, 336 S.C. 266, 297, 519 S.E.2d 583, 599 (Ct. App. 1999). See also, *Jervey v. Martint Env'tl., Inc.*, 396 S.C. 442; 721 S.E.2d 469 (S.C. App. 2012).

Here, the Fund had a statutory right to have a stop payment hearing within sixty (60) days of their Form 21. See, S.C. Code §42-9-260(D). Indeed, the Commission complied, and set the first hearing for October 29, 2014, within sixty (60) days of the Form 21 filed on September 5, 2014. The Fund waived that right, and their right to claim credit, by voluntarily seeking to continue the hearing on five (5) occasions over the course of a year, delaying the determination of permanency. They cannot, in equity, claim reimbursement for the payments that resulted from that delay.

Further, S.C. Code §42-9-210 governs “Deduction from compensation of payments made by employer when not due and payable.” It provides “payments ... not due and payable when made may ... be deducted from the amount paid as compensation.” The temporary total benefits paid by the employer were due and payable “when made”, irrespective of the Commission’s determination of maximum medical improvement a year later. Also, at best, §42-9-260 allows for “deductions from the amount paid as compensation.” It does not provide for direct reimbursement by the Claimant to the employer.


**CONCLUSION**

For the foregoing reasons, the Order of the Appellate Panel should be reversed.

Respectfully submitted,

June 24<sup>th</sup>, 2016

WUKELA LAW FIRM

  
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