

STATE OF SOUTH CAROLINA)
)
 COUNTY OF RICHLAND)
)
 THEODORE P. POLANSKY,)
)
 Employee,)
 Respondent/Cross-Appellant,)
)
)
)
 v.)
)
 SC OFFICE OF THE ATTORNEY)
 GENERAL,)
)
 Employer, and)
)
 STATE ACCIDENT FUND,)
)
)
 Carrier,)
 Appellants/Cross-Respondents,)
)

IN THE COURT OF COMMON PLEAS
 OF THE FIFTH JUDICIAL CIRCUIT

Docket Nos: 2015-CP-40-07380
 (Appeal)
 2015-CP-40-07468--
 (Cross-Appeal)

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SC Court of Appeals

**ORDER AFFIRMING THE
 SC WORKERS' COMPENSATION
 COMMISSION AS TO THE ISSUES
 RAISED ON APPEAL BY THE
 APPELLANTS**
DOCKET NO.: 2015-CP-40-07380

(APPEAL)
 LEANNETTE W. MERRIDGE
 C.C.P. & G.S.
 2016 JUN -6 AM 11:37
 RICHLAND COUNTY
 FILED

This matter came to be heard by me on May 20, 2016, as on an appeal and a cross-appeal filed by the parties in the above-referenced matter. This Order applies to the appeal (Docket No. 2015-CP-40-07380) filed by the Appellants, the Defendants, (the employer and the workers' compensation insurance carrier), below. The Appellants were represented by Temus C. Miles, Jr., of the McKay Law Firm, a member of the Richland County Bar. The Respondent, the Claimant below, was represented by Preston F. McDaniel, also of the Richland County Bar.

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After review of the Record, the Briefs, the arguments of counsel and the issues raised by the Appellants in their Appeal to this Court, I affirm the Decision of the Commission.

STANDARD OF REVIEW

The SC Administrative Procedures Act (APA) establishes the standard for judicial review of Decisions by the S.C. Workers' Compensation. Under the scope of review established in the APA, this Court may not substitute its judgment for the Commission as to the weight of the evidence on questions of fact, and may only reverse or modify the Decision if the Appellants' substantial rights have been prejudiced because the Decision is effected by an error of law or is clearly erroneous in review of the reliable, probative, and substantial evidence on the whole Record. See: SC Code §1-23-380(5)(e) (Supp. 2015). 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 the Appellate Panel reached." Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1976). The possibility of drawing two inconsistent conclusions from the evidence does not prevent an Administrative Agency's Findings from being supported by substantial evidence. Palmetto Alliance, Inc. v. SC Public Service Commission, 282 S.C. 430, 319 S.E.2d 695 (1984). Where there is a conflict in the evidence, the Commission's Findings of Fact are conclusive. The final determination of witness credibility and the weight to the

accorded evidence is reserved to the Commission. Sharpe v. Case Produce, Inc., 336 S.C. 154, 519 S.E.2d 102 (1999); Brown v. Peoplease, 402 S.C. 476, 741 S.E.2d 761 (SC App. 2013) (emp. added).

REVIEW AND DECISION OF THE ISSUES ON APPEAL

By way of appeal, the Defendants raised twelve (12) Exceptions which were combined into three (3) arguments for decision by the Court. The first centers around the "inclusion" of, but yet in the same argument the lack of weight given to, reports, referred to as "updated", medical reports of Dr. Avie Rainwater, Ph.D; and to the reference to Dr. Rainwater as an authorized medical provider. The second argument is whether the Commission erred as a matter of fact and/or concluding as a matter of law that the Claimant suffered physical brain damage and by finding such brain damage compensable under the standard established by the Supreme Court. The third argument is whether the Commission erred as a matter of fact by finding that the Defendants should have had notice of physical brain injury; and whether the Claimant's request for benefits should be barred under the equitable doctrine of *laches*.

As to the first issue, the Court finds no error of law or fact. The Court would note that Defendants sought to exclude the report of Dr. Rainwater based simply and only on a set of pleadings put into evidence over objection filed in an unrelated matter after the date of the report sought to be excluded. Those

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pleadings establish only that Dr. Rainwater's group filed a Complaint against the State Accident Fund, months after the challenged report, over non-payment of medical bills in totally unrelated matters. The Court would also note that such evidence is in the nature of impeachment evidence which does not go to admissibility but goes to the weight to be given such evidence. As noted in the Standard of Review and specifically as to expert evidence, the weight and credit to be given any expert testimony or evidence is for the Commission as the factfinder. Tiller v. National Home Center of Sumter, 334 S.C. 333, 513 S.E.2d 843 (1999); "Impeachment by Proof of Bias", Sanders and Nichols, Trial Handbook for S.C. Lawyers, §25:7, 5th Edition (2015). The final determination of witness credibility and the weight to be afforded evidence is reserved to the Workers' Compensation Commission, and it is not the task of the Court to weight the evidence as found by the Commission. Sharpe v. Case Produce, Inc., supra.

Also as to the report of Dr. Avie Rainwater, the Defendants take exception to the Commissioner's reference to him as an authorized treating provider. In Brief, in argument, and in the Record they do not question that he was an authorized treating medical provider, at least during some period of the time during the course of this claim between 1999 and the date of the hearing. The Record reveals specifically, that he was an authorized provider to perform psychological tests and paid for performing those tests in 2001. Clearly he was an authorized provider and there is no problem with the reference to him as being an authorized medical provider.

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Also as to these reports, while the Defendants challenged their admissibility and the reference of Dr. Rainwater as being an authorized medical provider, the Defendants then conversely challenge the fact that the Hearing Commissioner gave his reports little weight. After making numerous detailed Findings of Fact in her Award including citation to pages and pages of testimony and evidence from Dr. Frank Forsthoefel; Dr. Jean Jonet, Ph.D.; Dr. Ezra Riber, MD; Dr. Marturano; Dr. Krebs; and Dr. Adams, the Commissioner then found as a fact that she would have made the same decision regardless of Dr. Rainwater's Opinion and report and made a finding that she gave those little weight. The weight and credibility to be given to any evidence as noted above, is for the Commission. There is no merit to this argument or issue.

As to the second argument for review whether the Claimant sustained physical brain damage and whether it met the compensability standard, the Court finds no error of law or fact in the decision by the Workers' Compensation Commission and the same is hereby affirmed as to this basis for review. Without citation, where there is substantial evidence in the Record from a factual standpoint, the Decision of the Commission must be affirmed. The Defendants admit and it is agreed that the Claimant sustained a chemical encephalopathy, drug-drug interaction in 2002. Encephalopathy by its very definition is a disease of the brain, especially one involving alterations of brain structure. Merriam Webster Dictionary, URL [http: "www.merriam-webster.com"](http://www.merriam-webster.com). That condition is specifically addressed in the hospital records as occurring during and as being one of the reasons for the hospitalization in the 2002. It

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is then regularly and consistently referred to throughout the medical records thereafter; see for example, the letter of the treating psychiatrist, Dr. Frank Forsthoefel of July 29, 2004 referring to the, "allergic encephalopathy to Seroquel". (APA Submissions, p. 11). During this time, 2002 to 2005, not only does Dr. Ezra Riber, the authorized chronic pain medicine specialist refer to the encephalopathy and make a specific request for referral to a neurologist for evaluation due to the cognitive problems that this man was having but as noted by this Court he specifically forwarded a copy of all of his treatment notes to the State Accident Fund assigned adjuster, Ms. Mee-Ling Khor-Ghould. There is repeated reference to problems with memory, concentration, and requests for neuropsychological testing, and neurological evaluation throughout the medical records. By 2009, the Claimant specifically placed the Defendants on notice of his specific request for compensation benefits for permanent residual brain damage due to his encephalopathy that occurred in 2002. (APA Submissions, p. 699). There are not only numerous opinions that the Claimant sustained physical brain damage that was severe, Dr. Forsthoefel testified extensively as to the Claimant's brain damage and as to its severity. There is clearly substantial evidence that the Claimant sustained physical brain damage that it was severe and also that the Defendants were placed on notice of the Claimant's injury to the brain.

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Next, there is not only uncontradicted medical opinion testimony but numerous medical and psychological opinions in evidence that the Claimant sustained physical brain damage and that it was severe and that it is compensable under the criteria established by the SC Supreme Court. Again, the Commission is the factfinder and the report from Dr. Frank Forsthoefel, the authorized treating psychiatrist, found at the Claimant's APA Submissions, pp. 2-3, is more than sufficient evidence to meet the criteria compensability of severe brain damage as established by the Supreme Court in Sparks v. Palmetto Hardware, Inc., 406 S.C. 124, 750 S.E.2d 61 (2013) and Crisp v. Southco., Inc., 401 S.C. 627, 738 S.E.2d 835 (2013). Dr. Forsthoefel at that point specifically states that the Claimant has physical brain damage and that it is severe enough to constitute a hindrance or obstacle to employment and that it is permanent. On pp. 6 and 8, again Dr. Forsthoefel specifically states that the Claimant is totally and permanently disabled, and specifically that he is totally and permanently disabled due to the physical brain damage that he sustained as a result of the encephalopathy. The authorized treating chronic pain medicine specialist, Dr. Ezra Riber, MD, states the same opinion on pp. 12, 13 and 14 of the Claimant's APA Submissions. Finally, the Hearing Commissioner sets out repeated quotes in her Order from the testimony of Dr. Forsthoefel and in fact appointed a Guardian ad litem from the bench during the hearing due to the

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severity of the Claimant's condition. The Decision of the Workers' Compensation Commission is therefore affirmed as to this issue and these issues raised on appeal.

As to the third argument and as to the issues raised, first there is substantial evidence to support the Commission's Decision as to notice of the physical brain injury and therefore the Decision must be affirmed by this Court. For the reasons set forth hereinbefore in reference to the second argument and the group of issues raised as to whether or not there was sufficient evidence of brain damage and whether that brain damage met the criteria for an Award for compensable brain damage entitling the Claimant to lifetime benefits, that same evidence clearly establishes that from 2002 forward that the Defendants were placed on notice of the Claimant's physical brain injury. As noted throughout the Decision on that argument, the Defendants were placed on notice in 2002 of a brain injury and from 2002 until the very date of the hearing continued to pay for all medical care related to the brain injury.

The Defendants also raise the issue of *laches* and based upon the Briefs of the parties and review of the Decisions of our SC Supreme Court and Court of Appeals, the issue of *laches* simply does not apply.¹ Under the doctrine of *laches*, the

¹ The Court notes that it is doubtful whether or not this issue was preserved for appeal as to the doctrine of *laches*. While not only was it not raised in the first Form 51 and was not set out and detailed as a specific defense until the Form 58 filed by present Counsel who was not substituted as Counsel until less than fifteen (15) days prior to the scheduled hearing, the Mediation Agreement specifically provides that the Claimant is totally and permanently disabled by agreement, and that the only

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doctrine only applies if a party: 1) knowing of his rights; 2) does not timely assert them; and 3) by any unreasonable delay causes his adversary to occur expenses or otherwise detrimentally change his position and also 4) the affected party must affirmatively prove material prejudice. Only when all four elements are met will equity bar the enforcement of those known rights. Muir v. C.R. Bard, Inc., 336 S.C. 266, 519 S.E.2d 583 (SC App. 1999). The concept of laches only applies in a very limited set of circumstances and applies equally to both of the parties, that being the Claimant and the Defendants in this case. While the Claimant has the responsibility to raise issues and claims in a timely manner, the Defendants have the same responsibility to assert any defenses that they claim. This Court agrees with the Commissioner and the Commission that the doctrine of laches simply does not apply. Both parties had access to the same medical records from 2002 through the date that a claim was filed in 2011. Both parties knew that the Claimant suffered a physical brain injury in 2002 as a result of the encephalopathy and knew that by 2004 the treating psychiatrist, and in fact three (3) other and different authorized treating and/or evaluation physicians in 2004 and 2005 recommended a complete neurological workup to include

issue left open is the, "compensability" of the physical brain damage that the Claimant incurred. In that same Mediation Agreement, the Defendants admit that they had always authorized all of the treatment for and by the treating physicians that have expressed the opinions concerning the brain damage and agreed to provide their continuing medical care for life.

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neuropsychological testing. Neuropsychological testing was not authorized and provided by the Defendants and were not performed until 2008. That testing in 2008 recorded severe cognitive deficits. The neuropsychologist who performed those tests in 2008, Dr. Nicholas Lind, Ph.D., subsequently in 2012 concurred in the opinion that the Claimant had sustained physical brain damage and that it was severe. In 2009 the Claimant wrote the Defendants and specifically placed them on notice that he was claiming severe physical brain damage and an entitlement to lifetime compensation due to that brain damage. In 2011, within one (1) week of the date that the authorized treating psychiatrist issued his opinion that the Claimant had sustained physical brain damage and that he was totally and permanently disabled from all work due to that brain damage, the Claimant filed a claim for lifetime compensation benefits due to that severe, permanent physical brain damage. In addition, the Commission, as is recorded in the Hearing Commissioner's Order found that the Defendants had paid for all medical care and specifically all of this care and had the same access to all of the medical records as did the Claimant. The doctrine of laches simply does not apply.

Also, as noted above, there was no definitive diagnosis until 2011 of physical brain damage that was permanent and severe and within one (1) week of that diagnosis the Claimant filed.

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Finally, even if the other elements were in existence, which they are not in the opinion of this Court, there is no prejudice to the Defendants because the Defendants had total access to all the medical records. There is simply no material prejudice to the Defendants in not moving forward with the defense since they had access to the same exact medical evidence as did the Claimant. In addition, while the Court is of the opinion that the doctrine of laches does not apply, it was not raised as a defense in the initial response to the Form 50 that was filed by the Claimant seeking compensation for compensable brain damage and an entitlement to lifetime compensation benefits. Also, in the mediation, simply the compensability of the brain injury was left open for decision. It was agreed that the Claimant was totally and permanent disabled.

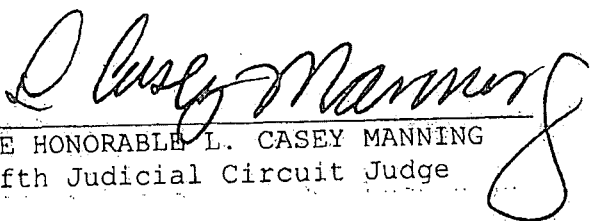
Finally, the Court would note that if it did apply it would apply to the Defendants failure to timely raise the defense. Both parties had the same notice from 2002 through 2011 concerning the Claimant's injury to his brain. Further, it was the Defendants and not the Claimant that did not provide the neuropsychological testing for a period of over four (4) years from the date it was requested. The Defendants were placed on notice of the claim no later than 2009. For all these reasons as to these bases for the appeal in the third argument, the Decision of the SC Workers' Compensation Commission is hereby affirmed.

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For all the foregoing reasons, after due and proper consideration of the Record, the Briefs and arguments of the parties, the Decision of the SC Workers' Compensation Commission is hereby affirmed as to the appeal filed by the Defendants as Appellants in this Court.

THEREFORE, IT IS ORDERED that the Decision of the SC Workers' Compensation Commission as to the appeal filed by the Defendants as Appellants before this Court be and hereby is AFFIRMED.

AND IT IS SO ORDERED.


THE HONORABLE L. CASEY MANNING
Fifth Judicial Circuit Judge

Dated: June 3, 2016

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