RECEIVED
NOV 21 2016
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISION
APPELLATE PANEL

Appellate Case No.: 2016-000601

Scott Ledford, Employee.....Appellant,

v.

Department of Public Safety, Employer, and State Accident Fund, Carrier.....Respondents.

FINAL BRIEF OF RESPONDENTS

Sarah S. Alphin, Esquire
S.C. Bar No.: 78645
Willson, Jones Carter & Baxley, P.A.
4500 Fort Jackson Boulevard
Columbia, South Carolina 29209
(803) 227-2885

John Paul Simkovich, Esquire
S.C. Bar No.: 101861
Willson, Jones Carter & Baxley, P.A.
4500 Fort Jackson Boulevard
Columbia, South Carolina 29209
(803) 227-2893

Attorneys for Respondents

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes, Rules, and Regulations

STATEMENT OF ISSUES ON APPEAL

I. Whether the Hearing Commissioner was obligated to recuse herself from issuing an Order and Decision pursuant to Judicial Canon 3E, Rule 501, SCACR necessitating a hearing *de novo*.

II. Whether the Hearing Commissioner's Decision and Order filed December 17, 2014 overruled prior Decision and Order filed May 1, 2013.

III. Whether the Commission's findings of fact are supported by substantial evidence.

STATEMENT OF THE CASE

Appellant sustained an injury to his right leg, cervical spine, and lumbar spine by an accident arising out of and in the course of his employment with Respondent-Employer on March 10, 2012. (R. p. 370). Notably, Appellant sustained a prior injury to his spine while working for Respondent-Employer July 15, 2010. (R. pp.108-119). Respondents and Appellant settled the 2010 claim for 25% to the spine or 75 weeks in permanent partial disability benefits as a result of that accident. (R. p. 262).

Respondents filed a Form 21 Request for Hearing on January 31, 2014 requesting to stop payment of compensation, pay permanency compensation, and credit for over-payment of temporary compensation following Appellant's release at Maximum Medical Improvement (hereinafter "MMI"). (R. p. 274). A Hearing was held on August 15, 2014. (R. p. 139).

At the Hearing, Respondents argued Appellant reached MMI on October 31, 2013 and any permanent partial disability should be no more than the impairment ratings of the authorized treating physicians, or if there is any partial disability above the impairment ratings, it would be *de minimis*. (R. p. 144). Respondents also argued for credit of 25% or 75 weeks of compensation paid to the spine as a result of Appellant's prior workers' compensation claim in 2010 with the same Respondents. (R. p. 145). Respondents asserted the back or spine is a single body part as the law does not differentiate between the levels of the spine. (R. pp. 145-46). Therefore, Respondents argued the 25% paid to the back on Appellant's prior claim should be credited against an award, if any, to the back. (R. pp. 145-46). Respondents further argued that Appellant was not entitled to

future medical treatment for the back as the authorized treating physician opined further treatment was needed only if Appellant's back condition deteriorated. (R. pp. 146-47).

Appellant asserted he is permanently and totally disabled as a result of injuries to his right leg and back resulting from the 2012 accident. (R. pp. 147-48). Appellant argued that Respondents should get no credit for permanency previously paid to Appellant from his 2010 claim as the 25% paid to the spine was for Appellant's thoracic spine only, an injury not alleged in the 2012 accident. (R. p. 148).

After the Hearing and after the Hearing Commissioner prepared her findings of fact, Appellant moved to recuse the Hearing Commissioner and have the claim reassigned to a new Commissioner for a new hearing. (R. pp. 232-41). The Hearing Commissioner denied the Motion on November 3, 2014. (R. pp. 97-106).

Pursuant to the Order of December 17, 2014, the Hearing Commissioner determined Appellant reached MMI on October 31, 2013 and that Appellant was not permanently and totally disabled. (R. pp. 56-94). The Hearing Commissioner awarded Appellant 10% permanent partial disability to the right leg and found there was no additional permanent partial disability beyond the 25% to the spine already paid to Appellant by Respondents. (R. p. 93). Finally, the Hearing Commissioner found Respondents were entitled to credit of overpayment of temporary benefits paid beyond October 31, 2013. (R. p. 94).

Appellant appealed his case to the Workers' Compensation Appellate Panel and requested the Appellate Panel reverse the Order of the Hearing Commissioner and reassign the case to another Commissioner for a hearing *de novo*. (R. pp. 221-230). The Appellate Panel heard the appeal on March 17, 2015 and rendered a Decision and Order

filed on January 21, 2016. (R. pp. 2-55). The Appellate Panel Affirmed the Hearing Commissioner's Order on Appellant's Motion to Recuse as well as Affirming in Part and Reversing in Part the Hearing Commissioner's Decision and Order on the Form 21 Hearing. (R. pp. 54-55). The Appellate Panel reversed the Hearing Commissioner's award of no additional permanent disability to the back beyond the 25% already paid and awarded Appellant 15% additional permanent disability to his back for the 2012 accident. (R. pp. 54-55). Additionally, the Appellate Panel limited the amount of credit of overpayment of temporary total compensation due to Respondents by shifting the date of credit to January 21, 2015. (R. p. 54). On March 21, 2016, Appellant filed his Notice of Intent to Appeal. This appeal follows.

STATEMENT OF THE FACTS

Appellant is 39 years of age. (R. p. 157). He graduated high school and attended college for two years where he studied criminal justice. (R. pp. 157-58). On the date of the accident in issue, Appellant's position/rank with Respondent-Employer was Lance Corporal and ACE team member with the South Carolina Highway Patrol. (R. p. 159). Appellant testified he worked for Respondent-Employer until he was placed on medical disability retirement. (R. p. 158).

Appellant had prior a workers compensation claim in 2010 that "was a t-spine injury only." (R. p. 204, lines 12-18). Appellant denied that he received an impairment rating to his cervical spine as a result of his 2010 workers' compensation claim. (R. p. 188, lines 24-25). Appellant testified that as a result of his 2010 workers compensation claim he only received treatment to his thoracic spine and that he did not complain of neck pain. (R. p. 206, lines 16-20). However, after being confronted by a medical report from his 2010

workers' compensation claim on cross-examination, Appellant acknowledged he received a 5% impairment rating to his cervical spine as a result of his 2010 workers' compensation claim. (R. p. 206, lines 4-7). As a result of his 2010 injury to the spine, Appellant was paid 25% to the spine. (R. p. 262).

As for the 2012 accident, Appellant was injured in a motorcycle accident. (R. p. 172, line 5-p.173, line11). He sustained compensable injuries to his right leg, neck, and low back. (R. p. 118). Appellant underwent right ankle surgery with Dr. Taylor on January 30, 2013. (R. pp. 430-31). Ultimately, Dr. Taylor released Appellant at MMI on May 23, 2013, assigned a 7% permanent impairment, restricting Appellant from running, cutting, and pivoting, and determined no future medical treatment was needed. (R. p. 383).

Appellant initially treated with Dr. Mills at Coastal Orthopaedic Associates for his neck and back pain after the 2012 accident. (R. p. 374). Dr. Mills diagnosed Appellant with C5-6 spondylosis with right cervical radiculopathy and L5-S1 spondylosis. (R. p. 376). Dr. Mills previously treated Appellant for his 2010 injuries. (R. p. 539, lines 7-21). Dr. Mills testified Appellant's thoracic area was the most symptomatic as a result of his 2010 workers' compensation accident, but Appellant also had symptoms in his neck, upper back, and lower back. (R. p. 553, lines 2-11).

Appellant underwent further spine evaluation with Dr. Edwards of Pee Dee Orthopaedic. (R. p. 91). Noting that Appellant was not interested in pursuing aggressive treatment for the cervical spine, Dr. Edwards found Appellant had reached MMI for the spine as of October 31, 2013 and assigned 15% impairment to the back based on cervical disc protrusions. (R. p. 91). Dr. Edwards further opined that it was more likely than not that

the Appellant will require cervical fusion surgery and lumbar disc surgery versus disc replacement surgery *if the Appellant's condition deteriorates in the future*. (R. p. 472).

Appellant sought further evaluation from Dr. Poletti at Southeastern Spine Institute. (R. pp. 474-75). Dr. Poletti first evaluated Appellant on May 7, 2012 and noted that Appellant had "remained with neck pain" since the 2010 injury. (R. p. 476). Dr. Poletti's later note of March 5, 2014 indicated Appellant did not have neck pain prior to his 2012 motorcycle accident. (R. p. 481). Dr. Poletti placed Appellant at MMI on March 5, 2014 and assigned a 23% permanent impairment to the spine based on cervical and lumbar radiculopathy. (R. p. 481). As to Appellant's need for surgery, Dr. Poletti has at different times indicated that Appellant "potentially" needs surgery, "likely" needs surgery, and "may" require surgery. (R. pp. 477, 479, 481).

Appellant admitted he has neither looked for nor applied for any jobs since getting hurt at work on March 10, 2012. (R. p. 63, lines 4-5). Appellant further admits he continues to own and operate a landscaping and lawn company called ProCutters. (R. p. 63, lines 6-13). Appellant denied knowing how much income ProCutters makes, but he agreed that his tax returns for the year after his accident indicate gross receipts and sales of $334,906. (R. p. 201, line 18-p. 202, line 4). In fact, ProCutters' gross receipts increased from $243,658 in 2012 to $334,906 in 2013. (R. pp. 608, 644).

Appellant testified that he is "somewhat of a hustler" and that he "work[s] a lot," (R. p. 163, lines 7-9), but later tried to clarify that he tries "from time to time to get involved" with the landscaping business. (R. p. 184, line 24-p.185, line 2). Appellant testified that he tries to abide by his work restrictions, but his pain intensifies when he does not. (R. p. 188, lines 13-15). Appellant also testified that his landscaping business

supplements his income and that he must continue operating the business because he "do[es] not have a choice." (R. p. 168, line 3).

STANDARD OF REVIEW

In workers' compensation cases, the South Carolina Workers' Compensation Commission is the trier of fact. Hunter v. Patrick Constr. Co., 289 S.C. 46, 344 S.E.2d 613 (1986). The South Carolina Administrative Procedures Act, S.C. Code Ann. §1-23-380(5)(1976), establishes the "substantial evidence" rule as the standard for judicial review of a decision of the Commission:

> The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the administrative agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are:
> (d) affected by other error of law; [or]
> (e) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record.

An appellate court, in workers' compensation appeals, may overturn a conclusion of the Workers' Compensation Commission if that conclusion is "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981).

> The test is whether the decision of the Commission is supported by substantial evidence. 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 that the administrative agency reached in order to justify its action.

Mullinax v. Winn-Dixie Stores, Inc., 318 S.C. 431, 458 S.E.2d 76 (Ct. App. 1995).

Therefore, an appellate court may overturn findings of fact of the Commission if there is no reasonable probability that the facts could be as related by the witnesses upon whose testimony the finding was based. Lowe v. Am-Can Transport Services, Inc., 283 S.C. 534, 324 S.E.2d 87 (Ct. App. 1984). Further, an award cannot be based on surmise, conjecture, or speculation. Tiller v. Nat'l Health Care Ctr. of Sumter, 334 S.C. 333, 339, 513 S.E.2d 843, 845 (1999); *see also*, McDowell v. Stilley Plywood Co., 210 S.C. 173, 41 S.E.2d 872 (1947) (holding testimony that is based on surmise, conjecture, and speculation has no probative value). While a finding of fact of the Commission will normally be upheld, such a finding may not be based upon surmise, conjecture, or speculation; instead, it must be founded on evidence of sufficient substance to afford a reasonable basis for it. Edwards v. Pettit Constr. Co., 273 S.C. 576, 257 S.E.2d 754 (1979).

ARGUMENT

I. THE APPELLATE PANEL CORRECTLY RULED THAT THE HEARING COMMISIONER WAS NOT REQUIRED TO RECUSE HERSELF PUSUANT TO JUDICIAL CANON 3E.

The Hearing Commissioner has a duty to hear and decide matters assigned to her except those in which disqualification is required because her impartiality might reasonably be questioned. Canon 3B(1), 3E, Rule 501, SCACR. Canon 3(E) provides that recusal may be necessary when: (1) the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding; (2) the judge served as a lawyer in the matter in controversy; (3) the judge or his family member has more than a *de minimis* interest that could be affected by the proceeding; or (4) the judge or someone within the third degree in relationship to her is a party to the proceeding or acting as a lawyer in the proceeding. Canon 3(E)(1)(a)-(d), Rule 501, SCACR.

Appellant readily admits that the "recusal never involved any claim Commissioner Barden or member of her family had any personal prejudice against the Appellant, any relationship with the State Fund, any knowledge of the facts of case [sic], or any financial interest in the outcome of the case." However, Appellant never indicates, not once in his twenty-one page Appellate Brief, the source of the alleged bias. He accuses the Single Commissioner of bias merely because she ruled against him.

It is well established that it is not enough for the party to simply allege bias. Mallet v. Mallet, 323 S.C. 141 at 146 - 47, 473 S.E.2d 804 at 807 (S.C. App. 1996). This Court has ruled that the party seeking disqualification must show some evidence of bias or prejudice. Id. Moreover, "[t]he fact a trial judge ultimately rules against a litigant is not

proof of prejudice by the judge, even if it is later held the judge committed error in his rulings." Id. at 147, 473 S.E.2d at 808 (citation omitted). Appellant has not introduced any cogent evidence of bias or prejudice as none exists.

Undeterred by the lack of bias evidence, Appellant's counsel attempts to draw the Court's attention to a telephone conference held by the Hearing Commissioner with the parties. The Hearing Commissioner called the parties as an extension of professional courtesy to provide her tentative ruling on the matter. (R. pp. 98-99). Appellant's counsel alleges that during this phone call, the Hearing Commissioner threatened criminal proceedings against his client to coerce an unfavorable settlement. Appellant fails to identify the source of the Hearing Commissioner's bias that would motivate her to make such an alleged threat. Appellant repeatedly states in his Appellant Brief that he has supplied the only evidence in the record of what was said on the phone call.[1] Appellant apparently overlooks the Hearing Commissioner's nine page Order Denying Motion to Recuse setting forth in meticulous detail the reasons she denied his Motion to Recuse, including her staunch denial that she ever made such a threat. (R. pp. 97-106).

Appellant did not allege a bias existed by the Hearing Commissioner until *after* she revealed her ruling would be unfavorable to Appellant. The Hearing Commissioner is the sole judge of credibility and sole decider of weight given to each piece of evidence presented during the hearing. The Hearing Commissioner held no bias or prejudice while listening to Appellant's testimony, and her actions did not prevent Appellant from fully litigating his claim. The Hearing Commissioner merely judged Appellant's testimony, determined his credibility, and accordingly weighed it against other evidence. The

[1] It is important to note, the evidence the Appellant refers to is self-serving as it is an affidavit from his attorney, a memorandum written by his attorney, and an affidavit by his certified public accountant.

Hearing Commissioner's Decision and Order contains sixty-seven separate findings of fact, each and every one of which were supported by citations to the record. (R. pp. 56-94). Much to Appellant's disdain, the Hearing Commissioner pointed out the glaring inconsistencies between Appellant's testimony and the other evidence in the record. Again, allegations of bias and prejudice only came after the hearing and after the Hearing Commissioner judged the Appellant's testimony.

Furthermore, if a party disagrees with a Commissioner's finding, that party's remedy is to appeal to the Full Commission for consideration of the Appellate Panel. S.C. Code Ann. § 42-17-50. The Appellate Panel has the power to "reconsider the evidence, receive further evidence, rehear the parties . . . and amended the award." Id. The Appellate Panel may make its own findings of fact and reach its own conclusions of law either consistent or inconsistent with those of the Hearing Commissioner. Lowe v. Am-Can Transp. Serv. Inc., 283 S.C. 534, 324 S.E.2d 87 (Ct. App. 1984).

The Appellate Panel is not bound by the Hearing Commissioner's findings of fact and could have issued new findings based on their review of the evidence. The Appellate Panel did not do so and instead adopted nearly all of the findings of the Hearing Commissioner. (R. pp. 2-55). After reviewing all of the evidence in the record, the Appellate Panel affirmed the Hearing Commissioner's Order on Appellant's Motion to Recuse. (R. p. 53). It also Affirmed in Part and Reversed in Part the Hearing Commissioner's Decision and Order on the Form 21 Hearing. (R. pp. 54-55). In other words, the Appellate Panel found that the Hearing Commissioner's findings were supported by the substantial evidence in the record and simply modified the final award by awarding an additional 15% permanent partial disability to the Appellant's back.

Thus, Appellant received a fair review of the evidence and actually succeeded on appeal, yet he is still moving for a new hearing in front of a new single Commissioner.

It is unclear on what grounds Appellant alleges his rights have been affected and how the Hearing Commissioner's alleged bias was also transmuted to the Appellate Panel. This is especially true in light of the fact that the Appellate Panel actually increased Appellant's award. As the Hearing Commissioner astutely opined:

> [Appellant] made no motion for recusal prior to the hearing, or even after the hearing, until he was dissatisfied with [Respondents'] settlement offer, and decided he instead would attempt to obtain a new hearing with a different commissioner (which would have the effect of enabling his client to "qualify" and "explain" his testimony at the hearing before the undersigned). Under the Judicial Canons, the undersigned cannot allow [Appellant] to utilize a recusal mechanism to change the outcome of his case (*i.e.*, to obtain a "second bite at the apple") solely because he is dissatisfied. His remedy is to appeal.

(R. p. 105).

It would be highly prejudicial to Respondents to allow Appellant to have another single Commissioner determine his credibility and permanency. The Hearing Commissioner was duty bound to deny Appellant's Motion to Recuse and the Appellate Panel correctly affirmed her decision. Respondents respectfully request that this Court do the same.

II. THE APPELLATE PANEL CORRECTLY HELD THAT THE HEARING COMMISIONER DID NOT OVERRULE THE PRIOR DECISION AND ORDER OF MAY 1, 2013.

The Hearing Commissioner determined that Appellant suffered no additional permanent disability over the 25% disability to the spine that Appellant was paid as a result of his 2010 claim. (R. p. 93). Appellant inaccurately argues that the Hearing Commissioner assigned a 0% disability to Appellant's lumbar and cervical spine. The Hearing Commissioner found that "there is no *additional* permanent partial disability

beyond the 25% to the spine already paid to Claimant." (R. p. 33). (emphasis added). Appellant's characterization that the Hearing Commissioner awarded 0% to the back, thereby overruling a prior Order of the Commission, is erroneous. Regardless, this is a moot argument as the Appellate Panel awarded Appellant 15% to the back. (R. pp. 54-55).

Dr. Edwards last saw Appellant on October 31, 2013 and released him on that day with a 15% impairment rating to the spine. (R. p. 471). Notably, an MRI taken in 2010 after the first accident showed degenerative disc disease at C5-6 and C6-7. (R. p. 385). Dr. Edwards noted that the Appellant has only a cervical protrusion without radiculopathy or myelopathy and opined that Appellant does not need surgery now. (R. p. 471). Dr. Edwards refers to Claimant's condition as disc degeneration. (R. p. 471).

Appellant treated only conservatively for his lumbar and cervical spine. Despite the fact that Appellant testified his pain is "terrible" and "life changing," he did not want aggressive treatment and does not take any prescription medication for his pain. (R. p. 183, lines 4-9; p. 193, lines 13-14; p. 199, line 23-p. 200, line 13). Appellant's most recent medical report indicates he has no neck pain and only "mild" low back pain. (R. pp. 464-65).

The Hearing Commissioner correctly gave no weight to the opinions of Dr. Poletti as she found many inconsistencies in Dr. Poletti's reports as well as equivocalness regarding future medical treatment for Appellant. (R. p. 89). Dr. Poletti initially noted in 2012 that Appellant had "remained with neck pain" since the 2010 injury. (R. p. 476). Dr. Poletti then indicated less than a year later that Appellant suffered neck pain as a result of his motorcycle accident and that he did not have neck symptoms before the motorcycle

accident. (R. pp. 481-82). This is in complete contradiction to his prior medical note. Dr. Poletti also is equivocal as to surgery, stating at different times that Appellant "potentially" needs surgery, "likely" needs surgery, and "may" require surgery in the future. (R. pp. 477, 479, 481). Dr. Poletti is wholly inconsistent, and the Commission correctly determined his opinions were not entitled to any weight.

The Commission appropriately gave the greatest weight to the statements and opinion of Dr. Edwards, who examined Appellant much more recently than the other physician. Dr. Edwards further relied on objective findings such as the "absence of focal neurologic deficit." (R. p. 471). In fact, Dr. Edwards specifically notes that Appellant is not interested in aggressive treatment and that Dr. Edwards did not push Appellant in that regard due to the absence of focal neurologic deficit. (R. p. 471).

Additionally, Dr. Mills testified he treated Appellant for his 2010 and 2012 accidents. (R. p. 539, lines 7-20). Dr. Mills further testified that Appellant had symptoms in his neck, lower back, and upper back from the 2010 accident. (R. p. 553, lines 2-11). Dr. Mills also testified Dr. Sarb treated the Appellant for neck pain from his 2010 accident. (R. pp. 6, line 17-p. 8, line 10).

Therefore, the Commission found that the 25% disability to the back received by Appellant for his 2010 accident included and encompassed the cervical, thoracic, and lumbar spine. Appellant argues an error due to the Commission ruling that he sustained 0% permanent disability, but that is not what the Commission ruled. The Hearing Commissioner found that the Appellant suffered *no additional permanent disability* in the 2012 accident over the 25% disability he received from the 2010 accident. (R. p. 93). As

such, Appellant's argument that the Hearing Commissioner awarded 0% back effectively overruling a prior Order of the Commission that there was a back injury is misplaced.

Furthermore, the Appellate Panel amended the Hearing Commission's permanency award and awarded Appellant 15% additional permanent partial disability to his back. (R. pp. 54-55). The Appellate Panel has left no live dispute for a new Commissioner to address given that the award is now 15% to the back. Further, Appellant has not made any allegations of bias in regards to the Appellant Panel's award nor has he questioned the insufficiency of the award. He is simply asking this Court to allow him another opportunity to try his case. Respondents assert the Commission's rulings are supported by substantial evidence and respectfully request this Court to affirm the same.

III. THE COMMISSION'S FINDINGS OF FACT ARE SUPPORTED BY SUBSTANTIAL EVIDENCE, AND THEREFORE, ALL FINDINGS MUST BE UPHELD.

The Hearing Commissioner made sixty-seven findings of fact, each and everyone one of which contains a citation to evidence in the record. Appellant conveniently narrows in on one finding of fact to conclude that the Hearing Commissioner's ruling is based on pure speculation. It is clear Appellant is merely grasping at straws to find indices of bias and relies on his misplaced argument that due to the Hearing Commissioner's bias, there is not substantial evidence to support the findings and rulings of the Full Commission.

Appellant argues that the Appellate Panel's adoption of finding of fact insinuating that Appellant is a liar who should be prosecuted for fraud is unsupported by the substantial evidence. However, such argument is improper as there is no such finding of fact. The Appellate Panel does find that Appellant was untruthful and evasive when

testifying, a finding supported by the substantial evidence. Appellant denied that he had any neck injury or neck pain prior to his 2012 accident. (R. p. 206, lines 22-24). Appellant was specifically asked whether he complained of any neck pain after his 2010 accident, to which he testified "no." (R. p. 206, lines 22-24). Therefore, the findings related to Appellant's lack of credibility and untruthfulness are supported by the substantial evidence in the record.

Despite Appellant's denial of neck injury or pain before his 2012 accident, a prior Order of the Commission proves that not only did Appellant allege an injury to his neck and complain of neck pain after his 2010 accident, he actually sought a change of condition for the worse based on neck pain. (R. p. 108-19). The Commission specifically found as a fact that Appellant received treatment for his neck as result of his 2010 accident. (R. p. 117). The Commission's finding in the case at hand that Appellant lacked credibility is supported by the substantial evidence.

The Hearing in this matter was held to determine whether Appellant had reached MMI and whether he was entitled to any permanency benefits. The parties stipulated that Appellant had reached MMI. (R. p. 143, lines 22-24). Appellant sought a finding of permanent and total disability. (R. p. 147, lines 6-7). The Commission properly weighed the evidence in this case and determined Appellant was not permanently and total disabled. (R. p. 49). Such finding is supported by the substantial evidence in the record. Appellant has run his own successful business for 18 years and continued to do so after his 2012 work accident. (R. p. 201, lines 6-13). In fact, Appellant's ProCutters income increased after his 2012 accident. (R. pp. 608, 644).

Appellant is well educated as he graduated high school and attended 2 years of college. (R. p. 157, lines 21-23). A vocational report submitted into evidence identifies multiple jobs Appellant is qualified to perform and that are within his restrictions. (R. pp. 440-49). Appellant admits he has not applied for or looked for any employment. (R. p. 201, lines 4-5; p. 208, lines 11-14). To support an award of permanent and total disability, Appellant has the burden to prove he has made reasonable efforts to obtain employment and failed to do so due to an injury produced limitation. Shealy v. Algernon Blair, Inc., 250 S.C. 106, 113, 156 S.E.2d 646, 649 (1967). Appellant fails to meet this burden based on his own testimony that he has neither applied for nor looked for any employment, and therefore, the Commission correctly determined Appellant was not permanently and total disabled.

Appellant accuses the Hearing Commissioner of never giving "the Appellant or his CPA an opportunity to explain basic accounting to her." It is the obligation of Appellant to present evidence for the Hearing Commissioner's consideration. Appellant could have testified in greater detail regarding his income tax return, his CPA could have testified, or he could have refuted the evidence in some other way. Appellant had notice that Respondents intended to submit Appellant's tax returns into the record as such documents were properly listed on Respondents' Pre-Hearing Brief. (R. p. 370-71). Appellant neither objected to the submission of his tax returns nor presented any contrary evidence. Instead, Appellant argues that the Commission's consideration of such properly submitted evidence indicates bias.

Regardless of any explanation, it does not take an accountant to question why a small landscaping business needs a boat, spends over $6,000.00 for uniforms, over

$11,000 in utilities, and nearly $3,000 in telephone expenses. (R. pp. 620, 623). The Hearing Commissioner admitted she did not have the expertise to question the legality of Appellant's deductions and did not make any rulings as to the same. She merely pointed out the excessive deductions on Appellant's tax returns that mask his true income. It is the Commission's duty and obligation to weigh the evidence presented and make rulings. Appellant makes hay of the seemingly innocuous deductions, but fails to mention the more egregious ones listed on his tax returns. The fact that the Hearing Commissioner ruled against Appellant does not make her biased, it simply means Appellant did not meet his burden of proof establishing wage loss or permanent and total disability.

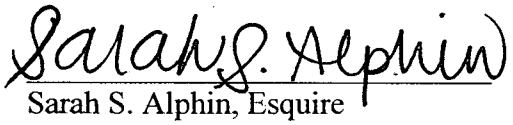
The Commission weighed the evidence presented and properly determined the facts of the claim. The findings of facts are supported by the substantial evidence. Those facts furthermore support the Commission's conclusions and rulings that Appellant neither suffered wage loss nor permanent and total disability. Instead, the Commission awarded Appellant disability compensation under S.C. Code Ann. §42-9-30 for his right leg and back injuries and such findings and rulings are supported by the substantial evidence.

CONCLUSION

The Hearing Commissioner is charged with the task of weighing the evidence and making findings regarding credibility. In doing so, it is inherent that the Hearing Commissioner has the duty to evaluate the evidence and determine the facts of the case and subsequent rulings of law. Appellant's disagreement with the Hearing Commissioner's decision does not constitute a manifestation of bias or prejudice. Pursuant to S.C. Code Ann. §42-17-50, Appellant is afforded the opportunity to appeal

his case to the Full Commission if he disagrees with a ruling of the Hearing Commissioner. He has already exhausted this remedy and is improperly requesting this Court to grant a *de novo* hearing. Appellant should not be granted this relief as his allegations are meritless and a second hearing would be highly prejudicial to Respondents. The substantial evidence in the record supports the findings of fact issued by the Commission. Accordingly, Respondents respectfully request that this Court affirm the Workers' Compensation Commission Full Appellate Panel's January 21, 2016 Decision and Order.

Respectfully submitted,



Sarah S. Alphin, Esquire
S.C. Bar No.: 78645
John Paul Simkovich, Esquire
S.C. Bar No.: 101861
Willson, Jones Carter & Baxley, P.A.
4500 Fort Jackson Boulevard
Columbia, South Carolina 29209
(803) 227-2885

Attorneys for Respondents

November 21, 2016
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

Appellate Case No.: 2016-000601

Scott Ledford, Employee ..... Appellant,

v.

Department of Public Safety, Employer, and
State Accident Fund, Carrier ..... Respondents.

CERTIFICATE OF COUNSEL

Respondents, by and through their undersigned counsel, certify that the Respondents' Final Brief complies with Rule 211(b), SCACR.

Sarah S. Alphin, Esquire
John Paul Simkovich, Esquire
Willson Jones Carter & Baxley, P.A.
4500 Fort Jackson Boulevard
Columbia, South Carolina 29209
(803) 227-2885
ssalphin@wjlaw.net
Attorneys for Respondents

November 21, 2016
Columbia, South Carolina