IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
Appellate Panel

Appellate Case No. 2016-001992

O'Shea L. Brown, Claimant — Appellant,

v.

Steel Technologies, Employer,
and
Twin City Fire Ins. Co., Carrier — Respondents.

INITIAL BRIEF OF RESPONDENTS

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STATEMENT OF ISSUES ON APPEAL

1. WHETHER OR NOT THE APPELLATE PANEL OF THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION ERRED IN FINDING APPELLANT'S ADDITIONAL ALLEGED INJURIES FOR THE VASCULAR CONDITION AND ASSOCIATED RIGHT HIP AND LOWER BACK NOT COMPENSABLE.

2. WHETHER OR NOT THE APPELLATE PANEL OF THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION ERRED IN FINDING APPELLANT TO NOT BE PERMANENTLY AND TOTALLY DISABLED.

3. WHETHER OR NOT THE APPELLATE PANEL OF THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION ERRED IN FINDING APPELLANT ENTITLED TO AN AWARD OF 12% PERMANENT PARTIAL DISABILITY TO HIS RIGHT LOWER EXTREMITY.

4. WHETHER OR NOT THE APPELLATE PANEL OF THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION ERRED IN FINDING APPELLANT TO NOT BE ENTITLED TO FUTURE MEDICAL TREATMENT TO HIS RIGHT LOWER EXTREMITY.

5. WHETHER OR NOT THE APPELLATE PANEL ERRED IN FINDING RESPONDENTS ENTITLED TO A CREDIT FOR OVERPAYMENT OF TEMPORARY TOTAL DISABILITY COMPENSATION FROM THE DATE OF THE SINGLE COMMISSIONER'S HEARING UNTIL THE DATE THE ORDER WAS ISSUED.

STATEMENT OF THE CASE

This case involves an accepted injury by accident to Appellant's right knee, which occurred on April 30, 2012 as he was climbing a ladder to get atop the bed of his trailer. It was as a result of this injury that Appellant was recommended for and did undergo a partial medial meniscectomy. However, a dispute arose as to the question of causation with respect to certain other conditions Appellant alleges to have been related to this claim and the resulting injury and/or treatment. Specifically, Appellant presented an allegation that a vascular condition was aggravated or activated as a result of the original knee injury, the resulting surgery or both.

Appellant further alleged that as a result of the chronic lymphedema experienced in his right lower extremity he began to suffer hip and low back pain. Appellant alleged that he was permanently and totally disabled under S.C. Code Ann. § 42-9-10 on account of the injury to one body part with an affect to others and an inability to return to gainful employment. Respondents admitted compensability of the right knee injury and accepted the partial medial meniscectomy as related but denied compensability of all other conditions or affected body parts. Therefore, Respondents argued that in accordance with the prevailing law and in light of this being an injury exclusively to a scheduled member Appellant's recovery is confined to S.C. Code Ann. § 42-9-30.

Respondents contended the physician most familiar with Appellant's vascular condition, Dr. Edward Morrison, concluded under oath in a deposition that Appellant's vascular condition was not related to this claim. Specifically, Dr. Morrison both in the face of direct examination and cross-examination concluded the vascular condition did not occur as a result of the injury or resulting treatment nor was it aggravated or exacerbated by the knee injury or surgery. In fact, Dr. Morrison described with particularity why it was implausible, thus lacking medical certainty, that the meniscal tear or resulting arthroscopic surgery could have affected Appellant's pre-existing vascular disorder or otherwise resulted in chronic lymphedema. Due to the conclusions of Dr. Morrison and the opinions of other physicians Respondents argued that the issues Appellant complained of relative to the hip and lower back were likewise unrelated as they were inextricably linked to the chronic lymphedema found to not be compensable. It had been established throughout the evidence that the hip and back issues were occasioned by an alteration of Appellant's gait, which was noted to be a direct result of Appellant's chronic lymphedema.

Given the lack of a causal connection between the lymphedema and the underlying claim any issues flowing therefrom must too be found unrelated thus not compensable.

The hearing took place before Commissioner R. Michael Campbell, II on February 6, 2015 in Isle of Palms, South Carolina. Commissioner Campbell, on November 9, 2015, issued his order instructions in this matter. Specifically, Commissioner Campbell noted Appellant sustained a compensable injury to his right knee, which resulted in a partial medial meniscectomy. Commissioner Campbell further found that Appellant had, as to the right knee injury, achieved maximum medical improvement on February 19, 2014. Commissioner Campbell finally concluded, as to the right knee injury, that Appellant had sustained 12% permanent partial disability to his right lower extremity and that no physician had required any future medical treatment specific to the compensable right knee injury. Further, Commissioner Campbell ruled Appellant's vascular condition, right hip, and lower back conditions were not caused, activated or aggravated by his right knee injury thus rendering any future treatment associated therewith as unrelated. Based upon these conclusions Commissioner Campbell found Appellant was not permanently and totally disabled given the injury only involved one body part. Appellant appealed these ruling of the Single Commissioner. Respondents appealed the Single Commissioner's finding that they were not entitled to credit for overpayment of those temporary total disability benefits paid from February 6, 2015 until November 9, 2015.

The Appellate Panel of the South Carolina Workers' Compensation Commission, upon hearing oral arguments by the parties, affirmed in part and reversed in part. Specifically, the Appellate Panel affirmed the findings of the Single Commissioner as to Appellant having achieved maximum medical improvement, the chronic lymphedema and associated hip and lower back pain not being compensable, his not being permanently and

totally disabled but rather entitled to 12% permanent partial disability of the lower extremity and his not being entitled to or in need of any future medical treatment to his right knee. The Full Commission; however, reversed the Single Commissioner on the issue of Respondents' entitlement to a credit for overpayment of compensation. The Full Commission found Respondents where obligated to continue payment of temporary total disability compensation when it was not due or payable from the date of the hearing until the date the order instructions were provided to the parties. Furthermore, the continued payments were found to have not been occasioned by any action or inaction of either party such that Respondents were entitled to a credit for that period so prescribed.

ARGUMENTS

1. THERE WAS SUBSTANTIAL EVIDENCE IN THE RECORD TO SUPPORT THE APPELLATE PANEL'S FINDING THAT THE APPELLANT'S ALLEGED ADITIONAL INJURIES FOR THE VASCUALR CONDITION AND ASSOCIATED RIGHT HIP AND LOWER BACK ARE NOT COMPENSABLE AND THE FINDING WAS NOT BASED ON OR AFFECTED BY AN ERROR OF LAW.

Appellant has advanced numerous issues in his appeal, the first of which include challenges to the finding that the chronic lymphedema he presently suffers from is not causally related to the accepted injury. However, the overall premise for each issue advanced by Appellant, with the exception of the credit for overpayment, is flawed as Appellant argues that there exists substantial evidence in the record to support and alternative finding favorable to his positions. Specifically, Appellant contends that the Commission's finding the vascular condition and associated right hip and lower back injuries were not compensable was "against the greater weight and preponderance of substantial evidence in the record." Appellant proceeds then to make identical arguments as to the Appellate Panel's findings as to Appellant's permanent partial disability award in lieu of finding permanent and total disability and denying future

medical treatment. At no point in the Initial Brief of Appellant is there a challenge mounted or argument made that the findings of the Appellate Panel, which Appellant takes issue with were not supported by substantial evidence as is the proper standard of review for this Court.

"The South Carolina Administrative Procedures Act (APA) establishes the standard for judicial review of decisions of the Workers' Compensation Commission." *Hargrove v. Titan Textile Co.*, 360 S.C. 276, 288, 599 S.E.2d 604, 610 (Ct.App. 2004); (*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)). "A reviewing court may reverse or modify a decision of an agency if the findings, inferences, conclusions or decisions of that agency are 'clearly erroneous in view of the reliable, probative and substantial evidence on the whole record.'" *Id.*; (*quoting Bursey v. South Carolina Dep't of Health and Envtl. *289 Control,* Op. No. 3813, 360 S.C. 135, 600 S.E.2d 80, (Ct.App. filed June 1, 2004) (Shearouse Adv. Sh. No. 24 at 47); S.C. Code Ann. § 1-23-380(A)(6)(e) (Supp.2003). "Under the scope of review established in the APA, this Court may not substitute its judgment for that of the Commission as to the weight of the evidence on questions of fact, but may reverse where the decision is affected by an error of law." *Id.*, 360 S.C. at 289; (*See Frame v. Resort Servs., Inc.,* 357 S.C. 520, 593 S.E.2d 491 (Ct.App.2004); *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.2003)).

Review of decisions rendered by the South Carolina Workers' Compensation Commission is governed by the substantial evidence rule as promulgated by the APA. *Id.* Any such review by the Court of Appeals is limited to a determination of whether there is unsupported by substantial evidence to or was a result of an error in the application of the law. *Id.* "In reviewing the decision of the commission, we will not set aside its findings unless they

are not supported by substantial evidence or they are controlled by an error of law." *Lyles v. Quantum Chem. Co. (Emery)*, 315 S.C. 440, 445, 434 S.E.2d 292, 294 (Ct.App. 1993). A finding is supported by substantial evidence "unless there is no reasonable probability that the facts could be as related by a witness upon whose testimony the finding was based." A finding upon which reasonable men might differ will not be set aside. *Id.*; (*quoting Lark v. Bi-Lo, Inc.,* 276 S.C. 130, 136, 276 S.E.2d 304, 307 (1981)).

"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 administrative agency reached in order to justify its action." *See Supra Hargrove*, 360 S.C. at 289; (*See Etheredge v. Monsanto Co.,* 349 S.C. 451, 562 S.E.2d 679 (Ct.App.2002); *Broughton v. South of the Border,* 336 S.C. 488, 520 S.E.2d 634 (Ct.App.1999)). "The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence." *Id.* at 290; (*See Sharpe v. Case Produce, Inc.,* 336 S.C. 154, 519 S.E.2d 102 (1999); *Muirv. C.R. Baird, Inc.,* 336 S.C., 266, 282, 519 S.E.2d 583, 591 (Ct. App. 1999)). "Where there are conflicts in the evidence over a factual issue, the findings of the Appellate Panel are conclusive." *Id.*; (*See Etheredge,* 349 S.C. at 455, 562 S.E.2d at 681).

The findings of the Appellate Panel relative to the compensability of the chronic lymphedema and associated hip and lower back are all supported by substantial evidence and as such cannot and cannot be set aside. Appellant, on April 30, 2012 sustained an admitted injury to his right knee, which resulted in a torn medial meniscus. Following the injury and in the course of the medical treatment Appellant required a partial medial meniscectomy, which was completed on October 2, 2012. Based upon the available evidence the surgery was successful in

its repair of Appellant's torn medial meniscus though Appellant contends that he began, *following* the surgery, to experience swelling in his right lower extremity to an extent never previously experienced. Appellant, as a result of the perceived swelling, was sent for additional evaluation to Dr. Edward C. Morrison of Coastal Vascular & Vein Center. Dr. Morrison opined that Appellant had a vascular disorder, which was causing significant swelling of his lower extremity and performed a surgical procedure to close his greater saphenous vein. After the procedure failed to reduce the swelling Appellant was referred to Dr. Edward M. Tavel, Jr. of Pain Specialists of Charleston for the primary purpose of ruling out complex regional pain syndrome and to otherwise treat the pain associated with the Appellant's chronic lymphedema.

During the course of the litigation counsel for Respondents subpoenaed both Drs. Morrison and Tavel. Both parties questioned Dr. Morrison extensively regarding the causal connection, if any, between Appellant's chronic lymphedema for which he was treating him and the accepted right knee injury and/or resulting treatment. Dr. Morrison was directly examined and cross-examined by both attorneys answering some very pointed questions on the issue as follows:

> Q: Is it your opinion, in Mr. Brown's case, that his current condition is directly attributable to the arthroscopy that he underwent?
>
> A: His current condition of venous disease and lymphatic disease is attributable to the arthroscopy?
>
> Q: Yes, sir.
>
> A: No.

See Deposition of Dr. Morrison, P. 12, ll. 9-17.

> A: in my experience, chronic lymphedema does not result from a single meniscus tear and repair.

See Deposition of Dr. Morrison, P. 37, ll. 5-7

> Q: is it your testimony to a reasonable degree of medical certainty that the treatment that you are providing to Mr. Brown is not work related at all?
>
> ...
>
> Q: Do I [sic] think it's related to his work injury? Are you treating because of ...
>
> A: No, ma'am. I do not think so.

See Deposition of Dr. Morrison, P. 38, ll. 3-19.

> A: Do I think it's a major surgery that's going to precipitate a massive edema, I do not.

See Deposition of Dr. Morrison, P. 44, ll. 14-16.

> A: Now, I don't even have the orthopedic results, but was a knee trauma, and maybe one of y'all could tell me about that, you know, a meniscus tear, which you can do walking the hall, did that precipitate his edema? In my opinion, ma'am, it did not precipitate his edema.

See Deposition of Dr. Morrison, P. 45, ll. 13-19.

Simply put there was no question as to Dr. Morrison's stance on any perceived causal connection between Appellant's right knee injury or resulting surgery and the chronic lymphedema he was treating. The greatest weight, as found by the Single Commissioner and affirmed by the Appellate Panel, was given to the treating physicians, including Drs. Morrison and Tavel and their respective depositions. As held by the Court in *Hargrove*, this Court cannot substitute its judgment as to the weight of the evidence. Dr. Morrison's testimony provides substantial evidence to support the finding of the Appellate Panel that Appellant's vascular condition was not causally related to the compensable knee injury sustained by Appellant on April 30, 2012 or the treatment associated therewith. Based upon the deposition testimony of Dr. Morrison there was substantial evidence to support the finding of the Appellate Panel that the vascular condition was not causally related despite the references by Appellant to evidence that might have otherwise supported a finding of compensability. The findings of an administrative

agency may still be supported by substantial evidence although there is a possibility of drawing two inconsistent conclusions from the evidence. *See Supra Hargrove*, 360 S.C. at 289.

Appellant next turns his attention to the compensability of the "associated right hip and lower back" issues under the same pretense as with the vascular condition arguing they are causally related, which he submits is supported by substantial evidence. However, in the opening sentence of the Initial Brief of Appellant relative to each the hip and lower back (Pages 19 & 20), Appellant references that "it is undisputed that the vascular condition caused the hip condition" and "it is undisputed that the vascular condition caused the back condition." The argument being advanced by Appellant suffers from a distinct and fatal flaw in that the substantial evidence supported the Appellate Panel's finding that the chronic lymphedema was not causally related to the work related injury nor was it a result of the treatment thereof thus severing any connection between either associated condition, hip or lower back, and the workplace accident.

In further attempting to relate the hip and back issues to the accepted claim Appellant misstates pertinent facts and findings of the physician's involved in this case by attempting to infer Respondents were providing treatment for these conditions. Specifically, Appellant identifies one medical report of the authorized orthopedic surgeon that included a reference to pain radiating to his hip and attempts to infer this was evidence that Respondents accepted and paid for treatment to the hip. Despite the extensive medical documentation in evidence in this case Appellant fails to identify one visit, bill or treatment record of any kind where he underwent treatment focused on the hip or lower back at the expense of Respondents. The presence of a complaint by Appellant does not represent or indicate acceptance of an allegedly related body part only that a patient has a complaint. Moreover, in the deposition of Dr. Edward Tavel he was

directly asked and succinctly refuted any indication or inference that he was authorized to or otherwise did provide treatment to Appellant for his hip. Likewise, Appellant references complaints to his IME physician, Dr. Mason Ahearn, relative to the lower back and references an opinion rendered by Dr. Ahearn that Dr. Tavel was authorized to and did treat Appellant's back pain. As was the case with the hip, during his deposition Dr. Tavel was asked and likewise denied that he was authorized or did provide any treatment for Appellant's back pain. In fact, during the deposition of Dr. Tavel Appellant himself acknowledged Respondents never approved certain treatment to his back. (*see* Deposition Transcript of Dr. Edward M. Tavel, Jr., P. 23, ll. 1-9). The substantial evidence in this case clearly supports the finding reached by the Appellate Panel that the chronic lymphedema was the impetus of the hip and back pain on account of it having significantly altered his gait. The substantial evidence supports a finding that the chronic lymphedema is not compensable and as such any body parts affected thereby, having been attributed to the alteration of his gait due to excessive swelling, are likewise unrelated and not compensable.

2. THERE WAS SUBSTANTIAL EVIDENCE TO SUPPORT THE APPELLATE PANEL'S FINDING THAT APPELLANT WAS NOT PERMANENTLY AND TOTALLY DISABLED AND THE FINDING WAS NOT BASED ON OR AFFECTED BY AN ERROR OF LAW.

Appellant next contends that the Appellate Panel erred finding he was not permanently and totally disabled. S.C. Code Ann. § 42-9-10(a) states that "[w]hen the incapacity for work resulting from an injury is total, the employer shall pay, or cause to be paid … a weekly compensation equal to sixty-six and two-thirds percent of his average weekly wage … [but] in no case may the period covered by the compensation exceed five hundred weeks except as provided in subsection (C)." Appellant's initial attempt to establish the error of the Appellate Panel in finding him to not be permanently and totally disabled is to reassert the contention that

the vascular condition was compensable. Respondents have thorough established that substantial evidence existed to support the finding that the vascular condition was not compensable such that the Appellate Panel finding cannot be set-aside. Without the vascular condition being compensable Appellant's associated hip or lower back issues are also unrelated to this claim rendering it an injury to a single scheduled member confining recovery to S.C. Code Ann. § 42-9-30 such that S.C. Code Ann. § 42-9-10 cannot be relied upon as a basis under which Appellant could be found permanently and totally disabled.

Appellant, alternatively argues *Ellison v. Frigidaire Home Prods.*, 371 S.C. 159, 638 S.E.2d 664 (2006) controls this case and supports a finding of permanent and total disability. Appellant contends specifically he is unable to work on account of the combination of his pre-existing condition and his workplace injury to his right lower extremity, which he believes entitles him to an award of permanent and total disability under *Ellison II.* In *Ellison II* the employee sustained a fracture of his leg for which he was eventually give 20% permanent impairment. *Id.* However, in addition to the aforementioned work related injury *Ellison* suffered from a whole host of pre-existing conditions, which included "hypertension, sleep apnea, prostate cancer, diabetes and congestive cardiac disease." *Id.* The Court permitted the employee in *Ellison* to recover for permanent and total disability despite the fact that the evidence presented reflected no causal connection between the pre-existing conditions and his workplace injury. Specifically, the Court relied upon certain language found in S.C. Code Ann § 42-9-400(a) and (d), which state in pertinent part:

> (a) If an employee who has **a permanent physical impairment from any cause or origin** incurs a subsequent disability from injury by accident arising out of and in the course of his employment, resulting in compensation and medical payments liability or **either,** *for disability that is *162 substantially greater, by reason of the* ***combined effects*** *of the preexisting impairment and subsequent injury* **or** by reason of the aggravation of the preexisting impairment, than that which would

> have resulted from the subsequent injury alone, the employer or his insurance carrier shall in the first instance pay all awards of compensation and medical benefits provided by this Title; but such employer or his insurance carrier shall be reimbursed from the Second Injury Fund....
>
> ....
>
> (d) As used in this section, "**permanent physical impairment**" means any permanent condition, *whether congenital or due to injury or disease,* of such seriousness as to constitute a hindrance or obstacle to obtaining employment or to obtaining reemployment if the employee should become unemployed. (emphasis added).

Id. 371 S.C. at 161-62.

In placing its reliance on the foregoing statute the Court relied upon a belief that "the legislature clearly envisioned that a claimant may recover for greater disability than that incurred from a single injury to a particular body party if the combination hinders reemployment." *Id.* 371 S.C. at 164. Furthermore, it was noted that there was "no requirement that the pre-existing condition aggravated the injury, or that the injury aggravated the pre-existing condition, so long as there is a greater disability simply from the "combined effects" of the injury and the pre-existing condition." *Id.* The key in the analysis undertaken by the Court is that the permanent physical impairment must precede the workplace accident noting it affects one who "incurs a subsequent disability" from a compensable accident.

Appellant simply argues, "*Ellison II* is controlling in this case" (Initial Brief of Appellant, P. 12); however, he first fails to address the failings of her evidentiary presentation to the Single Commissioner. For *Ellison II* to be the controlling case here Appellant must have presented evidence of pre-existing conditions that "combined" with the injury. It is acknowledged in the evidence Appellant was felt to have a vascular disorder that pre-existed the workplace accident. However, there is no evidence in the record showing Appellant's pre-existing vascular disorder to be a hindrance or obstacle to his employment thus distinguishing this case from *Ellison II.* In the instant case the only evidence produced by Appellant relates to the workplace injury and

issues he began experiencing thereafter, for which substantial evidence exists to establish as being unrelated. Therefore, *Ellison II*, is not controlling as the evidence propounded by Appellant to establish his claim for permanent and total disability is not a combination of pre-existing conditions and a workplace injury but rather a workplace injury and unrelated issues he began experiencing thereafter.

Appellant also, in an attempt to draw support under *Ellison II* for a finding of permanent and total disability, references options offered by two vocational experts, Fi Fi Jubran and Dr. Robert E. Brabham. In their respective reports Ms. Jubran and Dr. Brabham discuss Appellant's status based upon his presentation on the given date of their examination; however, neither discuss his pre-existing medical history or other maladies from which he suffered prior to the workplace accident. To look to either report as supportive of a finding under *Ellison II* either Ms. Jubran or Dr. Brabham would have had to find Appellant as unable to engage in any form of sustainable employment as a result of the combined effects of a pre-existing condition or conditions and the compensable right knee injury. Neither of the opinions rendered by Ms. Jubran or Dr. Brabham resulted conclusions to support a finding that Appellant's inability to work was a by-product of the "combined effects" of a pre-existing condition and a workplace injury as required under *Ellison II* to support a finding of permanent and total disability. Therefore, Appellant cannot look to the holding of *Ellison II* as applicable to the instant case as supporting a contention that he is permanently and totally disabled.

Respondent contends the case on appeal more closely, based upon the substantial evidence in the record, correlates to *Singleton v. Young Lumber Co.*, 236 S.C. 454, 114 S.E.2d 837 (1960). In *Singleton* the claimant presented evidence to establish a leg injury and evidence tending to establish an ability to return to gainful employment. *Id.* However, there was no

evidence to establish, as is comparable to the case at bar, that the compensable injury to Singleton combined with any pre-existing conditions to cause the injured worker to experience greater disability. In the instant case Respondents acknowledge there was certainly discussion that Appellant's vascular disorder was likely pre-existing there was no evidence showing that pre-existing condition combined with the workplace injury in any cognizable way to result in a greater disability thus rendering *Singleton* as controlling thus confining Appellant to an award under S.C. Code Ann. § 42-9-30, the scheduled member section.

However, if this Court believes substantial evidence was presented as to Appellant's pre-existing condition and its combined effect with the workplace injury resulting in greater disability Respondent contends *Ellison II* should not apply. It is irrefutable that the premise of S.C. Code Ann. § 42-9-400 was to create a means by which employers could seek reimbursement from the South Carolina Second Injury Fund under certain prescribed circumstances, which would have included cases like that in *Ellison II.* In *Ellison II*, the Court astutely notes the aforementioned section provides that an "employer's reimbursement from the Fund for the "combined effects" of a workplace injury and pre-existing conditions would be futile unless a claimant could actually make such a recovery in the first place." *Id.* at 164. However, by the date of the accident at issue in this case the Second Injury Fund had long since begun winding down its operations and in fact was no longer even accepting new claims. Therefore, under the logic employed by the Court in *Ellison II* any efforts undertaken by Respondents to seek reimbursement under S.C. Code Ann. § 42-9-400 would be futile. Respondents; therefore contend the logic employed by the Court in *Ellison II* to support its belief that legislature intended for such claims to be permissible has become obsolete. In light of the inability of employers and carriers to look to S.C. Code Ann. § 42-9-400 for a reimbursement a

claimant should likewise be precluded from being able to look to a statute to advance a claim similar to that in *Ellison II.*

3. THERE WAS SUBSTANTIAL EVIDENCE TO SUPPORT THE APPELLATE PANEL'S FINDING THAT APPELLANT SUSTAINED 12% PERMANENT PARTIAL DISABILITY TO THE RIGHT LOWER EXTREMITY AND THE FINDING WAS NOT BASED ON OR AFFECTED BY AN ERROR OF LAW.

Plaintiff's next contention was that the Appellate Panel erred in finding Appellant was entitled to 12% permanent partial disability as being against the substantial evidence. Respondent herein again notes the Court must review this Appellate Panel decision not on whether there was substantial evidence that could support an alternate finding but rather whether or not there was substantial evidence supporting the finding that was made. The evidence clearly reflects an impairment rating provided by Dr. Rudolph of 13% though the Form 14B, Physician's Statement clearly indicates the rating was increased to the maximum allowable because of the significant swelling present. However, substantial evidence was presented to support the finding of the Appellate Panel that the swelling was not related to the workplace injury and as such its inclusion in Dr. Rudolph's rating was appropriately removed and reassessed.

It is well settlement that an impairment rating may not rest on speculation or conjecture, it need not be shown by mathematical precision and it may rely on lay testimony. *Lyles v. Quantum Chem. Co. (Emery)*, 315 S.C. 440, 434 S.E.2d 292 (Ct.App. 1993); (*See Linen v. Ruscon Constr. Co.,* 286 S.C. 67, 68, 332 S.E.2d 211, 212 (1985) (although expert testimony suggested the claimant suffered from a 20-30% impairment to his back, testimony of claimant and vocational expert was substantial evidence the claimant's impairment exceeded 50%). Furthermore, a commissioner is permitted to establish a degree of disability different from that suggested by expert testimony. *Id.*; *(See Cropf v. Pantry, Inc.,* 289 S.C. 106, 108, 344 S.E.2d 879, 881 (Ct.App.1986)). It is undisputed that Appellant injured his right knee and underwent a

right partial medial meniscectomy, which pursuant to the American Medical Association Guide to the Evaluation of Permanent Impairment Fifth (5th) Edition, Table 17.33, calls for an impairment rating of 2% and in the instant case the Single Commissioner determined Appellant's disability was 12%. While there were other multiple impairment ratings proffered they related to conditions that were found by said Commissioner to be unrelated to the workplace accident. Therefore, there was substantial evidence in the record to support the finding of the Single Commissioner, which was affirmed by the Appellate Panel.

4. THERE WAS SUBSTANTIAL EVIDENCE TO SUPPORT THE APPELLATE PANEL'S FINDINGTHAT THE APPELLANT WAS NOT ENTITLED TO FUTURE MEDICAL TREATMENT AND THE FINDING WAS NOT BASED ON OR AFFECTED BY AN ERROR OF LAW.

Appellant's final contention was that the Appellate Panel's finding that he was not entitled to or in need of future medical treatment was against the greater weight and preponderance of reliable and substantial evidence and based on erroneous legal conclusions. First and foremost, Appellant fails to identify even one erroneous legal conclusion that has any affect on this holding as he has not cited to a single statute or case as legal precedent controlling or erroneously relied on by the Appellate Panel. The Initial Brief of Appellant simply references medical treatment identified by different providers, including his own IME doctors, Appellant may need in the future. However, the premise for the different types of medical treatment identified by Appellant is the chronic lymphedema, which was deemed to not be compensable; a finding supported by the substantial evidence. Based upon the absence of any causal connection between the compensable injury and the chronic lymphedema it would be improper to order Respondents to provide such treatment.

S.C. Code Ann. § 42-15-60(A) states in pertinent part:

> [t]he employer shall provide medical, surgical, hospital, and other treatment … for a period not exceeding ten weeks from the date of injury, to effect a cure or give relief *and for an additional time as in the judgment of the commission will tend to lessen the period of disability as evidenced by expert medical evidence and stated to a reasonable degree of medical certainty.*"

(*Emphasis Added*).

The foregoing statute, among other functions serves to place, within the sound judicial discretion of the commissioner, the authority to determine what an employer and carrier may be ordered to provide ongoing future medical treatment. To contend the Single Commissioner or Appellate Panel erred requires a showing of abuse of discretion and not simply list medical treatment some physicians' felt was warranted. It stands to reason that an employer and carrier should not be, and cannot be, ordered to provide treatment for an unrelated condition as the chronic lymphedema has been established to be in this case. As a direct result of the foregoing conclusion that the chronic lymphedema was unrelated Respondents cannot be ordered to provide treatment for said condition under the prevailing law.

5. BECAUSE THE EVIDENCE IN THE RECORD INDICATES PAYMENTS MADE BY RESPONDENT OF TEMPORARY TOTAL DISABILTIY COMPENSATION TO APPELLANT WHEN NOT DUE OR PAYABLE.

S.C. Code Ann. § 42-9-210 provides, in pertinent part, "any payments made by an employer … during the period of his disability … which by the terms of this Title were not due and payable when made may, subject to the approval of the commission, be deducted from the amount of to be paid as compensation." Appellant has made no challenge to either the Single Commissioners finding or that of the Appellate Panel that he reached maximum medical improvement as of February 19, 2014. The prevailing case law, as even supported by those cases cited by Respondent, indicates that "the date of maximum medical improvement signals the end of entitlement to temporary total disability benefits." *Curiel v. Envtl. Mgmt. Servs. (MS)*,

376 S.C. 23, 29, 655 S.E.2d 482, 485 (2007). Therefore, based upon the application of the foregoing laws Respondents were entitled to terminate temporary total disability benefits as of February 19, 2014 and any payments made thereafter were not due or payable thus rendering them subject to S.C. Code Ann. § 42-9-210 for a credit.

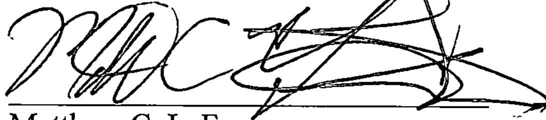
On their appeal of the Single Commissioner's denial of Respondents' request for a credit did not challenge their entitlement to a credit back to the date of maximum medical improvement rather it challenged the denial of a credit from the date of the original hearing, February 6, 2015 until the issuance of the Order Instructions, November 9, 2015. Specifically, Respondents cited to *Sanders v. MeadWestavco Corp.*, 371 S.C. 284, 638 S.E.2d 66 (Ct.App. 2006), which supported the notion that on date the claimant had reached MMI benefits were to be terminated in favor of entry of a permanent award. Similarly, in *Watson v. Xtra Mile Driver Training,* 399 S.C. 455, 732 S.E.2d 190 (Ct.App. 2012) the issue of a defendant and employer's entitlement to a credit was at issue and this Court established the entitlement to a credit as an equitable one noting "[b]ecause equity follows the law, XTRA is entitled to credit for any TTD compensation payments it made to Watson after the date of MMI." *Id.*, at 465. Under the principles of equity Respondents argued, and the Appellate Panel agreed, there was no action or inaction on behalf of either party leading to the continued payment of temporary total disability compensation benefits from the date of the hearing, February 6, 2015 until the Order Instructions were issued, November 9, 2015. Therefore, based upon principles of equity the Appellate Panel determined Respondents were entitled to a credit for payment of temporary total disability benefits for those benefits paid during the foregoing period of time, which comports with all of the prevailing law on the issue.

It is categorically undeniable that the action, or as argued inaction, of Respondents had no nexus to the fact the Single Commissioner did not render a conclusion for thirty-nine (39) weeks and four (4) days. It was based precisely on the fact that Respondent did not cause or otherwise contribute to the Commission's delay in rendering its decision after the hearing that the equitable principle supported the Appellate Panel's Order entitling Respondent to a credit for overpayment in accordance with prevailing statute and case law cited herein. Appellant has not presented any cogent theory or argument to establish that this award by the Appellate Panel was unsupported by substantial evidence or controlled by an error of law and as such there is simply no basis for reversing this finding.

CONCLUSION

For the reasons stated herein, this Court should affirm the judgment of the South Carolina Workers' Compensation Commission Appellate Panel in full.

Respectfully submitted,



January 20, 2017

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SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
Appellate Panel

Appellate Case No. 2016-001992

O'Shea L. Brown, Claimant . . . . Appellant,

v.

Steel Technologies, Employer
and
Twin City Fire Ins. Co., Carrier . . . . Respondents.

PROOF OF SERVICE

I certify that I have served the Initial Brief of Respondents by depositing a copy of it in the United States Mail, postage prepaid, on January 20, 2017, addressed to the attorney of record, Joe Ann Calvy, Esquire, P.O. Box 610, Kingstree, SC 29556.

Denise M. Brockwell
Paralegal

January 20, 2017

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January 20, 2017

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SC Court of Appeals

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RE: O'Shea Brown v. Steel Technologies and Twin City Fire Ins. Co.
Appellate Case No. 2016-001992

Dear Ms. Kitchings:

Please find enclosed for filing an original and one copy of the Initial Brief of Respondents and Proof of Service in the above-captioned matter. Also enclosed please find an original and one copy of the Designation of Matter to be Included in the Record on Appeal and Proof of Service. Once filing is complete, please return the clocked copies to us in the enclosed self-addressed, stamped envelope.

By copy of this correspondence to the attorney of record, I am hereby serving a copy of the Initial Brief of Respondents and Designation of Matter to be Included in the Record on Appeal upon Ms. Calvy.

Sincerely yours,

Denise M. Brockwell
Paralegal

/dmb
Enclosures

cc: Joe Ann Calvy, Esquire
Linda Cannon-Rivera, Gallagher Bassett (via email only)

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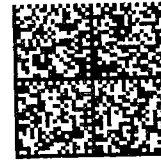
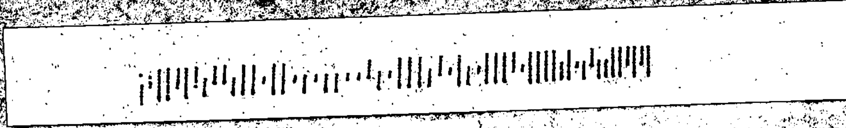
JAN 23 2017
SC Court of Appeals





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