

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

W.C.C. File No.: 1502120

Reginald Evans, Employee, Claimant Appellant,

v.

Exel Inc., Employer, and
New Hampshire Insurance Company, Carrier, Respondents.

INITIAL BRIEF OF RESPONDENTS

RECEIVED

APR 03 2017

SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

- I. DID THE COMMISSION PROPERLY DECLINE TO AWARD CLAIMANT ADDITIONAL DISABILITY FOR DISFIGUREMENT?
- II. IS THE COMMISSION'S AWARD OF 35% PERMANENT PARTIAL DISABILITY IS SUPPORTED BY SUBSTANTIAL EVIDENCE?
- III. DID THE COMMISSION PROPERLY AWARD RESPONDENTS A CREDIT FOR TEMPORARY TOTAL DISABILITY PAID AFTER CLAIMANT REACHED MAXIMUM MEDICAL IMPROVEMENT?
- IV. DID THE COMMISSION ERR IN NOT REQUIRING RESPONDENTS TO PAY CLAIMANT'S LEGAL FEES AND/OR LONG-TERM DISABILITY?

STATEMENT OF THE CASE

Appellant Reginald Evans, Claimant below, was employed by Respondent Exel Inc.,¹ when was injured on February 21, 2015 when a forklift driven by a coworker struck him in the right lower leg. Respondents provided medical treatment and, on January 15, 2016, filed a Form 21, seeking termination of temporary total disability (“TTD”) benefits and a determination of permanent benefits due to Claimant, if any. (Form 21, dated Jan. 15, 2016).

The parties were heard by Single Commissioner Aisha Taylor on March 27, 2016. Commissioner Taylor issued an Order on May 12, 2016 noting that the parties had stipulated that Claimant sustained a compensable injury to his right leg and that he had reached maximum medical improvement (“MMI”) on January 8, 2016. In addition, Commissioner Taylor found that Claimant sustained a 35% permanent partial disability (“PPD”) to his right leg pursuant to S.C. Code Ann. § 42-9-30, to be paid in a lump sum, and awarded him future causally related medical treatment in the form of nerve pain medication. Finally, Commissioner Taylor awarded Respondents credit of overpayment of TTD from the date Claimant reached MMI to the date of the Order, and ordered that Claimant’s attorney’s fees and costs/expenses be taken out of the lump sum award. (Single Commissioner Order, served May 16, 2016). Up to this point, Claimant was represented by counsel.²

¹ Employer Exel carried workers’ compensation insurance with New Hampshire Insurance Company at the time of the accident. Both Employer and Insurer are referenced herein jointly as Respondents herein.

² Claimant’s counsel moved to be relieved which was granted in an Order filed June 2, 2016. (Order to Relieve Counsel, filed June 2, 2016).

Claimant, proceeding *pro se*, filed a Form 30 Request for Commission Review, raising seven issues. (CL Form 30, dated May 16, 2016). The parties were heard by an appellate panel of the Full commission on October 17, 2016. The Appellate Panel affirmed the Single Commission Order in its entirety, adding a Ruling of Law that, “Claimant did not seek an award for disfigurement at the initial hearing and therefore is barred from doing so on appeal.” (Appellate Panel Decision and Order, filed Jan. 9, 2017) (“Commission Decision”).

Claimant timely appealed to this Court.

FACTUAL BACKGROUND

Claimant testified at the hearing before Commissioner Taylor that he was 53 years old, single with no dependents. He has a college degree in business. (Tr. p. 6, line 25 – p. 7, line 15). He served in the military from 1981 until 1999, the last 13 years in the South Carolina National Guard Reserves in a full-time administrative civil service position. (Tr. p. 7, line 19 – p. 8, line 3) (Tr. p. 22, lines 3-11). Following that, he opened a consulting firm, working with businesses putting together government contracts until 2011, when he went to work for Exel as a standing forklift operator. (Tr. p. 8, line 13 – p. 9, line 23).

On February 21, 2015, he was injured when a fellow employee accidentally crashed his forklift into Claimant’s forklift, injuring Claimant’s right lower leg. (Tr. p. 10, line 11 – p. 11, line 6). Claimant was taken to the emergency room and later treated by Dr. W. Scott James. (Tr. p. 11, lines 10-21).

Dr. James referred Claimant to a neurologist, who performed a nerve study and prescribed medication for the nerve pain. (Tr. p. 13, line 21 – p. 14, line 3). Dr. James

eventually released Claimant from his care with light duty restrictions. Dr. James' medical report from January 8, 2016 notes that Claimant's functional capacity evaluation ("FCE") indicated he could do sit down forklift work, but not standup forklift work. Dr. James assigned a 15% impairment to the right lower extremity. (Tr. p. 14, lines 18-19) (Def. APA pp. 18-21). Claimant testified that he believed he had lost around 40-50 percent of the use of his right let. (Tr. p. 18, lines 18-21).

At the hearing, Claimant showed Commissioner Taylor his scar. (Tr. p. 12, lines 6-21). However, he made no request for an award for disfigurement. In his detailed statement of the issues before Commissioner Taylor, (Tr. p. 4, lines 21-22), Claimant's Counsel stated only that, "we don't disagree that [Claimant] is at maximum medical improvement as released by Dr. James, the authorized -- treating physician. Dr. James released him with a 15 percent impairment to the leg, a significant permanent work restriction of light duty, which prevent[s] him from going back to his former job. And it is our position that we ask the Commission to issue an award of permanent partial disability but it is our position that the impairment rating of 15 percent is not indicative of his actual extent of disability, and that the extent of disability is far in excess of the impairment rating." (Tr. p. 5, lines 7-21).

At the Appellate Panel hearing, Claimant raised an issue regarding attorney's fees. However, he acknowledged that he had not briefed that issue. (App. Tr. p. 7, line 6 - p. 8, line 2).

STANDARD OF REVIEW

Judicial review of a Commission decision is directed by the substantial evidence rule of the Administrative Procedures Act, S.C. Code Ann. § 1-23-380(5) (Supp. 2015).

Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981). A reviewing court should affirm the decision of the Full Commission unless it is clearly erroneous in view of the substantial evidence of the whole record. Lark, 276 S.C. at 136, 276 S.E.2d at 307. 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 same conclusion the administrative agency reached in order to justify its action. Pierre v. Seaside Farms, Inc., 386 S.C. 534, 540, 689 S.E.2d 615, 618 (2010). “The possibility of drawing two inconsistent conclusions from the evidence does not prevent the Commission’s finding from being supported by substantial evidence.” Sharpe v. Case Prod., Inc., 336 S.C. 154, 160, 519 S.E.2d 102, 105 (1999). Instead, the findings of the Full Commission are presumed correct and can be set aside only if unsupported by substantial evidence or based on an error of law. McGuffin v. Schlumberger-Sangamo, 307 S.C. 184, 186, 414 S.E.2d 162, 163 (1992).

ARGUMENT

I. The Commission properly declined to award Claimant additional disability for disfigurement.

Claimant argues that the Commission erred in denying him an award for disfigurement because he did not seek such relief before the Single Commissioner “due to ineffective counsel of the Appellant attorney.” First, the Commission, which can only exercise those powers granted in its enabling statute, is not authorized to resolve disputes concerning efficacy of counsel. South Carolina Ambulatory Surg. Ctr. Assoc. v. South Carolina Workers’ Comp. Comm’n, 389 S.C. 380, 393, 699 S.E.2d 146, 153 (2010) (explaining that an “administrative agency has only such powers as have been conferred by law and must act within the authority granted for that purpose”). Nowhere in the Act

is the Commission authorized to hear complaints of ineffective assistance of counsel. There are forums where a party can raise allegations concerning the adequacy of legal representation, but the Commission is not one of them.

Second, Claimant's complaint of ineffective assistance of counsel is not properly before this Court. Claimant did not raise this issue to either the Single Commissioner or the Appellate Panel so that, even if the Commission had the power to resolve such claims, which it does not, that issue is not preserved for appeal. Creech v. Ducane Co., 320 S.C. 559, 564, 467 S.E.2d 114, 117 (Ct. App. 1995) ("only issues within the application for review are preserved for the full commission"); Green v. City of Columbia, 311 S.C. 78, 80, 427 S.E.2d 685, 687 (Ct. App. 1993) (only those issues within the scope of the appellant's exception to the full commission and its notice to the respondent are preserved for appeal to the commission), *citing* Ham v. Mullins Lumber Co., 193 S.C. 66, 7 S.E.2d 712 (1940) (holding that "all findings of fact and law by the hearing commissioner became and are the law of th[e] case, except only those within the scope of the exception of defendant and the notice given to the parties by the commission").

Third, as the Commission correctly noted, and Claimant appears to concede, there was no request for an award for disfigurement before the Commission. Claimant's Counsel stated only that they were seeking a disability award "far in excess" of the 15% impairment rating provided by Dr. James. (Tr. p. 5, lines 7-21). Although Claimant offered to show his scar to Commissioner Taylor, this was in the context of his description of his treatment and recovery, and there was no request for any award based on disfigurement. (*See* Tr. p. 12, line 5 – p. 13, line 7). An issue not presented to the

single commissioner is not preserved for appeal. See Robbins v. Walgreens, 375 S.C. 259, 266, 652 S.E.2d 90, 94 (Ct. App. 2007).

This Court should hold that the Commission properly declined to award Claimant a separate award for disfigurement.

II. The Commission's award of 35% permanent partial disability is supported by substantial evidence.

Claimant argues the Commission erred in awarding him only 35% permanent partial disability. However, the Commission's permanent partial disability award, pursuant to S.C. Code Ann. § 42-9-30, is supported by substantial evidence, including the medical evidence and claimant's testimony, (Commission Decision pp. 7-8), and should be affirmed on appeal.

Dr. James assigned Claimant a 15% impairment to his lower right extremity. The Commission took this into account, along with Dr. James' permanent restrictions, the FCE and Claimant's testimony, and awarded Claimant 35% loss of use of the leg – more than double Dr. James' impairment rating. It is axiomatic that “the determination of an injured employee's impairment rating is more art than science, involving the consideration of evidence the Commission may gather from the injured employee, medical and vocational experts, and lay witnesses.” Burnette v. City of Greenville, 401 S.C. 417, 429, 737 S.E.2d 200, 206-207 (Ct. App. 2012); Fishburne v. ATI Syst. Int'l, 384 S.C. 76, 86, 681 S.E.2d 595, 600 (Ct. App. 2009) (the percentage of disability does not need to be “shown with mathematical exactness”). The Commission's determination is supported by substantial evidence in the form of Dr. James' opinion, the FCE and Claimant's testimony. As a result, it should be upheld on appeal. Sharpe, 336 S.C. at 160, 519 S.E.2d at 105.

Claimant notes the Commission's reference to his limited "ability to return to work given his work history" and appears to argue that his disability award should be greater based on his inability to return to his prior job. However, an award under Section 42-9-30 is made for the degree of loss of use of a scheduled member, without consideration of a claimant's ability or inability to earn wages. Wigfall v. Tideland Utils., Inc., 354 S.C. 100, 105, 580 S.E.2d 100, 102 (2003) (under the scheduled loss provision, "compensation depends on the character of the injury ... and not the loss of earning capacity").

This Court should affirm the Commission's award of 35% permanent partial disability award to Claimant's right leg.

III. The Commission properly awarded Respondents a credit for temporary total disability paid after Claimant reached maximum medical improvement.

As part of Claimant's second issue, he also argues that the Commission erred in awarding a credit to Respondents for TTD paid from the date of MMI to the date of the Single Commissioner Order because Respondents did not offer him a job within his work restrictions. Respondents sought credit for the overpayment of benefits pursuant to Section 42-9-210. (Form 21). That provision provides, in pertinent part, that "[a]ny payments made by an employer to an injured employee 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 to be paid as compensation..." S.C. Code Ann. § 42-9-210. There is no requirement that an employer offer a claimant a job in order to receive a credit that is otherwise appropriate under Section 42-9-210.

Instead, once a claimant reaches MMI, his or her entitlement to temporary total disability benefits ends and a permanent award, if warranted may be ordered. As is stated in Curiel v. Environmental Mgmt Servs. (MS), and elsewhere:

Essentially, workers' compensation benefits accrue along a time continuum: temporary total disability benefits are available from the date of injury through the date of maximum medical improvement; post-MMI benefits may then be awarded either as a permanent total or partial disability, or as a percentage of impairment to a scheduled member. [citation omitted] Accordingly, **the date of maximum medical improvement signals the end of entitlement to temporary total benefits.**

376 S.C. 23, 29, 655 S.E.2d 482, 485 (2007) (emphasis added). Thus, once Claimant reached MMI, he was no longer entitled to TTD. The credit is based on the difference between TTD and the PPD award granted by the Commission.

Accordingly, this Court should affirm the Commission's award of a credit for overpayment of TTD.

IV. The Commission did not err in not requiring Respondents to pay Claimant's legal fees and/or Long-Term Disability.

Claimant argues that the Commission erred in not requiring Respondents to pay his legal fees and Long-Term Disability. First, these last two issues are not preserved for appeal. Appellant did not seek legal fees or payment of Long-Term Disability before the Single Commissioner. He did not raise either of these issues on his Form 30. (CL Form 30). Any issue not raised on a party's Form 30 cannot be challenged at a later date. *See, e.g., Creech*, 320 S.C. at 564, 467 S.E.2d at 117 ("only issues within the application for review are preserved for the full commission"); *Green*, 311 S.C. at 80, 427 S.E.2d at 687 (only those issues within the scope of the appellant's exception to the full commission and its notice to the respondent are preserved for appeal to the commission). Therefore,

neither the issue of attorney's fees nor issue of Long-Term Disability is preserved for review.

Claimant appears to argue that he is entitled to attorney's fees due to "ineffective counsel of the Appellant attorney." Again, as is discussed above in Section I, the issue of the ineffective assistance of counsel was never raised to the Commission, is not preserved for appellate review, and is not an issue the Commission can address in any event.

Finally, even if the issue had been raised, the Commission lacks authority to award attorney's fees as a litigation expense. Baxter v. City Ins., 368 S.C. 510, 514, 630 S.E.2d 42, 44 (2006). Because attorney's fees are not provided for under the Act, and there is no contract between Claimant and Respondents providing for attorney's fees awards, they cannot be awarded in this case. *E.g.*, Historic Charleston Holdings, LLC v. Mallon, 381 S.C. 417, 436, 673 S.E.2d 448, 458 (2009) ("[a]ttorney's fees are not recoverable unless authorized by contract or statute").

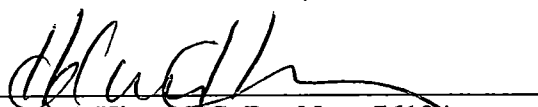
As a result, this Court should reject Claimant's argument concerning attorney's fees and Long-Term Disability.

CONCLUSION

For all the reasons stated herein, this Court should affirm the Commission Decision and dismiss this appeal.

March 31, 2017

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