THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
WCC File No. 1307602

Appellate Case No. 2016-001003

Verma Tedder,

Claimant, Appellant,

v.

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

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

This is an admitted accident case decided by the Workers' Compensation Commission on a Form 21 filed September 5, 2014. While originally claiming injury to her right arm, right hand, right knee, left leg, and back, Appellant ultimately abandoned all of her claims except for the injuries to her left knee and lower back. Following a surgery on her left knee and follow-up physical therapy, her authorized provider, Dr. Elvington declared her to have reached maximum medical improvement as of August 26, 2014, assigned her a three percent permanent physical impairment to her left knee, and released her with no restrictions. (ROA pp. 276-304). At about the same time, Appellant was seen by Dr. Edwards in follow up for her low back pain. He declared her to be at maximum medical improvement as of July 3, 2014, assigned her five percent impairment rating, and released her with no restrictions. (ROA p. 358).

Respondents filed a Form 21 on September 5, 2014 to stop payment to Appellant for Temporary Total Disability ("TTD"). (ROA p. 35). The Commission scheduled a

hearing on October 29, 2015. Appellant then filed a Form 58 claiming for the first time that she is totally and permanently disabled. (ROA p. 232). As a result, the Commission notified the parties that mediation would be required pursuant to S.C. Reg. 67-1802. The October hearing was continued to permit mediation. (ROA p. 237). The parties mediated on February 23, 2015. Thereafter, the hearing date was rescheduled for May, but then was continued based on scheduling conflicts of counsel, each time with the consent of all parties including counsel for Appellant. (ROA p. 30).

While the mediation and hearings were pending scheduling, Appellant scheduled additional assessments with experts of her choice. Appellant participated in a Functional Capacity Evaluation which showed sub-maximal effort on her part and self-limiting throughout the testing. (ROA pp. 370-392). She also underwent a Vocational Evaluation to support her claim for permanent and total disability. Respondents received these reports as part of Appellant's April 17, 2015 submissions. In response, Respondents requested that Appellant submit to evaluation with their Vocational Expert. After weeks of Appellant refusing to cooperate with Respondents' request, Respondents filed a Motion to Compel her to submit to a Vocational Evaluation with their expert. (ROA pp. 410-413). On August 7, 2015, the Commission responded by denying Respondents' Motion but warning Appellant that "if Claimant chooses not to submit to Defendants' evaluation, neither party's Vocational Report will be considered by the undersigned Commissioner." (ROA . 1).

Appellant elected not to submit to evaluation by Respondents' expert, and instead, at the hearing on August 20, 2015, before the Single Commissioner, asked that the Commissioner reconsider her ruling regarding the Vocational Evaluation which the

Commissioner denied based, in part, on Appellant's "myriad of credibility issues." (ROA p. 19)

Following the submission of evidence and the hearing, the Single Commissioner found Appellant sustained a ten percent permanent partial disability to left knee, an eight percent permanent partial disability to her back and found that Appellant is not permanently and totally disabled under either S.C. Code § 42-9-10 or § 42-9-30(21). She ordered a total of 43.5 weeks of compensation for the injuries. The Commissioner further ordered that Respondents are entitled to credit back for the TTD payments made since they filed the Form 21 on September 8, 2014.

Appellant appealed the Single Commissioner's ruling to the Appellate Panel. Following a February 22, 2016 hearing and its *de novo* review of the facts, the Panel issued its Order on April 20, 2016. The Panel concurred with and affirmed the decision of the Single Commissioner and rejected Appellant's new claim that Respondents' request for credit for the TTD benefits paid following the submission of the Form 21 be denied under the doctrines of laches and waiver. This appeal follows.

FACTS

Appellant was a teacher's aide for sixteen years with Respondent Darlington County Community Action Agency. On March 29, 2013, Appellant was supervising three-year-old children on the playground when one of the children ran in front of her, causing her to fall to the ground on her left side.

Appellant initially claimed injuries to her right arm, right hand, right knee, left leg, and lower back. She was seen at McLeod Urgent Care, (ROA pp. 248-266), and went

to physical therapy. (ROA pp. 276-385). She then saw McLeod Occupational Health, (ROA pp. 305-306), who referred her to Pee Dee Orthopaedic. (ROA p. 320).

Appellant was examined and treated by Dr. Robert Elvington who diagnosed a medial meniscus tear of the left knee, (ROA pp. 330-331), and performed a partial medial meniscus meniscectomy on September 4, 2013 (ROA p. 338). On December 3, 2013, Dr. Elvington provided limited work restrictions for Appellant. (ROA 339).

Thereafter, Appellant followed up with Dr. Elvington and continued to complain of right knee pain. Dr. Elvington ultimately opined during his Deposition on March 4, 2014, that any right knee complaints were not related to her admitted injury. (ROA pp. 98-134).

Post-surgery, Appellant continued to be evaluated and treated by Dr. Elvington and was referred for a course of physical therapy with Lowe's Physical Therapy. (ROA pp. 276-304). On August 26, 2014. Dr. Elvington found her to be at maximum medical improvement (left knee) with a permanent impairment rating of three percent (3%) and no restrictions. (ROA p. 360.) Appellant testified at the hearing that she was not aware of any restrictions on her ability to return to work after her August 26, 2014 appointment with Dr. Elvington. (ROA p. 194, lines 1-8). Nevertheless, Appellant never returned to work and continues to insist she is permanently and totally disabled from work.

Appellant was also seen during this time by her treating orthopedic spine specialist, Dr. Edwards, also of Pee Dee Orthopedics. Dr. Edwards noted on July 3, 2014 that "patient was reassured there is no evidence of underlying compressive pathology or instability that would require surgical intervention. Use of good body mechanics and careful lifting techniques are emphasized. She is at maximum medical improvement and

has a 5% impairment of her spine based on her industrial injury. No specific restrictions are necessary. She is discharged." (ROA p. 358)

Appellant was then referred by her attorney to Tracy Hill, P.T., of Columbia Rehabilitation Clinic, Inc. for a Functional Capacity Evaluation ("FCE") on September 12, 2014. Hill noted that "a five position hand grip test was performed and graph results did not resemble a bell-shaped curve indicating sub-maximum efforts. Coefficients of variation at position 2 of the right hand were above 15% indicating sub-maximal effort..." Appellant repeatedly self-limited throughout the testing, which she herself – not the evaluator – ultimately terminated based on her own subjective complaints of pain. (ROA pp. 370-392).

Appellant also underwent a Vocational Evaluation by J. Adger Brown on September 19, 2014. She refused to submit to evaluation by Respondents' Vocational expert and so both the Single Commissioner and Commission refused to consider her expert's report.

At the hearing before the Single Commissioner, Appellant "ambulated laboriously" with a cane though no doctor had prescribed her a cane and her pre-surgery notes indicated she had only a "mildly antalgic" gait, and later, had a "normal" gait. (ROA pp. 248-266 and ROA pp. 326-366).

The Panel in its Decision and Order concurred with the Single Commissioner regarding Appellant's substantial credibility problems, noting that "Claimant did not make a good witness on her own behalf," referring to the Single Commissioner's note of the same finding based on the Commissioner's observations of Appellant's demeanor and testimony at the hearing. Specifically, the Panel's Order noted that Appellant had

previously "completed and/or signed a form in which she denied any prior workers' compensation claims or impairment ratings." (ROA p. 29, Finding 19(c)) In fact, Appellant had filed a previous worker's compensation claim for injuries to her right knee, for which an impairment rating was assigned and for which she received a settlement, as well as a prior personal injury lawsuit for injuries to her back, which was likewise settled. (ROA p. 28, Finding 8).

ARGUMENT

The Administrative Procedures Act ("APA") governs this Court's review of the South Carolina Worker's Compensation Commission's decisions. *Shealy v. Aiken County*, 341 S.C. 448, 535 S.E.2d 438 (S.C. 2000) (*citing Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 276 S.E.2d 304 (1981). This Court will reverse the Commission's decision only if Appellant's substantial rights have been prejudiced because the decision is affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. *Id.* "Substantial evidence is not a mere scintilla of evidence nor evidence viewed from one side, but such evidence, when the whole record is considered, as would allow reasonable minds to reach the conclusion the Full Commission reached." *Id. quoted in Whigham v. Jackson Dawson Communs.*, 410 S.C. 131, 763 S.E.2d 420 (S.C. 2014). In workers' compensation cases, the Full Commission is the ultimate fact finder. *Id. citing Hunter v. Patrick Constr. Co.*, 289 S.C. 46, 344 S.E.2d 613 (1986). The final determination of witness credibility and the weight to be accorded evidence is reserved to the Full Commission. *Id. citing Ford v. Allied Chem. Co.*, 252 S.C. 561, 167 S.E.2d 564 (1969). It is not the task of this Court to weigh the

evidence as found by the Full Commission. *Id. citing Ellis v. Spartan Mills*, 276 S.C. 216, 277 S.E.2d 590 (1981). "Under the scope of review established in the APA, this court may not substitute its judgment for that of the Appellate Panel as to the weight of the evidence on questions of fact," but may only reverse where the decision is affected by an error of law." *Fishburne v. ATI Sys. Int'l*, 384 S.C. 76, 681 S.E.2d 595 (Ct. App. 2009) (*citing Stone v. Traylor Bros., Inc.*, 360 S.C. 271, 274, 600 S.E.2d 551, 552 (Ct. App. 2004).

I. THE COMMISSION PROPERLY FOUND APPELLANT NOT TO BE PERMANENTLY AND TOTALLY DISABLED BECAUSE IT FOUND HER NOT CREDIBLE, BECAUSE SHE REFUSED TO SUBMIT TO A VOCATIONAL ASSESSMENT BY RESPONDENTS' EXPERT, AND BECAUSE SHE FAILED TO PUT FORTH APPROPRIATE EFFORTS DURING THE ASSESSMENTS SHE DID AGREE TO UNDERGO.

A. A fair reading of record as a whole clearly supports the Appellate Panel's findings of fact and legal conclusions.

At the heart of the Appellate Panel's finding that Appellant is not permanently and totally disabled as a result of her admitted injury is its reliance on the testimony and records of the two authorized physicians who treated Appellant for her left knee and low back injury. Dr. Elvington diagnosed a medial meniscus tear of the left knee (ROA pp. 330-331) and performed a partial medial meniscus meniscectomy on September 4, 2013 (ROA p. 338) and then oversaw Appellant's recovery. On December 3, 2013, while Appellant was recovering from surgery, Dr. Elvington provided limited work restrictions for Appellant. Thereafter, Appellant followed up with Dr. Elvington and was also referred to a course of physical therapy with Lowe's Physical Therapy. (ROA pp. 276-304). Over nine months later, Dr. Elvington found her to be at maximum medical

improvement (left knee) with a permanent impairment rating of three percent (3%) and no restrictions. (ROA p. 360.) Appellant herself admitted at the hearing that she was not aware of any restrictions on her ability to return to work after her August 26, 2014 appointment with Dr. Elvington. (ROA p. 194, lines 1-8).

Nevertheless, Appellant never returned to work and continues to insist she is permanently and totally disabled from work and that the work restrictions given to her by Dr. Elvington during her post-surgery recovery period trump his final opinion. That final opinion, given nine months later, determined Appellant was at maximum medical improvement and provided a Permanent Impairment Rating of three percent and made no mention of permanent work-related restrictions. Appellant did not present a Form 14B or elicit in the deposition of Dr. Elvington any opinions as to permanent work restrictions.

Appellant was also seen during this time by her treating orthopedic spine specialist, Dr. Edwards, who noted on July 3, 2014, that "patient was reassured there is no evidence of underlying compressive pathology or instability that would require surgical intervention. Use of good body mechanics and careful lifting techniques are emphasized. She is at maximum medical improvement and has a 5% impairment of her spine based on her industrial injury. No specific restrictions are necessary. She is discharged." (ROA p. 358).

In the face of the explicit opinions of both of her treating physicians that she had reached MMI and needed no permanent work restrictions, Appellant hired a non-treating physical therapist, Tracy Hill, to complete a Functional Capacity Evaluation to support her contention that she is unable to return to work. However, her own expert found that "a five position hand grip test was performed and the graph results did not resemble the

bell-shaped curve indicates sub-maximal effort. Coefficients of variations at position 2 of the right hand were above 15% indicate sub-maximal effort. Wydell's evaluation of non organic signs were negative." (ROA p. 370). The remainder of Ms. Hill's report if rife with Appellant's further "sub-maximal effort" and self-limiting due to subjective complaints of pain on the vast majority of the tests. (ROA pp. 378-389, pp. 391-392).

Appellant claims that even with such findings by her own expert, the Single Commissioner and Appellate Panel were obligated to accept without question, Ms. Hill's conclusion that Appellant could only return to work with restrictions. In support of her argument, Appellant cites *Burnette v. City of Greenville*, 401 S.C. 417, 737 S.E.2d 200 (Ct. App. 2012) which cautions Commissioners against interpreting test results where there is no competent medical evidence in the record to support the Commissioners' interpretations. In fact, far from substituting their judgment for that of the hired expert, Ms. Hill, the Single Commissioner and Appellate Panel credited Hill's findings as to Appellant's sub-maximal efforts and combined those findings with the explicit findings of the actual treating physicians who placed no limitations on Appellant's ability to work. This situation is far from one where a single commissioner purports to read and interpret MRI studies without the benefit of an expert opinion. Here, the Single Commissioner and the Appellate Panel all viewed the FCE report's data as supporting their conclusion that Appellant lacks credibility and is not, in fact, totally and permanently disabled.

South Carolina Code Ann. §42-9-10 provides for a permanent total disability if "the incapacity for work resulting from an injury is total." The extent of disability is a question of fact to be proved as any other fact is proved. *Hanks v. Blair Mills, Inc.*, 286

S.C. 378, 384, 335 S.E. 2d 91, 95 (Ct. App. 1985). In *Wynn v. Peoples Natural Gas Co. of S.C.*, 238 S.C. 1, 11 – 12, 118 S.E. 2d 812, 817 – 18 (1961), our Supreme Court stated:

> Disability in compensation cases is to be measured by loss of earning capacity. Total disability does not require a complete helplessness . . . the generally accepted test of total disability is the inability to perform services other than those that are 'so limited in quality, dependability or quantity that a reasonably stable market for them does not exist.'"

While permanent total disability is generally based on loss of earning capacity, S.C. Code §42-9-30 (21) states that there is a rebuttable presumption of permanent total disability when a Claimant has 50% or more loss of use of the back. Therefore, a Claimant with 50% or more loss of use of the back is not required loss of earning capacity to establish permanent total disability. *Bateman v. Town & Country Furniture Co.*, 287 S.C. 158, 160, 336 S.E. 2d 890, 891 (Ct. App. 1985) (Holding a Claimant who suffers 50% or more of loss of use of the back or knee not showing loss of earning capacity to recover PPD).

Here, Appellant's Permanent Impairment Rating was a mere five percent to the back so there is no presumption she is entitled to Permanent Total Disability. Likewise, her three percent Permanent Impairment Rating to the left leg does not entitle her to permanent and total disability pursuant to S.C. Code §42-9-10. The burden on is on Appellant to prove as a matter of fact that she has "the inability to perform services other than those that are 'so limited in quality, dependability or quantity that a reasonably stable market for them does not exist.'" Both of Appellant's physicians released her without work restrictions and with relatively modest impairment ratings. Other than her hired gun expert who herself questioned Appellant's efforts, the only evidence to support Appellant's claims of an inability to perform services is her own testimony.

Given Appellant's strong reliance on her own testimony that she is unable to return to work, the Single Commissioner and Appellate Panel quite properly focused on their observations of Appellant's lack of credibility. In addition to the questionable effort at her own FCE, Appellant was observed by the Single Commissioner to ambulate laboriously into and of the hearing room with a cane that no doctor had prescribed. Her medical records, however, indicated that before surgery she walked with a "mildly antalgic" gait, and, that she walked with a normal gait post-surgery. (ROA pp. 254, 260, 262; ROA pp. 357-358; ROA pp. 110-111). Further, Appellate denied at her hearing her prior right knee problems, (ROA p. 166, lines 22 – 23), however, she had previously admitted a prior Worker's Compensation settlement and permanent impairment rating for an injury to right knee. (ROA pp. 50-55).

As this Court has stated, "the Commission is the sole fact finder in workers compensation cases and . . . any questions of credibility must be resolved by the Commission." *Smith v. S.C. Dept. of Mental Health*, 329 S.C. 45, 501, 494 S.E.2d 630, 638 (Ct. App. 1997). It makes good sense for the Appellate Panel, which did not have the benefit of observing the witnesses, to give weight to the Hearing Commissioner's opinion. *Green v. Raybestos-Manhatten, Inc.,* 250 S.C. 58, 64, 156 S.E. 2d 318,321 (1967). *In Fishbourne v. ATI Systems Intern*, 384 S.C. 76, 681 S.E. 2d 595 (Ct. App. 2009), on facts substantially similar to those presented here, this Court found there was substantial evidence to support the Appellate Panel's Decision that the claimant's testimony was not credible including the fact that the claimant ambulated into the hearing room with a cane that no doctor prescribed. That conduct, in addition to her other inconsistent statements, caused the Single Commissioner and Appellate Panel to question

that claimant's credibility. Just as in *Fishbourne*, this Court should defer to the Appellate Panel's factual determination that Appellant lacks credibility.

Moreover, where, as here, the Panel was faced with conflicting testimony (the treating physicians vs. the Appellant and her hired expert), this Court is constrained by the standard of review. *Colonna v. Marlboro Park Hosp.*, 404 S.C. 537, 745 S.E.2d 128 (Ct. App. 2013) (*citing Stokes v. First Nat'l Bank*, 306 S.C. 46, 50, 410 S.E.2d 248, 251 (1991). Both the Single Commissioner and the Appellate Panel quite reasonably elected to credit the testimony and evidence from the two primary treating physicians and the actual findings of Appellant's expert of sub-maximal and self-limiting effort over the conclusory testimony of the non-treating physical therapist and the less than credible testimony of Appellant herself.

When the evidence is conflicting, the findings of the Appellate Panel are conclusive. *Hargrove v. Titan Textile Co.*, 360 S.C. 276, 290, 599 S.E.2d 604, 611 (Ct. App. 2004). The final determination of witness credibility and the weight to be accorded evidence is reserved for the Appellate Panel. *Bass v. Kenco Group*, 366 S.C. 450, 458, 622 S.E.2d 577, 581 (Ct. App. 2005). This Court should defer to the Commission which properly concluded that Appellant is not totally and permanently disabled.

B. The Commission properly excluded Appellant's Vocational Expert's Report because Appellant refused to undergo evaluation by Respondents' expert.

Appellant claims the Commission committed a reversible error of law by excluding her expert's Vocational Evaluation. Her argument is simply that because she provided the report to Respondents more than the ten days ahead of the scheduled

hearing as required by S.C. Reg. 67-612(B)(2), neither the Single Commissioner nor the Panel may exclude it as a sanction for her failure to submit to evaluation by Respondents' expert. Appellant's rather cursory argument ignores the well-settled law that administrative agencies are required to meet minimum standards of due process. *Smith v. South Carolina Dep't of Mental Health*, 329 S.C. 485, 494 S.E.2d 630 (S.C. Ct. App. 1997), and that "due process at least requires an opportunity to present favorable witnesses." *Id. citing Brown v. South Carolina State Bd. of Educ.*, 301 S.C. 326, 391 S.E.2d 866 (1990); *Tall Tower, Inc. v. South Carolina Procurement Review Panel*, 294 S.C. 225, 363 S.E.2d 683 (1987). Here, Respondents retained their own Vocational Expert two months prior to the final hearing to evaluate Appellant's report and perform their own independent evaluation. Appellant ignored repeated requests for her to be evaluated, and, even after the Single Commissioner warned her that her refusal to submit to evaluation would result in her expert's report being excluded, she continued to refuse to cooperate or be evaluated by Respondents' expert.

Had the Commissioner and Appellate Panel considered Appellant's expert's report, Appellant would have been rewarded for her obduracy in refusing to cooperate and Respondents would not have received due process. Both the Single Commissioner and Appellate Panel rightfully disregarded the conclusions of Appellant's Vocational Report as a sanction for her failure to comply and should be affirmed.

However, even if this Court concludes the Commission should have considered Appellant's Vocational Expert's Report, its failure to do so was harmless as the report was neither controlling nor supported by any of the other medical evidence in the

record. Expert testimony is to be considered like any other testimony. *Tiller v. Nat'l Health Care, Ctr. Of Sumter*, 334 S.C. 333,340,513 S.E. 2d, 843, 846 (1999). While medical testimony is entitled to great respect, it should not be held conclusive irrespective of other evidence and the fact finder may disregard it if the record includes other competent evidence. *Id.* at 340, 513 S.E. 2d at 846.

Appellant's own medical providers demonstrate that post-surgery and physical therapy, she had no work restrictions as found by the Vocational Expert. The August 26, 2014 Addendum by Dr. Elvington does not mention any permanent work restrictions (ROA p. 360). Furthermore, Appellant's Vocational Expert opined "that it is her back that is most painful and most limiting." (ROA p. 398). Yet, Appellant's authorized treating physician, Dr. Edwards, noted in his exam in which he found her to be at maximum medical improvement that was a "pleasant female in no acute distress, rises easily from sitting to standing; decreased loradosis; reluctant to reverse loradosis without forward flexion; returns upright with muscular dysrhythmia; motor strength in the lower extremities is 5 of 5; reflexes are 2 plus and symmetric; hip motion is full and painless; peripheral pulses full; no dermatol paresthesias; no sciatic stretch signs; no long track findings and gate is normal." (ROA p. 358). Dr. Edwards further interpreted the MRI Appellant's spine as showing (a) no stenosis or other abnormality, (b) "no serious pathology," (c) no compressive pathology; (d) no need for surgical intervention or invasive treatment; and (e) no need for restrictions. (ROA pp. 357-358).

The overwhelming evidence is that Appellant is not permanently and totally disabled as a result of her admitted injury of March 29, 2013, and, even if Appellant's

Vocational Expert's report had been admitted and considered, it would not have materially changed the findings of the Panel. Therefore, its exclusion even if error is harmless and should not justify the reversal of the Commission's findings.

II. THE COMMISSION PROPERLY REFUSED TO APPLY THE DOCTRINES OF LACHES AND WAIVER TO BAR RESPONDENTS' CLAIMS FOR CREDIT FOR THEIR OVERPAYMENTS TO APPELLANT.

Appellant's second issue on appeal asserts that because the hearing on Respondents' Form 21 was "set and continued on six (6) different occasions over the course of a year at the Defendants' request," (Appellant's Brief at p. 17), Respondents have lost their right to credit for their overpayments to her. Factually, Appellant's assertion is incorrect. The Form 21 hearing was initially scheduled to be heard on October 29, 2014. Prior her Form 58 submissions in advance of that hearing, Appellant had not alleged that she was permanently and totally disabled. (ROA pp. 232-235). Even in that filing, Appellant did not indicate that mediation was required pursuant to S.C. Reg. 67-1802. South Carolina Regulation 67-1802(A) requires that "claims arising under §42-9-10 or claiming permanent and total disability pursuant to §42-9-30(21) ... must be mediated prior to a Hearing."

Following Appellant's pre-hearing briefings, the parties agreed they were required to mediate pursuant to the Regulation. Mediation proceeded on February 23, 2015. When mediation failed, Respondents' Form 21 was reset for a Hearing on May 5, 2015. Thus, the largest part of the delay in receiving a hearing was due to Appellant's belated assertion of total and permanent disability and the resulting need for mediation pre-

hearing. Because of counsel's involvement in the unusual, extended General Assembly sessions that summer, the hearing had to be carried over from May 5, 2015 until August 20, 2015, a span of just over three months – not the one year asserted by Appellant. For each continuance, Respondents requested and received Appellant's consent. The delay in scheduling the hearing cannot fairly be attributed solely to the actions of Respondents nor is there any evidence that any ill-motive and nefarious purpose underlay the minor scheduling delays. *C.f., Sanders v. MeadWestvaco Corp.*, 371 S.C. 284, 638 S.E.2d 66, (Ct. App. 2006) ("Under section 42-9-260, Westvaco was entitled to have its request to terminate temporary total benefits heard within 60 days of filing the request. Here, the delay in having a timely hearing falls squarely on both parties. Thus, we find no substantial evidence supporting the Appellate Panel's decision to overpay benefits to Sanders.")

Despite Appellant's having consented to each continuance, she is now before this Court claiming Respondents have lost their right to credit for their overpayment of TTD based on the doctrines of "laches" and "waiver." First, laches is an equitable principle that applies only where a party delays doing something that in law should have been done for an unreasonable and unexplained length of time. *Midstate Trust, II v. Wright.* 323 S.C. 303, 474 S.E. 421 (1996). *See also Provident Life and Accident Ins. Co. v. Driver*, 317 S.C. 471, 451 S.E. 2d 924 (Ct. App. 1994) (laches is negligent failure to act for an unreasonable period of time). Second, under the doctrine of laches, if a party, knowing his rights, does not timely assert them, but by unreasonably delay causes his adversary to incur expenses or otherwise detrimentally change his position, then equity will ordinarily

refuse to enforce these rights. *Id.* Delay standing alone does not, in and of itself, constitute laches. *Mid-State Trust*, 323 S.C. at 307.

Here, Appellant has not even alleged that she incurred any expenses or detrimentally changed her position because of the hearing delay. Moreover, she has not made the barest assertion of negligence on Respondents' part or that any of the delays were unreasonable. The first delay from August to May occurred because of the requirement the case be mediated once Appellant alleged permanent and total disability. The second, three-month series of delays related to the Legislative duties of counsel for Respondents. Nothing in either set of delays bespeaks of negligence or smacks of unreasonableness. Laches simply does not apply on these facts.

Moreover, Appellant bears the burden of proving negligence, the opportunity to have acted sooner, and material prejudice to her. *Provident Life and Accident Ins. Co.*, 317 S.C. at 478; *Mid-State Trust*, 323 S.C. at 307 (the party asserting laches must show that it has been materially prejudiced by the other party's delay). Appellant continued to draw Temporary Total Disability knowing full well that she could be ordered to repay any overpayments should the Panel rule against her. There was no expenditure of resources on her part and no change in her legal position at all. She stands in exactly the same shoes as any claimant receiving TTD and so she could not have been prejudiced by the allegedly unreasonable delay. Moreover, rather than opposing the continuance requests, Appellant's counsel consented to them and even asserted at the Hearing that they were entirely appropriate and that Appellant did not believe she was prejudiced by the rescheduling of the hearing. (ROA p. 148, lines 1-13).

As to Appellant's claim that somehow, by pursuing the mandated pre-hearing mediation and asking for continuances to permit counsel to attend to his Legislative duties, Respondents effectively waived their right to reimbursement for overpayment of benefits, that too should be unavailing. As discussed above, the majority of the delay in having Respondents' motion heard was directly related to Appellant's belated assertion of total and permanent disability requiring pre-hearing mediation. The remaining continuances were all for legitimate reasons and were granted with the consent of Appellant.

Our Court summarized the law of laches along with waiver in *Strickland v. Strickland*, 375 S.C. 76, 85-6, 650 S.E.2d 465, 470-1 (1997):

> Laches is an equitable doctrine which arises upon the failure to assert a known right. *Emery v. Smith*, 361 S.C. 207, 215, 603 S.E.2d 598, 602 (Ct.App.2004). The equitable doctrine of laches is equivalent to the legal doctrine of waiver, which is the "voluntary and intentional relinquishment or abandonment of a known right," *Parker v. Parker*, 313 S.C. 482, 487, 443 S.E.2d 388, 391 (1994). Both laches and waiver require a party to have known of a right, and known that the party was abandoning that right.

Our Court's application of the waiver and estoppel law from *Strickland* and *Parker* was reiterated in *Eason v. Eason*, 384 S.C. 473, 682 S.E.2d 804, 807-8 (2009):

> "Waiver is a voluntary and intentional abandonment or relinquishment of a known right." *Parker v. Parker*, 313 S.C. 482, 487, 443 S.E.2d 388, 391 (1994). Stated differently, waiver requires a party to have known of a right and known he was abandoning that right. *Strickland*, 375 S.C. at 85, 650 S.E.2d at 471.

In short, in order for waiver to apply to these facts, the Appellate Panel would have had to have found that Respondents, by requesting continuances from May to August to permit counsel to fulfill his Legislative duties, knowingly and intentionally abandoned

their claims for credit for the overpayment of benefits. No evidence of such an intentional waiver of rights exists.

Appellant's last allegation is that the Appellate Panel should not have credited Respondents for their overpayment of TTD going back to their filing of their Form 21 because she claims S.C. Code § 42-9-210 does not apply. Her theory is that because the Commission had not yet confirmed her date of maximum medical improvement, the payments she had been receiving were actually "due and payable when made" and so could not be credited back to Respondents. Appellant's logic strains credulity as the purpose of S.C. Code 42-9-210 is to provide for the crediting of overpayments in just these type of situation. *See e.g.*, *Sanders v. MeadWestvaco Corp.*, 371 S.C. 284, 638 S.E.2d 66 (Ct. App. 2006) (*citing Hendricks v. Pickens County*, 335 S.C. 405, 414, 517 S.E.2d 698, 703 (Ct. App. 1999) (It was appropriate for a commission to determine whether or not to provide a credit to the employer and workers' compensation insurer pursuant to S.C. Code § 42-9-210 once the commission affirmed that the worker had reached maximum medical improvement.)). Because S.C. Code § 42-9-210 clearly applies and because the Appellate Panel quite correctly found that Appellant had not carried her burden of proof on her laches or waiver claim, this Court should affirm the Appellate Panel in all respects.

CONCLUSION

For the reasons stated, Respondents request that this Court affirm the judgment of the Appellate Panel in all respects.

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
WCC File No. 1307602

Appellate Case No. 2016-001003

Verma Tedder.....Claimant/Appellant,

Vs.

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

The undersigned counsel for the Respondents hereby certifies that the Respondent's Brief complies with SCAR 211(b).

RESPECTFULLY SUBMITTED,

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