BEFORE THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION'S APPELLATE PANEL

CHISHOLM FRAMPTON, Employee/Claimant, v. S.C. DEPARTMENT OF NATURAL RESOURCES, Employer, and S.C. STATE ACCIDENT FUND, Carrier, Defendants.	W.C.C. FILE NO. 1012533 **DECISION & ORDER**

STATEMENT OF THE CASE

The Claimant alleges that on September 4, 2010, he was driving a truck across a dove field and injured his neck. He claims to have permanent injuries to his neck and both arms. According to the Claimant, he has lost more than 50% of his back and requires additional medical treatment.

The Defendants contend that the alleged events of September 4, 2010 caused nothing more than a cervical sprain or strain injury and that he did not aggravate any of his known pre-existing conditions, which include a C6-7 radiculopathy diagnosed approximately six months prior to the dove field incident. Therefore, the Defendants argue that S.C. Code Ann. § 42-9-35 bars the claim for benefits. The Defendants further argue that the Claimant reinjured his neck in a subsequent intervening accident on November 4, 2010, after which he required a cervical fusion surgery that was covered under the State Health Plan. The Claimant later reinjured his neck in a subsequent, intervening motor vehicle accident on May 16, 2011. Therefore, the Defendants contend

that any permanent loss of us of the neck (back) and any need for medical treatment is not proximately related to the dove field incident on September 2, 2010 and is not the responsibility of the Defendants.

The claim originally came before Commissioner Taylor for a hearing on July 15, 2017 pursuant to the Forms 50 and 51. In her October 3, 2016 Decision and Order, Hearing Commissioner Taylor found that the "Claimant suffered from pre-existing neck pain and right arm numbness" and that "there is no medical evidence stated to a reasonable degree of medical certainty that the Claimant's September 4, 2010 dove field incident aggravated or exacerbated his pre-existing neck condition for which he was already treating with a neurosurgeon." Commissioner Taylor also concluded that the "Claimant did not meet his burden of proof under S.C. Code Ann. § 42-9-35." Neither these findings, nor this conclusion, were appealed by the Claimant and are; therefore, the law of the case. As such, the Defendants argue that the Hearing Commissioner erred as a matter of law in awarding the Claimant any benefits under the Act. We agree.

HEARING COMMISSIONER'S FINDINGS AND CONCLUSIONS

The Hearing Commissioner made the following Findings of Fact and Conclusions of Law in her October 3, 2016 Decision and Order:

FINDINGS OF FACT

1. I find Claimant suffered from pre-existing neck pain and right arm numbness prior to his alleged work injury. Most notably, Claimant received treatment with Dr. Bailey, a neurosurgeon, on March 16, 2010, just six months prior to his alleged work injury, when Claimant was prescribed physical therapy, Lortab and Flexeril. (Defendants' Exhibit B). An MRI dated the same showed Claimant had spondylosis,

most impressive at C5-6 and C6-7 and bilateral C6 in right grade and left C7 radiculopathy... (Defendants' Exhibit A).

2. Claimant's Form 50 Request for Hearing and Form 58 Pre-Hearing Brief alleges an injury by accident on September 4, 2010. Although Claimant sent a subsequent letter to Mr. Harry Gregory of the State Accident Fund alleging an injury on November 4, 2010, I find Claimant's testimony admitting the possibility of an error as well as a medical note dated September 7, 2010 support Claimant's allegation of a September 4, 2010 work accident.

3. Claimant returned to Dr. Baily on March 15, 2011. Claimant's intake sheet notes Claimant's complaints/problems began on February 20, 2010, prior to the date of either alleged work injury. Dr. Bailey again noted continued complaints of neck pain and right arm numbness and referred Claimant to Dr. Keffer for a nerve conduction study.

4. Claimant presented to Dr. Keffer on March 16, 2011 for a nerve conduction study. Claimant reported that his problems had started "14 months earlier", that his neck pain "gradually began", and that he had these problems "for years".

5. On March 21, 2011, Claimant underwent an anterior cervical discectomy and fusion. As of April 6, 2011, Claimant reported that he "had no further pain." (Claimant's APA p. 10).

6. On May 1, 2011, Claimant was released to return to work and he has been working full-time for the employer since.

7. I find there is no medical evidence stated to a reasonable degree of medical certainty that Claimant's September 4, 2010 dove field incident aggravated or exacerbated his pre-existing neck condition for which he was already treating with a neurosurgeon. Nevertheless, Defendants admitted the claim and provided medical treatment.

8. Claimant was involved in a major motor vehicle collision on June 16, 2011, which totaled his car and resulted in "immediate onset of neck

pain" that required treatment to include prescription medication and physical therapy. Claimant was placed on light duty as a result of the accident and Dr. Bailey noted the motor vehicle collision caused an "exacerbation of neck pain." (Claimant's APA p. 13)

9. As of November 22, 2011, Claimant's exacerbation of neck pain resulting from the motor vehicle collision had "mostly subsided," as such, I do not find the June 16, 2011 motor vehicle collision was a superseding intervening act sufficient to break the chain of causation. (Claimant's APA p. 15).

10. Claimant continued to treat with Dr. Bailey throughout 2012 wherein there were some flare-ups in pain; however, as of April 17, 2013 when he was released, Claimant only complained of occasional pain and was not taking any medications for pain. Dr. Bailey issued Claimant a 20% impairment rating to his cervical spine. (Claimant's APA p. 18).

11. Dr. Bailey completed a Form 14B Physician's Statement on September 20, 2013. On the Form 14B, Dr. Bailey noted that Claimant treated with him from March 15, 2011 through April 17, 2013 and that Claimant was at maximum medical improvement as of April 17, 2013. Dr. Bailey noted Claimant would need continued medical treatment to include annual x-rays and periodic MRIs of the cervical spine. This information was contained in the last treatment note dated April 17, 2013 as well.

12. Claimant submitted a second Form 14B Physician's Statement dated the same, September 20, 2013, wherein Dr. Bailey increased Claimant's impairment rating from 20% to the whole person to 26% to the whole person. In addition, Dr. Bailey opined Claimant was unable to return to work at his current employer and, in addition to the periodic x-rays and MRI scans, would also need medications as prescribed. Lastly, Dr. Bailey opined, "Patient may require further

surgery in the future if he were to develop hardware failure or adjacent level degeneration." (Claimant's APA p. 26).

13. I find Claimant had returned to work full time as of May 1, 2011 and has not missed any time from work related to his neck since that time. This finding is based on the evidence as a whole including the Claimant's testimony. Furthermore, I find Claimant had received two promotions since returning from his work injury and at the time of the hearing was the Deputy Director of the Department of Natural Resources and earned an annual salary of $102,500.00.

14. Based on Claimant's return to work and promotions received since his original date of injury, I give Dr. Bailey's revised Form 14B very little weight due to his opinion that Claimant couldn't return to his current employment. That opinion is completely disproven by the facts of the case and calls into question the additional information placed in the revised Form 14B.

15. I did not find Claimant's testimony to very credible with regard to the extent of his pre-existing neck condition and his current symptomology. The Findings of Fact contained herein are based strictly on the medical evidence and evidence of Claimant's employment history with SCDNR.

16. I find Claimant is at maximum medical improvement as of April 17,2013 per Dr. Bailey.

17. I find Claimant is not permanently and totally disabled as alleged.

18. I find this claim is governed by S.C. Code Ann. Section 42-9-30(21).

19. I find Claimant has sustained 20% permanent partial disability to his back as a result of his work injury. This finding is based on the evidence as a whole including the"20% medical impairment to the cervical spine" as noted in the original Form 14B and the "26% of the whole person medical impairment for the cervical spine" as noted in the revised Form 14B dated the same — which I did not give as much weight due to its inaccuracy regarding Claimant's work status. I also considered Claimant's continued full-duty, unrestricted employment and advancement/promotions within the Department of Natural Resources since his work injury. The opinions of Dr. Poletti have also been considered.

20. Claimant also alleges an injury to both arms as a result of this injury. At the hearing, Claimant testified as to a loss of strength in his arms; however, I find this is not supported by a preponderance of the medical evidence and is therefore denied.

21. I find Claimant is entitled to yearly x-rays and periodic MRIs as recommended in Dr. Bailey's Form 14B.

22. In the revised Form 14B, Dr. Bailey indicated Claimant would continue to need "medications as prescribed"; however, as of the last medical appointment with Dr. Bailey, April 17, 2013, Claimant was not taking any prescription medication. Additionally, at the hearing — two years after being released from Dr. Bailey for this work injury - Claimant admitted on cross-examination that he was not taking any prescription medication for his neck injury. As such, I find Claimant is not entitled to pain medication as a result of this work injury.

23. Claimant is not entitled to further surgical procedures due to adjacent level degeneration noted in Dr. Bailey's revised Form 14B. I find the statement regarding the same is speculative and based on an event that may or may not occur.

24 *I find Claimant is entitled to lifetime maintenance of the hardware in his cervical spine per the Act.*

CONCLUSIONS OF LAW

1. *The Claimant sustained an injury to his neck by accident arising out of and in the course of his employment on September 4, 2010 pursuant to S.C. Code Ann. § 42-1-160.*
2. *The Claimant did not meet his burden of proof under S.C. Code Ann. § 42-9-35. The record is clear that he has a history of cervical radiculopathy that predates the September 4, 2010 accident and there is no competent medical evidence that the September 4, 2010 accident aggravated that pre-existing condition. In fact, the records of the Claimant's treating physician, Dr. Bailey, make no mention of any work-related accident or injury on or about September 4, 2010 and the Claimant's own statements to Dr. Bailey indicate that his neck problems began in January 2010.*
3. *Geathers v. 3V, Inc., 371 S.C. 570 (2007) holds that when a non-disabling work injury is aggravated by a subsequent accident, the Claimant is not entitled to any additional medical or compensation benefits as a result of the first accident. While the Claimant was involved in a major motor vehicle collision on June 16, 2011, which totaled his car and resulted in "immediate onset of neck pain" that required treatment to include prescription medication and physical therapy, as well as light duty restrictions, and while Dr. Bailey concluded that the motor vehicle collision caused an "exacerbation of neck pain," the court's holding in Geathers does not apply to the facts of this case.*
4. *Pursuant to S.C. Code Ann. § 42-9-10 and § 42-9-20, the Claimant has no loss of wage-earning capacity as a result of the September 4, 2010 accident and; therefore, he is not entitled to any benefits under these statutes.*

5. *Pursuant to S.C. Code Ann. § 42-9-30(21), the Claimant is entitled to 60 weeks of compensation at the rate of $689.71 per week, representing benefits for a 20% loss of use of the back (neck).*
6. *Pursuant to S.C. Code Ann. § 42-15-60, the Clamant reached maximum medical improvement as of April 17, 2013, and there is no additional medical care or treatment that would tend to lessen the period of disability. Further, pursuant to S.C. Code Ann. § 42-15-60, the Claimant is entitled to yearly x-rays and periodic cervical MRI scans as recommended by Dr. Bailey, so long as they are causally-related to the September 4, 2010 accident and would tend to lessen the period of disability caused by the September 4, 2010 accident. The Claimant is also entitled to lifetime maintenance of the surgical hardware in his cervical spine.*

ISSUES ON APPEAL

The parties both appealed the Hearing Commissioner's October 3, 2016 Decision and Order. The Claimant's Form 30 raises only a single on appeal:

1. *The Single Commissioner erred in regard to the finding that the injured worker only lost 20% of the spine inasmuch as the finding is not consistent with the substantial evidence in the record, which indicates a greater percentage loss of use of the spine or a finding of permanent and total disability pursuant to § 42-9-30.*

The Claimant did not challenge any of the Hearing Commissioner's other Findings of Fact or Conclusions of Law.

By their cross-appeal, the Defendants raised the following issues in their Form 30:

1. *Did the Hearing Commissioner err as a matter of law in awarding medical and compensation benefits to the Claimant after finding and concluding that the Claimant did not meet his burden of proof under S.C. Code Ann. § 42-9-35?*

2. *Did the Hearing Commissioner err as a matter of law in concluding that Geathers v. 3V, Inc., does not apply to the facts of the case?*

3. *Did the Hearing Commissioner err as a matter of law in failing to find and conclude that the Claimant is not entitled to any medical or compensation benefits based on the holding of Geathers v. 3V, Inc.?*

4. *Does the greater weight of the evidence support the Hearing Commissioner's finding that the Claimant's subsequent motor vehicle accident, which admittedly exacerbated the Claimant's alleged neck injury, did not "break the chain of causation"?*

5. *Did the Hearing Commissioner err in failing to find and conclude that any need for medical treatment is not causally-related to the alleged accident of September 4, 2010 based upon the greater weight of the evidence and the applicable law?*

6. *Did the Hearing Commissioner err in failing to find and conclude that any alleged permanent impairment or disability is not causally-related to the alleged accident of September 4, 2010 based upon the greater weight of the evidence and the applicable law?*

EVIDENCE SUMMARY

The Claimant is a 50-year-old college graduate. He has been employed by the Department of Natural Resources since 1993 and currently serves as a Colonel supervising the state's conservation officers.

According to the Claimant, on September 4, 2010, he was a passenger in a pick-up truck driving through a dove field. He believes that the bouncing in the truck that

day caused his neck to hurt. The Claimant sought medical treatment at Doctors Care three days later and subsequently sought treatment from Dr. Byron Bailey for neck and arm pain.

The Claimant testified that he did not "recall" seeing Dr. Bailey prior to the alleged dove field incident on September 4, 2010 and denied having any problem with his neck prior to September 4, 2010. However, Dr. Bailey's medical records clearly show that the Claimant began treating with Dr. Bailey for neck pain well before the incident. In a report dated March 16, 2010, Dr. Bailey noted that the Claimant had "numb dysesthesias affecting his right arm" and a cervical MRI scan showed disc degeneration at C6-7 affecting both exiting foramen. Dr. Bailey prescribed physical therapy, Flexeril, and Lortab. (Defendants' Exhibits A & B).

When the Claimant returned to Dr. Bailey on March 16, 2011, he reported that his neck pain started "gradually" over a period of "14 months." (Defendants' Exhibit E). There is absolutely no mention of any alleged accident or injury on September 4, 2010 (or any incident in a dove field) in any of the records of Dr. Bailey. Dr. Bailey performed a cervical discectomy and fusion on March 21, 2011, which was paid under the Claimant's group health insurance. There is no mention of any work-related accident or injury in Dr. Bailey's operative notes. The Claimant received sick leave while out of work following this surgery.

The Claimant testified that in June 2011, he was involved in a motor vehicle accident with his family in south Florida while driving a state vehicle. The Claimant admits that he sought medical treatment for pain in his neck and arms with Doctors Care and with Dr. Bailey as a result of the motor vehicle accident. A report from Doctors Care dated June 27, 2011 states that the Claimant was in a motor vehicle accident on

June 16, 2011 and now had "acute neck pain...reactivation of prior injury." (APA p.5). Dr. Bailey's records include a report dated July 1, 2011, which states that the Claimant was "involved in a motor vehicle accident in which the vehicle was totaled...resulting in immediate onset of neck pain." (APA p.12). As a result of the motor vehicle accident, Dr. Bailey prescribed several medications, including an anti-inflammatory, an analgesic, and a muscle relaxer, and he also placed new work restrictions (light duty) as a result of this new accident. (APA p.12). Dr. Bailey's report dated August 23, 2011 states that the Claimant was "involved in a motor vehicle accident which has caused exacerbation of neck pain" and as a result, Dr. Bailey recommended physical therapy. (APA p.13).

On cross-examination, the Claimant was confronted with a letter he wrote to Harry B. Gregory, Jr., the Director of the State Accident Fund. In this letter, the Claimant stated that

> "there is no doubt in my mind that I was injured on November 4, 2010. I did not experience any pain of this magnitude in my neck prior to November 4, 2010."

The Claimant testified that while he remembered writing this letter, he initially claimed "I was not injured on November 4th of 2010. I was injured in a dove field." (T. p.38, lines 2—13). Moments later, the Claimant testified that his neck problems in fact became worse on Thursday, November 4th, 2010. (T. p.40, lines 2—6). There is no mention of any injury or accident on Saturday, September 4, 2010 in the letter to Mr. Gregory.

At the hearing, the Claimant testified that he last saw Dr. Bailey in May 2015 because he was having "increasing pain in [his] neck." (T. p.28, line 14). However, the Claimant admits that he is working his regular, full time job and has been twice promoted since his neck surgery. He has not missed any significant period of time from work as a result of his neck and, at the time of the hearing, the Clamant was earning approximately $103,000 per year. The Claimant admits that he does not take any prescription medications for his neck and does not use any braces or assistive devices. (T. p.53).

DISCUSSION

Pursuant to S.C. Code Ann. § 42-9-35, the Claimant was required to prove, with expert medical evidence stated to a reasonable degree of medical certainty, that the alleged accident on September 4, 2010 aggravated his pre-existing neck condition.[1] Only by meeting this statutory burden of proof may the Commission properly award medical or compensation benefits the Claimant under the Act.

Here, the Claimant did not meet his required burden of proof under S.C. Code Ann. § 42-9-35. In fact, the Commissioner Taylor entered the following conclusion of law with respect to this failure:

> "The Claimant did not meet his burden of proof under S.C. Code Ann. § 42-9-35. The record is clear that he has a history of cervical radiculopathy that predates the September 4, 2010 accident and there is no competent medical evidence that the September 4, 2010 accident aggravated that pre-

[1] By employing the term "shall" in S.C. Code Ann. § 42-9-35, the legislature has made the Claimant's burden of proof mandatory. Collins v. Doe, 352 S.C. 462, 470, 574 S.E.2d 739, 743 (2002)("

existing condition. In fact, the records of the Claimant's treating physician, Dr. Bailey, make no mention of any work-related accident or injury on or about September 4, 2010 and the Claimant's own statement to Dr. Bailey indicate that his neck problems began in January 2010."

The Claimant's Form 30 makes no mention of this legal conclusion and raised no argument with regard to the application of S.C. Code Ann. § 42-9-35. Therefore, Commissioner Taylor's Conclusion of Law #2, which concludes that the Claimant did not meet his burden of proof under S.C. Code Ann. § 42-9-35 is the law of the case. Atlantic Coast Builders v. Lewis, 398 S.C. 323, 329 (S.C. 2012) (citing Buckner v. Preferred Mut. Ins. Co., 2255 S.C. 159 (1970) for the proposition that "an unappealed ruling, right or wrong, is the law of the case.").

The Hearing Commissioner also made a specific finding of fact regarding the Claimant's credibility (or rather, *lack thereof*) regarding this seminal issue under S.C. Code Ann. § 42-9-35. According to the Hearing Commissioner:

> "I do not find Claimant's testimony to be very credible with regard to the extent of his pre-existing neck condition and his current symptomology."

This finding was not appealed and is the law of the case. In addition, the Hearing Commissioner decided to

> "give Dr. Bailey's revised Form 14B very little weight due to his opinion that Claimant couldn't return to his current employment. That opinion is

completely disproven by the facts of the case and calls into question the additional information placed in the revised Form 14B."

This finding is also the law of the case because it was not appealed.

Because the Claimant failed to meet his burden of proof under S.C. Code Ann. § 42-9-35 and because an award of benefits under the Act must be necessarily predicated on meeting this statutory burden, the Appellate Panel concludes that Commissioner Taylor erred as a matter of law in awarding the Claimant medical and compensation benefits. Therefore, the award of benefits under S.C. Code Ann. § 42-9-30(21) and § 42-15-60 is hereby reversed and vacated as a matter of law.

CONCLUSION

After careful consideration of the arguments of the parties and the Record in this case, the Appellate Panel hereby REVERSES Hearing Commissioner Taylor's October 3, 2016 Decision and Order. The Appellate Panel; therefore, enters its own Findings and Conclusions consistent with S.C. Code Ann. § 42-17-50, as follows:

FINDINGS OF FACT

1. The Claimant's Form 50 Request for Hearing and Form 58 Pre-Hearing Brief allege that the Claimant sustained an injury to his neck and right arm by accident on September 4, 2010.

2. The Hearing Commissioner found that the *"Claimant suffered from pre-existing neck pain and right arm numbness prior to his alleged work injury. Most notably, Claimant received treatment with Dr. Bailey, a neurosurgeon, on March 16, 2010, just*

six months prior to his alleged work injury, when Claimant was prescribed physical therapy, Lortab and Flexeril. (Defendants' Exhibit B). An MRI dated the same showed Claimant had spondylosis, most impressive at C5-6 and C6-7 and bilateral C6 in right grade and left C7 radiculopathy... (Defendants' Exhibit A)." These findings, which are supported by the greater weight of the evidence, were not appealed and are affirmed as the law of the case.

3. The Hearing Commissioner also found that the *"Claimant returned to Dr. Bailey on March 15, 2011. Claimant's intake sheet notes Claimant's complaints/problems began on February 20, 2010..."* This finding, which is supported by the greater weight of the evidence, was not appealed and is affirmed the law of the case.

4. In addition, the Hearing Commissioner found that the *"Claimant presented to Dr. Keffer on March 16, 2011 for a nerve conduction study. Claimant reported that his problems had started '14 months earlier', that his neck pain 'gradually began', and that he had these problems 'for years'."* These findings, which are supported by the greater weight of the evidence, were not appealed and are affirmed as the law of the case.

5. The Hearing Commissioner specifically addressed the Claimant's credibility in her Findings of Fact, as follows: *"I do not find Claimant's testimony to be very credible with regard to the extent of his pre-existing neck condition and his current symptomology."* This finding regarding the Claimant's lack of credibility regarding the seminal issue in this claim was not appealed and is the law of the case.

6. The Hearing Commissioner went on to find that *"there is no medical evidence stated to a reasonable degree of medical certainty that Claimant's September 4, 2010 dove field incident aggravated or exacerbated his pre-existing neck condition for which he was already treating with a neurosurgeon."* This finding, which is supported

by the greater weight of the evidence, was not appealed and is affirmed the law of the case.

7. The Claimant's physician, Dr. Bailey, never addressed the issue of whether the alleged accident on September 4, 2010 aggravated the pre-existing neck and right arm condition for which he had previously treated the Claimant and there are no other documents, records of other material that address this issue in the Record of this claim.

CONCLUSIONS OF LAW

1. Pursuant to S.C. Code Ann. § 42-9-35, an "employee shall establish by a preponderance of the evidence, including medical evidence, that ...the subsequent injury aggravated the pre-existing condition." (emphasis added). Use of the term "shall" mandates that this burden of proof is mandatory. Collins v. Doe, 352 S.C. 462, 470, 574 S.E.2d 739, 743 (2002)("under the rules of statutory interpretation, use of the words 'shall' or 'must' indicates the legislature's intent to enact a mandatory requirement."). Based upon the greater weight of the evidence and the established facts of this case, § 42-9-35 applies to the present claim for benefits. The Hearing Commissioner ruled that the *"Claimant did not meet his burden of proof under S.C. Code Ann. § 42-9-35. The record is clear that he has a history of cervical radiculopathy that predates the September 4, 2010 accident and there is no competent medical evidence that the September 4, 2010 accident aggravated that pre-existing condition. In fact, the records of the Claimant's treating physician, Dr. Bailey, make no mention of any work-related accident or injury on or about September 4, 2010 and the Claimant's own statements to Dr. Bailey indicate that his neck problems began in January 2010."*

The Hearing Commissioner's rulings in this regard were correct and, furthermore, because they were not appealed, they are affirmed as the law of the case.

2. Because the Claimant has failed to satisfy his burden of proof under S.C. Code Ann. § 42-9-35, he is not entitled to any benefits under the Workers' Compensation Act as a matter of law.

ORDER

IT IS, THEREFORE, HEREBY ORDERED that the Claimant is not entitled to and the Defendants are not liable for, any benefits under the South Carolina Workers' Compensation Act with respect to the alleged accident of September 4, 2010.

ITS IS FURTHER ORDERED that W.C.C. File No. 1012533 is hereby **DENIED** and **DISMISSED WITH PREJUDICE.**

IT IS SO ORDERED!

The Honorable T. Scott Beck
S.C. Workers' Compensation Commissioner

Dated: July 24, 2017

WE CONCUR:

Commissioner Melody James

Commissioner Susan S. Barden

CERTIFICATE OF SERVICE

This is to certify that the undersigned has on this date served a copy of this order in the above entitled action upon all parties to this case by sending an electronic copy hereof by electronic mail addressed to the attorneys for said parties; or if there is an unrepresented party(ies), by depositing a copy hereof, postage paid in the United States mail, first class, addressed to the unrepresented party(ies) and to the attorney(s) for the represented party(ies).

By Valerie Deller on July 24, 2017