THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

WCC File No. 1406130

Billy Wayne Herndon, Employee/Claimant .....Appellant-Respondent,

v.

G & G Logging, Inc., Employer, and
Palmetto Timber S.I. Fund c/o Walker,
Hunter & Associates, Inc., Carrier..... Respondents-Appellants.

INITIAL REPLY BRIEF OF RESPONDENTS-APPELLANTS

McAngus Goudelock & Courie
Helen F. Hiser
Brian G. O'Keefe
Jonathan G. Lane
735 Johnnie Dodds Blvd., Suite 200
P.O. Box 650007
Mount Pleasant, South Carolina 29465
(843) 576-2900

Attorneys for Respondents-Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES
CASES

STATUTES

MISCELLANEOUS

ARGUMENTS

I. THE COMMISSION ERRED IN ASSIGNING GREATER WEIGHT TO DR. JOHNSON AND LITTLE WEIGHT TO DR. GEE BASED ON ARBITRARY AND CAPRICIOUS CONSIDERATIONS

Claimant's sole response to the fact that the Commission based its decision to afford greater weight to the medical opinion of Dr. Johnson than to that of Dr. Gee is arbitrary and capricious is to point out that the Commission has authority to weight the evidence before it, which in a general sense is absolutely correct. Without any explanation, however, Claimant simply asserts that the Commission "did not act in an arbitrary and capricious manner." Claimant's failure to even address this issue in any meaningful manner is a tacit concession that the Commission's Finding of Fact Nos. 15 and 19 are arbitrary and capricious. *See* In the Matter of the Care and Treatment of McCracken, 346 S.C. 87, 92, 551 S.E.2d 235, 238 (2001) (a cursory and unsupported argument is deemed abandoned on appeal).

Claimant then argues that the Commission Decision can be supported without Dr. Johnson's opinion.[1] However, it is undeniable that the Commission made the award in this case based on its heavy reliance on Dr. Johnson's opinion, which the Commission noted was in conflict with that of Dr. Gee. (Commission Decision, pp. 17-20). As explained in more detail in Respondents-Appellants' Brief, the Commission's Finding of Fact Nos. 15 and 19, (Commission Decision, pp. 18, 20), are arbitrary and capricious and should be reversed. S.C. Code Ann. § 1-23-380(A)(5) (Supp. 2014).

"A decision is arbitrary if it is without a rational basis, is based alone on one's will and not upon any course of reasoning and exercise of judgment, is made at pleasure, without

---

[1] Tellingly, however, despite asserting that the Commission Decision can be upheld without relying on Dr. Johnson's opinion, Claimant himself relies on Dr. Johnson's opinion to argue that the hypothetical question posed to Dr. Pacult was "completely proper." (App.-Resp. Br. p. 9).

adequate determining principles, or is governed by no fixed rules or standards." Trimmier v. S.C. Dep't of Labor, 405 S.C. 239, 246, 746 S.E.2d 491, 495 (Ct. App. 2013), *quoting* Deese v. S.C. State Bd. Of Dentistry, 286 S.C. 182, 184-85, 332 S.E.2d 539, 541 (Ct. App. 1985). The Commission gave more weight to Dr. Johnson's report than to Dr. Gee's report simply because it saw "no reason" for Claimant to be seen by Dr. Gee in Sumter, South Carolina, (Commission Decision, p. 20), despite the fact that both physicians' offices are approximately 1 hour and 15 minutes from Walterboro, South Carolina where Claimant resides. (Hrg. Tr. p. 62 lines 20-25).[2] This is an arbitrary and capricious geographic distinction that is without a reasonable basis to justify its use in assigning weight to evidence. Trimmier, 405 S.C. at 246, 746 S.E.2d at 495.

In addition, the Commission gave weight to Dr. Johnson's opinion because, "Dr. Johnson's records are more current in time than Dr. Gee's." (Commission Decision, p. 18). Under the facts of this case, where Dr. Johnson's IME was less than three weeks after Dr. Gee's IME, such a basis is also arbitrary and capricious. As explained in their Brief, placing greater weight on medical evidence based on an insignificant interval of time between medical evaluations is arbitrary and capricious. *Cf.* Smith v. South Carolina Dep't of Mental Health, 329 S.C. 485, 499, 494 S.E.2d 630, 637 (Ct. App. 1997) (expressing concern over relying on medical evidence that was "more than two years old at the time of the hearing"). The inevitable result of the Commission Decision, if upheld, will result in a "race" among parties to schedule doctors' visits, with each side vying to schedule the last possible appointment prior to hearing so as to secure the greatest weight from the Commission.

---

[2] *See* https://www.mapquest.com/directions/from/us/sc/walterboro-282032128/to/us/sc/sumter-282038480.

This Court should reverse the Commission's decision to give greater weight to Dr. Johnson and little weight to Dr. Gee based on arbitrary and capricious considerations.

II. THE COMMISSION ERRED IN AWARDING CLAIMANT TOTAL AND PERMANENT DISABILITY UNDER SECTION 42-9-10 BECAUSE CLAIMANT FAILED TO PROVE AN INJURY TO A SECOND BODY PART

The Commission erred in making an award under Section 42-9-10 because the record contains no objective medical evidence of injury or impairment to a body part other than to Claimant's cervical spine. Clamant failed to show any objective evidence of "**additional injuries** beyond the lone scheduled injury." Colonna v. Marlboro Park Hosp., 404 S.C. 537, 545, 745 S.E.2d 128, 133 (2012) (emphasis added); *see also* Bixby v. City of Charleston, 300 S.C. 390, 397, 388 S.E.2d 258, 262 (Ct. App. 1989) (equating "affect" to another body part with a "residual disability" to another body part). In the context of recovery under 42-9-10, the Supreme Court also has noted that "impairment" requires a showing of physical deficiency. Wigfall v. Tideland Utils., 354 S.C. 100, 104, 580 S.E.2d 100, 102 (2003) ("[t]he *Singleton* Court intended "impairment" to encompass a physical deficiency"). As a result, he should be limited to an award under Section 42-9-30. Singleton v. Young Lumber Co., 236 S.C. 454, 471, 114 S.E.2d 837, 845 (1960)

Claimant argues that the evidence before the Commission supports the award of total and permanent disability under Section 42-9-10. Despite averring that the Commission Decision can be supported without the Commission's heavy reliance on Dr. Johnson's opinion, Claimant proceeds to rely on Dr. Johnson's evaluation to support his argument that he proved an injury to a second body party.

He also misconstrues Dr. Gee's medical opinion. Dr. Gee stated that Claimant "does not have radicular pain or paresthesias in the left arm as he did prior to surgery." He also explained

that, although he noted "decreased range of motion[,] [t]his evaluation is a little inconsistent with command movements compared with voluntary movements that are noticed during the examination." Dr. Gee also noted "a little grip strength deficit on the left but he is a right handed individual and I think the difference is acceptable." Finally, although Dr. Gee noted decreased motion of Claimant's left shoulder, he opined that "this is from disuse and adhesive capsulitis and is improving with therapy." (Def. APA p. 2). Taking Claimant at his word that the Commission award can be sustained without the arbitrary and capricious decision to weight Dr. Johnson's opinion more heavily, Dr. Gee's opinion certainly does not support a finding of an injury or impairment to a body part other than Claimant's cervical spine.

As a result, regardless of whether he is able to "*to earn the wages* which the employee was receiving at the time of injury in the same or any other employment," Stephenson v. Rice Servs., Inc., 323 S.C. 113, 116, 473 S.E.2d 699, 701 (1996), he has not "establish[ed] an additional injury or impairment to a second body part," Colonna, 404 S.C. at 549, 745 S.E.2d at 135, and, as a result, he is limited to recovery under the scheduled member statute. Singleton, 236 S.C. at 471, 114 S.E.2d at 845.

This Court should reverse the Commission's decision to award Claimant compensation under Section 42-9-10.

III. EVEN IF CLAIMANT COULD PROCEED UNDER SECTION 42-9-10, HE FAILED TO MEET HIS BURDEN OF PROVING HE IS ENTITLED TO TOTAL AND PERMANENT DISABILITY

A. The Commission's finding of total and permanent disability is in error because it is based on a flawed hypothetical that is unsupported by substantial evidence in the record.

Without any analysis of the flawed hypothetical posed to Dr. Pacult by Claimant's counsel, Claimant simply asserts the Commission did not err in relying on it in making the award

in this case. (Commission Decision, p. 19). Instead, Claimant points to other portions of Dr. Pacult's testimony as evidence that the Commission Decision should be affirmed. However, the Commission specifically quoted the problematic hypothetical in its Decision and Claimant has not even attempted to argue that the hypothetical was not flawed. As explained in Respondents-Appellants' Brief, "it is well settled that the probative value of expert testimony, based upon hypothetical factors, stands or falls on the existence or nonexistence of the facts upon which it is predicated." Chapman v. Foremost Dairies, Inc., 249 S.C. 438, 449, 154 S.E.2d 845, 851 (1967); Radcliffe v. Southern Aviation Sch., 209 S.C. 411, 424, 40 S.E.2d 626, 632 (1946) (rejecting medical testimony based on unproven facts). It is equally axiomatic that the claimant has the burden of proving he or she is entitled to benefits under the Act. Clade v. Champion Labs, 330 S.C. 8, 11, 496 S.E.2d 856, 858 (1998).

Here, the hypothetical clearly assumes facts that have not been proven: "**if there's a greater risk of further injury** to his back (neck) by going back to work in the logging woods ... would you recommend to him, 'Well, you **need** to go back to work' or 'You **need** to go back to work as a log truck driver?'" (Commission Decision, p. 19; Pacult Dep. p. 36, lines 12-22) (emphasis added). Dr. Pacult also testified, "[t]he question is how do you prove that this is due to the fusion or is it because of the primary condition of the spine worsens with time and age ... we don't have an answer for that." (Pacult Dep. p. 30, line 21 – p. 31, line 11). Dr. Pacult also testified:

> Q. If you're driving a truck over rough road, driving a log truck over a rough road that has logs in it and bumps and whatever, is there a risk there with somebody that has a fusion at C6-7, has a bad spine above, in three disc levels above that, has basically four bad discs, **is there a greater risk in**

an individual like that to herniate a disc above the one you did the fusion at?

A. I think it makes perfect sense. It's very logical. **But would you ask me that in a reasonable degree of medical certainty, I would say no.**

(Pacult Dep. p. 35, lines 7-18) (emphasis added).

Based on this testimony, which came just one question prior to the testimony relied on by the Commission, it is plain to see Dr. Pacult does not believe, to a reasonable degree of medical certainty, that Claimant is at any greater risk of further injury to his back by going back to work driving a truck. Furthermore, the hypothetical asked Dr. Pacult whether he would tell Claimant he **needed** to go back to work as a log truck driver, not whether he would tell him he **could** go back to work as a log truck driver.

The Commission's finding that Claimant is totally and permanently disabled should be reversed as it is based, in part, on a flawed hypothetical and, therefore, Claimant failed to meet his burden of proving total and permanent disability.

B. The Commission's finding of total and permanent disability is in error because it is based on the patently erroneous premise that any person who is not able to work 8 hour days and 40 hour weeks is totally and permanently disabled

That Pearson's 10-page report includes the term "part-time" once in one sentence discussing "gainful employment," does not change the fact that he defined "competitive employment" as "full-time competitive employment," where "a worker must have the capacity to work an 8 hour day and 40 hour week." (Cl. APA p. 105). While Pearson defined "competitive employment," he does not define "gainful employment," and/or explain how it is different from "competitive employment." Instead, he stated repeatedly that, "if an individual, regardless of reason or cause, is unable to meet the standards and expectations of competitive employment,

they are unable to work." (Cl. APA p. 111; *see also* pp. 105, 112). To the extent Person talks about "part-time" competitive employment, his report is internally inconsistent, given his clear and repeated definition of "competitive employment" to mean fulltime employment where an individual has the capacity to work eight hours a day, 40 hours per week.[3]

As noted previously, at the time of his accident, Claimant was working only part-time. (Cl. Dep. p. 17, lines 12-14) (Page Vocational Assessment, pp. 3, 6) (Hr'g Tr. p. 57, lines 6-21; p. 59, lines 19-22). Page was able to identify multiple full and part-time positions within the work restrictions provided by both Dr. Gee and Dr. Johnson. (Page Vocational Assessment, pp. 5-6). The Commission clearly erred in relying on Pearsall's vocational evaluation based on full-time competitive employment to find Claimant is totally and permanently disabled.

[3] In addition, Pearson opined incorrectly that Claimant could not return to any commercial driving position, including as a school bus driver, because he would not be able to pass the physical exam required for the CDL. Claimant testified that he had passed the CDL physical since his accident, ("[y]es sir … [g]ot the medical card in my pocket"), but just had not taken the written portion of the test "because Dr. Johnson … advised me not to get back in a truck." (Hr'g Tr. p. 36, line 19 – p. 37, line 2; p. 61, line 21 – p. 62, line 11).

CONCLUSION

Respondents-Appellants respectfully request that this Court reverse the Commission's decision to assign greater weight to Dr. Johnson's medical opinion and little weight to Dr. Gee's medical opinion, as that decision is based on irrelevant distinctions that render it arbitrary and capricious. Further, Respondents-Appellants respectfully request that this Court reverse the Commission's findings that Claimant suffered additional injuries to his left shoulder, left arm, and left hand and fingers, and that Claimant is totally and permanently disabled pursuant to Section 42-9-10, as these findings are not supported by substantial evidence in the record and are based on an error of law.

Respectfully submitted,

McANGUS GOUDELOCK & COURIE

October 25, 2017

Helen F. Hiser, S.C. Bar No.: 76124
Brian G. O'Keefe, S.C. Bar No.: 16165
Jonathan G. Lane, S.C. Bar No.: 101787
735 Johnnie Dodds Blvd., Suite 200
P.O. Box 650007
Mount Pleasant, South Carolina 29465
(843) 576-2900

Attorneys for Respondents/Cross-Appellants G&G Logging, Inc. and Palmetto Timber S.I. Fund c/o Walker, Hunter & Associates, Inc.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

WCC File No. 1406130

Billy Wayne Herndon, Employee/Claimant ..... Appellant, Cross-Respondent

v.

G & G Logging, Inc., Employer, and

Palmetto Timber S.I. Fund c/o Walker,
Hunter & Associates, Inc., Carrier..... Respondents, Cross-Appellants.

PROOF OF SERVICE

I certify that I have served the **Initial Reply Brief of Respondents-Appellants** on Billy Wayne Herndon by depositing a copy of it in the United States Mail, postage prepaid, on October 25, 2017, addressed to his attorney of record:

Andrea C. Roche, Esquire
Mickle & Bass, LLC
Post Office Box 5639
Columbia, South Carolina 29250

Kathy Aldrich

Kathy Aldrich
Legal Assistant to Helen F. Hiser
McANGUS GOUDELOCK & COURIE LLC
735 Johnnie Dodds Blvd., Suite 200
PO Box 650007
Mount Pleasant, South Carolina 29465
(843) 576-2900

Attorneys for Respondents-Appellants

mgc

Reply To
HELEN F. HISER
Direct Dial: (843) 576-2930
helen.hiser@mgclaw.com

October 25, 2017

Via U.S. Mail
The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: Billy Wayne Herndon v. G & G Logging, Inc. and Palmetto Timber S.I. Fund c/o Walker, Hunter & Associates, Inc.
Date of Accident: May 12, 2014
WCC File No.: 1406130
Our File No.: 2069.14023
Claim No.: 247-92-7471
Appeal No.: 2017-000692

Dear Ms. Kitchings:

Enclosed for filing please find the following documents:

1. original and one copy of the Initial Reply Brief of Respondents-Appellants; and,
2. original and one copy of Respondents-Appellants' Proof of Service.

Please file these documents and return the clocked-in copies in the enclosed, self-addressed stamped envelope.

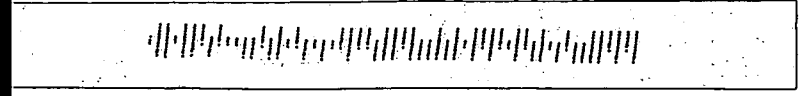
Yours truly,

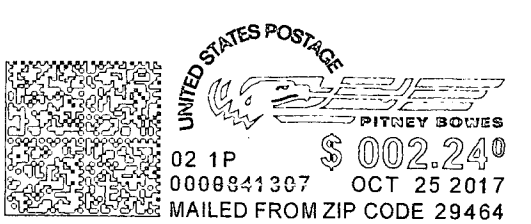
McAngus Goudelock & Courie, LLC

Helen F. Hiser

Enclosures

cc: Andrea C. Roche, Esq





mgc | INSURANCE DEFENSE

POST OFFICE BOX 650007

MT. PLEASANT, SC 29465

RECEIVED
OCT 27 2017
SC Court of Appeals

2069.14023 / HFH/kea
The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211