THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
Appellate Panel

Susan S. Barden, Commissioner
Melody James, Commissioner
Aisha Taylor, Commissioner

Appellate Case No. 2017-000692
Trial Court Case 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.

RESPONDENT'S FINAL BRIEF OF APPELLANT-RESPONDENT

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STATEMENT OF THE CASE

Billy Wayne Herndon ("the Claimant") requested a hearing in this admitted workers' compensation claim on August 18, 2015 against G&G Logging, Inc. ("the Employer") and its workers' compensation carrier Palmetto Timber Self Insurance Fund (collectively "the Defendants"). At a hearing on May 3, 2016, the Claimant argued his average weekly wage was $695.00 with a resulting compensation rate of $463.36 based on the actual wages he had earned with the Employer. (R. p. 65, lines 16-25). He further argued the admitted accident had rendered him permanently and totally disabled, entitling him to all benefits arising therefrom. (R. p. 63, line 24-p. 65, line 16).

At the hearing, the Defendants argued exceptional reasons existed to deviate from the standard wage calculation, and the Claimant was not permanently and totally disabled. (R. p. 67, line 1-p. 70, line 9). By order dated July 26, 2016, the Single Commissioner found (1) the standard wage calculation as found on the Form 20 was correct, (2) the Defendants had not contested the standard wage calculation for over two years, and (3) the Claimant was permanently and totally disabled. (R. p. 18-25). The Defendants appealed.

By order dated February 23, 2017, the Full Commission affirmed the finding of permanent and total disability and reversed the finding regarding the wage calculation. (R. p. 49-50). The Full Commission found exceptional reasons existed to deviate from the standard wage

calculation and found the Claimant's average weekly wage to be $297.69 with a resulting compensation rate of $198.47. (R. p. 48). The Full Commission also awarded the Defendants a credit for overpayment of benefits totaling $36,527.82. (R. p. 49). The Claimant filed a Notice of Appeal to this Court on March 21, 2017. The Defendants filed a Notice of Cross-Appeal on March 23, 2017.

FACTS

The Claimant sustained an admitted injury by accident arising out of and in the course and scope of his employment on May 12, 2014. (R. p. 43). The Claimant was involved in an accident while driving a logging truck. (R. p. 100, line 14-p. 101, line 11).

On the day of the accident, the Claimant presented to Dr. Brian Thompkins complaining of left upper arm pain and elbow pain. (R. p. 247). Dr. Thompkins noted "tenderness primarily in the left upper arm" and "some limited range of motion on the left shoulder." (R. p. 247). On May 27, 2014, the Claimant returned to Dr. Thompkins with "left neck/ left shoulder pain." (R. p. 249). The Claimant also reported swelling, numbness and tingling in the left upper extremity. (R. p. 249). On exam, Dr. Thompkins noted "tenderness primarily on the C-spine paraspinal muscles on the left trapezius area and into the left shoulder." (R. p. 249). He also noted decreased strength in the left arm that may be due to pain. (R. p. 249). On June 10, 2014, the Claimant saw Dr. Thompkins with complaints of neck pain with left-sided shoulder and arm radiation. (R. p. 249). Dr. Thompkins noted the Claimant had radiation into the left arm and appeared to have decreased grip strength and decreased flexion and extension. Dr. Thompkins ordered an MRI of the cervical spine. (R. p. 250).

On June 19, 2014, the Claimant was admitted to Colleton Medical Center complaining of chest pain. (R. p. 256). The emergency room physician noted "the patient complains of neck

pain with tingling down the arm ever since a motor vehicle accident six weeks ago." (R. p. 256). On June 20, while in the hospital, the Claimant had a cervical MRI. (R. p. 257-258).

On June 23, 2014, the Claimant saw Dr. Thompkins. He reviewed the MRI and on the physical exam noted tenderness primarily on the left side with left upper extremity radiation. (R. p. 264). Dr. Thompkins diagnosed neck pain and left upper extremity radiculopathy. (R. p. 264). Dr. Thompkins referred the Claimant for a neurosurgical evaluation. (R. p. 264).

The Claimant eventually saw Dr. Pacult, a neurosurgeon. (R. p. 214). Dr. Pacult noted the Claimant had cervical radiculopathy on the left side. (R. p. 215). He noted the "MRI of the cervical spine shows significant disc degeneration at multiple levels, and on the left C6/C7 there is a foraminal stenosis with impressive left sided osteophyte formation compressing as expected C7 nerve root." (R. p. 215). Dr. Pacult recommended surgery, and the Claimant underwent a cervical fusion on January 13, 2015. (R. p. 218).

The Claimant continued to treat with Dr. Pacult following surgery. On February 2, 2015, Dr. Pacult ordered physical therapy for the cervical spine and left shoulder. (R. p. 219). On March 16, 2015, Dr. Pacult noted the Claimant was "complaining of cervical pain into the shoulder and into the arm on the left side." (R. p. 221). On April 27, 2015, Dr. Pacult found the Claimant had reached maximum medical improvement and recommended a referral to a specialist for an impairment rating. (R. p. 224). He stated the Claimant was unable to return to truck driving due to pain. (R. p. 224).

The Defendants sent the Claimant to Dr. Gee at Industrial Medicine in Sumter for an impairment rating. On June 11, 2015, Dr. Gee noted the Claimant described cervical pain and pain into his shoulder muscles. (R. p. 184). Furthermore, Dr. Gee noted a left grip strength deficit and that the Claimant's range of motion in his left shoulder was "significantly decreased."

(R. p. 184). Dr. Gee found the Claimant had cervical radiculopathy, agreed the Claimant was at maximum medical improvement, and assigned a 9% impairment rating to the whole person. (R. pp. 183-185). Dr. Gee further gave the Claimant work restrictions of "limit 'heavy' work & strain." (R. p. 183).

On June 30, 2015, the Claimant saw Dr. Donald Johnson in Mt. Pleasant for an independent medical evaluation. Dr. Johnson noted the Claimant had complaints of "neck pain with radiating pain, paresthesias and numbness down the left arm to the left hand." (R. p. 269). He noted the Claimant had symptoms down into the index and forefinger and along the brachioradialis. (R. p. 269). Dr. Johnson opined:

> Per the fifth edition AMA Guides, I would assign a 26% impairment to the whole person per page 392, table 15-5. This is a whole person rating. However, the patient has decreased functional use of his left arm secondary to radiculopathy with residual numbness and weakness of the left arm and hand.
>
> In regards to work, the patient may not return to his previous vocation. If he tries to do so, I think it is inevitable that he will injure a disc above his cervical fusion. Work restrictions of avoiding heavy lifting and strain are impossible in the line of work this gentleman is currently employed by [sic].
>
> Work restrictions would involve no work from shoulder level above with limited extension of his neck and no lifting from shoulder level to above greater than 15 to 20 pounds. Again, I am worried about the adjacent levels of this patient's cervical fusion.

(R. p. 270).

The parties deposed Dr. Pacult. Dr. Pacult testified he did not know Dr. Gee. (R. p. 275, (p.12, lines 14-16)). When asked if he was in agreement with the impairment rating given by Dr. Gee, Dr. Pacult testified "[w]ell, like I say, this certainly doesn't sound unreasonable, but I don't do those ratings for that one reason. I don't have the knowledge how to assign the impairment rating. There's special book that pain managing physicians have and AMA guidelines. I don't have that." (R. p. 277 (p. 18, ll. 1-6)). Dr. Pacult testified Dr. Johnson had a good reputation and

would be a competent individual to give an impairment rating. (R. p. 282 (p.40, ll.1-10)). Dr. Pacult testified several times he thought the Claimant was reliable. (R. p. 275 (p. 11, l. 10), p. 278 (p. 24, ll.23-24, p. 25, ll. 1-10)). Dr. Pacult testified the Claimant's limitations are based on his pain. (R. p. 276). He further testified that it was not uncommon for an individual with the Claimant's injury to be experiencing ongoing pain. (R. p. 276 (p. 15, ll. 17-25)).

The Claimant underwent vocational evaluations. On August 31, 2015, Dixon Pearsall, Ph.D., opined:

> [The Claimant's] current access to competitive employment (employability) is negligible (>1%). Essentially and practically there are no positions represented in significant numbers in the regional or national economies consistent with the residual functional/vocational capacities of [the Claimant]. It is "highly likely" and "very probable" that Mr. Herndon will not return to gainful employment in any capacity. This would include all full and part-time competitive positions represented in significant numbers in the national economy at any and all exertion or skill levels. As such, [the Claimant] is not competitively employable in the national economy.

(R. p. 300).

On February 2, 2016, George Page, MS, CVE, CDMS, PVE, opined there were jobs available that the Claimant could perform. (R. pp. 290-291). He further found the Claimant was capable of earning a wage between $9 and $10 per hour. (R. p. 291). Dr. Pearsall provided a supplemental report wherein he addressed and disagreed with the findings of Mr. Page. (R. pp. 305-311).

At the hearing before the Single Commissioner, the Claimant's wife testified the Claimant was a "totally different man" since the accident. (R. p. 73, lines 8-24). She testified the medications the Claimant takes make him drowsy for most of the day. (R. p. 79, lines 3-9). He sits in a recliner all day. (R. p. 79, lines 10-22). He now has no patience and does not like to be around a lot of people. (R. p. 79, line 23-p.80, line 11).

The Claimant testified he has problems with his neck and with his left arm and left hand.

(R. p. 91, lines 1-9). He did not graduate from high school and has no computer skills. (R. p. 91, line 10-p. 92, line 21). The Claimant testified he has spent most of his life driving log trucks. (R. p. 92, line 22-p. 94, line 13). He has also worked as a carpenter. (R. p. 94, lines 8-10). The Claimant testified the medicine he takes because of the accident makes him sleepy and groggy and therefore unable to drive long distances. (R. p. 89, lines 7-20). The Claimant testified he can only stand still for approximately 10 minutes. (R. p. 110, lines 3-10). He can only walk a "couple hundred yards." (R. p. 110, lines 11-13). He testified he can only sit comfortably for about 30 minutes. (R. p. 110, lines 14-17). He stated that although he can do some bending, stooping, squatting, and kneeling, he cannot do half of what he used to do before the accident. (R. p. 110, lines 18-24).

The Claimant testified he can lift approximately 10 pounds with his left arm. (R. p. 110, line 25-p. 111, line 2). He has trouble reaching, twisting, and pulling. (R. p. 111, lines 3-13). He testified he has no patience now, affecting his ability to deal with the public. (R. p. 112, lines 3-8). The medications make it difficult for him to focus and concentrate on a task. (R. p. 112, lines 9-12). Furthermore, the Claimant testified he is lying in his bed or sitting in his recliner approximately five or six hours out of an eight-hour day. (R. p. 114, lines 12-20).

STANDARD OF REVIEW

"The Administrative Procedures Act ("APA") provides the standard for judicial review of decisions by the Commission." Burnette v. City of Greenville, 401 S.C. 417, 426, 737 S.E.2d 200, 205 (Ct. App. 2012). This Court can "reverse or modify the decision only if the claimant'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." Hutson v. South Carolina State Ports Authority, 399 S.C. 381, 387, 732 S.E.2d 500, 503

(2012). Substantial evidence is neither 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.

ARGUMENTS

I. THE COMMISSION'S DETERMINATION OF PERMANENT AND TOTAL DISABILITY IS SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD.

Section 42-9-10 of the Workers' Compensation Act provides "[w]hen the incapacity for work resulting from an injury is total, the employer shall pay" weekly benefits during the total disability up to 500 weeks. S. C. Code Ann. § 42-9-10. The Commission may base a "finding of total disability on the claimant's complete loss of earning capacity as a result of a work-related injury. . . . Employees who because of a work-related injury can perform only limited tasks for which no reasonably stable market exists are considered totally disabled notwithstanding their nominal earning capacity." Stephenson v. Rice Services., Inc., 323 S.C. 113, 118, 473 S.E.2d 699, 702 (1996) (citations omitted).

"'[T]otal disability' does not require complete, abject helplessness. Rather it is an inability to perform services other than those that are so limited in quality, dependability, or quantity that no reasonably stable market exists for them. Evidence that the claimant has been able to earn occasional wages or perform certain kinds of gainful work does not necessarily rule out a finding of total disability or require that it be reduced to partial." McCollum v. Singer Co., 300 S.C. 103, 107, 386 S.E.2d 471, 474 (Ct. App. 1989) (citations omitted).

"'[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.' When

the evidence is conflicting over a factual issue, the findings of the Appellate Panel are conclusive. In workers' compensation cases, the Appellate Panel is the ultimate finder of fact. The final determination of witness credibility and the weight to be accorded evidence is reserved to the Appellate Panel." Hamilton v. Martin Color-Fi, Inc., 405 S.C. 478, 485–86, 748 S.E.2d 76, 80 (Ct. App. 2013) (citations omitted). "The regulations do not forbid the assignment of more or less weight to different reports. . . . South Carolina jurisprudence makes clear the Appellate Panel determines the weight of the evidence." Id.

The Commission weighed the evidence before it and determined the Claimant was permanently and totally disabled. In doing so, the Commission gave greater weight to the opinion of Dr. Johnson than to Dr. Gee. The Commission was well within its purview to do so, discussed both reports in its order, and did not act in an arbitrary and capricious manner.

Even if the Commission erred in some way by weighing the two reports as it did, other substantial evidence in the record supports a finding of permanent and total disability. The Claimant underwent a cervical fusion, resulting in limited range of motion in his neck. He continues to have pain in his neck and in his left shoulder, arm, and hand. Dr. Pacult, the authorized treating physician, testified the Claimant's return to work is limited by his pain. He further testified several times that he found the Claimant to be reliable.

The Claimant testified regarding his limitations due to his injury, including difficulty standing, walking, sitting, lifting, bending, stooping, squatting, kneeling and that the medication he takes makes him drowsy. The Claimant and his wife both testified as to how much of the day he spends lying down or sitting in his recliner. The Commission found the Claimant's testimony to be credible based both on the record and on the Single Commissioner's finding that the Claimant was "very credible." Even without the opinions of Dr. Johnson and Dr. Gee, Dr.

Pacult's opinion paired with the Claimant's testimony is sufficient for a finding of permanent and total disability and represents substantial evidence in the record.

The Commission did not err by citing and relying on the testimony from Dr. Pacult's deposition regarding the potential harm the Claimant could sustain by returning to work:

> Q: I'm looking at it from an objective standpoint, if there's a greater risk of further injury to his back by going back to work in logging woods –
>
> A: Uh-huh.
>
> Q: --would you recommend – if he came back in today and said, you know, "Going out in the logging woods, I bounce around all the time. I don't want to do further damage to my back," 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"?
>
> A: No, I don't. . . .

(R. p. 281 (p. 36, ll. 12-22)). Although Dr. Pacult could not say to a reasonable degree of medical certainty that the Claimant was at greater risk of additional harm by returning to work, he did say it made "perfect sense," and was "very logical." (R. p. 281 (p. 35, ll. 16-17)). Furthermore, Dr. Johnson stated that if the Claimant tried to return to driving the logging truck, it was Dr. Johnson's opinion that "it is inevitable that he will injure a disc above his cervical fusion." Based on evidence in the record, *i.e.*, the opinion of Dr. Johnson, the hypothetical asked of Dr. Pacult was completely proper.

When weighing the vocational evidence, the Commission gave greater weight to the opinion of Dr. Pearsall. Contrary to the assertion of the Defendants, Dr. Pearsall did not rely exclusively on the Claimant's inability to work 8 hours per day, 40 hours per week. Dr. Pearsall concluded the Claimant could not work part time or full time:

> [The Claimant's] current access to competitive employment (employability) is negligible (>1%). Essentially and practically there are no positions represented in significant numbers in the regional or national economies consistent with the residual functional/vocational capacities of [the Claimant]. It is "highly likely" and "very

probable" that Mr. Herndon will not return to gainful employment in any capacity. *This would include all full and part-time competitive positions represented in significant numbers in the national economy at any and all exertion or skill levels.* As such, [the Claimant] is not competitively employable in the national economy.

(R. p. 300) (emphasis added). Dr. Pearsall's opinion and report represent substantial evidence in the record to support a finding of permanent and total disability.

II. THE COMMISSION PROPERLY AWARDED DISABILITY UNDER SECTION 42-9-10 WHERE THE CLAIMANT SUSTAINED AN INJURY TO HIS NECK AFFECTING HIS SHOULDER, ARM, AND HAND.

The Claimant is entitled to pursue compensation under § 42-9-10 because he sustained an injury to his neck that affects his left shoulder, arm, and hand. In Singleton v. Young Lumber Co., 236 S.C. 114 S.E.2d 837 (1960) the court held "where the injury is confined to a scheduled member, and there is no impairment of any other part of the body because of such injury, the employee is limited to the scheduled compensation; even though other considerations such as age, lack of training, or other conditions peculiar to the individual, effect a total or partial industrial incapacity." Id. Further, "[t]o obtain compensation in addition to that scheduled for the injured member, claimant must show that some other part of his body is affected." Id. In Wigfall v. Tideland Utilities, Inc., 354 S.C.100, 580 S.E.2d 100 (2003), the supreme court stated the "Singleton Court intended 'impairment' to encompass a physical deficiency."

The record is replete with evidence the Claimant's shoulder, arm, and hand have been affected by his neck injury. All of Dr. Thompkins records mention issues with the shoulder or upper extremity, including decreased grip strength. After the Claimant's surgery, he continued to have problems with his left shoulder and arm. On February 2, 2015, Dr. Pacult ordered physical therapy for the cervical spine and left shoulder. On March 16, 2015, Dr. Pacult noted the Claimant was "complaining of cervical pain into the shoulder and into the arm on the left

side." (APA p. 39).

At the IME performed by Dr. Gee, the doctor noted the Claimant described cervical pain and pain into his shoulder muscles. (R. p. 184). Furthermore, Dr. Gee noted a left grip strength deficit and that the Claimant's range of motion in his left shoulder was "significantly decreased." (R. p. 184).

When the Claimant saw Dr. Johnson, Dr. Johnson noted the Claimant had complaints of "neck pain with radiating pain, paresthesias and numbness down the left arm to the left hand." (R. p. 269). He noted the Claimant had symptoms down into the index and forefinger and along the brachioradialis. Dr. Johnson opined the Claimant "has decreased functional use of his left arm secondary to radiculopathy with residual numbness and weakness of the left arm and hand." (R. p. 269).

The Claimant testified he was still having problems with his left arm and hand. The Commission found the Claimant credible. All of the medical evidence supports the Claimant has a physical deficiency down the left side (significantly decreased range of motion to the shoulder, weakness in the left hand) and that his shoulder, arm, and hand have been affected by the radiculopathy stemming from his neck injury. The medical evidence in combination with the Claimant's credible testimony clearly establish a "second body part" such that the Claimant was entitled to pursue a disability award under § 42-9-10.

CONCLUSION

For the foregoing reasons, this Court should affirm the Decision and Order of the South Carolina Workers' Compensation Commission as to the finding of permanent and total disability.

December 6, 2017

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Respondent's Final Brief of Appellant-Respondent complies with Rule 211(b), SCACR.

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