THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

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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.

BRIEF OF RESPONDENTS-APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

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

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

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

STATEMENT OF THE CASE

Appellant-Respondent Billy Wayne Herndon, Claimant below, filed a Form 50 on June 9, 2014, alleging injury to "both shoulders, neck, back, chest, left hand" arising out of a work-related accident that occurred on May 12, 2014. (R. p. 53). His employer at the time of the accident, G & G Logging Company ("Employer"), and their workers' compensation insurer, Palmetto Timber S.I. Fund c/o Walker, Hunter & Associates, Inc. (jointly referred to herein as "Respondents-Appellants"), filed a Form 51 admitting that the Claimant was injured in a work-related accident but denying the nature and extent of his alleged causally-related injuries and permanent disability, if any. (R. p. 54).

Claimant filed an Amended Form 50 on September 30, 2015, alleging that he had injured his left upper extremity in addition to the body parts alleged in his prior Form 50. Claimant sought entitlement to continuing medical treatment and to total and permanent disability benefits pursuant to Section 42-9-10. (R. p. 55). Respondents-Appellants filed a Form 51, again admitting that Claimant had been involved in a work-related accident but denying the nature and extent of his injuries and/or that he was permanently disabled. (R. p. 56).

The parties filed Pre-Hearing Briefs and APA submissions. As part of those submissions Respondents-Appellants submitted the Form 14B report of Dr. James Gee, based on a June 11, 2015 IME, placing Claimant at maximum medical improvement ("MMI") as of April 27, 2015 and assigning a 9% medical impairment to the whole person. Claimant submitted the June 30, 2015 IME of Dr. Donald Johnson, II, who assigned a 26% medical impairment to the whole person and recommending future medical treatment.

The parties were heard by Single Commissioner Michael Campbell, II on May 3, 2016. In an Order dated July 26, 2016, the Single Commissioner found that Claimant sustained an

admitted injury to his neck by accident arising out of and in the course of his employment; that the additional body parts of left shoulder, left arm, left hand and fingers were causally related to the admitted work injury; and that Claimant is totally and permanently disabled under Section 42-9-10(B).[1] In reaching this conclusion, the Single Commissioner gave greater weight to the medical opinion of Claimant's IME doctor, Dr. Johnson, and little weight to the opinion of Dr. Gee. In particular, the Single Commissioner found that there was "no reason for claimant to be rated by Dr. Gee in Sumter, South Carolina when all of claimant's medical treatment was provided in the Walterboro/Charleston area." In addition, the Single Commissioner gave more weight to Dr. Johnson's records because they were "more current in time than Dr. Gee's." The Single Commissioner also found that the average weekly wage as calculated on the Form 20 at $695.00 was correct. (Single Commissioner Decision and Order, dated July 26, 2016, R. pp. 1-26) ("Single Commissioner Decision").

Respondents-Appellants timely appealed to the Full Commission asserting, among other things, that the Single Commissioner's finding of total and permanent disability pursuant to Section 42-9-10, including his findings of fact regarding the weight of evidence presented from Dr. Gee and Dr. Johnson, were in error. (R. pp. 57-60).[2]

An Appellate Panel of the Full Commission heard the parties on October 10, 2016, and issued its decision on February 23, 2017. The Commission affirmed in part and reversed in part the Single Commissioner Decision, finding, among other things, that Claimant's alleged additional body parts including the left shoulder, left arm, left hand and fingers are causally

[1] Although both the Single Commissioner and Full Commission decisions stated the award is pursuant to Section 42-9-10(B), that clearly is a scrivener's error, as Claimant never alleged loss of "both hands, arms, shoulders, feet, legs, hips, or vision in both eyes, or any two thereof ..." The award plainly is pursuant to Section 42-9-10(A), for total and permanent disability.

[2] Respondents-Appellants also challenged the calculation of Claimant's average weekly wage. That issue is addressed in Respondents-Appellants' Respondents Brief.

related to the admitted neck injury, and that Claimant is entitled to total and permanent disability pursuant to Section 42-9-10(B).[3] In its Order, the Commission affirmed the Single Commissioner's decision to assign greater weight to the medical evidence of Dr. Johnson and little weight to that of Dr. Gee, based on the fact that Dr. Johnson's records were "more current in time," and because there was "no reason for claimant to be rated by Dr. Gee in Sumter, South Carolina when all of claimant's medical treatment was provided in the Walterboro/Charleston area." However, the Commission revised Claimant's average weekly wage, which was determined to be $297.63, with a corresponding compensation rate of $198.47, and allowed Respondents-Appellants a credit for weekly compensation paid at the incorrect rate. (Appellate Panel Decision and Order, filed Feb. 23, 2017, R. pp. 27-51) ("Commission Decision").

Respondents-Appellants timely appealed to this Court.

FACTUAL BACKGROUND

Claimant, who was 66 years old at the time of the Single Commissioner hearing, lives in Walterboro, South Carolina. He began working for Employer as a part-time truck driver in January 2014, two years after he had retired from his previous employer and had begun drawing Social Security benefits. (R. p. 87, lines 6-15) (R. p. 327, line 19 – p. 328, line 16). Claimant sustained an admittedly compensable injury to his cervical spine on May 12, 2014 when he was involved in a work-related accident while driving his logging truck for Employer. (R. p. 63, lines 8-10; p. 66, lines 24-25). After notifying his supervisor of the accident by telephone, Claimant elected to forgo treatment at the emergency room and instead sought treatment from his family physician, Dr. Bryan Thompkins at Walterboro Family Practice. (R. p. 102, line 5 – p. 103, line 7).

[3] Again, as noted above, the reference to Section 42-9-10(B) is a scrivener's error.

Claimant saw Dr. Thompkins in January and May of 2014. Dr. Thompkins prescribed pain medication and recommended a conservative course of treatment that included physical therapy. (R. pp. 246-250). On June 20, 2014, Claimant underwent an MRI of his cervical spine, which showed "significant disc degeneration at multiple levels and but on the left C6C7 there is a foraminal stenosis with impressive left-sided osteophyte formation compressing as expected left C7 nerve root." (R. pp. 215, 257-258). On June 23, 2014, Claimant returned for a follow-up with Dr. Thompkins, at which time Dr. Thompkins noted that the MRI results revealed that "his [Claimant's] C-spine issues may be the source of his pain." (R. p. 263). Claimant last saw Dr. Thompkins on September 15, 2014, indicating that he had been approved for a neurosurgery evaluation. At that time, Dr. Thompkins diagnosed Claimant with "neck pain" with "left upper extremity radiculopathy." (R. p. 268).

Claimant presented to Dr. Artur Pacult of Neurosurgery and Spine Specialists of Charleston on October 27, 2014. Dr. Pacult diagnosed Claimant with "cervical radiculopathy at C7" and recommended an anterior cervical discectomy arthrodesis with plating at C6-7. (R. p. 214-215). Claimant underwent surgery on the C6-C7 vertebrae, and presented back to Dr. Pacult on February 2, 2015, for a post-operative visit. Dr. Pacult noted that Claimant's pain and numbness were "markedly improved," and that Claimant "essentially has normal neurological examination," (R. p. 218), meaning that Claimant did not have any paralysis, numbness, or weakness into the arm. (R. p. 274, Pacult Dep. p. 9, lines 1-13). Dr. Pacult further noted that, in his opinion, in "a few weeks patient will be able to return to his occupation [as a] truck driver." (R. p. 218). Claimant continued to follow up with Dr. Pacult post-operatively and underwent physical therapy to aid in his rehabilitation.

Claimant returned to Dr. Pacult on April 27, 2015, at which time Dr. Pacult indicated Claimant's condition had plateaued. Dr. Pacult noted, "I believe the patient agrees that he has reached MMI. According to him, he is not able to return to work due to his persistent pain. No objective findings however." (R. p. 223-224). At his deposition, Dr. Pacult confirmed that there were no objective findings to corroborate Claimant's ongoing subjective complaints, that Claimant did not require any future medical treatment, and that, medically, Claimant was able to return to work as a truck driver. (R. p. 275, Pacult Dep. p. 11 lines 17-24). Dr. Pacult also confirmed that he did not find any separate or distinct injury to Claimant's left arm or left upper extremity. (R. p. 278, Pacult Dep. p. 22 lines 4-8). Claimant was then referred to an impairment rating specialist for a rating, as Dr. Pacult does not provide workers' compensation impairment ratings. (R. pp. 223-224). Dr. Pacult stated that no further treatment was suggested or recommended. (R. p. 224).

On June 11, 2015, Claimant presented to Dr. Gee in Sumter, South Carolina, who indicated Claimant's diagnosis was radiculopathy and noted the body parts injured as cervical. Dr. Gee confirmed that Claimant had reached MMI as of April 27, 2015, and assigned him a 9% medical impairment rating to the whole person. Dr. Gee further opined that Claimant was able to return to work with restrictions to include "limit heavy work and stairs" and indicated Claimant would not need future medical care related to his work-related injury. (R. pp. 183-185). After reviewing Dr. Gee's Form 14B, Dr. Pacult testified that he agreed with Dr. Gee's assessment that Claimant's diagnosis was radiculopathy and the body part injured was the cervical spine. (R. p. 275, Pacult Dep. p. 13, lines 7-14). Dr. Pacult further testified that the 9% impairment rating assigned by Dr. Gee was reasonable and that he had no reason to question that rating. (R. pp. 276-277, Pacult Dep. p. 17, line 22 – p. 18, line 13).

Shortly thereafter, on June 30, 2015, Claimant obtained his own IME with Dr. Johnson at the Southeastern Spine Institute in Mt. Pleasant, South Carolina. Dr. Johnson noted Claimant "continues to have symptoms, more neck than arm pain," and he had "no spasticity or myelopathic signs." Although Dr. Johnson noted numbness, it was, "interestingly ... in a C5-C6 distribution." Per the fifth edition *AMA Guides*, Dr. Johnson assigned Claimant a 26% whole person impairment, noting that Claimant "has decreased functional use of his left arm secondary to radiculopathy with residual numbness and weakness of the left arm and hand." Dr. Johnson opined Claimant is able to work with "no lifting from shoulder level to above greater than 15 to 20 pounds." (R. pp. 269-271).

Claimant obtained a vocational assessment from Dixon Pearsall on August 31, 2015. Despite finding that Claimant possessed viable and potentially transferrable vocational/occupational skills, Pearsall concluded that Claimant is incapable of returning to work because he did not have the capacity to work an 8-hour day and 40-hour week on an ongoing and continuous basis. According to Pearsall, any individual who cannot meet the minimum standard of working 8-hour days and 40 hour weeks competitively is totally and permanently disabled. (R. pp. 292-301). There is no evidence in the record that Pearsall conducted any kind of labor market survey to identify potentially available positions and he provided no additional evidentiary basis for his opinions.

Respondents-Appellants obtained a vocational assessment from George Page on February 2, 2016. Page concluded that Claimant is able to work in light or sedentary duty positions, and identified six different jobs that were within the restrictions provided by both Dr. Gee and Dr. Johnson and could be performed on a full- or part-time basis. Page concluded that Claimant is able to return to work for wages between $9.00 and $10.00 per hour. (R. pp. 286-291).

At the May 13, 2016 hearing before Commissioner Campbell, Claimant testified he had passed all the required physical exams for the CDL prior to his accident and, moreover, had passed a physical for his CDL following his work accident. (R. p. 121, lines 18-25). Claimant testified that none of the doctors he has seen has provided any standing, walking, sitting, bending, stooping or squatting restrictions. (R. p. 124, lines 10-24) The only restrictions in this matter came from Dr. Gee during his impairment rating evaluation and Dr. Johnson during the IME obtained by Claimant.

STANDARD OF REVIEW

Judicial review of a Workers' Compensation Commission decision is governed by S.C. Code Ann. § 1-23-380 (Supp. 2014) of the Administrative Procedures Act (hereafter "the APA"); Lark v. Bi-Lo, 276 S.C. 130, 276 S.E.2d 304 (1981). Under the APA, a Commission decision should be reversed, modified or remanded if unsupported by substantial evidence, or if substantial rights of the appellant have been affected by an error of law, or if the decision is arbitrary or capricious or characterized by an abuse or unwarranted exercise of discretion. S.C. Code Ann. § 1-23-380(A)(5).

Review of the Commission's factual findings is governed by the substantial evidence standard. "A reviewing court may reverse or modify a decision of an agency if the findings, inferences, conclusions, or decisions of that agency are 'clearly erroneous in view of the reliable, probative and substantial evidence on the whole record.'" Bass v. Isochem, 365 S.C. 454, 467, 617 S.E.2d 369, 376 (Ct. App. 2005), *quoting from* Bursey v. South Carolina Dep't of Health & Envtl. Control, 360 S.C. 135, 600 S.E.2d 80 (Ct. App. 2004); *see also* S.C. Code Ann. § 1-23-380(A)(5)(e). "Substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole,

would allow reasonable minds to reach the conclusion the administrative agency reached in order to justify its action." Frame v. Resort Services Inc., 357 S.C. 520, 527-28, 593 S.E.2d 491, 495 (Ct. App. 2004). However, workers' compensation awards "must not be based on surmise, conjecture or speculation." Tiller v. Nat'l Health Care Ctr., 334 S.C. 333, 339, 513 S.E.2d 843, 845 (1999). In addition, a reviewing court should reverse, remand or modify a decision of the Workers' Compensation Commission if it is affected by an error of law. Etheredge v. Monsanto Co., 349 S.C. 451, 562 S.E.2d 679 (Ct. App. 2002).

ARGUMENTS

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

The Commission erred in assigning greater weight to the medical opinion of Dr. Johnson and little weight to that of Dr. Gee based on the geographic location of the two medical practices and the timing of the two IME's. Because the weighting was based on arbitrary and capricious distinctions, the Commission Decision should be reversed.

In its findings of fact, the Commission stated:

> 15. The records of Dr. Johnson and Dr. Gee appear to contradict one another, but Dr. Johnson's records are more current in time than Dr. Gee's.
>
> 19. We give the greatest weight to Dr. Johnson and little weight to Dr. Gee. We find no reason for Claimant to be rated by Dr. Gee in Sumter, South Carolina when all of Claimant's medical treatment was provided in the Walterboro/Charleston area.

(Commission Decision, R. pp. 44, 46). These are arbitrary and capricious findings that must be reversed.

As noted above, a Commission decision "should be reversed, modified or remanded ... if the decision is arbitrary or capricious ..." S.C. Code Ann. § 1-23-380(A)(5). "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 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).

Dr. Gee from Sumter, South Carolina assigned a 9% whole person rating, (R. pp. 183-185), whereas Dr. Johnson from Mt. Pleasant, South Carolina assigned a 26% whole person rating. (R. pp. 269-271). Dr. Pacult, Claimant's treating physician, testified that he did not have any reason to undermine or question Dr. Gee's assigned impairment ratings. (R. pp. 276-277, Pacult Dep. p. 17, line 22 – p. 18, line 13). Both Dr. Gee and Dr. Johnson met with Claimant for approximately the same amount of time. Both physicians' offices are approximately 1 hour and 15 minutes from Walterboro, South Carolina where Claimant resides. As admitted by Claimant, the drive from his home in Walterboro to Mt. Pleasant is approximately 65-70 miles – over an hour's drive. (R. p. 122, lines 20-25). The distance between Sumter and Walterboro is only slightly farther than the distance between Walterboro and Mt. Pleasant.[4]

Nevertheless, 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, R. p. 46). It appears the only basis for the specific weight afforded to the medical opinions in this case is the fact that Dr. Gee practices in Sumter rather than Mt. Pleasant. As a result, the decision to afford greater weight to Dr. Johnson is based on an arbitrary and capricious geographic distinction that is without a reasonable basis to

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

justify its use in assigning weight to evidence. Trimmier, 405 S.C. at 246, 746 S.E.2d at 495. Therefore, the Commission's factual finding on this issue should be reversed.

The Commission's determination to give greater weight to Dr. Johnson's opinion also was based on the fact that, "Dr. Johnson's records are more current in time than Dr. Gee's." (Commission Decision, R. p. 44). Under the facts of this case, such a basis is also arbitrary and capricious. Dr. Gee evaluated Claimant on June 11, 2015. Dr. Johnson evaluated Claimant on June 30, 2015, less than 3 weeks after Claimant had seen Dr. Gee. There is no evidence that Claimant's condition changed or that anything of significance regarding his condition occurred in that brief period of time. 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"). Inevitably, 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. Such a result is clearly undesirable and incompatible with the Act.

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 by awarding Claimant benefits under Section 42-9-10. Claimant suffered a single injury to a scheduled member – the cervical spine – and is therefore limited to recovery under Section 42-9-30. "Where [an] 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." Singleton v. Young Lumber Co., 236 S.C. 454, 471, 114 S.E.2d 837, 845 (1960) (emphasis added). "*Singleton* stands for the exclusive rule that a claimant with one scheduled injury is limited to recovery under section 42-9-30 alone. The case also stands for the rule that an individual is not limited to scheduled benefits under section 42-9-30 if he or she can show **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). Therefore, the ability of a claimant with an injury to a scheduled member to recover under Section 42-9-10 "is premised on [his or] her ability to establish an additional injury or impairment to a second body part." Id., 404 S.C. at 549, 745 S.E.2d at 135. A claimant must prove not only that another body part was "affected" in a vague and general sense, but that another body part was impaired or injured for Section 42-9-10 to apply. *See* Id., 404 S.C. at 546, 745 S.E.2d at 133. Indeed, this Court has required a showing of **a disabling effect** to a second body part to justify recovery under Section 42-9-10. Id., 404 S.C. at 545, 745 S.E.2d at 133; *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").

The medical record establishes Claimant sustained a neck injury only with radicular symptoms stemming from his cervical spine injury which were improving and likely had resolved. Dr. Thompkins opined that Claimant experienced neck pain with left upper extremity radiculopathy and, after review of a cervical MRI, that the source of Claimant's pain likely

stemmed from the cervical spine. (R. pp. 263, 268). Following surgery, Dr. Pacult noted that Claimant's pain and numbness were markedly improved and further noted that Claimant had an essentially normal neurological examination. Dr. Pacult testified that a normal neurological examination meant Claimant did not have paralysis or numbness and did not have weakness in the left arm. Claimant's only symptom was subjective pain complaints. (R. pp. 274, 279, Pacult Dep. p. 9, lines 4-13, p. 26, lines 1-13). Dr. Pacult also opined there were no objective findings to support the subjective complaints of pain. (R. p. 275, Pacult Dep. p. 10, lines 11-14; p. 11, lines 17-20). Dr. Pacult further elaborated and testified, "[s]ame in this situation. Patient comes, says, 'I have pain,' but objectively there is no weakness, there is no numbness, there is no change of reflex. So subjectively he has radiculopathy; objectively he does not have." (R. p. 279, Pacult Dep. p. 26, lines 7-10). Dr. Pacult confirmed that Claimant "did not have an injury to his left arm, no, to the extremity itself, no." (R. p. 278, Dr. Pacult Dep., p. 22, lines 4-8). Dr. Gee noted Claimant's diagnosis of cervical radiculopathy and assigned a 9% whole person rating. (R. pp. 183-185). Dr. Gee specifically noted Claimant "does not have radicular pain or paresthesias in the left arm as he did prior to surgery." (R. p. 184).

The record contains no objective medical evidence of injury or impairment to Claimant's left extremity following his surgery. Finding an injury to a second body part based solely on subjective complaints of pain alone with no supporting objective medical evidence of injury to a second body part, would allow claimants to avoid the limitations of Section 42-9-30 simply by claiming to have pain or numbness or tingling in a body part secondary to a compensable injury. Such a ruling, if upheld, would unfairly create a windfall to claimants and place an unreasonable burden on employers, who have no way of disputing purely subjective complaints of pain.

As noted above, each of Claimant's medical providers found that Claimant suffered a single injury to the cervical spine. As the back is a scheduled injury, and because no additional physical injury to another body part was proven through medical evidence, Claimant is limited to recovery under 42-9-30. Singleton, 236 S.C. at 471, 114 S.E.2d at 845. Further, as explained in detail in Section I, the Commission's reasons for giving greater weight to the opinion of Dr. Johnson than to that of Dr. Gee are arbitrary and capricious. And, since Dr. Johnson's opinion appears to be the sole basis for assigning benefits under Section 42-9-10, since Dr. Johnson was the only doctor in the record to find that Claimant complained of any loss of use in his left arm following his cervical fusion, the Commission's finding that Claimant is totally and permanently disabled should be reversed as an error of law and fact.

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.

The Commission's finding of total and permanent disability is based, in part, on a flawed hypothetical posed to Dr. Pacult by Claimant's counsel. (Commission Decision, R. p. 45). Because that hypothetical is based on unproven facts and assumptions, it is flawed and lacks any probative value. As a result, the Commission erred in relying on it. "[I]t 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, Dr. Pacult stated in his medical notes that he believed Claimant would be able to return to his job as truck driver. (R. p. 218). Although Claimant advised Dr. Pacult that he was not able to return to work due to his persistent pain, Dr. Pacult testified there was no objective evidence to support this claim. (R. pp. 276, 277, 278, Pacult Dep. p. 14, lines 8-9; p. 20, lines 16-19; p. 23, lines 13-16). According to Dr. Pacult, medically, Claimant was capable of returning to work. Subjectively, Claimant stated he could not.

Nonetheless, the Commission relied on a very specific portion of Dr. Pacult's testimony, quoted in the Commission's Decision and Order, which Respondents-Appellants assert is taken completely out of context and does not support the proposition that Claimant cannot return to work. The Commission relied on a hypothetical question posed by Claimant's attorney to the effect that, "**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, R. p. 45; R. p. 281, Pacult Dep. p. 36, lines 12-22) (emphasis added). This hypothetical is not based on any facts proven in this claim and contradicts prior testimony from Dr. Pacult. Specifically, Dr. Pacult was asked if there was a greater risk to other discs in Claimant's neck after having undergone a fusion procedure to which Dr. Pacult 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." (R. p. 280, Pacult Dep. p. 30, line 21 – p. 31, line 11). Furthermore, Dr. Pacult was asked:

> 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.**

(R. p. 281, 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. Therefore the hypothetical question which the Commission relied on based upon the premise posed "if there's a greater risk of further injury to his back" assumes facts not in evidence and is not supported by the prior testimony. In other words, since Dr. Pacult testified he does not believe there is a greater risk of further injury to his neck by going back to work, then the following hypothetical based upon a greater risk of further injury by going back to work is unsupported factually and does not support the conclusion that Dr. Pacult believes Claimant should not return to work. *See* Chapman, 249 S.C. at 449; Radcliffe, 209 S.C. at 424. 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

The Commission's finding of total and permanent disability is in error as it is based on Pearsall's vocational assessment that concluded Claimant, "cannot meet the basic expectations and requirements of competitive employment (work) at any exertion or skill level." (Commission Decision, R. p. 46). Pearsall 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." (R. p. 293). This is the only category of work for which Pearsall evaluated Claimant. To make the leap from concluding that Claimant cannot meet Pearsall's "competitive employment" standard of eight-hour days/40-hour work weeks to the conclusion that he cannot work in any capacity whatsoever is both unsupported and speculative. Workers' compensation awards "must not be based on surmise, conjecture or speculation." Tiller, 334 S.C. at 339.

In this case, it is particularly illogical to claim that Claimant is incapable of returning to work in any capacity because he cannot regularly work a full time schedule when, at the time of his accident, Claimant was working only part-time in any event. (R. p. 328, lines 12-14) (R. pp. 288, 291) (R. p. 117, lines 6-21; p. 119, lines 19-22). Further, the record reflects that Page was able to identify multiple full and part-time positions within the work restrictions provided by both Dr. Gee and Dr. Johnson. (R. pp. 290-291). As Pearsall's opinion is based on an unproven and speculative assumption (that Claimant was totally and permanently disabled because he could not fill full-time "competitive employment" positions), and contradicted by evidence in the record that Claimant had not worked full-time during any of the years after he retired and planned to continue to limit his earnings in order to preserve his Social Security benefits, the

Commission erred in relying on Pearsall's vocational evaluation to find Claimant is totally and permanently disabled.

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,

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December 6, 2017

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

WCC File No. 1406130

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

v.

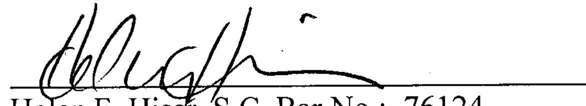
G & G Logging, Inc., Employer, and
Palmetto Timber S.I. Fund c/o Walker,
Hunter & Associates, Inc., Carrier .... Respondents-Appellants.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Brief of Respondents-Appellants G&G Logging, Inc. and Palmetto Timber S.I. Fund c/o Walker, Hunter & Associates, Inc. complies with Rule 211(b), SCACR. The undersigned also certifies that this Brief of Respondents-Appellants complies with the South Carolina Supreme Court's April 15, 2014 Order re: Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings.

December 6, 2017

McANGUS GOUDELOCK & COURIE, LLC



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