THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable G. Thomas Cooper, Jr.,, Circuit Court Judge

Case No.: 2016-000422

Clifford Pasley ..... Claimant/Appellant

v.

TransAgri, Inc. / Leonard Enterprises ..... Employer,

And

South Carolina Uninsured Employer's Fund, Insurer,
Respondents.

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RESPONDENTS' INITIAL BRIEF

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STATEMENT OF THE CASE

This case arises out of an accident that occurred on January 17, 2002. A Form 50 was originally filed in 2002, however, the original attorney handling the case withdrew as counsel. Appellant was released from his doctor on February 18, 2003. A second Form 50 was filed on October 27, 2011. A Form 51 was filed by the South Carolina Uninsured Employer's Fund (UEF), denying the case and that the South Carolina Workers' Compensation Commission had jurisdiction over this matter. A Form 51 was also filed by Traveler's Insurance denying the case and that there was no coverage through Traveler's Insurance. A hearing on the merits was held on June 27, 2012. There is nothing in the record to explain why there was such a lengthy delay in between the date of injury and the hearing on the merits.

As a result of the hearing in front of the Single Commissioner, Appellant was found to have sustained a temporary injury to his back with no resulting permanent injury. Leonard Enterprises and Trans Agri were found to be subject to the Act by regularly employing four or more employees.

A Form 30 was filed by the Appellant on January 17, 2013 alleging that the Single Commissioner erred in the determination of the Appellant's average weekly wage, erred in failing to find that the Appellant sustained permanent disability to his back and legs, whether the Single Commissioner erred in finding that the Appellant was not entitled to medical treatment or care after January 1, 2004. The UEF also filed a Form 30 alleging that the Single Commissioner erred in finding that the Leonard Enterprises and Trans Agri were subject to the Act, whether the Single Commissioner erred in finding that the Appellant did not work between January 17, 2002 and December 31, 2003. A hearing was held before the Full Commission on July 15, 2013. The Full Commissioner reversed the findings regarding the Appellant's average weekly

wage but otherwise affirmed the order of the Single Commissioner. Appellant then appealed to circuit court. On December 17, 2014, the circuit court found that there was substantial evidence to support the findings of the Commission. Appellant then filed a Motion for a New Hearing or an Amendment of the Order. On January 14, 2016, the circuit court issued an order denying the Appellant's Motion for New Hearing and Amendment of Order. Appellant then appealed to the Court of Appeals.

STATEMENT OF FACTS

Appellant alleges an injury to his back that occurred in the course and scope of his employment on January 17, 2002. In a recorded statement taken by Travelers Insurance, Appellant denied any prior back problems. Appellant first went to a doctor on January 23, 2002 with back pain. It was noted that he has had back pain in the past. It was also noted he "does some working out, does not know if he aggravated it with that." (Appellant's APA Submissions, p. 66). A MRI was done on March 25, 2002 that showed grade 1 L5-S1 spondylolisthesis associated with degenerative disc disease. (Appellant's APS Submissions, p. 63). On April 15, 2002, it was noted that the Appellant was making significant improvement without any specific therapy. (Appellant's APA Submissions, p. 61). A second MRI of the lumbar spine was done on August 31, 2011 that showed Grade 1 anterolisthesis of L5 with respect to S1 and advanced degenerative disk disease. (Appellant's APA Submissions, p. 41). Appellant admitted that there were no changes between the 2002 MRI and the 2007 MRI. (Hearing Tr. p. 95). Appellant only takes iburprofen for his back pain. (Hearing p. 92).

The first note from Dr. Neal in the record is dated August 28, 2002 although it is noted as a follow up visit. Appellant was released from Dr. Neal's care on February 18, 2003. (Appellant's APA Submissions, p. 26). On October 5, 2005, Dr. Neal noted that

Appellant had pain in his low back that was likely due to degenerative arthritis. (Appellant's APA Submissions, p. 242).

Since January 17, 2002, Appellant has held at least 4 different truck driving jobs. (Hearing Tr. P. 73). Appellant returned to work in 2004 earning substantially more in 2004 than he did in 2001 and has continued to work since then. After this accident, Appellant continued to work as a truck driver for several years. (Hearing Tr. pp. 89-91). Appellant stopped working as a truck driver, when his employer sold the truck he was driving. (Hearing Tr. p. 91-92). Since this accident, Appellant at times has been out of work and has drawn unemployment. Appellant admitted that he certified to the Employment Security Commission that he was willing and able to work. (Hearing Tr. p. 94). At the time of the hearing Appellant was working at the VA full time in housekeeping. (Hearing p. 74).

Appellant admitted that he previously injured his back, while serving in the military in Operation Desert Storm. (Hearing Tr. p. 75). Appellant testified that he went to sick hall a couple of times for a sore back. (Hearing p. 74). In 2009, Appellant was assigned a thirty (30%) percent disability from the VA to his back, for military service that preceded the January 17, 2002 injury. Appellant admitted that he received a disability from the military due to a record of back problems while in the military. (Hearing p. 74).

STANDARD OF REVIEW

The Administrative Procedures Act ("APA") provides the standard for judicial review of decisions by the Commission. Pierre v. Seaside Farms, Inc., 386 S.C. 534, 540, 689 S.E.2d 615, 618 (2010); Lark v. Bi-Lo, Inc., 276 S.C. 130, 133-34, 276 S.E.2d 304, 306 (1981). Under the APA, this court can reverse or modify the decision of the

Commission if the substantial rights of the appellant 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. S.C. Code Ann. § 1-23-380(5)(d), (e) (Supp. 2011); Transp. Ins. Co. v. S.C. Second Injury Fund, 389 S.C. 422, 427, 699 S.E.2d 687, 689-90 (2010).

The Commission is the ultimate factfinder in workers' compensation cases. Shealy v. Aiken Cnty., 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000). As a general rule, this court must affirm the findings of fact made by the Commission if they are supported by substantial evidence. Pierre, 386 S.C. at 540, 689 S.E.2d at 618. "Substantial evidence is that evidence which, in considering the record as a whole, would allow reasonable minds to reach the conclusion the Commission reached." Hill v. Eagle Motor Lines, 373 S.C. 422, 436, 645 S.E.2d 424, 431 (2007). "The possibility of drawing two inconsistent conclusions from the evidence does not prevent the Commission's finding from being supported by substantial evidence." Id.

ARGUMENT

THE CIRCUIT COURT WAS CORRECT IN AFFIRMING THE COMMISSION'S FINDINGS AS THE FINDINGS ARE SUPPORTED BY SUBSTANTIAL EVIDENCE.

1. The circuit court was correct in affirming the findings that the Appellant was not entitled to any further medical or disability benefits after January 1, 2004.

There is clearly substantial evidence to support the Commission's findings that Appellant is not entitled to additional medical treatment after January 1, 2004. Appellant was released from care on February 18, 2003. (Appellant's APA Submissions, p. 26).

Appellant did not receive any additional treatment in 2003 for this back and there are no records of treatment for his back in 2004. However, the record and testimony of the Appellant shows that he had returned to work as truck driver during this time period. On October 5, 2005, Dr. Neal noted that Appellant had pain in his low back that was likely due to degenerative arthritis. (Appellant's APA Submissions, p. 24). In other words, the Appellant's medical provider is clearly now stating that any problems from the back are stemming from degenerative arthritis not from the January 17, 2002 injury. Furthermore, it is also important to note that no medical records from 2006 or 2007 were produced by the Appellant. The only note in the record that is from the VA is dated September 14, 2008 and this note is unclear as to the reason for the treatment. (Appellant's APA Submissions, p. 43). No medical records from 2009 were produced. In 2010, Appellant was sent by his then attorney for an IME at Southeastern Spine Institute. By this time, 8 years have passed since the date of accident, Appellant has admittedly worked several different jobs and requalified for his commercial driver's license since the date of accident. Therefore, there is substantial evidence in the record to support the finding that after January 1, 2004, any treatment Appellant received for his back was related to other conditions.

As discussed at length in the order of the Single Commissioner, there is documentation supporting the finding that the Claimant did not suffer any permanent impairment and only had a temporary injury. The order states that:

> Mr. Pasley admitted that he recalled giving a recorded statement, but did not recall saying that he had never injured his back previously. (Tr., p. 87) He admitted, at the hearing, that he actually been to sick bay in the military for his back and was receiving thirty (30%) percent disability from the military for his back, which included some of the pain from this injury. (Tr., p. 88) In fact, he testified that he believed that his

disability was paying for some of the injury in this case. (Tr., p. 88) Further, the Claimant admitted that he continued to work after his accident in this case from 2003 to 2010, or for approximately seven (7) years, and that he has made as much as $27,000 in 2004, driving as a truck driver. (Tr., p. 90) He also admitted that Dr. Neal released him to work by January 2003. The Claimant testified that he is aware that he has the condition of spondylolisthesis and degenerative disk disease, and that his MRI in 2007 was essentially the same as the one in 2002. (Tr., p. 95)

The issue is not whether there is substantial evidence to support the Appellant's position but whether there is substantial evidence to support the Commission's order and circuit court affirmation and there is clearly substantial evidence to support the findings of the Commission and circuit court affirmation. Appellant admitted he receives 30% disability to his back from the military. Appellant's own testimony is that the rating from the military also includes his workers' compensation injury. Ten years had passed between the date of accident and by the time of the hearing by the Single Commissioner. In those ten years, Appellant had years of no treatment for his back, has held at least 4 jobs as a truck driver. At the time of the hearing, he was working at the VA doing physical work. Furthermore, the initial note of treatment from back on January 23, 2002 references that Appellant may have also hurt his back while working out. (Appellant's APA Submissions, p 66).

2. Claimant did not suffer a permanent impairment related to the accident of January 17, 2002.

In the Appellant's brief, he alleges that his military back condition was aggravated by this accident. Appellant references South Carolina Code Section 42-9-400(a) and Ellison v. Frigidaire Home Products, 371 S.C. 159, 638 S.E.2d 664 (2006). Section 42-9-400, is the code section pertaining to reimbursement for the Second Injury Fund. Section 42-9-400 states that "[i]f an employee who has permanent physical impairment from any cause or origin incurs a subsequent disability from injury by accident .... That

is substantially greater and is caused by aggravation of the pre existing impairment than that which would have resulted from the subsequent injury alone, the employer or his insurance carrier shall pay all awards of compensation and medical benefits... However, § 42-9-400 does not require the Commission to find a permanent aggravation. Although, Appellant's argument is that under § 42-9-400, his injuries should be found compensable. (Appellant's brief, p. 11) Compensability isn't an issue. The Commission found the injury to the back compensable but just didn't find a permanent impairment. Arguably, the Ellison case would not apply to the case at bar as it was decided well after the date of accident.

At the hearing in front of the Single Commissioner, Appellant did not argue that the Appellant suffered an aggravation. (Hearing Tr. pp. 6-7 and Claimant's Form 58 and Addendum). Therefore, any argument that the Appellant suffered an aggravation of a prior injury has been waived as it was raised at the initial hearing. Appellant cannot suddenly raise an issue for the first time on appeal. Creighton v. Coligny Plaza Ltd. Pshp., 334 S.C. 96, 512 S.E.2d 510 (Ct. App. 1998).

Appellant seems to be arguing in his brief that it was premature for the Commission to issue a ruling on whether Appellant suffered a permanent impairment. Appellant asked the Single Commissioner to make an award on permanency. (Tr. p. 7). Appellant then states in his brief that he had permanent injuries to his back, right leg and cardiovascular system. (Appellant's brief, p. 11). Appellant's cardiovascular system was never plead on his Forms 50 & 58. Appellant is inconsistent in his brief as to what relief he is requesting and what appellant issues he is raising.

There is substantial evidence to support the findings that the Appellant did not

suffer a permanent impairment. On October 5, 2005, Dr. Neal noted that Appellant had pain in his low back that was likely due to degenerative arthritis. (Appellant's APA Submissions, p. 242). Appellant was released from Dr. Neal in January of 2003. There are no medical records in evidence from between January of 2003 and September 2005. There are no medical records from 2006, 2007, or 2009 in the record. The record from the VA assigning the Appellant his 30% disability to his back is not in the record. Appellant had the burden of proving his case and failed to produce any records to show an aggravation. However, there is substantial evidence in the record to show that Appellant did not suffer a permeant impairment.

It appears one of the issues on appeal, is not whether the Commission's Order was supported by the greater weight of and the substantial evidence in the record, but rather whether there was some evidence supporting the claims made by Appellant and therefore findings should be made in the Appellant's favor. Again, the Appellant would lead the Court to believe the Commission was in essence required to assign greater weight to the opinion evidence of Appellant's doctors who didn't work for the Veteran's Administration. Further, the Appellant worked fairly regularly after the 2002 accident, which coupled with the pre-existing condition and a review of the Veteran Administration's file, makes it more likely the accident was only a temporarily aggravation.

Appellant's brief is replete with references that the Commission's failure to find in his favor is contrary to the purpose of the Act. It is a well settled rule of law that the burden of proof is upon the Claimant to prove such facts as will render an injury compensable under the provisions of the Worker's Compensation Act, and that no

award may be based on surmise, conjecture or speculation. Cf. Walker v. City Motor Car, 232 S.C. 392, 102 S.E. 2d 373 (1958); Packer v. Corbett Canning Co., 238 S.C. 431, 120 S.E. 2d 398; Gosnell v. Bryant, 240 S.C. 215, 125 S.E. 2d 405 (1962). Further, it has been held that the difficulty in proving a fact in a worker's compensation case does not relieve a party on whom the burden rests of proving it nor does it shift the burden to the other party. Cf. Herndon v. Morgan Mills, Inc., 246 S.C. 201, 143 S.E. 2d 376 (1965). The same requirement to establish compensability logically extends to a Claimant's burden of establishing a greater weight of the competent evidence in the record establishes the Claimant sustained a degree of permanency. Simply put, the Hearing Commissioner in exercising his discretion reviewed the evidence in the record as a whole and appropriately determined that the Appellant did not sustain a permanent impairment. Taken further, it is well established that a Commissioner has discretion under Section 42-15-60 to award what is decided to be causally related medical care and the Commission was correct in not awarding future medical benefits. The Commission did order reimbursement for out of pocket expenses from January 17, 2002 until December 31, 2003.

Other evidence controverting Appellant's claim that the Commission could only reach one conclusion, is exemplified by the testimony of the Appellant at the hearing. Appellant admitted he gave a recorded statement two weeks after the January 17, 2002 accident and denied any prior injuries to his back (H. Tr. 87). Appellant admitted under cross-examination that he did in fact go to the sick bay for back issues during his military tenure and that at the time of the hearing he was receiving 30% disability from the military due to his back condition. Appellant was also forced to admit at the hearing

that he continued working for about seven years after the 2002 accident and that the only medication he was taking was Ibuprofen. Also during this seven-year period, the Claimant admitted at the hearing that he did file for unemployment at various times certifying that he was willing and able to work. (H. Tr. 94). Finally, Appellant admitted he continued to pass his CDL physicals since the 2002 accident and that he has not been housebound or unable to drive since 2002.

Furthermore, there is no reference by the Single Commissioner in the hearing transcript or in the Decision and Order that he solely relied on the Appellant's receipt of V.A. disability benefits as the reason he denied the Appellant's requests for disability compensation and medical care. In fact, Finding of Fact #9 states that there is no definitive medical evidence in the case causally connecting the Claimant's continuing back issues to the January 17, 2002 accident. It is well within the Commission's discretion to consider all evidence, and determine the appropriate weight to give particular testimony or evidence.

There is also substantial evidence to support Findings of Fact #'s 8 & 9 and Conclusion of Law #5 of the Single Commissioner's order that was ultimately affirmed by the circuit court. Finding of Fact #8 states "[i]n 2009, the Claimant was assigned a thirty (30%) percent disability from the VA to his back, for military service preceding the January 17, 2002 injury. Finding of Fact #9 states "[b]ecause military disability is assigned for service related injuries and there is no definitive medical evidence in this case causally connecting the Claimant's continuing back issues to the injury of January 17, 2002, reimbursement for medical treatment and care after January 1, 2004, is denied." Conclusion of Law #5 states: Under § 42-9-30, the Claimant has failed to

meet his burden of proving that he sustained any loss of use or disability to his back, as a result of this accident, but, instead only a temporary aggravation of a pre-existing condition, for which he is receiving a 30% disability." As argued above, there is substantial evidence in the record to support these findings of fact and conclusions of law and the circuit court was correct in their affirmation of the Commission's order.

CONCLUSION

Therefore, for all of the foregoing reasons, the order of circuit court should be affirmed.

Respectfully submitted

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February 8, 2018
Charleston, South Carolina

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PROOF OF SERVICE

I certify that I have served the Respondents' Initial Brief and Designation of Matter to be Included in the Record on Appeal upon the Appellant by mailing a copy of the same in the United States mail, with sufficient postage affixed thereto and return address clearly marked on the date indicated below address as follows:

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Margaret Urbanic

February 8, 2018

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February 8, 2018

File No.: 2002502.000

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
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Re: Clifford Pasley v. TransAgri, Inc. / Leonard Enterprises
Case No.: 2016-000422
Claim No.:

Dear Ms. Kitchings:

Enclosed for filing please find an original and one (1) copy of a Respondents' Initial Brief and Designation of Matter for the above referenced matter. Also enclosed is the Proof of Service. I have enclosed a self-addressed, stamped, envelope for your convenience in returning a clocked copy of the Brief and Designation to my office.

Very truly yours,

CLAWSON and STAUBES, LLC

Margaret M. Urbanic

MMU/
Enclosure

cc: Frank A. Barton, Esq.

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