THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

WCC File No. 1012533
Appellate Case No. 2017-001764

Chisolm Frampton, Employee, ... Appellant,

v.

S.C. Department of Natural Resources, Employer,
and S.C. State Accident Fund, Carrier, ... Respondents.

REPLY BRIEF

John C. Land, III # 3118
LAND PARKER & WELCH
P.O. Box 138
Manning, SC 29102
(803) 435-8894
(803) 233-6591 (facsimile)
pat@lpwlawfirm.com

Blake A. Hewitt # 73674
BLUESTEIN THOMPSON SULLIVAN
P.O. Box 7965
Columbia, SC 29202
(803) 779-7599
(803) 779-8995 (facsimile)
blake@bluesteinattorneys.com

Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes and Other Authorities

ARGUMENT

A. Respondents did not appeal the hearing commissioner's finding that liability was admitted and this finding of admission requires reversal of the appellate panel's decision to deny benefits.

The hearing commissioner awarded benefits because she found Respondents admitted liability for a compensable claim. The relevant finding, in its entirety, provides:

> I find there is no medical evidence stated to a reasonable degree of medical certainty that Claimant's September 2, 2010 dove field incident aggravated or exacerbated his pre-existing neck condition for which he was already treating with a neurosurgeon. Nevertheless, Defendants admitted the claim and provided medical treatment.

(R.p.7, ¶7). Respondents did not appeal this finding.

Respondents raised six issues in their request for appellate panel review. (R.pp.42-43). None of those issues allege the hearing commissioner erred by finding as a fact that Respondents admitted the claim.

Respondents were required to lodge a specific objection if they disagreed with the finding that the claim was admitted. The hearing commissioner's findings and conclusions are binding on a party unless they are raised in that party's "Form 30"—the request for appellate panel review. *Hilton v. Flakeboard* contains a fairly recent articulation of this principle, explaining "[o]nly issues raised to the Commission within the application for review of the single commissioner's order are preserved for review." 418 S.C. 245, 249, 791 S.E.2d 719, 721 (2016). This Court's decisions have similar language. E.g. *Creech v. Ducane Co.*, 320 S.C. 559, 564, 467 S.E.2d 114, 117 (Ct. App. 1995) (only issues in the application for review are preserved for the full commission). The hearing commissioner's finding of admission became conclusive when Respondents' Form 30 did not reference it.

This is not a case where an issue was left off the Form 30 but argued in briefing. Respondents filed a brief in support of their request to reverse the hearing commissioner's decision. (R.pp.48-55). That brief discusses Respondents' arguments about burden of proof and that the claimant allegedly suffered a non-disabling injury, but the brief never acknowledges or disputes the central reason why the hearing commissioner awarded the claim. The hearing commissioner found Respondents admitted the claim and provided medical treatment. That unchallenged finding bound Respondents and the appellate panel.

Further scrutiny of the appellate panel proceedings reinforces the point. Respondents' argument to the panel was chiefly based on burden of proof. The claimant said the answer to that argument was simple: The claim was admitted. (R.p.61, ¶I.). Respondents did not mention admission until their oral argument, saying the claim had been accepted because the claimant had allegedly denied having a pre-existing condition. (R.p.139, lines 3-7). Respondents cited no evidence for this assertion, and the fact remains neither Respondents' Form 30 nor their brief challenged the finding of an admitted claim.

The claimant will readily admit the record does not resemble the record of an admitted case. Respondents tried this case like it was fully denied, contesting *everything*. This may be odd, but it does not matter. The hearing commissioner found aggravation of a pre-existing condition was not relevant because Respondents had admitted the claim. Respondents did not appeal that finding. This prevented the appellate panel from reversing based on the claimant's failure to prove aggravation of a pre-existing condition. (R.p.30, ¶2). The hearing commissioner found the claimant did not have to prove aggravation of a pre-existing condition. Compensability had been admitted.

***

The claimant firmly believes in his other arguments on compensability.

First, the finding that this claim was admitted is correct. Given the background the only sensible interpretation of Respondents' Form 51 is that Respondents admitted a compensable injury to the neck/cervical spine. The underlying injury occurred four years before a claim for benefits was filed and Respondents provided a lengthy course of treatment before the claim for benefits was filed. The treatment was supervised by the same doctor who treated the claimant for his supposed "pre-existing condition," (R.pp.245-246), and that doctor also completed two Form 14B "physician's statements" for the commission—before the claim for benefits was filed. (R.pp.178, 183-184). Respondents knew this and admitted a neck injury, disputing its extent but not its existence. They did not answer with a denial.

Second, the "aggravation statute"—S.C. Code Ann. § 42-9-35—was not properly raised because it was not listed on Respondents' Form 51 or their Form 58, violating the statute limiting Respondents to the defenses stated on these forms and requiring an evidentiary showing to add defenses after filing an answer. See S.C. Code Ann. § 42-1-705 (2015). The argument that the claimant had a pre-existing condition came too late.

But the Court need not reach these two arguments in this case. It does not matter that the claim truly *was* admitted and it does not matter that the aggravation statute was not properly raised below. The outcome is controlled by the fact that the hearing commissioner's finding of an admitted claim was not appealed. This unappealed finding is binding on the parties and on the appellate panel. The Court need not go further on compensability. The Court should reverse the commission and remand for entry of an award.

B. Because the issue will arise on remand, the Court should explain that the claimant's return to work and his subsequent promotion are not relevant when estimating the medical impairment caused by the claimant's injury.

There are multiple impairment ratings in the file. Dr. Byron Bailey is the authorized treating neurosurgeon and he opined the claimant has a 75% impairment rating to his cervical spine and a 26% impairment of his "whole person." (R.p.184). Dr. Stephen Poletti opined the claimant has a 33% "whole person" impairment rating. (R.p.223).

The hearing commissioner assigned a lower rating, finding the claimant had only a 20% impairment to his back. (R.pp.9-10, ¶19). The commissioner discounted Dr. Bailey's rating because Dr. Bailey had also opined the claimant could not return to work. *Id.* The commissioner further explained she "considered Claimant's full-duty, unrestricted employment and advancement/promotions . . . since his work injury." *Id.*

The hearing commissioner erred in considering the claimant's return to work and his promotions when estimating the medical impairment caused by the claimant's injury. The "medical model" of workers' compensation focuses on the "character" of the claimant's injury. *Bixby v. City of Charleston*, 300 S.C. 390, 398, 388 S.E.2d 258, 263 (Ct. App. 1989); *Singleton v. Young Lumber Co.*, 236 S.C. 454, 469, 114 S.E.2d 837, 844 (1960). Awards are controlled by the degree of the claimant's medical impairment. *Simmons v. City of Charleston*, 349 S.C. 64, 74, 562 S.E.2d 476, 481 (Ct. App. 2002).

In many cases, the mere fact that a claimant has gone back to work has nothing to do with the degree of that claimant's medical impairment due to an injury. The same is also true with respect to promotions. Both things are true here. This claimant was injured while

working in the field for the Department of Natural Resources. He was promoted to a desk job in April of 2011, (R.p.77, lines 6-8); seven months after he injured his neck and one month after his fusion surgery. The fact that he can capably perform his job as a supervisor has nothing to do with whether he has restricted range of motion in is his neck, residual pain, is at increased risk of developing arthritis, and will require future surgery. The fact that he is earning more money is similarly irrelevant to his physical limitations.

It would be different if the evidence showed Mr. Frampton was able to accomplish work-related tasks the doctors believe he is physically incapable of doing. That sort of evidence would probably impact Mr. Frampton's impairment rating, but that is not the case here and that is not how the hearing commissioner analyzed the claim. The hearing commissioner specifically explained she considered Mr. Frampton's post-injury work and promotions when considering his impairment rating. These facts were obviously relevant to the question whether Mr. Frampton was permanently and totally disabled, but there is no logical correlation between these facts and the degree of medical impairment to Mr. Frampton's neck.

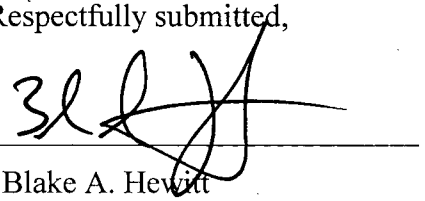
The Court need not address this issue, but Mr. Frampton appealed the hearing commissioner's finding about the degree of his impairment to the appellate panel and the panel will be required to address this argument on remand. Several appellate decisions have addressed similarly-postured issues when they will likely arise on remand. (Appellant's Br., p.17). In addition to the cases cited in the claimant's principal brief, *Davis v. Richland County Council* collects other decisions addressing the merits of issues in the interest of judicial economy. 372 S.C. 497, 501 n.1, 642 S.E.2d 740, 742 n.1 (2007).

All parties seem to agree that return to work is relevant when seeking to rebut permanent and total disability. There is no sensible reason to avoid taking the next step and reiterating the same thing multiple precedents describing the medical model already confirm. Evidence of post-injury earnings is not relevant when determining the degree of a claimant's medical impairment. Additional precedents supporting this proposition are listed on pages 13 and 14 of Appellant's principal brief.

CONCLUSION

This Court should reverse the commission and remand this case for adjudication of Frampton's cross-appeal.

Respectfully submitted,



February 21, 2018

John C. Land, III # 3118
LAND PARKER & WELCH
P.O. Box 138
Manning, SC 29102
(803) 435-8894
(803) 233-6591 (facsimile)
pat@lpwlawfirm.com

Blake A. Hewitt
BLUESTEIN THOMPSON SULLIVAN
P.O. Box 7965
Columbia, SC 29202
(803) 779-7599
(803) 779-8995 (facsimile)
blake@bluesteinattorneys.com

Attorneys for Appellant

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

WCC File No. 1012533
Appellate Case No. 2017-001764

Chisolm Frampton, Employee, ... Appellant,

v.

S.C. Department of Natural Resources, Employer,
and S.C. State Accident Fund, Carrier, ... Respondents.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 211(a), SCACR, I certify that the *Brief of Appellant* and *Reply Brief* comply with the provisions of Rule 211(b), SCACR, and with the August 13, 2007, Supreme Court Order regarding personal data identifiers.

Respectfully submitted,

February 21, 2018

Blake A. Hewitt #73674
BLUESTEIN THOMPSON SULLIVAN, LLC
P.O. Box 7965
Columbia, SC 29202
(803) 779-7599

Attorney for Appellant