

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
APPELLATE PANEL

Appellate Case No. 2017-001027
W.C.C. File No. 1019167

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SC Court of Appeals

Seeahray Brailsford, Employee, Claimant,.....Appellant,

v.

Piggly Wiggly Carolina Company, Inc., Employer, and Constitution
State Service Company as TPA for Greenbax Enterprise Inc., Carrier, Respondents.

BRIEF OF RESPONDENTS

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TABLE OF CONTENTS

Table of Authorities ii

Statement of Issue on Appeal 1

Standard of Review 2

Statement of the Case 4

Facts 7

Argument 8

 I. SUBSTANTIAL EVIDENCE SUPPORTS THE CONCLUSION OF
 THE UNANIMOUS FULL COMMISSION THAT APPELLANT IS
 NOT ENTITLED TO ADDITIONAL WORKERS' COMPENSATION
 BENEFITS 8

 A. The Full Commission Properly Affirmed The Decision
 Authorizing Termination of Temporary Total Disability
 Payments And Credit For Overpayment Based Upon The Date
 Of Filing Of Respondents' Form 21, Employer's Request For
 Hearing..... 9

 B. Appellant Failed To Meet Her Burden Of Proving She Sustained
 Additional Work-Related Physical Injuries 10

 C. Appellant Has Waived Her Claim For A Compensable
 Psychological Overlay Or Depression 10

Conclusion 12

TABLE OF AUTHORITIES

State Cases

<i>Bass v. Kenco Group</i> , 366 S.C. 450, 622 S.E.2d 577 (Ct. App. 2005).....	3
<i>Curriel v. Environmental Management Services (MS)</i> , 376 S.C. 23, 655 S.E.2d 482 (2007)	9
<i>Farrell v. Jerry's, Inc.</i> , 370 S.C. 22, 633 S.E.2d 893 (2006).....	2
<i>Hall v. United Rentals, Inc.</i> , 371 S.C. 69, 636 S.E.2d 876 (Ct. App. 2006).....	9
<i>Hargrove v. Titan Textile Co.</i> , 360 S.C. 276, 599 S.E.2d 604 (Ct. App. 2004)	3
<i>Kennedy v. Williamsburg County</i> , 242 S.C. 477, 131 S.E.2d 512 (1963)	8
<i>Lark v. Bi-Lo, Inc.</i> , 276 S.C. 130, 276 S.E.2d 304 (1981).....	2
<i>Lee v. Harborside Café</i> , 350 S.C. 74, 564 S.E.2d 354 (Ct. App. 2002)	8
<i>Palmetto Alliance, Inc. v. S.C. Pub. Serv. Comm'n</i> , 282 S.C. 430, 319 S.E.2d 695 (1984)	3
<i>Robbins v. Walgreens and Broadspire Services, Inc.</i> , 375 S.C. 259, 652 S.E.2d 90 (Ct. App. 2007).....	11
<i>Rogers v. Kunja Knitting Mills Co.</i> , 312 S.C. 377, 440 S.E.2d 401 (Ct. App. 1994).....	2
<i>Shealy v. Aiken County</i> , 341 S.C. 448, 535 S.E.2d 438 (2000)	3
<i>Shealy v. Algernon Blair, Inc.</i> , 250 S.C. 106, 156 S.E.2d 646 (1967).....	10

Statutes

S.C. Code Ann. § 1-23-380.....	2
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STATEMENT OF ISSUE ON APPEAL

- I. DOES SUBSTANTIAL EVIDENCE SUPPORT THE CONCLUSION OF THE UNANIMOUS FULL COMMISSION THAT APPELLANT IS NOT ENTITLED TO ADDITIONAL WORKERS' COMPENSATION BENEFITS?

STANDARD OF REVIEW

South Carolina Code Ann. § 1-23-380 establishes the “substantial evidence” rule as the standard of review for decisions of the Workers’ Compensation Commission. *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 276 S.E.2d 304 (1981). Pursuant to that rule, the court reviewing an award or denial of benefits may only reverse or modify the agency’s decision if the findings, rulings, and conclusions of the administrative agency are “clearly erroneous in view of the reliable and substantive evidence of the whole record.” *Id.*, 276 S.C. at 135, 276 S.E.2d at 306. Substantial evidence is defined as:

Such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. It must be enough to justify, if the trial went to a jury, refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury. This is something less than the weight of the evidence and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency’s finding from being supported by substantial evidence.

Id., 276 S.C. at 135-136, 276 S.E.2d at 307.

Appellate courts are not at liberty to substitute their view of the evidence for that rendered by the Commission. Rather, the court’s “role is appellate only, and is limited to deciding whether the Commission’s decision is not supported by substantial evidence or is controlled by some error of law.” *Rogers v. Kunja Knitting Mills Co.*, 312 S.C. 377, 440 S.E.2d 401 (Ct. App. 1994). When reviewing an appeal from the Workers’ Compensation Commission, the appellate court may not weigh the evidence or substitute its judgment for that of the Full Commission as to the weight of the evidence and questions of fact. *Farrell v. Jerry’s, Inc.*, 370 S.C. 22, 26, 633 S.E.2d 893, 894-895 (2006).

Moreover, “the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency’s finding from being supported by substantial

evidence.” *Palmetto Alliance, Inc. v. S.C. Pub. Serv. Comm’n*, 282 S.C. 430, 432, 319 S.E.2d 695, 696 (1984). In workers’ compensation cases, the Appellate Panel is the ultimate finder of fact. *Shealy v. Aiken County*, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000). When the evidence is conflicting over a factual issue, the findings of the Appellate Panel are conclusive. *Hargrove v. Titan Textile Co.*, 360 S.C. 276, 290, 599 S.E.2d 604, 611 (Ct. App. 2004). The final determination of witness credibility and the weight to be accorded evidence is reserved for the Appellate Panel. *Bass v. Kenco Group*, 366 S.C. 450, 458, 622 S.E.2d 577, 581 (Ct. App. 2005).

STATEMENT OF THE CASE

Appellant Seeahray Brailsford (“Brailsford”) initiated these proceedings with the filing of her Form 50, Employee’s Request for Hearing, dated October 22, 2014, in which she alleged a November 23, 2014 work-related incident resulting in injuries to her left arm, left shoulder, left hand, clavicle, and psychological overlay of depression and anxiety. (Supp. R. pp. 19-20) Respondents admitted a work-related injury to Brailsford’s left shoulder only and denied the compensability of any other work-related injuries. (Supp. R. p. 21) Thereafter, Brailsford, proceeding *pro se*, filed a second Form 50 dated April 5, 2016, in which she alleged work-related injuries to her left rotator cuff, left arm, and hand, as well as entitlement to total permanent disability payments. (Supp. R. p. 24) Brailsford’s second Form 50 omitted any reference to psychological overlay. Once again, Respondents admitted Brailsford sustained a compensable injury to her left shoulder and denied the remainder of her claim. (Supp. R. p. 25) In addition, Respondents asserted Brailsford attained maximum medical improvement as of July 29, 2014, that she received a converted impairment rating of 46.7% to the left shoulder, and that Respondents were entitled to an order stopping payment of temporary total disability benefits with a credit for those benefits paid beyond July 29, 2014, or the date upon which Brailsford was found to have reached maximum medical improvement. (Supp. R. p. 23)

The single commissioner heard oral argument August 1, 2016, during which Brailsford waived her right to counsel and elected not to submit any documents or other evidence for consideration by the tribunal. (Supp. R. p. 70, lines 11-13; p. 71, lines 6-8) She also confirmed to the single commissioner that she was not seeking benefits for depression and that no physician has related her physical injuries to her alleged depression. (*Id.*, p. 85, line 20 – p. 86, line 11) In his October 11, 2016 Decision and Order, the single commissioner determined Brailsford did not

sustain a work-related injury to her left arm, left elbow, or depression. (Supp. R. p. 6, ¶ 3) In addition, the single commissioner determined Brailsford failed to demonstrate a causal connection between her shoulder injury and her other alleged physical ailments, liver damage, or subsequent infections. (*Id.*) Further, the single commissioner agreed Brailsford attained maximum medical improvement for the left shoulder injury as of July 29, 2014, was assigned a converted impairment rating of 46.7% to the left shoulder, and that she was not assigned any other or additional impairment rating stemming from the November 23, 2014 incident. (*Id.*, p. 6, ¶ 5) As a result, the single commissioner concluded Respondents were entitled to stop payment of temporary total disability benefits and to a credit for payments beyond July 25, 2016, the date Respondents filed their Form 21, Request for Hearing. (*Id.*, p. 6, ¶ 6)

Brailsford sought review of the single commissioner's Decision and Order with the filing of her October 14, 2016 Form 30, Request for Commission Review, in which she challenged the timeliness of treatment and the single commissioner's determinations regarding injury to the left shoulder only. (Supp. R. p. 26) In its March 29, 2017 Decision and Order, the Appellate Panel of the South Carolina Workers' Compensation Commission ("the Full Commission") fully and unanimously affirmed the conclusions reached by the single commissioner. (Supp. R. pp. 10-18) First, the Full Commission agreed Brailsford failed to establish a causal connection between her left shoulder injury and her subsequent treatment for liver problems and other claimed infections. (*Id.*, p. 17, ¶ 1) Second, the Full Commission determined it was appropriate to limit her award of 70% permanent partial disability of the left shoulder to the maximum period of 500 weeks allowable pursuant to the Workers' Compensation Act. (*Id.*, p. 17, ¶¶ 4-5) Finally, the Full Commission affirmed the single commissioner's finding that Brailsford is entitled to lifetime causally related medical expenses limited to removal, maintenance, or repair of hardware in the

left shoulder. (*Id.*, p. 17, ¶ 6)

In her April 25, 2017 Notice of Appeal filed in this Court, Brailsford indicates she seeks appellate review of two aspects of the Full Commission Decision and Order. First, she challenges the portion of the Full Commission Decision and Order permitting Respondents to stop payment of temporary total disability benefits and awarding Respondents a credit for overpayment. Second, Brailsford challenges the Full Commission Decision and Order to the extent it affirmed the denial of benefits for her alleged liver and arm injuries. Notably, Brailsford's Notice of Appeal does not indicate she is challenging the denial of benefits for alleged depression.

FACTS

Brailsford was hired by Employer Piggly Wiggly Carolina Company, Inc. (“Employer”) in 2006, and worked as a deli and bakery manager. (Supp. R. p. 42, line 22 – p. 43, line 2; p. 48, lines 17-18) She sustained a work-related injury on November 23, 2010, as she reached overhead for some frozen pies in Employer’s walk-in freezer. (*Id.*, p. 51, line 16 – p. 53, line 12) Brailsford claimed injury to her left clavicle, left shoulder, left arm, and left fingers. (*Id.*, p. 49, lines 6-16) Brailsford sought medical attention from Employer’s company physician, Dr. Lovelace, the next day. (*Id.*, p. 53, line 22 – p. 54, line 9)

An MRI of Brailsford’s left shoulder, taken January 17, 2011, revealed a full thickness rotator cuff tear. (Supp. R. pp. 93-96) Dr. Holmes surgically repaired Brailsford’s left rotator cuff on March 9, 2011. (*Id.*, pp. 97-102) Brailsford continued to experience left shoulder issues and received a second opinion, at Defendants’ expense, by Dr. David Lee, who performed a second surgery on Brailsford’s left shoulder on February 15, 2012. (*Id.*, pp. 103-106) Brailsford continued to have left shoulder problems and underwent a left reverse total shoulder arthroplasty, which included placement of prosthetic hardware, on November 6, 2012. (*Id.*, pp. 107-110) As of July 29, 2014, Dr. Lee noted Brailsford to be at maximum medical improvement and assigned a converted impairment rating of 46.7% to the left shoulder. (*Id.*, pp. 111-112)

ARGUMENT

It has long been a tenant of South Carolina workers' compensation law that "[t]he burden is upon a claimant to prove such facts as will render [her] injury compensable within the provisions of the Worker's Compensation Law." *Lee v. Harborside Café*, 350 S.C. 74, 81, 564 S.E.2d 354, 358 (Ct. App. 2002) (citing *Kennedy v. Williamsburg County*, 242 S.C. 477, 480, 131 S.E.2d 512, 513 (1963)). Further, "[s]uch an award must not be based on surmise, conjecture, or speculation." *Id.* In light of these constraints, the Full Commission was correct in affirming the denial of additional benefits for the remaining injury allegations Brailsford raised below and in this Court.

I. SUBSTANTIAL EVIDENCE SUPPORTS THE CONCLUSION OF THE UNANIMOUS FULL COMMISSION THAT APPELLANT IS NOT ENTITLED TO ADDITIONAL WORKERS' COMPENSATION BENEFITS.

The Full Commission reviewed the substantial evidence below and unanimously affirmed the single commissioner's determination that Brailsford sustained a work-related injury to her left shoulder only and that she did not sustain any other work-related injuries or conditions. Further, the Full Commission unanimously and correctly affirmed the single commissioner's conclusions that Brailsford did not establish a causal connection between her compensable injury and any other ailment, that the award of permanent partial disability is properly limited to the maximum period of 500 weeks, and that Respondents were entitled to stop temporary total disability payments as well as a credit for overpayment of those benefits. The judgment below should be affirmed because these findings are supported by the substantial evidence in the record and because Brailsford cannot establish that an error of law has been committed.

A. The Full Commission Properly Affirmed The Decision Authorizing Termination of Temporary Total Disability Payments And Credit For Overpayment Based Upon The Date Of Filing Of Respondents' Form 21, Employer's Request For Hearing.

It was appropriate to terminate Brailsford's temporary total disability benefits and to award Respondents credit for overpayment as of July 25, 2016, the date Respondents filed their Form 21, Request for Hearing/Stop payment of compensation. As the Supreme Court of South Carolina has observed, "the date of maximum medical improvement signals the end of entitlement to temporary total benefits." *Curriel v. Environmental Management Services (MS)*, 376 S.C. 23, 29, 655 S.E.2d 482, 485 (2007). Further, "[t]he term 'maximum medical improvement' means a person has reached such a plateau that, in the physician's opinion, no further medical care or treatment will lessen the period of impairment." *Id.* (citing *Hall v. United Rentals, Inc.*, 371 S.C. 69, 89, 636 S.E.2d 876, 887) (Ct. App. 2006) (additional citations omitted)). Since maximum medical improvement is a factual finding for the Commission, its determination must be upheld if supported by substantial evidence. *Id.* (citation omitted).

The substantial, and only, evidence presented to the single commissioner or the Full Commission in this case demonstrates Brailsford received treatment for her left shoulder injury and reached maximum medical improvement as of July 29, 2014. Following her November 23, 2014 injury, Brailsford treated with Dr. Oscar Lovelace. A December 28, 2010 MRI of the left shoulder indicated a rotator cuff tear, which was surgically repaired by Dr. Wendall Holmes on March 9, 2011. (Supp. R. p. 92; pp. 97-99) Brailsford received subsequent additional treatment for the left shoulder injury, including revision surgery performed by Dr. David Lee, physical therapy, and, ultimately, a reverse total shoulder arthroplasty. (*Id.*, pp. 103-106; pp. 113-115) Following these interventions and therapy, Dr. Lee determined Brailsford reached maximum

medical improvement as of July 29, 2014, and he assigned a converted 46.7% impairment rating to the left shoulder. (*Id.*, pp. 111-112)

B. Appellant Failed To Meet Her Burden Of Proving She Sustained Additional Work-Related Physical Injuries.

The burden of demonstrating a compensable injury rests with the claimant in a workers' compensation case, and "[w]here the only reasonable inference from the record is that the claimant has failed to sustain this burden, it would be futile to remand the case." *Shealy v. Algernon Blair, Inc.*, 250 S.C. 106, 110, 156 S.E.2d 646, 648 (1967). In this case, the medical evidence demonstrates, and the Full Commission agreed, that Appellant received extensive medical treatment for a compensable work-related injury to the left shoulder only. The substantial record evidence further demonstrates that all of the treatment she received was limited to the left shoulder injury. Stated differently, there is no record evidence, medical, expert, or otherwise, of any treatment to any other body part, and Brailsford admitted as much before the Full Commission. Arguing before the Full Commission, Brailsford was asked whether she presented the single commissioner with "any evidence" demonstrating a causative link between her admitted left shoulder injury and the liver disease she allegedly developed thereafter, to which she responded "no." (R. p. 10, line 16 – p. 11, line 7)

C. Appellant Has Waived Her Claim For A Compensable Psychological Overlay Or Depression.

As noted, Brailsford's Notice of Appeal does not indicate that she is challenging the denial of benefits for psychological overlay or depression, and she did not present that issue to the single commissioner for his determination. At oral argument before the single commissioner, the single commissioner noted Brailsford was seeking "an award of permanent partial disability to her left shoulder, her left arm and her left hand[,] and she is seeking future medical care for

causally related maintenance, replacement or repair of the prosthetic shoulder.” (Supp. R. p. 72, lines 3-7) When asked by the single commissioner if she was seeking any additional benefits she responded “no.” (*Id.*, lines 8-10) She once again confirmed that she was not seeking benefits for depression at the conclusion of the hearing. (*Id.*, p. 85, line 20 – p. 86, line 11) The issue of depression was not argued before the Full Commission, and it found that she “did not sustain any other injuries by accident . . . [including] depression” presumably based on Brailsford’s failure to make this argument before the single commissioner. (Supp. R. p. 16, ¶ 4) *See Robbins v. Walgreens and Broadspire Services, Inc.*, 375 S.C. 259, 652 S.E.2d 90 (Ct. App. 2007) (finding argument on appeal was waived where claimant failed to argue issue before the single commissioner or the Appellate Panel). As such, Brailsford’s claim for depression should be deemed abandoned and not subject to further appellate review.

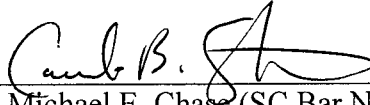
CONCLUSION

For the reasons stated herein, Respondents urge the Court to affirm the Decision and Order of the Full Commission in its entirety.

Respectfully submitted,

March 19, 2018

By:



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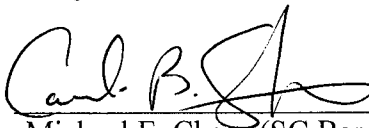
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CERTIFICATE OF COUNSEL

The undersigned certifies that the BRIEF OF RESPONDENTS complies with Rule 211(b), SCACR, as well as the South Carolina Supreme Court's Order dated April 15, 2014.

March 19, 2018

By:



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