THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

W.C.C. File No.: 0824526

Robert L. Harrison, Employee, ... Appellant,

v.

Owen Steel Company, Inc., Employer, and
Old Republic Insurance Company
c/o Gallagher Bassett Services, Inc., Carrier,. ..... Respondents.

RESPONDENTS' BRIEF

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S.C. SUPREME COURT

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STATEMENT OF THE CASE

Appellant/Claimant Robert L. Harrison suffered an admitted workplace injury to his cervical spine on September 17, 2008, while he was working as a Gantry welder for Owen Steel Company.[1] (R. p. 309, lines 8-21). Respondents provided medical treatment, including a cervical fusion, and compensation while Claimant was recovering. (R. p. 309, line 22 – p. 310, line 9). This matter was assigned W.C.C. File No. 0824526. He returned to work with Owen Steel in various capacities and now works as lead man on the night shift, making more money than he made prior to his injury. (R. p. 310, line 25 – p. 311, line 11) (R. p. 312, lines 3-24) (R. p. 314, lines 1-2).

On October 4, 2010, Claimant suffered a second workplace injury to the same body part – his cervical spine – that he injured in 2008. (R. p. 314, lines 15-21) (R. pp. 141-143). He ultimately settled his claim with Owen Steel relating to the 2010 injury. (R. p. 319, lines 20-23). That matter was assigned W.C.C. File No. 1013900.

On December 13, 2011, the Commission sent Claimant's counsel a letter inquiring whether he planned to proceed with his claim in this matter. (Letter from G. Line to J. Mullis, Jr., dated Dec. 13, 2011, R. p. 107). Claimant's counsel responded that he did, in fact, "plan to pursue this claim." (Letter from J. Mullis, Jr. to SC Workers' Compensation Commission, dated Dec. 30, 2011, R. p. 108).

Claimant filed a Form 50 on April 24, 2013, (Form 50, dated April 24, 2013, R. pp. 333-334), a corrected Form 50, (Form 50, dated April 29, 3013, R. pp. 335-336), and finally a second corrected Form 50 dated May 8, 2013, seeking additional compensation and medical treatment, alleging injury and change of condition to "back, neck/cervical

[1] Owen Steel's workers' compensation carrier at that time was Old Republic General, jointly referred to herein as Respondents.

spine, right shoulder, left shoulder, and/any all other areas of the body directly/indirectly effected [sic], including but not limited to an nervious [sic] condition and/or mental condition which Claimant has or may have as a result there from." (Form 50 dated May 8, 2013, R. pp. 298-299). All of Claimant's Form 50s listed an incorrect workers' compensation file number, W.C.C. File No. 0804580,[2] and sought to have the matter combined with W.C.C. File No. 1013900, which is the file number assigned to his 2010 workplace injury.

Respondents filed a Form 51 denying Claimant's claim for further medical care and/or compensation benefits. Among other defenses, Respondents asserted that Claimant's current complaints were not related to his 2008 work-related accident, and that his claim was barred by section 42-15-40 of the Workers' Compensation Act ("Act"). (Resp. Form 51, dated May 24, 2103, R. pp. 300-301).

The parties filed pre-hearing briefs. At the time these were filed, it was still unclear what date of injury – April 21, 2008 or September 17, 2008 – Claimant was alleging. (Cl. Form 58, R. p. 254) (Resp. Form 58, R. pp. 288-289). On their Form 58, Respondents stated that one of the issues for determination was "[w]hether the Claimant's claim for a compensation arising out of alleged injuries to the back, neck, right shoulder, left shoulder, nervous condition, mental condition, psyche, and/or all other areas of the body directly/indirectly affected will be barred on the basis that the Claimant did not file a claim for a compensation within two years after the alleged accident." (Resp. Form 58, R. p. 288).

[2] W.C.C. File No. 0804580 relates to a claim involving an April 21, 2008 incident, not the September 17, 2008 accident that is the subject of W.C.C. File No. 0824526. (*See* Resp. Form 51, dated May 24, 2013, R. pp. 300-301) (R. p. 328, line 17 – p. 329, line 7).

The parties were heard by Commissioner Avery B. Wilkerson, Jr. on July 17, 2013, who issued an opinion finding that Claimant reached MMI on July 21, 2010 and that Claimant's current claim was time barred because it was neither filed within two years of the accident nor within two years of the last payment of compensation. Commissioner Wilkerson also found that, even if the claim was not time barred, Claimant did not meet his burden of proving any additional permanent partial disability because the Claimant was working full time and earning a higher wage than he had been earning at the time of his 2008 accident. (Single Commissioner Decision & Order, filed Nov. 7, 2013, R. pp. 244-253 ("2013 Single Commissioner Decision")).

Claimant appealed the 2013 Single Commissioner Decision to the Full Commission, raising 21 separate issues, including whether Commissioner Wilkerson had erred in finding that "as the result of a lack of diligence, Claimant did not file a claim for compensation until the filing of a Form 50, on May 8, 2013 ..." (Cl. Form 30, R. pp. 302-306).

An Appellate Panel of the Full Commission heard oral argument on February 18, 2014. At that hearing, Claimant's counsel argued that, "[l]aches was pled as a defense, and it's my understanding that the order ruled against [Respondents' counsel] because it did not find for it in the Commissioner's order." (R. p. 322, lines 19-22). Respondents' counsel stated that, if the Commission overturned the 2013 Single Commissioner Decision on the statute of limitations issue, "then I think we've got to go back and deal with the laches issues." (R. p. 330, line 16 – p. 331, line 4).

The Full Commission issued a Decision & Order reversing the Single Commissioner on the statute of limitations issue. The Full Commission specifically

remanded "to the Jurisdictional Commissioner for findings with regard to issues of intervening accidents, laches, and permanency, which were not determined by the Appellate Panel." (Appellate Panel Decision & Order, filed May 12, 2014, R. pp. 236-243 ("2014 Commission Decision")).

On remand, the parties filed pre-hearing briefs. (Cl. Form 58 Pre-Hearing Brief, R. p. 65) (Resp. Form 58 Pre-Hearing Brief, R. p. 118) ("Resp. 2014 Form 58"). In their Form 58, Respondents raised the doctrine of laches, among other defenses. (Resp. 2014 Form 58, R. p. 118).

Commissioner Gene McCaskill held a hearing on August 1, 2014, and issued his decision on February 12, 2015, finding that "claimant has indeed slept on his rights and to now go back for a possible determination [of] compensability and disability after at least three intervening accidents over the past six years would be both speculative and prejudicial to [Respondents]." He also found that Claimant had no just cause for not filing his claim earlier and, as a result, his claim was barred by the Doctrine of Laches. Even if the Doctrine of Laches did not apply, "it would be impossible to determine the Claimant's entitlement to permanent partial disability benefits without speculating," due to the passage of time and intervening accidents. (Decision & Order of Single Commissioner, filed Feb. 12, 2015, R. pp. 33-39 ("2015 Single Commissioner Decision").

Claimant filed a timely Form 30, raising nine issues to the Full Commission. (Form 30, R. pp. 41-43). An Appellate Panel of the Full Commission heard oral argument on May 18, 2015 and issued its Decision and Order on September 8, 2015. The Commission affirmed the 2015 Single Commissioner Decision in its entirety. In addition

to finding that this claim is barred by laches, the Commission held that, "even if Laches was not a bar to the receipt of benefits, there have been so many intervening accidents over time, it would be impossible to determine the Claimant's entitlement to permanent partial disability benefits without speculating." As a result, the "Claimant has not met his burden of proving by preponderance of the evidence as to what his causally related condition was as a result of the September 17, 2008 accident." (Appellate Panel Decision & Order, filed Sept. 8, 2015, R. pp. 1-23 ("2015 Commission Decision").

Claimant timely appealed to this Court.

FACTUAL BACKGROUND

Following Claimant's September 17, 2008 injury, he began treating with Dr. Thomas J. Holbrook. An August 31, 2009 medical note indicated that Claimant's "chief complaint [was] of neck pain which radiates behind the left shoulder blade down the left arm to the elbow." (R. p. 73). On November 10, 2009 Dr. Holbrook performed an anterior cervical discectomy with fusion and instrumentation on Claimant's cervical spine at C5-C6. (R. pp. 73-78). After Claimant recovered from surgery, Dr. Holbrook had him undergo a Functional Capacity Evaluation ("FCE"). The FCE results indicated Claimant could lift up to 50 lbs at shoulder levels occasionally, 30 lbs frequently and 20 lbs constantly "if he ... avoids poor body mechanics ..." (R. pp. 81-85). On July 21, 2010, Dr. Holbrook released Claimant at Maximum Medical Improvement ("MMI") with a 50-pound lifting restriction and "a 25% impairment to the whole person." Dr. Holbrook's notes indicate that Claimant "states that he is doing well. He has no radicular arm pain. He will occasionally have some discomfort in the cervical paraspinous muscles which is relieved with aspirin." (R. pp. 86, 89).

Claimant was involved in a motorcycle crash on April 4, 2010, when a car pulled out in front of his motorcycle. He suffered multiple abrasions and a fractured left clavicle, with complaints of pain in his left shoulder. (R. pp. 137-140) (R. p. 197, line 5 – p. 199, line 16). Although he denied any neck pain at the time he was seen at the ER, he suffered painful abrasions to his "head, hand, left shoulder." (R. pp. 294-297). He testified that he was out of work and receiving temporary total disability at the time this accident occurred. (R. p. 228, lines 3-10). He also testified that he did not feel any need to inform Dr. Holbrook, his treating physician, of this accident. (R. p. 325, line 21 – p. 326, line 4).

On September 29, 2010, Claimant underwent an Independent Medical Evaluation ("IME") by Dr. Donald Johnson. Dr. Johnson noted that Claimant had gone back to work full time as a welder, which required him to "bend over with his head in a flexed position for 30-40 minutes at a time on a continuous basis," in order to perform "horizontal welds." Dr. Johnson observed that Claimant "significantly has degenerative changes at the two levels above his fusion, specifically 3-4 and 4-5." Dr. Johnson agreed that Claimant was at MMI, and assigned him a 25% impairment rating to the whole body. Dr. Johnson cautioned that performing Claimant's regular welding duties required him to use "poor body mechanics" and put him at risk of needing further neck surgery. Dr. Johnson did not recommend any on-going medical care or treatment. (R. pp. 90-91).

Claimant testified that, after Dr. Holbrook released him with restrictions, he returned to work as a welder. (R. p. 315, lines 11-13). Although Claimant initially testified that he returned as a welder, as opposed to as a Gantry welder, (R. p. 315, lines 18-24), he later stated, "[t]hey put me right back on the gantry." (R. p. 324, lines 21-23).

He agreed that he was performing his job without any accommodations. (R. p. 316, lines 5-19). Claimant testified that working as a welder required him to wear a hard hat with a shield, to bend down and engage in lifting up to 40 pounds. (R. p. 313, lines 8-22).

Interestingly, at the 2014 hearing, Claimant testified that he returned to work performing light duty after Dr. Holbrook released him[3] and, after a year of light duty, returned to a position as welder some time in 2011. (R. p. 210, lines 9-25). However, Dr. Johnson's September 20, 2010 IME indicates that Claimant returned "back to the workplace on a full time basis where he has been continuing to work as a welder." (R. pp. 90-91).

On October 4, 2010, Claimant reinjured the same body part at work. (R. p. 314, lines 15-21). Notes from the ER indicate that Claimant "felt an immediate onset of sharp pain which radiated down to his upper back and down his left arm." (R. p. 274). Claimant began treating with Dr. Raymond C. Sweet. Dr. Sweet's medical notes indicate that, on November 2, 2010, Claimant was "complaining of shooting pain down the neck and back into the left arm," and that, despite his prior surgery with Dr. Holbrook, Claimant "was still having some pain in the left arm and never completely recovered, but it is worse now ..." (R. pp. 141-143). Dr. Sweet noted that Claimant was "mainly complaining of chronic achy low neck pain," and recommended against a posterior fusion, indicating that Claimant should perform light duty work. On November 18, 2010, Dr. Sweet noted that he would not see Claimant further "unless something should change." (R. pp. 144-145).

Dr. Sweet also filled out a Form 14B, indicating Claimant had injured his cervical spine, that he reached MMI as of November 2, 2010 and assigning a 15%

[3] Dr. Holbrook released Claimant at MMI in July 2010. (R. pp. 86, 89).

impairment rating to the whole body based on the injury to Claimant's cervical spine. Dr. Sweet stated that Claimant would need future medical care and treatment. (R. p. 146). Claimant testified that the restrictions previously imposed by Dr. Holbrook "were eliminated" by Dr. Sweet following his October 2010 workplace accident. (R. p. 319, lines 2-15).

Claimant settled his 2010 workplace injury claim with Respondents for $42,193.63, representing 28% loss of use of his back, or 84 weeks PPD. (Form 19, dated Aug. 17, 2011, R. p. 307, and Form 16A, R. p. 121, both filed in in W.C.C. File No. 1013900). Although Claimant testified that he could distinguish between the problems he currently is having as a result of his 2008 workplace injury and those he is experiencing as a result of his 2010 workplace injury, and despite what he may or may not have understood he was settling with regard to his 2010 injury, he agreed that the problems he experiences from the two workplace accidents are "similar." (R. p. 320, line 13 – p. 321, line 5).

In February 2012, Claimant injured his shoulder while lifting his daughter off the ground which caused neck and shoulder pain that he testified was similar to the problems he experienced following his 2008 workplace injury. (R. p. 317, line 21 – p. 318, line 7). Claimant testified that, as his daughter "was falling off the porch, I reached to try to grab her and I grabbed her arm and she snatched me down with her." (R. p. 226, line 25 – p. 227, line 2). Claimant provided a written statement wherein he stated that, "[o]n Feb 26th 2012 I bent over to pick up my 4 year old daughter who had fallen off the front porch. While picking her up I felt a sharp pinch between my neck and my right shoulder. The pain lasted that night until the next morning. On Feb 28th 2012 as I was running the

gantry around 1:30-2:00 AM I started feeling the same pain in my right shoulder. As I continued to work the pain started going down my right arm and my thumb, index and middle fingers went numb and also had a tingling feeling in the tips. I told my supervisor about my situation and told him that I was going to the doctor that day." (R. pp. 292-293) (R. pp. 147-151).

On an intake form from Columbia Neurosurgical Associates, P.A., dated March 26, 2012 and signed by Claimant, he reported "[n]eck pain going down back and right arm. Numbing and tingling in thumb, index and middle finger." He indicated that these symptoms began on February 26, 2012 and were the result of a work-related injury. However, Dr. Holbrook's written notes from that visit indicate that Claimant said his symptoms "began about a month ago after he picked up his daughter who had fallen of the porch 2/26/12." Dr. Holbrook noted that Claimant was "experiencing radicular type pain on the right whereas before he had undergone surgery for radicular symptoms on the left." (R. pp. 100-103). Claimant admitted that the pain he experienced after this event was very similar to the problems he had experienced after his 2008 workplace accident. (R. p. 317, line 9 – p. 318, line 7).

When asked, Claimant denied that the problems he was having in 2013 were attributable to the 2012 incident where he picked up his daughter. In response, he was asked:

Q: Well, what are they attributable to?

A: It's attributable to the surgery I had from the accident I had in my neck.

Q: And the 2010 accident that you had?

A: That's the only – **the two (2); yes, sir.**"

Q: Okay. And the incident with your daughter?

A: That's on the right side –

Q: Okay. That's on the right side –

A: – that's not on the left side.

Q: – but as far as your neck pain is concerned, **you agree that all three (3) of those events contribute to your current neck pain?**

A: **With me reaching down; yes sir.**

(R. p. 323-A, lines 1-18) (emphasis added).

Later, when asked:

Q: What specific problems are you having today that are entirely attributable to your 2008 accident and can you tell us that?

A: Yes. I'm still having a little pain in my neck every now and then and pain still shoots down through my left arm; every now and then ... my fingertips will go numb, tingling.

Q: Okay. And what kind of problems are you still having today as a result of your 2010 accident?

A: **The same.**

(R. p. 326, lines 14-23) (emphasis added).

Claimant testified that, since 2012, he has worked as a shop foreman. He agreed that his position is a "working supervisor" where, on occasions, he has to perform the tasks he is supervising, including "welding, turning beams, cleaning pieces up" and Gantry welding, which are physically demanding tasks. (R. p. 212, line 3 – p. 214, line 8) (R. p. 230, line 11 – p. 232, line 8 (Claimant's supervisor, Terry Hartwell, testifying as to the physical nature of Claimant's job and that Claimant has never requested any changes or modifications to his job due to neck pain)). Claimant testified that, when he experiences problems with his neck, he takes over-the-counter medications such as

aspirin, but does not take any prescription medications. He has not complained to his supervisor or asked for any job modifications. (R. p. 214, line 12 – p. 215, line 15). Claimant acknowledged that he fishes, goes to the "drag strip," and rides his motorcycle regularly. (R. p. 196, lines 12-14) (R. p. 215, line 16 – p. 218, line 25).

Claimant was involved in a motor vehicle accident in July 2013. (R. p. 193, line 24 – p. 196, line 6) (R. p. 222, line 24 – p. 223, line 4). Claimant was involved in another automobile accident on March 9, 2014. Medical notes indicate that he "was restrained driver T-boned. Airbag did not deploy. Now having pain from the top of his neck to the top of his right buttocks .... Has tingling in his right hand on/off." (R. pp. 124-127). On a return visit, he again presented with "pain in neck and back from MVA. States symptoms are getting worse instead of better." (R. pp. 128-131) (R. p. 193, line 24 – p. 196, line 6).

In addition, during the summer of 2014, Claimant was involved in an altercation at work where he punched a former co-employee so hard that the other man fell to the ground. Claimant then "got on top of him and subdued him" until the police came. (R. p. 219, line 9 – p. 221, line 25). The physical altercation lasted approximately five minutes, and Claimant held the former co-worker on the ground for an additional 15 minutes. (R. p. 220, line 22 – p. 221, line 2).

Despite Claimant's assertion that he could "differentiate" between the symptoms he was experiencing as a result of his 2008 and 2010 workplace accidents and other accidents, his testimony conflicted in numerous places with the medical reports. (R. p. 324, lines 3-10 (medical note from Doctor's Care in October 2008 states Claimant "feels one hundred percent (100%); ready to resume normal duties" and Claimant denying

having made that statement)) (R. p. 321, line 9 – p. 323, line 6 (Claimant insisting he told Dr. Holbrook on his last visit that he continued to have pain in his neck, right shoulder and arm; whereas Dr. Holbrook's medical notes from that visit indicate he is doing well and has no radicular pain)) (R. p. 200, line 16 – p. 201, line 16 (Claimant again insisting he told Dr. Holbrook that he was having pain in his neck and left arm with tingling in his fingertips when Dr. Holbrook released him in July 2010, despite the fact that Dr. Holbrook's notes indicate no radicular arm pain)) (R. p. 201, line 18 – p. 204, line 21 (Claimant insisting that, in February 2012 following the incident with his daughter, he did not tell Dr. Holbrook he was experiencing pain in his neck; whereas Dr. Holbrook's notes state that Claimant "now complains of neck and right arm pain radiating down the right arm in to the hand with some intermittent numbness and tingling in the right arm ...")) (R. p. 205, line 15 – p. 210, line 4 (Claimant insisting that he did not tell the physicians at Doctor's Express in March 2012 that he was experiencing neck pain; whereas the medical notes indicate that "[t]he patient presents with a chief complaint of constant, but worse at time, neck pain of the neck and back since Wednesday, February 29, 2012")) (R. p. 195, line 2 – p. 196, line 6 (medical notes from March 2014 car accident indicate that Claimant was "[h]aving pain at the top of his neck ... to the top of his right buttocks" and Claimant insisting he did not say that)) (R. p. 223, lines 5-25 (Claimant insisting he could distinguish between the pain from his 2008 workplace accident and all of the other accidents, despite what the medical records said concerning those later accidents)).

STANDARD OF REVIEW

Judicial review of a Commission decision is directed by the substantial evidence rule of the Administrative Procedures Act, S.C. Code Ann. § 1-23-380(5) (Supp. 2014). Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981). A reviewing court should affirm the decision of the Full Commission unless it is clearly erroneous in view of the substantial evidence of the whole record. Lark, 276 S.C. at 136, 276 S.E.2d at 307. The reviewing court may not substitute its own judgment for that of the Full Commission as to the weight of the evidence on a question of fact, but may reverse if the decision is affected by an error of law. S.C. Code Ann. § 1-23-380(5). The Administrative Procedures Act "mandates that the commission take the evidence, judge the credibility and weight of that evidence, and from that judgment determine the facts of the case." Rogers v. Kunja Knitting Mills, Inc., 312 S.C. 377, 381, 440 S.E.2d 401, 403 (Ct. App. 1994).

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 same conclusion the administrative agency reached in order to justify its action. Pierre v. Seaside Farms, Inc., 386 S.C. 534, 540, 689 S.E.2d 615, 618 (2010). "Workers' compensation awards must not be based on surmise, conjecture or speculation." Tiller v. National Health Care Ctr. of Sumter, 334 S.C. 333, 339, 513 S.E.2d 843, 845 (1999). Instead, the findings of the Full Commission are presumed correct and can be set aside only if unsupported by substantial evidence or based on an error of law. McGuffin v. Schlumberger-Sangamo, 307 S.C. 184, 186, 414 S.E.2d 162, 163 (1992). It is not within the appellate court's purview to reverse findings

of the Full Commission which are supported by substantial evidence. Broughton v. South of the Border, 336 S.C. 488, 496, 520 S.E.2d 634, 637 (Ct. App. 1999).

Where there is a conflict in the evidence, either by different witnesses or the testimony of the same witness, the factual findings of the Commission are conclusive. Anderson v. Baptist Med. Ctr., 343 S.C. 487, 492-93, 541 S.E.2d 526, 528 (2001). Furthermore, it is the Commission's prerogative to believe or disbelieve expert testimony. *See* Pack v. South Carolina Dept. of Transp., 381 S.C. 526, 536, 673 S.E.2d 461, 466-67 (Ct. App. 2009) (observing that the "Commission need not accept or believe medical or other expert testimony, even when it is unanimous, uncontroverted, or uncontradicted").

ARGUMENTS

I. The Commission properly considered the Defense of Laches.

Claimant first asserts that Respondents and the Commission should be barred from raising the issue of laches because Respondents did not plead laches on their Form 51. However, the issue of laches was addressed by counsel for both Claimant and Respondents before the Appellate Panel in the February 18, 2014 hearing. In fact, Claimant's counsel specifically asserted that, "**[l]aches was pled as a defense**, and it's my understanding that the order ruled against [Respondents' counsel] because it did not find for it in the Commissioner's order." (R. p. 332, lines 19-22) (emphasis added). Respondents' counsel agreed that, if the Commission overturned the 2013 Single Commissioner Decision on the statute of limitations issue, "then I think we've got to go back and deal with the laches issues." (R. p. 330, line 16 – p. 331, line 4). Thus, Claimant's current procedural arguments are belied by his own representations to the

Commission. In any event, the defense of laches was clearly pled on Respondents' 2014 Form 58, Claimant had full opportunity to respond to Respondents' laches defense, which was then ruled on by the Commission. (Resp. 2014 Form 58, R. p. 118). *See* Transportation Ins. Co. v. South Carolina Second Injury Fund, 389 S.C. 422, 431, 699 S.E.2d 687, 691 (2010) (in order to be preserved, laches must be pled and ruled on by the Commission); *cf.* Staubes v. City of Folly Beach, 339 S.C. 406, 413-414, 529 S.E.2d 543, 546-547 (2000) (finding negligence cause of action properly before the court and preserved for appeal where, although not pled in the complaint, both parties treated the negligence claim as having been raised, and where the defendant both argued the issue at oral argument below and had ample opportunity to respond to the claim).

In addition, as noted above, there was a good deal of confusion initially about what claim Claimant was pursuing. Claimant's Form 50s initiating the hearing in this claim contained the wrong W.C.C. File Number (No. 0804580), which referred to an altogether different injury/claim. (Cl. Form 50s, R. pp 333-334, 335-336, 298-299). As a result, Respondents' Form 51 was responding, in part, to the confusion raised by Claimant's citation to the incorrect W.C.C. File number and corresponding injury date. (Resp. Form 51, R. pp. 300-301).

Claimant argues that the laches defense was waived because Respondents' Form 51 did not comply with Rule 8(c), SCRCP. However, there is no basis for imposing the strict rules of civil court pleading on Commission proceedings, which are designed to be more flexible. *See* King v. Wesner, 198 S.C. 49, 62, 16 S.E.2d 289, 295 (1941) (the "niceties of pleadings and process in the law Courts" are not required in workers'

compensation proceedings). In any event, as noted above and as is conceded by Claimant, Respondents clearly raised the laches defense on their 2014 Form 58.

It is unclear what Claimant's cite to "S.C. Code Section 705" is intended to reference.[4] Regulation 67-603 provides that an employer must file a Form 51 within 30 days of service of the Form 50, stating fully its position and defenses, and "replying to each specification in the Form 50." It also provides that the "Form 51 must describe with as much specificity as possible the defenses to be relied upon by the defendants." S.C. Code Reg. § 67-603. However, that regulation does not, as Claimant suggests, (App. Br. p. 12), require "an employer to plead with specificity all defenses to be relied upon by the employer." Over time, the allegations in this case were clarified and Claimant eventually corrected the W.C.C. File No. for this matter. As Claimant's clarification of the claim evolved, so did Respondents' defenses. Certainly by the time the Commission heard Claimant's first appeal in this matter, it was clear that laches had been raised as a defense, (R. p. 332, lines 19-22), and Claimant has had adequate notice of and ample time to prepare his opposition to Respondents' laches defense. Claimant can claim no unfair surprise or lack of opportunity to present his case.

Finally, Claimant has presented no authority for his assertion that failure to plead laches on a Form 51 constitutes a waiver of that defense. As explained above, the parties and Commission are not bound by the strict pleading rules that apply in civil court. While some of the Commission's regulations specifically reference the South Carolina Rules of Civil Procedure – S.C. Code Reg. §§ 67-211, 67-214, 67-215 and 67-216 – Regulation 67-603 does not. The fact that the Commission's Regulations specifically

[4] S.C. Code Reg. § 67-705, which addresses filing appellate briefs with the Commission, does not appear to be applicable.

adopt the provisions of the Rules of Civil Procedure in some sections but not others is persuasive proof that it did not intend for those rules to apply to all aspects of workers' compensation proceedings.[5] Furthermore, none of the Commission's Regulations that adopts the Rules of Civil Procedure reference or adopt Rule 8(c), SCRCP. Instead, Regulations 67-211, 67-214 and 67-215 reference the Rules of Civil Procedure with respect to service of process, while Regulation 67-216 provides that "[t]he qualifications of and proceedings for appointment of a Guardian ad Litem shall be the same as those found in the South Carolina Rules of Civil Procedure."

Particularly given Claimant's counsel's concession at the Commission hearing that laches had already been pled, it is incongruous for him to argue now that it was not raised and properly before the Commission. Furthermore, as noted above, he had notice that laches was being claimed and had ample opportunity to oppose the substance of that defense. This Court should hold that the Commission properly considered the defense of laches in this case.

II. The Commission correctly determined that Claimant's claim is barred by the Doctrine of Laches.

"Laches is the neglect for an unreasonable and unexplained amount of time, under circumstances permitting diligence, to do what in law should have been done." Mid-State Trust, II v. Wright, 323 S.C. 303, 307, 474 S.E.2d 421, 423 (1996). "Delay alone in the assertion of a right does not constitute laches," as "the delay must be both unexplained and inexcusable." Timms v. Timms, 290 S.C. 133, 139, 348 S.E.2d 386, 390 (Ct. App. 1986). Laches "must be determined in the light of the circumstances of the particular case taking into consideration, among other things, whether the delay has

[5] There is no reference whatsoever to the Rules of Civil Procedure in the Act.

worked injury, prejudice, or disadvantage to one of the parties." Id. The party raising the defense of laches must show "the delay has worked injury, prejudice, or disadvantage to" it. Whitehead v. State, 352 S.C. 215, 219, 574 S.E.2d 200, 202 (2002). Laches may be found where the party claiming delay shows it "has been at least slightly prejudiced" by the failure to assert a claim in a timely manner. Mid-State, 323 S.C. at 307, 474 S.E.2d at 424.

Claimant has not even attempted to explain or excuse his failure to timely request a hearing to determine what permanent benefits, if any, were due to him as a result of the September 17, 2008 accident.[6] Claimant does not and has not challenged the Commission's finding that he "slept on his rights" and/or that he failed to show any just cause as to why he did not pursue his claim on a timely basis. (2014 Commission Decision, R. p. 15). Claimant's sole attack on the Commission's finding that his claim is barred by the doctrine of laches is his assertion that Respondents' failed to demonstrate prejudice. However, the Commission correctly and properly determined that Claimant's unwarranted delay in pursuing his claim caused prejudice to Respondents.

As the Commission pointed out, Respondents have been prejudiced in that Claimant has suffered at least three additional accidents to the same body part, making it impossible to separate out what part of his condition is the result of the injuries he sustained as a result of his September 17, 2008 accident from those sustained in the subsequent injuries to his neck. Although Claimant argued below that the settlement of his 2010 workplace injury in no way impacted this case, it is undisputed that Claimant injured the exact same body part – his cervical spine – in 2010 that is the subject of this

[6] He cannot do so in his Reply Brief, as arguments may not be raised for the first time on reply. Spivey v. Carolina Crawler, 367 S.C. 154, 161, 624 S.E.2d 435, 438 (Ct. App. 2005).

case. It is also undisputed that he settled his claim for the 2010 injury for $42,193.63, which represented 28% loss of use of his back, or 84 weeks PPD. (Form 19, dated Aug. 17, 2011, R. p. 307, and Form 16A, R. p. 121, both filed in W.C.C. File No. 1013900). Although he pointed to testimony that indicated that he understood he was settling only his 2010 injury, he has failed to present any medical or objective evidence that Dr. Sweet's 15% whole body impairment rating did not also include some of the impairment that is reflected in Drs. Holbrook and Johnson's 25% whole body impairment ratings. In fact, Claimant testified that the problems he experiences from the two workplace accidents are "similar," and that his current condition was caused by **both** his 2008 and his 2010 workplace accidents, as well as the 2012 incident with his daughter. (R. p. 320, line 13 – p. 321, line 5) (R. p. 323-A, lines 1-18) (R. p. 326, lines 14-23). Paying twice for some of the same elements of impairment would certainly result in material prejudice to Respondents.

Finally, Claimant again raises the argument that, if Respondents had an issue with "a delay in hearing," they should have requested a hearing sooner by filing a Form 21. (App. Br. pp. 15, 17). Such an argument is absurd and should be readily dismissed, as it is not the employer's burden to ensure a claimant's request for permanent benefits is timely. Instead, it is Claimant's burden to bring his claim in a timely manner. *See*, McMillan v. Midlands Human Resources, 305 S.C. 532, 534, 409 S.E.2d 443, 444 (Ct. App. 1991) ("a claimant must prosecute his claim in a timely fashion or it may be barred by the doctrine of laches").

This Court should affirm the Commission's finding that Claimant's claim is barred by the Doctrine of Laches.

III. The Commission correctly ruled that, even if laches does not apply, Claimant has not met his burden of proving what permanent disability, if any, he is entitled to as a result of his September 17, 2008 accident and any award would require speculation due to the intervening accidents to the same body part.

Even if, for the sake of argument, laches did not apply in this case, the Commission Decision nonetheless should be affirmed on its alternative rulings. The Commission found that, "even if Laches was not a bar to the receipt of benefits, there have been so many intervening accidents over time, it would be impossible to determine the Claimant's entitlement to permanent partial disability benefits without speculating." As a result, the Commission found that "Claimant has not met his burden of proving by a preponderance of the evidence as to what his causally related condition was as a result of the September 17, 2008 accident." (2015 Commission Decision, R. pp. 16-17, 21-22).

Claimant argues that Respondents failed to "disprove" his assertion that the 2010 MMI ratings by Drs. Holbrook and Johnson were still valid and somehow binding. (App. Br. p. 14). However, it is Claimant's burden to prove by a preponderance of the evidence that he is entitled to benefits. *E.g.*, Crisp v. SouthCo, Inc., 401 S.C. 627, 645, 738 S.E.2d 835, 844 (2013) (explaining that "it is always incumbent on the employee-claimant to prove that he or she has sustained an injury by accident, and demonstrate that he or she is entitled to benefits"). Here, Claimant failed to prove that the outdated 2010 MMI ratings, which do not account for his current status or condition given the multiple intervening accidents, had any probative value at all.

Claimant also presupposes that the Commission was compelled simply to accept the impairment ratings of Drs. Holbrook and Johnson. (App. Br. pp. 16-17). However, the Commission is not bound by expert medical testimony or evidence as controlling;

instead, "the Appellate Panel determines the weight and credit to be given to the expert testimony." Hargrove v. Titan Textile Co., 360 S.C. 276, 293-294, 599 S.E.2d 604, 613 (Ct. App. 2004). "Once admitted, expert testimony is to be considered just like any other testimony." Tiller, 334 S.C. at 340, 513 S.E.2d at 846. Indeed, "while medical testimony is entitled to great respect, the fact finder may disregard it if there is other competent evidence in the record." Id. Unless Claimant is now asserting that his own testimony is unreliable or lacks probative value, there is other probative evidence in the record concerning his condition as of the 2013 and 2014 hearings.

Indeed, in reaching a disability rating under Section 42-9-30, the Commission relies on both expert and lay testimony. Sanders v. MeadWestvaco Corp., 371 S.C. 284, 292, 638 S.E.2d 66, 71 (2006) (the Commission "correctly considered both medical and lay testimony in arriving at its decision"); Burnette v. City of Greenville, 401 S.C. 417, 429, 737 S.E.2d 200, 206-207 (Ct. App. 2012) (explaining that "the determination of an injured employee's impairment rating is more art than science, involving the consideration of evidence the Commission may gather from the injured employee, medical and vocational experts, and lay witnesses"). Where the medical evidence is stale or outdated, as is the case here, the Commission understandably and necessarily must rely on other evidence and testimony. *See* Smith v. South Carolina Dept. 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," and remanding so that full testimony could be elicited regarding "the impact of [the claimant's] injuries and the extent of his physical capabilities"). Furthermore, because the Commission bases a disability rating on both medical evidence and testimony at the

hearing, it is the claimant's condition at the time of the hearing that is key. *See* Fishburne v. ATI Sys. Int'l, 384 S.C. 76, 681 S.E.2d 595 (Ct. App. 2009) (Commission properly based its disability rating on medical evidence and testimony at the hearing). Here, the medical evidence Claimant asserts should bind the Commission – Dr. Holbrook's July 21, 2010 MMI rating and Dr. Johnson's September 29, 2010 IME – was over four years old at the time of the August 1, 2014 hearing before Commissioner McCaskill and did not account for Claimant's subsequent injuries to his neck or the settlement of his 2010 work place injury to the same body part.

Claimant cannot escape the fact that his request for additional permanent partial disability benefits is complicated by a number of factors. First, he suffered multiple injuries to the same body part since September 17, 2008. These include, among others: 1) his October 4, 2010 workplace injury, (R. p. 314, lines 15-21) (R. pp. 141-142) (R. p. 274-277); 2) the February 2012 incident where he reached out to catch and lift his daughter, (R. p. 317, line 21 – p. 318, line 7) (R. pp. 292-293) (R. pp. 147-151); and, 3) a March 9, 2014 automobile accident, after which he reported, "tingling in his right hand on/off," (R. pp. 124-127), and "pain in neck and back from MVA. States symptoms are getting worse instead of better." (R. pp. 128-131) (R. p. 193, line 24 – p. 196, line 6). He also crashed his motorcycle on April 4, 2010, when a car pulled out in front of him. In that accident, he suffered multiple abrasions and a fractured left clavicle, with complaints of pain in his left shoulder, as well as painful abrasions to his "head, hand, left shoulder." (R. pp. 137-142) (R. p. 197, line 5 – p. 199, line 15). It simply is impossible at this late date to separate out what permanent effects are the result of his September 17, 2008 accident and what are the result of his other accidents.

Second, Claimant himself testified that his current complaints and symptoms were the result of all three incidents – his 2008 and 2010 workplace accidents and the 2012 incident lifting his daughter. (R. p. 320, line 13 – p. 321, line 5) (R. p. 323-A, lines 1-18) (R. p. 326, lines 14-23). In addition, although Claimant insisted he could recall perfectly what happened in 2008 and could distinguish between the pain he felt as a result of his 2008 and 2010 workplace accidents and other accidents, there were numerous instances where he disputed statements attributed to him in the recorded medical notes. (R. p. 324, lines 3-10 (medical note from Doctor's Care in October 2008 states Claimant "feels one hundred percent (100%); ready to resume normal duties" and Claimant denying having made that statement)) (R. p. 321, line 9 – p. 323, line 6 (Claimant insisting he told Dr. Holbrook on his last visit that he continued to have pain in his neck, right shoulder and arm; whereas Dr. Holbrook's medical notes from that visit indicate he is doing well and has no radicular pain)) (R. p. 200, line 16 – p. 201, line 16 (Claimant again insisting he told Dr. Holbrook that he was having pain in his neck and left arm with tingling in his fingertips when Dr. Holbrook released him in July 2010, despite the fact that Dr. Holbrook's notes indicate no radicular arm pain)) (R. p. 201, line 18 – p. 204, line 21 (Claimant insisting that, in February 2012 following the incident with his daughter, he did not tell Dr. Holbrook he was experiencing pain in his neck; whereas Dr. Holbrook's notes state that Claimant "now complains of neck and right arm pain radiating down the right arm in to the hand with some intermittent numbness and tingling in the right arm ...")) (R. p. 205, line 15 – p. 210, line 4 (Claimant insisting that he did not tell the physicians at Doctor's Express in March 2012 that he was experiencing neck pain; whereas the medical notes indicate that "[t]he patient presents with a chief complaint of

constant, but worse at time, neck pain of the neck and back since Wednesday, February 29, 2012")) (R. p. 195, line 2 – p. 196, line 6 (medical notes from March 2014 car accident indicate that Claimant was "[h]aving pain at the top of his neck ... to the top of his right buttocks" and Claimant insisting he did not say that)) (R. p. 223, lines 5-25 (Claimant insisting he could distinguish between the pain from his 2008 workplace accident and all of the other accidents, despite what the medical records said concerning those later accidents)).

Third, Claimant continues to work full time and engage in a number of other activities that cast doubt on his level of impairment. Concededly his supervisory position is lighter duty than his prior welding position; however, Claimant admitted that he is a "working supervisor" where, on occasions, he has to perform the tasks he is supervising, including "welding, turning beams, cleaning pieces up" and Gantry welding, which are all physically demanding tasks. (R. p. 212, line 3 – p. 214, line 8) (R. p. 230, line 11 – p. 232, line 8 (Claimant's supervisor, Terry Hartwell, testifying as to the physical nature of Claimant's job and that Claimant has never requested any changes or modifications to his job due to neck pain)). He also admitted he rides his motorcycle regularly and continues to enjoy fishing and "going to the drag strip." (R. p. 196, lines 12-14) (R. p. 215, line 16 – p. 218, line 25). In the summer of 2014, he was involved in an altercation at work where he punched a former co-employee so hard that the other man fell to the ground. Claimant then "got on top of him and subdued him" until the police came. (R. p. 219, line 9 – p. 221, line 25). The physical altercation lasted approximately five minutes, and Claimant pinned the former co-worker on the ground for an additional 15 minutes. (R. p. 220, line 22 – p. 221, line 2) (R. p. 233, line 17 – p. 234, line 5).

Claimant's request for "any necessary future medical treatment for the workers compensation injury suffered by Claimant on September 17, 2008," (App. Br. p. 18), also belies his assertion that his 2008 workplace injury is distinct and can be considered in a vacuum. When he released Claimant at 25% in July 2010, Dr. Holbrook did not indicate that any further medical treatment was necessary or recommend any future care. In fact, Dr. Holbrook stated that Claimant could perform "heavy work with a 50 pound lifting restriction." (R. pp. 86, 89). In contrast, Dr. Sweet's 14B, related to Claimant's 2010 injury, stated that Claimant would need future medical care and treatment. (R. p. 146). Thus, to the extent Claimant is seeking future medical care, it must be linked to his 2010 injury and not to the 2008 accident.

As a result of the passage of time and multiple accidents Claimant has experienced, many of which injured his neck, the Commission correctly and properly held that any award based on Claimant's 2008 workplace accident would require speculation on its part. And, despite some outdated medical opinions, the Commission also properly held that Claimant failed to meet his burden of proving his entitlement to permanent benefits based on his 2008 accident. This Court should affirm the Commission's alternative rulings that Claimant failed to meet his burden of proving he is entitled to any additional permanent partial disability benefits, and that any such award necessarily would be based on speculation.

CONCLUSION

For all the reasons stated herein, this Court should affirm the Commission Decision in its entirety and dismiss Claimant's appeal.

Respectfully submitted,

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March 21, 2016

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

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SC Court of Appeals

W.C.C. File No.: 0824526

Robert L. Harrison, Employee, ... Appellant,

v.

Owen Steel Company, Inc., Employer, and
Old Republic Insurance Company
c/o Gallagher Bassett Services, Inc., Carrier,. ..... Respondents.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Respondents' Brief of Owen Steel Company, Inc. and Old Republic Insurance Company c/o Gallagher Bassett Services, Inc. complies with Rule 211(b), SCACR. The undersigned also certifies that this Respondents' Brief complies with the South Carolina Supreme Court's April 16, 2014 Order re: Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings.

March 21, 2016

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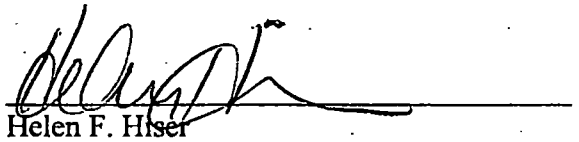

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