

3

ORIGINAL

THE STATE OF SOUTH CAROLINA
IN THE
COURT OF APPEALS

RECEIVED

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
Appellate Panel

APR 19 2017

SC Court of Appeals

SCWCC No.: 1205647

O'Shea L. Brown, ClaimantAppellant,

v.

Steel Technologies, Employer and

Twin City Fire Ins. Co., CarrierRespondents.

Appellate Case No. 2016-001992

FINAL BRIEF OF APPELLANT

Joe Ann Calvy
Joe Ann Calvy, LLC
P.O. Box 610
Kingstree, SC 29556
Telephone: (843) 354-5504
Facsimile: (843) 354-5845
Attorney for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....ii

STATEMENT OF ISSUES ON APPEAL.....iii

STATEMENT OF THE CASE.....1

FACTUAL BACKGROUND.....8

STANDARD OF REVIEW.....11

ARGUMENTS

I. Did the Commission err in finding that Claimant’s alleged additional injuries for the vascular condition and associated right hip and lower back are not supported by the greater weight of the evidence and thus are not compensable, when such a finding was against the greater weight and preponderance of reliable and substantial evidence in the record and is based on erroneous legal conclusions?..... 11

II. Did the Commission err in finding that Claimant was not permanently and totally disabled when such a finding was against the greater weight and preponderance of reliable and substantial evidence in the record and is based on erroneous legal conclusions?.....21

III. Did the single commissioner err in finding that Claimant is entitled to an award of 12% permanent partial disability to his right leg, when such a finding was against the greater weight and preponderance of reliable and substantial evidence in the record and is based on erroneous legal conclusions.....23

IV. Did the Commission err in finding that Claimant is not entitled to future medical treatment, when such a finding was against the greater weight and preponderance of reliable and substantial evidence in the record and is based on erroneous legal conclusions?.....24

V. Did the Commission err in finding that the Defendants are entitled to credit for overpayment of temporary benefits from the date of the Single Commissioner’s hearing to the date he issued his order?.....25

CONCLUSION.....26

CERTIFICATE OF COUNSEL.....27

TABLE OF AUTHORITIES

Broughton v. S. of the Border, 336 S.C. 488, 495, 520 S.E.2d 634, 637 (Ct.App.1999)
(internal citation omitted).....11

Ellison v. Frigidaire Home Prods., 371 S. C. 159, 161, 638 S. E.2d 664, 665 (2006)
(Ellison II)19

Hanks v. Blair Mills, Inc., 286 S.C. 378, 384, 335 S.E.2d 91, 95 (Ct.App .1985).....21

Lark v. Bi-Lo, Inc., 276 S.C. 130, 134-35, 276 S.E.2d 304, 306 (1981).....11

(Smith v. NCCL, Inc., 369 S.C. 236, 631 S.E.2d 268 (Ct. App. 2006).....26

Stone v. Traylor Bros.. Inc., 360 S.C. 271, 274, 600 S.E.2d 551, 552 (Ct.App.2004)....11

Wynn v. Peoples Natural Gas Co. of S. C., 238 S.C. 1, 11-12, 118 S.E.2d 812, 817-18
(1961).....21, 22

Statutes

S. C. Code Ann. Section 1-23-380 (Supp.2011).....11

S. C. Code Ann. Section 42-9-10.....1

S. C. Code Ann. Section 42-9-30.....1

S. C. Code Ann. Section 42-9-35.....18, 19

S. C. Code Ann. Section 42-9-210.....4,5

STATEMENT OF ISSUE ON APPEAL

- I. Did the Commission err in finding that Claimant's alleged additional injuries for the vascular condition and associated right hip and lower back are not supported by the greater weight of the evidence and thus are not compensable, when such a finding was against the greater weight and preponderance of reliable and substantial evidence in the record and is based on erroneous legal conclusions?
- II. Did the Commission err in finding that Claimant was not permanently and totally disabled when such a finding was against the greater weight and preponderance of reliable and substantial evidence in the record and is based on erroneous legal conclusions?
- III. Did the single commissioner err in finding that Claimant is entitled to an award of 12% permanent partial disability to his right leg, when such a finding was against the greater weight and preponderance of reliable and substantial evidence in the record and is based on erroneous legal conclusions.
- IV. Did the Commission err in finding that Claimant is not entitled to future medical treatment, when such a finding was against the greater weight and preponderance of reliable and substantial evidence in the record and is based on erroneous legal conclusions?
- V. Did the Commission err in finding that the Defendants are entitled to credit for overpayment of temporary benefits from the date of the Single Commissioner's hearing to the date he issued his order?

STATEMENT OF THE CASE

This case involves an accepted injury by accident to Claimant's right knee, which occurred on April 30, 2012 and necessitated a partial medial meniscectomy. He was climbing a ladder to get atop the bed of his trailer. However, a dispute arose as to the question of compensability with respect to a vascular condition/lymphedema present in Claimant's right lower extremity that caused life altering, permanent and irreversible swelling. Claimant sought a determination of compensability for the right lower extremity vascular condition, along with issues to his hip and lower back because of his altered gait, and a finding that he was permanently and totally disabled pursuant to S.C. Code Ann. § 42-9-10. Defendants treated all conditions, including the vascular condition and the back and hip issue up until the date of the hearing before the Single Commissioner. It was not until after Claimant reached maximum medical improvement with his vascular specialist that Defendants denied everything except for the initial knee injury. Defendants have ignored *Ellison II* and contend that the medical evidence contradict any assertion that the vascular condition is "causally related" to either the original injury of April 30, 2012 or treatment received as a result thereof. They do agree that the allegations of issues with his hip and lower back are solely as a result of an alteration to his gait, attributable exclusively to the vascular issues.

Defendants submit that the evidence of the case support simply a finding of a compensable injury to the right knee, and as such Claimant is only entitled to an award under S.C. Code Ann. § 42-9-30 for the right lower extremity. Alternatively, Defendants' disregarded the *Ellison II* case and argued that if the Commissioner was to

find the vascular condition to be “causally related,” he was not yet at maximum medical improvement for those issues.

Claimant filed a Form 50 Request for Hearing seeking the relief above. (Form 50, filed June 18, 2014) Defendants responded, as stated above. (Form 51, filed June 25, 2014) The parties filed pre-hearing briefs and APA submissions, and the case was heard by Commissioner R. Michael Campell, II on February 6, 2015. Over eleven (11) months later, on January 27, 2016, Commissioner Campbell issued an Order with the below findings:

Single Commissioner Findings

1. The parties to this proceeding are subject to and bound by the terms and provisions of the South Carolina Workers’ Compensation Act, as amended, with Steel Technologies, as the Employer, and Twin City Fire Insurance Company as the Carrier.
2. Counsel for both parties received order instructions on November 9, 2015.
3. Claimant sustained an admitted injury to his right knee arising out of and in the course and scope of his employment on April 30, 2012.
4. Claimant’s knee injury was specifically a torn medial meniscus for which he required a partial medial meniscectomy on October 2, 2012.
5. Claimant’s need for a partial medial meniscectomy was causally related to the admitted injury occurring on April 30, 2012.
6. Claimant alleged additional injuries, which included a vascular condition of the right lower extremity, the right hip, and lower back.

7. Claimant's alleged additional injuries for the vascular condition and associated right hip and lower back are not supported by the greater weight of the evidence and thus are not causally related to the admitted injury of April 30, 2012 or treatment occurring as a result therefrom.

8. Claimant underwent various treatments and evaluations with multiple physicians for his work related and alleged causally related injuries, including surgery.

9. Dr. Rudolph found Claimant to be at maximum medical improvement for his knee injury on February 19, 2014 with a noted 13% impairment of the right lower extremity.

10. Dr. Rudolph's impairment rating was noted to include an increase for the Claimant's swelling.

11. I find that Claimant has satisfied his burden of proof relative to the causal connection between his work related accident and the resulting knee injury, which required a partial medial meniscectomy.

12. The medical records support my determination that Claimant sustained an injury by accident arising out of and in the course of his employment to his right knee.

13. I give the greatest weight to the findings of the authorized treating physicians, which included Dr. Rudolph, Dr. Morrison and Dr. Tavel as well as the deposition testimony proffered by Drs. Morrison and Dr. Tavel.

14. Based on the greater weight of the evidence, I find that the Claimant's vascular condition was not caused, activated, or aggravated by the compensable right knee injury or the treatment received as a result of said injury.

15. Based on the greater weight of the evidence, I find that the additional injuries alleged by Claimant as to the right hip and lower back, are attributable to his altered gait, which was the direct result of his lymphedema, which I have already found to be unrelated to the admitted injury of April 30, 2012.

16. Based on the greater weight of the evidence, I find that Claimant reached maximum medical improvement for his admitted injury to his right knee on February 19, 2014.

17. Claimant is entitled to an award of 12% permanent partial disability to his right leg for this admitted injury.

18. Lacking a definitive opinion from Dr. Rudolph relative to future medical treatment for Claimant's admitted injury; I find that Claimant is not entitled to future medical care.

19. I find that Defendants are entitled, as of the date of this hearing, to terminate temporary total disability compensation on account of my having found Claimant to be at maximum medical improvement on February 19, 2014.

20. I find that Defendants are not entitled to any credit for overpayment for compensation paid from the date of maximum medical improvement until the date of this hearing as Defendant's did not at any time raise S.C. Code Ann. § 42-9-210.

21. I find that Defendants are also not entitled to any credit for overpayment for compensation paid between the date of this hearing and the date the Order Instructions were issued as Defendant's did not at any time raise S.C. Code Ann. § 42-9-210.

Both Claimant and Defendants timely filed cross appeals to the Full Commission. (Form 30, filed February 5, 2016 by Claimant and Form 30 filed February 12, 2016 by Defendant) The parties timely filed Full Commission briefs and an Appellate Panel of the Full Commission heard oral arguments on June 20, 2016 and issued a unanimous decision on September 20, 2016. The Full Commission's order AFFIRMED IN PART and REVERSED IN PART the Single Commissioner's order. The findings are as follows:

Full Commission Findings

1. The parties to this proceeding are subject to and bound by the terms and provisions of the South Carolina Workers' Compensation Act, as amended, with Steel Technologies, as the Employer, and Twin City Fire Insurance Company as the Carrier.
2. The hearing before the Single Commissioner occurred on February 6, 2015.
3. Counsel for both parties received order instructions on November 9, 2015.
4. Claimant's sustained a compensable knee injury, which required a partial medial meniscectomy that occurred on October 2, 2012.

5. Claimant's need for a partial medial meniscectomy was causally related to the admitted injury occurring on April 30, 2012.

6. Claimant's alleged additional injuries for the vascular condition and associated right hip and lower back are not supported by the greater weight of the evidence and thus are not casually related to the admitted injury of April 30, 2012 or treatment occurring as a result therefrom.

7. Dr. Rudolph found Claimant to be at maximum medical improvement for his knee injury on February 19, 2014 with a noted 13% impairment of the right lower extremity.

8. Dr. Rudolph's impairment rating was noted to include an increase for the Claimant's swelling, which was attributed to a vascular condition known as lymphedema, which Dr. Morrison concluded to be unrelated to the accident or resulting treatment.

9. We find that Claimant has satisfied his burden of proof relative to the causal connection between his work related accident and the resulting knee injury, which required a partial medial meniscectomy.

10. We give the greatest weight to the findings of the authorized treating physicians, which included Dr. Rudolph, Dr. Morrison and Dr. Tavel as well as the deposition testimony proffered by Drs. Morrison and Dr. Tavel.

11. Based on the greater weight of the evidence, we find that the Claimant's vascular condition, lymphedema, was not caused, activated, or aggravated by the compensable injury to Claimant's right knee or the treatment received as a result of said injury.

12. Based on the greater weight of the evidence, we find that the additional injuries alleged by Claimant as to the right hip and lower back, are attributable to his altered gait, which are the direct result of his lymphedema, which has already found to be unrelated to the admitted injury of April 30, 2012.

13. Based on the greater weight of the evidence, we find that Claimant reached maximum medical improvement for his admitted injury to his right knee on February 19, 2014.

14. We find Claimant is entitled to an award of 12% permanent partial disability to his right lower extremity for this admitted injury.

15. We find there is insufficient evidence to order any recommended future treatment that would lessen the period or extent of Plaintiff's disability as it pertains exclusively to the compensable injury to his right lower extremity; therefore, we find that Claimant is not entitled to future medical care.

16. We find that Defendants are entitled, as of the date of this hearing, to terminate temporary total disability compensation on account of my having found Claimant to be at maximum medical improvement on February 19, 2014.

17. We find that the Defendants continued to pay temporary total disability compensation from February 6, 2015 through November 9, 2015, while the parties awaited the order instructions of the Single Commissioner.

18. We find that neither party nor their respective counsel contributed to the delay in issuance of the order instructions between February 6, 2015 and November 9, 2015.

19. We find that Defendants are entitled to a credit for overpayment of temporary total disability compensation paid between the date of this hearing, February 6, 2015 and the date the Order Instructions were issued, November 9, 2015 though no credit shall be awarded for any temporary total disability compensation paid prior to the date of the hearing.

20. Defendants are entitled to a credit for compensation paid from February 6, 2015 and ending November 9, 2015, which totals Twenty-Two Thousand Five Hundred Ninety-Six and 85/100 (\$22,596.85) Dollars.

21. Defendants credit is in excess of Claimant's permanent partial disability award, thus no payment is due to the Claimant.

22. After Claimant's permanent partial disability award is applied to the aforementioned credit, Defendants have a resulting net credit of Nine Thousand Two Hundred Thirty-Four and 51/100 (\$9,234.51) Dollars.

23. The net credit owed to Defendant may be applied toward any future payments of permanency as ordered by this Commission or a higher court, if any; however, in no way shall this finding be construed to award Defendants reimbursement directly from the Claimant.

Claimant timely appealed to this Court.

FACTUAL BACKGROUND

At the time of the hearing, Claimant was 40 years old. He is a twelfth grade graduate who testified that he was transporting a load of steel to a vendor in Charlotte North Carolina on April 30, 2012, when he injured himself and has not worked since

May 2, 2012.(R. p. 133, lines 22-25, R. p. 127 16, lines 10-12) He received temporary total disability checks until November 9, 2015, the date of the single commissioner's order instructions. (R. p. 27) On the day of the injury, during the process of making a delivery, Claimant testified that he went to get on the back of the trailer attached to his truck and bumped his right knee. Immediately after the incident, Claimant testified to calling his supervisor, Maurice Byrd, to report what happened. Despite the occurrence, Claimant testified that he continued to process the delivery and also transported another load the following day to Greensboro, North Carolina. (R. p. 118, lines 7-22) (R. p. 119 lines 8-10)

Claimant testified that he did not experience any swelling to his leg until after the injury. (R. p. 119, lines 14-19) Approximately two (2) to three (3) days after the incident, he went to see a doctor at the direction of his employer. (R. p. 119, lines 20-25) At this initial evaluation he stated that he was simply provided some medications though after some time, approximately five (5) or six (6) months, he was sent to an orthopedist. (R. p. 120, lines 13-15) Claimant was referred to Dr. Rudolph for his surgery, which eventually occurred in the form of a partial medial meniscectomy. Claimant testified that approximately an hour and a half to two hours after the surgery he began to experience swelling, which he was told was a result of his having surgery. He testified that the swelling goes from his right foot all the way up into his right hip, right side and back.(Tr. p. 11, lines 5- 25) (Tr. p. 12, lines 1-25). Claimant's testimony was that prior to this incident and his surgery, he had never experienced any swelling and following the surgery, despite assurances it would improve, his swelling gravely increased. He testified at some point during his treatment, Dr. Rudolph recommended further treatment to his

knee as his kneecap is sitting out of place. (Tr. p. 145, lines 5-25) (Tr. p. 146, lines 1-25) (R. p. 36, lines 1-24) Claimant also developed and started complaining of back pain while he was treating with Dr. Rudolph. (Claimant's APA pp. 346-347)

Claimant was eventually referred to Dr. Morrison, who treated him for a vascular problem, in hopes of reducing the swelling. (R. p. 123, lines 17-25) Upon being seen by Dr. Morrison Claimant testified that he was recommended to undergo a vein closure, which was done. *Id.* However, Plaintiff testified that the vascular surgery that he underwent has not helped with his swelling, so he was eventually referred to Dr. Tavel for pain management. (R. p. 124, lines 9-17) Dr. Tavel has been treating him for issues relative to his having developed hip and back pain as well, which were attributed to changes in his gait from the swelling of his lower extremity. Claimant further testified that the issues he is experiencing with his back have been attributed to his altered gait on account of the swelling in his leg and that he has swelling on a daily basis. (R. p. 125, lines 2-8) (R. p. 125, lines 13-21) He testified that he also experiences problems with his hip in the hip joint all the time. (R. p. 125, lines 22-25)

Claimant addressed his employment status, contending that he was unable to work in any capacity on account of the limitations established by Drs. Rudolph and Tavel. Claimant testified that he was not supposed to lift or squat and that he could work in a position where he was sitting or standing, but this was for limited periods of time. Claimant also testified that he was supposed to be permitted a ten (10) minute break for every one (1) hour of work.

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act establishes the substantial evidence standard for judicial review of decisions by the Appellate Panel. S. C. Code Ann. § 1-23-380 (Supp.2011); Lark v. Bi-Lo, Inc., 276 S.C. 130, 134-35, 276 S.E.2d 304, 306 (1981). Under the substantial evidence standard of review, this court may not substitute its judgment for that of the Appellate Panel as to the weight of the evidence on questions of fact, but may reverse when the decision is affected by an error of law. Stone v. Traylor Bros., Inc., 360 S.C. 271, 274, 600 S.E.2d 551, 552 (Ct.App.2004).

“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 conclusions the [Appellate Panel] reached in order to justify its actions.” Broughton v. S. of the Border, 336 S.C. 488, 495, 520 S.E.2d 634, 637 (Ct.App.1999) (internal citation omitted).

ARGUMENT

- I. **Did the Commission err in finding that Claimant’s alleged additional injuries for the vascular condition and associated right hip and lower back are not supported by the greater weight of the evidence and thus are not compensable, when such a finding was against the greater weight and preponderance of reliable and substantial evidence in the record and is based on erroneous legal conclusions?**

In this case, Claimant suffered a knee injury that resulted in surgery. After surgery, Claimant had an enormous amount of swelling in the surgical leg and was referred to a vascular doctor, which resulted in vascular surgery. Claimant also developed hip and back pain as a result of the altered gait because of the swelling. Defendants contend that the vascular condition is a pre-existing condition that was not aggravated by

the injury and is thus not causally related to the work injury. Claimant contends that the work injury caused the vascular condition but regardless of how the derivation of the vascular condition, *Ellison II* is controlling in this case. Ellison made it clear that the pre-existing condition that renders the Claimant unable to work, can be considered, when determining whether a Claimant is permanently and totally disabled regardless of whether the pre-existing condition was aggravated or not.

This truck driver suffered a knee injury from bumping his knee on a truck trailer, which resulted in 1. an immediate swollen knee with arthroscopic right knee surgery and partial medial meniscectomy. 2. subsequent and continuous chronic post-operative swelling of the right knee, leg and foot despite great vein ablation and compression therapy by a vascular surgeon, lymphedema treatments and pain management, and 3. back and hip pain from his altered gait. Defendants directed treatment and paid for the medical care to the knee, the subsequent swelling of the lower extremity and the back and hip pain, from the date of the injury on April 30, 2012 until February 19, 2014, the date the knee specialist noted Claimant was at maximum medical improvement. (Single Commissioner Order Findings of Fact #9)

At the hearing, the Single Commissioner made findings that, Claimant sustained an admitted injury to his right knee arising out of and in the course and scope of his employment on April 30, 2012, Claimant's knee injury was specifically a torn medial meniscus for which he required a partial medial meniscectomy on October 2, 2012, Claimant's need for a partial medial meniscectomy was causally related to the admitted injury occurring on April 30, 2012. The single commissioner disregarded *Ellison II* and made a finding that the resulting lymphedema/chronic swelling and resulting back and

hip pain were not casually related to this work injury and that the greater weight of the evidence shows that the Claimant's vascular condition was not caused, activated, or aggravated by the compensable right knee injury or the treatment received as a result of said injury. (R. p. 20)

The Single Commissioner and the defendants do not deny that the problems with the Claimant's hip and back stems from his vascular condition. (R. pp. 8, 66-68) The Single Commissioner specifically made a finding that the additional injuries alleged by Claimant as to the right hip and lower back, are attributable to his altered gait, which was the direct result of his lymphedema. What we disagree on is whether the vascular condition is compensable as related to the work injury. During the course of his treatment, Claimant was evaluated by 2 vascular specialists. One opined that the bump from the knee caused the resulting lymphedema and resulting vascular condition, and the other, the authorized treating physician, opined that if he had known or if it was told emphatically, without any doubt, that Claimant had no evidence of chronic swelling pre-arthroscopy and that one leg went bad after that, he would say, okay, they have got to be temporally related. This argument will show that Claimant testified that he did not have any swelling to his leg pre-injury and the evidence of record supports the same and that this authorized treating physician testified that it would have been important to know if Claimant had swelling pre-injury. (R. p. 211, lines 16-23) In earlier testimony, Dr. Morrison had testified that Claimant had a pre-existing underlying vascular condition that was dormant, until the work injury and was not causally related to the work injury.

To be thorough, on July 24, 2012, Claimant saw Dr. Rudolph, an orthopedic specialist. Dr. Rudolph noted swelling in the lower extremity and noted that Claimant had

no back or hip pain at the time. (R. p. 374) On October 2, 2012, Claimant had right knee surgery. (Claimant's APA p. 224) When he returned to Dr. Rudolph on October 10, 2012, Dr. Rudolph noted a significant amount of swelling. (R. p. 369) By the time he returned on October 31, 2012, Dr. Rudolph noted a significant amount of swelling all the way down to his foot after his knee surgery. He also noted that there was a "deathly difference between the right leg and the left leg," and that the leg below the knee was a problem (R. p. 367) By November 28, 2012, Dr. Rudolph had made a referral to a vascular doctor, Dr. Morrison, and noted on December 19, 2012, that there was chronic swelling and skin changes after the surgery. (R. p. 363)

On March 19, 2014, Dr. Morrison completed a questionnaire from the Employer's attorney and in that questionnaire, Dr. Morrison indicated to a "reasonable degree of medical certainty" that claimant was diagnosed as having venous stasis disease and edema, that the knee injury likely exacerbated his underlying venous reflux disease, that the condition and underlying vascular surgery was as a direct result of the work injury in that the venous closure procedure was done to help improve the pain and edema which was "worsened by the knee injury," that the lymphedema is related to Claimant's work injury in that "the lymphedema and venous stasis disease were exacerbated by the knee injury, however; he likely had malfunctioning venous valves prior to injury" He indicated that he referred Claimant to Dr. Tavel for pain management and the referral was related to the work injury because "the work injury can cause reflex sympathetic dystrophy." (R. p. 380 In a later deposition, Dr. Morrison denied that the resulting venous stasis and edema condition was related to the surgery but maintained his position that the vascular condition was probably aggravated by the work injury. (R. p. 197 lines 22-25, R. p. 198

lines 1-8, R. p. 229 line 25, R. p. 230 lines 1-19) In his deposition, Dr. Morrison noted that Claimant has a significantly edematous and swollen leg and that his working diagnosis was that Claimant had edema of multifactorial origin, lymphatic and venous disease with the primary cause of his edema being venous disease and truncal obesity. (R. p. 192, lines 16-20, R. p. 194 line 20-25, R. p. 195, lines 1-2) On November 14, 2014, Dr. Gabor Winkler, a vascular surgeon, reviewed the medical evidence and opined to “a reasonable degree of medical certainty” that Mr. Brown’s chronic swelling is a direct result of the work injury to his right knee, that the impact of the injury could have caused the immediate swelling, as well as the ultimately resulting permanent swelling. He further stated that the swelling was further worsened by the arthroscopic knee surgery and he opined to a reasonable degree of medical certainty that the impairment due to the swelling in the right leg is and will remain a permanent problem and disability for Claimant and that even with lymphedema therapy, compression, therapy, and weight loss, some level of improvement in his symptoms can be achieved, it is extremely unlikely that he will return to normal function and that his permanent disability is as a direct result of his work injury. Dr. Alan, the orthopedist that evaluated Claimant agreed. Dr. Alan opined that the knee condition is a direct result of the work injury and that the vascular impairment of the right lower extremity is also causally related to the work injury as an unanticipated complication of the treatment for his injury. (R. p. 396)

Although the Single Commissioner did not find the vascular condition/lymphedema causally related to the work injury or the back and hip, it is the Claimant’s position that but for the work injury, he would not have needed treatment or

the surgery and thus the resulting excessive swelling would not have occurred. For the Single Commissioner to now deny this vascular condition is unjust.

In his deposition, Dr. Morrison, the authorized treating physician at Coastal Vascular and Vein Center, opined that the Claimant has venous stasis disease caused by malfunctioning venous valves. During the beginning of the deposition, Dr. Morrison's deposition was inconsistent and he opined that the venous stasis disease was present prior to the work injury and that the irreversible edema in his surgical leg post-surgery is not work related but was probably a pre-existing condition that was dormant until it was exacerbated/aggravated by the work injury. (R. p. 379) (R. p. 197 lines 22-25, R. p. 198 lines 1-8, R. p. 229 line 25, R. p. 230 lines 1-19) At the end of the deposition, during my re-examination, Dr. Morrison divulged that he had no knowledge of whether the Claimant had lymphedema/chronic swelling prior to his injury and this would have been important to know. (R. p. 211, lines 16-23) He also stated the following during his deposition:

Q: Dr. Morrison, what if I were to tell you, prior to the injury, both of Mr. Brown's legs were exactly the same? And since you're the treating physician, I think you have observed that the leg with the chronic problem is probably three times bigger or two and a half times bigger than his regular leg. So if I were to tell you that they were normal prior to the injury...

A: Yes, ma'am.

Q: ... would you be able to give any reasoning, at that point, as to what could have happened to him? You didn't observe it, but what if I just was to tell you that?

A: Well, if you ... if I had known or if it was told emphatically, without any doubt, that he had no evidence of chronic swelling pre-arthroscopy and that one leg went bad after that, I would say, okay, they're got to be temporally related. I would try to figure out how. But again, I cannot ... I can't, in my brain, understand how a knee arthroscopic procedure is going to deal up with anything lymphatics in the groin and the pelvis.

(Dr. Morrison Tr. p. 51, lines 16-25) (Dr. Morrison's Tr. p. 52, lines 1-16)

During his deposition, Dr. Morrison stated that the Claimant probably had some chronic lymphedema prior to his injury and that someone with lymphedema will have some appreciable swelling. (R. p. 230, lines 1-19) (R. p. 204, lines 19-25) There was no evidence in the record that the Claimant had chronic lymphedema prior to his injury. Defendant did not produce any evidence proving the same. Claimant did testify that his swelling began after the injury. (R. p. 119, lines 14-19) Dr. Rudolph noted that the Claimant's edema condition continued to get worst until he had to refer him to Dr. Morrison. (R. pp.346-376) Dr. Morrison also testified that if a person had significant swelling prior to surgery, doctors must be careful as this could make the swelling worse after surgery. (R. p. 230, lines 12-19)

Dr. Gabor A. Winkler, at McLeod Physician Associates, agreed to see Claimant for an independent medical evaluation and opined that the chronic swelling in the surgical leg is a direct result of the work-related injury that he sustained and the subsequent surgery that was necessary. (R. p. 392) Claimant saw two vascular specialists. It is his position that the injury and subsequent surgery caused the swelling and that the evidence supports a finding including the vascular condition as a causal link to the work injury.

Despite the obvious evidence showing that Dr. Morrison changed his position at the end of his deposition and concluded that knowing whether Claimant had swelling prior to his work injury would have been important to know and that if he did not have swelling pre-injury, it would be his position that the work injury and subsequent swelling were temporal and related, the single commissioner still made a finding that the vascular condition was an underlying condition that was pre-existing. If, despite the evidence, the

Court conclude that the venous condition was non-compensable South Carolina Workers' Compensation Laws do not punish employees for their pre-existing conditions. The law expressly provides that an injured worker may recover benefits whether the pre-existing condition was aggravated by a work-injury or not. The applicable workers' compensation statute is listed below:

SECTION 42-9-35. Evidence of preexisting injury or condition.

(A) The employee shall establish by a preponderance of the evidence, including medical evidence, that:

- (1) the subsequent injury aggravated the preexisting condition or permanent physical impairment; or
- (2) the preexisting condition or the permanent physical impairment aggravates the subsequent injury.

(B) The commission may award compensation benefits to an employee who has a permanent physical impairment or preexisting condition and who incurs a subsequent disability from an injury arising out of and in the course of his employment for the resulting disability of the permanent physical impairment or preexisting condition and the subsequent injury. However, if the subsequent injury is limited to a single body part or member scheduled in Section 42-9-30, except for total disability to the back as provided in Section 42-9-30(21), the subsequent injury must impair or affect another body part or system in order to obtain benefits in addition to those provided for in Section 42-9-30.

(C) As used in this section, "medical evidence" means expert opinion or testimony stated to a reasonable degree of medical certainty, documents, records, or other material that is offered by a licensed health care provider.

(D) The provisions of this section apply whether or not the employer knows of the preexisting permanent disability.

(E) On and after the effective date of this section, an employee who suffers a subsequent injury which affects a single body part or member injury set forth in Section 42-9-30 is limited to the recovery set forth in that section.

HISTORY: 2007 Act No. 111, Pt I, Section 19, eff July 1, 2007, applicable to injuries that occur on or after that date.

In Ellison II, the court noted that Ellison had injured his leg in a work injury. He had pre-existing physical conditions including hypertension, sleep apnea, prostate cancer, diabetes, and congestive cardiac disease, which, in combination with his workplace injury, rendered him physically unable to return to work after his accident. Ellison v. Frigidaire Home Prods., 371 S. C. 159, 161, 638 S. E.2d 664, 665 (2006) (Ellison II) Applying the above statute, the Commissioner concluded Ellison was totally disabled from the combined effect of his pre-existing conditions and his workplace injury to his leg. *Id.* at 162. Claimant is similarly situated. He has a vascular condition/lymphedema, which regardless of whether it is a pre-existing condition or was caused by the work injury, has rendered him unable to return to work. At the hearing, Claimant sought a finding that he was permanently and totally disabled because of his knee injury, the lymphedema, hip and back issues and vocational assessment.

As for causation for the hip, it is undisputed that the vascular condition caused the hip condition. (R. p. 8) (Respondent's Brief to the Full Commission pp. 66-68) On examination, Dr. Ahearn noted that Claimant's gait in and out of the brace was strongly right antalgic with a right hip lurch and with shortened right foot stance. Dr. Ahearn noted that all opinions he rendered in his report are most probable with a reasonable degree of medical certainty, that pain to the back is authorized and being managed by Dr. Tavel, a pain specialist. (R. pp. 288-293) Physical therapy records as early as March 29, 2013 note abnormality of gait. (R. p. 138) On February 18, 2013 Claimant complained to the vascular doctor of back and hip pain. (R. p. 158 and p. 160) On March 20, 2013 Claimant told the orthopedist, Dr. Rudolph, that his pain has radiated up to his back and

hip and he noted that Claimant was walking with a significant limp. (R. p. 357) The Defendants accepted and paid for treatment to the hip.

As for causation for the back, it is undisputed that the vascular condition caused the back condition. (Single Commissioner Finding of Fact #15 from which Defendant did not appeal.) During examination, Dr. Ahearn, the orthopedist, noted that Claimant's lumbar motion was limited to fingertips even with knees only and with very little reversal of the lumbar curve and that there was midline L3-L5 spinal tenderness, palpable low paralumbar muscular spasm, and right sciatic notch tenderness. Dr. Ahearn noted that all opinions he rendered in his report are most probable with a reasonable degree of medical certainty. He noted that pain to the back is authorized and being managed by Dr. Tavel, a pain specialist. (R. p. 343) Physical Therapy records as early as March 3, 2013 noted abnormality of gait. (R. p. 315) On December 16, 2013 Claimant made complaints of back pain in addition to hip, leg and foot pain. (R. p. 321) Dr. Alan, the orthopedist, agreed with causation and opined that the Claimant's lumbar radiculopathy is causally related to his work injury as an exacerbation and/or acceleration of the normal degenerative process of the lumbar spine secondary to severe gait impairment. (R. p. 396) The defendants accepted and paid for treatment to the back.

In their brief to the Full Commission, Defendants alleged Claimant made false accusations with respect to the Defendant accepting and paying for medical care to the back and hip. The evidence clearly shows that the Defendant provided treatment to the back and hip. (R. pp. 291, 305)

Claimant believes that he has met his burden of proving that he is permanently and totally disabled. Although Dr. Morrison, the treating physician, may have given conflicting opinions as to the relationship of Claimant's vascular condition to the work injury, the evidence clearly shows that Claimant either developed swelling after the work injury, like Dr. Winkler opined or the vascular condition was pre-existing and was lying dormant, until the work injury. As discussed, the Court in *Ellison II* made it clear that the pre-existing condition that renders the Claimant unable to work, can be considered, when determining whether a Claimant is permanently and totally disabled.

II. Did the Commission err in finding that Claimant was not permanently and totally disabled when such a finding was against the greater weight and preponderance of reliable and substantial evidence in the record and is based on erroneous legal conclusions?

At the hearing, Claimant sought a finding that he was permanently and totally disabled because of his knee injury, the lymphedema, hip and back issues.

S. C. Code Ann. Section 42-9-10 provides for permanent and total disability "when the incapacity for work resulting from an injury is total." The extent of disability is a question of fact to be proved as any other fact is proved. Hanks v. Blair Mills, Inc., 286 S.C. 378, 384, 335 S.E.2d 91, 95 (Ct.App. 1985). In Wynn v. Peoples Natural Gas Co. of S. C., 238 S.C. 1, 11-12, 118 S.E.2d 812, 817-18 (1961), our supreme court stated:

"Disability in compensation cases is to be measured by loss of earning capacity. Total disability does not require complete helplessness□ The generally accepted test of total disability is inability to perform services other than those that are "so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist."

(internal citations omitted).

If the Court finds that the vascular condition is compensable and thus should be included in determining disability, then Claimant's position is that the below evidence of record supports his request for a finding that he is permanently and totally disabled:

Following treatment, ratings and restrictions were assigned as follows: Claimant received a 60% permanent impairment to the lower extremity for lymphedema with sedentary work restrictions including no lifting, pushing, pulling, squatting, kneeling, crawling and no continuous sitting or standing greater than 1 hour at a time without a 10 minute break and no climbing ladders or stairs. Dr. Ahearn agreed. (R. p. 285) Dr. Ahearn assigned a 15% permanent impairment to the knee, 12% permanent impairment to the hip for mild hip arthritis that became symptomatic from antalgic gait, and a 5% whole person permanent impairment for L5-S1 disc desiccation with contained circumferential annular tear in the mild broadly bulging disc (R. p. 350) Because of the death of Dr. Ahearn during this case, Claimant was evaluated by Dr. Rodney K. Alan on April 30, 2012 for confirmation. The ratings assigned by Dr. Alan were 3% whole person for chronic pain, 60% right lower extremity for chronic lymphedema, 7% for right knee for the residual patellar instability and 2% to the right lower extremity for partial meniscectomy. He also assigned a 5% whole person rating to the lumbar. His total whole person rating assigned was 33%. (R. p. 396) Dr. Alan noted that the Claimant is restricted to sedentary work but it may not be feasible given Mr. Brown's chronic opioid dependence. (R. p. 396)

Vocational assessments are as follows: Fi Fi Jubran, Claimant's vocational expert, opined that his work history has been heavy in exertion, but because of Dr. Tavel's sedentary work restrictions, it is highly unlikely he will be able to find or sustain employment and she does not believe a reasonable stable market exists for Claimant and

she believes he is unemployable. If by chance he could find sedentary work which she feels is highly unlikely, he would be limited to wages of \$7.25 per hour. She believes because Dr. Tavel has indicated Claimant will need 10 minute breaks after sitting for an hour that would be an accommodation most employers would not be willing to tolerate.

(*id.*) Robert E. Brabham, Employer's own vocational expert, opined that "[a]t the time of this evaluation, it was apparent that due to the profound lower extremity swelling, he is experiencing limitations in sitting and standing of such severity that as yet, even any sedentary work, which might otherwise have been suggested, is precluded."

Based on the same, it is Claimant's position that he met his burden of proving permanent and total disability.

III. Did the single commissioner err in finding that Claimant is entitled to an award of 12% permanent partial disability to his right leg, when such a finding was against the greater weight and preponderance of reliable and substantial evidence in the record and is based on erroneous legal conclusions.

In the event that the Full Commission finds that the Claimant is not permanently and totally disabled, it is Claimant's position that his permanent impairment rating is higher than 12% based on the assigned impairment ratings depicted by the doctors in Argument II above and adopted verbatim in this argument. The Commission clearly reduced the rating base on Dr. Rudolph including the swelling in assigning the impairment rating. (R. p. 8) Therefore, if the vascular condition is compensable, the rating should be higher.

IV. Did the Commission err in finding that Claimant is not entitled to future medical treatment, when such a finding was against the greater weight and preponderance of reliable and substantial evidence in the record and is based on erroneous legal conclusions?

Claimant will need pain medications including compounding cream, DME equipment, liver and kidney function tests yearly if using chronic NSAIDs or narcotics containing acetaminophen, further knee surgery. (R. p. 346) Claimant “has had the worst result that he can have status post a medial meniscal tear.” (*Id.*) Dr. Alan noted that future treatments for Mr. Brown include ongoing lymphedema evaluation and treatment, future treatment for knee arthritis status post meniscectomy, ongoing pain management, durable medical equipment including a cane, brace for the knee and lumbar support. (R. p. 396) Dr. Morrison indicated in his deposition that significant weight loss to the tune of an 80-100 pound weight loss coupled with exercise and expensive monthly lymphatic pumps and lymphatic massages would be recommended for future improvement of the medical condition. (R. p. 241 lines 5-25, R. p. 242 lines 1-7) In addition, Dr. Morrison also testified that only 10% to 20% of his patients with chronic lymphedema who loses the recommended weight will get better and that those with the most significant improvement will have to include weight loss, exercise and lymphatic pumps and lymphatic massages in their routine. (R. p. 218 lines 3-25, p. 219 lines 1-25, R. p. 220 lines 1-12) Dr. Morrison went on to say that chronic lymphedema is a chronic condition and most people are going to need treatment once a month usually for a life, that it is rare that someone gets lymphatic massage and is cured. They get better, the fluid is cleared. They can utilize the stocking and they can function better but it is a long term problem. (*Id.*)

V. Did the Commission err in finding that the Defendants are entitled to credit for overpayment of temporary benefits from the date of the Single Commissioner's hearing to the date he issued his order

At the hearing, the Defendants argued that its failure to file a WCC Form 21 Request to Stop Compensation was a result of complex medical history at issue, which had not been fully vetted. Although the Defendants did not seek a finding for overpayment of temporary total benefits before the Single Commissioner, on appeal to the Full Commission, the Defendants requested that the Commission find that they were entitled to credit for payment of temporary total benefits for the over 12 months period it took the Single Commissioner to issue his order.

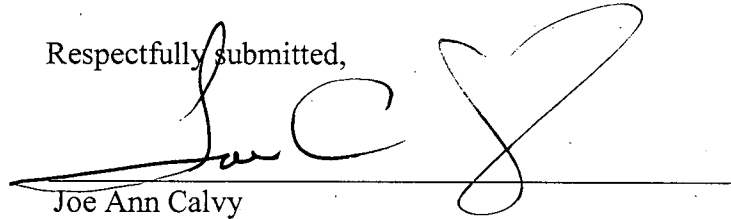
The Claimant made an equity argument to the Full Commission, highlighted the fact that Defendants did not even file a Form 21 Request for Stop Payment of benefits and did not request credit for overpayment of benefits at the hearing before the Single Commissioner and stated that equity should not allow the Defendants to receive an automatic credit for payment of benefits from the date of the hearing to the present. Defendant's position was that Claimant was at maximum medical improvement as early as February 19, 2014 and the Single Commissioner agreed. The hearing before the single commissioner was not until February 6, 2015. Claimant could have requested a hearing as early as February 19, 2014 but did nothing. It was not until after the Single Commissioner took over 12 months to issue an order that the Defendant sought credit. Had they requested a hearing much earlier, this could have been avoided. Further, if this Court finds that Claimant is permanently and totally disabled, then Claimant takes the position that Defendant is not entitled to credit for overpayment benefits. In *Smith*, the Court found that once an employee reaches maximum medical

improvement and remains disabled, then his injury is permanent. The Court went on to say that the fact the injury is permanent is "precisely the reason to terminate benefits in favor of permanent benefits upon a finding of maximum medical improvement. (Smith v. NCCI, Inc., 369 S.C. 236, 631 S.E.2d 268 (Ct. App. 2006))

CONCLUSION

Respondent prays that the Commission finds that the Commission did not abuse its discretion to grant him payment in lump sum and that the Court affirm the Commission's finding. The Appellants have failed to reach their burden of proving that the Commission's findings are wholly unsupported by the evidence or the conclusions reached are controlled by an error of law.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Joe Ann Calvy", written over a horizontal line.

Joe Ann Calvy
P. O. Box 610
Kingtree, S. C 29556
843-354-9000
Attorney for Appellant

Kingtree, S. C.
April 12, 2017

THE STATE OF SOUTH CAROLINA
IN THE
COURT OF APPEALS

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
Appellate Panel

SCWCC No.: 1205647

RECEIVED

APR 19 2017

SC Court of Appeals

O'Shea L. Brown, ClaimantAppellant,

v.

Steel Technologies, Employer and

Twin City Fire Ins. Co., Carrier.....Respondents.

Appellate Case No. 2016-001992

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Appellant, O'Shea Brown, complies with 211 (b), SCACR and with the South Carolina Supreme Court's Order dated April 15, 2014 as to Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings.

April 12, 2017

Joe Ann Calvy
Joe Ann Calvy, LLC
P.O. Box 610
Kingstree, SC 29556
Telephone: (843) 354-5504
Facsimile: (843) 354-5845
Attorney for Appellant