

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

T. Scott Beck, Commissioner
Michael Campbell, Commissioner
Susan Barden, Commissioner

W.C.C. File No. 1115485
Case No. 2018-001197

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SC Court of Appeals

Lamar Clark, Claimant,

Appellant,

v.

Philips Electronics, Employer, and Gallagher
Bassett Services, Carrier,

Respondents.

INITIAL BRIEF OF RESPONDENTS

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STATEMENT OF ISSUES ON APPEAL

1. Whether the Appellate Division's improperly based its denial of permanent and total disability benefits on speculation.
2. Whether the Commission erred in entering an Order that does not explain the important findings and containing other findings that are clearly irrelevant.

STATEMENT OF THE CASE

This case centers on Clark's attempt to frustrate the discovery process in an effort to preclude Respondent's from obtaining relevant medical records and documentation which directly contradict his allegations in support of his request for permanent and total disability.

Clark requested a hearing before the South Carolina Workers' Compensation Commission alleging that he sustained injuries to his lumbar spine, left hip, left leg, right leg, left foot, nervous system and psychological overlay. (Form 50). Clark sought an award of permanent and total disability under S.C. Code Ann. §§ 42-9-30 or 42-9-10 and requested medical treatment for all alleged body parts. Id.

Respondents argued that Clark's injury was limited to his lumbar spine and, therefore, he was limited to recovery of permanent benefits under S.C. Code Ann. § 42-9-30, with Respondents receiving getting credit for all benefits paid beyond MMI. (Form 21 and Form 51). Respondents further argued that, if the Commission were to find that Clark sustained an injury to more than one body part, he was unable to meet his burden of proving permanent and total disability under S.C. Code Ann. §§ 42-9-10 or 42-9-30.

PRE-EXISTING BACK AND PSYCHOLOGICAL CONDITIONS

During the discovery process, Clark was deposed under oath on May 22, 2013. (Ex. S). At that time, he testified that he had never had any prior injuries to his low back aside from a pulled muscle, had no recollection of ever undergoing an X-ray of his low back and had never been injured while working for a prior Employer. (Ex. S p. 11-12, p. 37).

Respondents served discovery on Clark's counsel and specifically requested Clark execute a release to obtain his files from the social security administration, yet Clark refused to execute same for the purpose of obtaining his SSDI file. (Hrg Comm'r Tr. p. 10 - 11). A month before the

scheduled hearing, Respondents were able to secure Clark's SSDI files, which revealed that Clark sustained a prior work-related injury involving back pain with radiculopathy that caused him to be unable to work through at least 2009, revealing similar complaints of pain and resulting limitations on his workability. (App. Panel Tr. p. 5).

In 2006, Clark sustained an injury while working for Tile Depot, leaving him with residual low back pain and complaints of radiculopathy.¹ (Ex. C, p. 626). At the hearing, he was impeached with the records from the Florida Workers' Compensation Commission evidencing that he did, in fact, file a workers' compensation claim in relation to his injury at Tile Depot.² (Hrg. Tr. p. 48, line 2 and p. 40 line 14). He treated at Halifax Medical Center for his back injury and was taken completely out of work. (APA 27, p. 2141, 2146).³

His prior work-related back injury at Tile Depot was significant enough for Clark to apply for Social Security Disability benefits on two occasions, alleging his back injury and diabetes prevented him from working in the years 2008 – 2009. (Hrg. Tr. P. 53, lines 3 – 7; Ex. N p. 2040). In his initial application, Clark described being “unable to lift [his] arms above [his] head,” and having “a hard time walking.” (Id.). He underwent a disability evaluation in October of 2008, wherein he reported a 2-year history of worsening mid-back and low back pain which he attributed to the lifting injury in 2006. (Ex. N, p. 2060). Clark also reported intermittent numbness and tingling affecting his left lower extremity at that time. (Id.).

¹ At his deposition, Clark was specifically asked to list all of his employers from college through Philips Electronics, yet he failed to disclose Tile Depot as a prior employer. (Ex. S, p. 21 line 15 - p. 36 line 8).

² Clark maintained at the Hearing that the lawsuit in Florida was related to wrongful termination, not a work injury.

³ At the Hearing, Clark denied ever reporting pain radiating into his left leg back in 2006.

Clark's low back pain with radiation into his left lower extremity continued for the following two years, resulting in a second application for SSDI in 2009. (Hrg. Tr. P. 54, lines 3 – 6; Hrg. Tr. P. 56, lines 6 – 18). In his 2009 application, Clark alleged that he was physically unable to lift anything, his back hurt from his neck all the way down to his tailbone, and some days he was unable to walk due to the severity of his knees.⁴ (Ex. N, p. 2066). Clark also indicated that he had undergone X-rays of his back at Florida Hospital, Ormond Memorial, and Halifax Medical Center⁵. (Ex. N p. 2071; Hrg. Tr. p. 57 lines 1 – 9). On May 5, 2009, Clark completed a pain questionnaire wherein he indicated that he suffered from “very sharp pain from the middle of [his] spine down to [his] hips,” and that sitting, standing, and bending caused him to experience pain. (Id. at p. 2077). He also reported on this form that his pain at that time lasted “some days 5 – 6 hours, and sometimes weeks,” and that his injuries made him unable to move items around in the house, sleep in certain positions and rake the yard. (Id. at p. 2078). Further, just seven months before his date of accident with this Employer, Clark presented to Newberry Hospital, reporting back and left flank pain. (Hrg Tr. p. 127 – 128).

Clark indicated in his 2008 SSDI Application that he had been seen by a doctor/hospital/clinic for emotional or mental problems that limited his ability to work.⁶ (Id. at p. 2042).

WORK INJURY AT PHILIPS

⁴ At the hearing, Clark denied reporting any of those issues on the application. (Hrg. Tr. p. 56 lines 19 – 25).

⁵ Clark testified at his deposition that he did not recall undergoing X-rays of his back prior to his work injury.

⁶ Clark denies not only that he alleged suffering from emotional or mental issues back in 2008, but that he ever saw a doctor as a result of same. (Hrg. Tr. p. 54 line 7 – p. 55 line 21). He testified that he had no psychological conditions prior to this injury. (Hrg. Tr. p. 41, lines 18 – 20).

Clark sustained an accepted injury to his low back on his third day of employment with Philips Electronics, July 20, 2011. (Hrg. Tr. p. 27, lines 6 – 8). He received medical treatment from Dr. John Hibbits, Dr. Daniel Sheehan, Dr. Thomas Holbrook, Jr., Dr. Steven Storick, Dr. Donald Johnson, II, Dr. Nicholas Lind, Dr. Justin Hutcheson, Dr. Daniel Westerkam, Dr. Robert Brabham, Dr. Gisele Girault, and Dr. Usama Gabr in relation to this work-injury with Philips Electronics.

An MRI of his lumbar spine was performed, which revealed an L5-S1 left parasagittal disc herniation. (Id. At p. 91). An EMG performed by Dr. Daniel Sheehan on January 25, 2012 revealed lumbar radiculopathy primarily affecting the left L5 nerve root distribution. (APA 4, p. 98). Clark began treating with Dr. Thomas Holbrook in February of 2012. (APA 1, p. 1 – 2). At this initial visit, Clark denied any previous problems with his low back and informed Dr. Holbrook that he had only had “some occasional strain which resolved with time.” (Id.).

On April 4, 2012, Dr. Holbrook performed a left L5-S1 microdiscectomy. (APA 1, p. 3). Following this procedure, Clark returned to Dr. Holbrook on May 2, 2012 and reported having complete relief from his left leg pain.⁷ (Clark’s APA 1, p. 6). Dr. Holbrook assigned a 10% impairment rating to his whole person for his lumbar spine on January 2, 2013 and referred him to pain management with Dr. Steven Storick. (Id. at p. 17).

On September 25, 2013, Dr. Holbrook performed a second surgery,⁷ a left L4-5 microdiscectomy. (APA 1, p. 28). Following the second surgery, Clark returned to Dr. Holbrook on February 24, 2014 and reported that he had no radicular leg pain.⁸ (APA 1, p. 36). Similarly,

⁷ At the hearing, Clark disputed that he ever reported complete resolution of his radicular pain to Dr. Holbrook. (Hrg Tr. p. 69 lines 4 – 9).

⁸ At the hearing, Clark disputed ever reporting this to Dr. Holbrook. (Hrg. Tr. p. 69 lines 15 – 20).

the PT notes from Progressive PT in 2014 showed increased improvement, as Clark reported feeling “practically no pain” at his May 21, 2014 visit.⁹ (Hrg Tr. p. 70 lines 14 – 18).

At his May 28, 2014 visit with Dr. Holbrook, Clark reported his pain at 40% better.¹⁰ (Id.) Clark made no mention of pain in his left hip or leg at this visit with Dr. Holbrook.¹¹ (Id.). On January 8, 2015, Clark reported to Dr. Storick that he received at least 50 – 60% temporary benefit from the injections, which he reiterated 6 months later. (APA 5 p. 117). On August 27, 2015, Clark reported having more issues with his right side of his back than his left¹². (APA 5, p. 124). On July 14, 2016, Clark reported at his visit at Progressive PT that “he felt the best he has felt since the start of therapy.” (APA 25 p. 1901). On July 19, 2016, the therapist noted that Clark was able to complete all activities in therapy.¹³ (Id. at p. 1900).

Dr. Storick testified that in April of 2015 he opted to proceed with a Rhizotomy because Clark had reported relief from the injections. (Ex. R. at p. 41 – 42). Based on Clark’s evaluation following the Rhizotomy, Dr. Storick saw it is a “pretty good sign” that the Rhizotomy was beneficial. (Hrg Tr. p. 76 lines 14 – 25; Id. at 46). Dr. Storick testified that he placed Clark at MMI on August 27, 2015 and, at that time, Clark had reported six weeks of benefit from the procedure. (Id. at 57 – 58).

⁹ At the hearing, Clark disputed reporting this to the therapist. (Hrg Tr. p. 70 lines 14 – 18).

¹⁰ At the hearing, Clark disputed ever having reporting this progress. (Hrg. Tr. p. 70 lines 9 – 13).

¹¹ At the hearing, Clark disputed ever having reporting this progress. (Hrg Tr. p. 71 lines 20 – 24).

¹² At the hearing, Clark disputed ever reported more issues with his right side of his back as compared to the left. (Hrg Tr. p. 78 lines 12 – 21).

¹³ At the hearing, Clark disputed that he was ever able to complete all activities of therapy. (Hrg. Tr. p. 85 lines 4 – 15).

On September 15, 2016, Clark returned to Dr. Holbrook, continuing to complain of low back pain radiating down his left leg to his foot. (APA 29). Dr. Holbrook opined that he did “not believe that he would benefit from any further surgery on his lumbar spine.” (Id. at 2152).

Clark’s treating physicians deemed him able to perform work ranging from sedentary to light duty. On July 10, 2014, Tracy Hill, P.T. noted that Clark “qualified for limited sedentary to limited light work. He does not tolerate occasional bending, squatting, kneeling, or reaching. He does not meet the full physical requirements necessary for sedentary or light work.” (APA 7, p. 156 – 58). On July 21, 2014, Dr. Daniel Westerkam agreed with this assessment, finding Clark “able to work in the limited sedentary to limited light work category. He can occasionally walk, stair climb and twist, but he cannot kneel, squat, bend or reach.” (APA 6, p. 128 – 30). Dr. Hutcheson additionally noted that Clark could perform work ranging from sedentary to light duty. (APA 10, p. 234 – 37). Dr. Girault opined that she, too, was in agreement with the previous assessments and found that Clark was capable of doing sedentary to limited light duty work. (APA 17, p. 1157 – 59; APA 26, p. 1911 – 16).

POST-INJURY VOCATIONAL ABILITIES

Clark testified at his 2013 deposition that he was no longer able to lift items weighing over 5 pounds or bend over without being in pain, which he attributed to his injury at Philips. (Ex. S p. 74-75). With regard to his activities of daily lifting, he testified that the work injury at Philips had rendered him unable to mow his yard, walk his dog, sweep, take out the garbage or load items into his truck. (Id. at p. 76). He further testified that the injury made it difficult for him to wash dishes, due to the required bending. (Id. at p. 75). With regard to his educational background, Clark testified that he attended only one year of college, which was at Georgia Military College. (Id. at p. 18).

Clark's vocational expert, Dr. Robert Brabham, evaluated Clark on two occasions: May 21, 2013 and December 18, 2015. (APA 13 p. 371-397). During the initial evaluation, Clark reported that any bending activity significantly increased his pain symptoms, he required the use of a "grabber" to reach items located up high or down low in the home,¹⁴ he was unable to drive, he could only walk for 20 minutes,¹⁵ he spent 5 – 6 hours a day reclining/resting in bed, he had difficulties sleeping - all of which he reported to be a direct result of his work injury at Philips. (Id. at p. 374). Clark informed Dr. Brabham that the extent of his educational history was 1 year of college at Georgia Military College. (Id.). Dr. Brabham's report specifically indicates that he questioned Clark about prior work injuries/pre-existing conditions, and Clark reported only a prior left knee injury while attending college. (Id. at p. 375).

Dr. Brabham noted that Clark "appeared credible in his description of his limitations and remaining functional capacities," and found that "the information provided during this interview was highly consistent with information reported in other reports." (Id.) As such, Dr. Brabham concluded that "clearly it is the on the job injury in 2011, which began his medical problems which have been the primary basis for his inability to maintain gainful employment." (Id.).

At his second evaluation in 2015, Dr. Brabham determined that Clark was no better than he was at the time of the original evaluation, as his conditions was worse in terms of pain and restrictions on activities of daily living. (Id. at 387). Dr. Brabham maintained his prior vocational opinion, finding Clark remained unable to be gainfully employed. (Id. at p. 397).

¹⁴ In his SSDI applications, Clark reported "a lot of times I am unable to lift my arms above my head." (Ex. N p. 2040).

¹⁵ In his 2009 disability evaluation, Clark reported that some days he was unable to walk due to the severity of his knees. (Id. at p. 2066).

Pursuant to the request of Respondents, Clark was evaluated by Jan Westmoreland, M.Ed., CRC of the Directions Group, initially on April 12, 2016. (Ex. B, p. 1918 – 1945). Similarly, Clark failed to inform Ms. Westmoreland of his prior injury to his back, and reported the extent of his educational history as 1 year of college at Georgia Military College. (Id. at p. 1929). With regard to his activities of daily lifting, Clark reported issues with sleeping and an inability to perform any household chores aside from cooking.¹⁶ (Id.). Clark further reported his physical abilities consisted of an ability to lift under 10 pounds, stand for 15 minutes, walk short distances and sit for 20 minutes. (Id. at p. 1928). He further reported pain while bending and overhead reaching.¹⁷ (Id.).

After review of medical reports and conducting a clinical interview with Clark, Ms. Westmoreland determined that Clark was physically capable of performing work within the sedentary to light capacity range. (Id. at 1935). Ms. Westmoreland further determined that, given Clark's work history, aptitudes and transferable skills, he was able to return to several jobs which accommodate his limitations. (Id.).

When Respondents received the above-mentioned SSDI applications a month prior to the hearing, Respondents first learned that Clark had completed additional college years of college which he had withheld from Respondents, medical providers and his vocational evaluators; specifically, he had completed an additional year of college, majoring in computer programming at Kaiser College. (Ex. N).

¹⁶ In his 2009 SSDI application, Clark reported that his injuries hindered his ability to move items around in the house, sleep in certain positions, and caused issues with raking his yard and walking." (Id. at p. 2078).

¹⁷ On May 5, 2009, Clark completed a pain questionnaire wherein he indicated that he suffered from "very sharp pain from the middle of [his] spine down to [his] hips," and the factors that caused him to experience pain were sitting, standing, and bending. (Id. at p. 2077).

Once Respondents were made aware of Clark's additional skills and education, a subsequent evaluation was performed by Ms. Westmoreland on July 18, 2016. (Id. at 1940). Ms. Westmoreland noted that, contrary to the April 12, 2016 report, Clark reported that he actually attended 2 years of college instead of only 1 year. (Id. at 1040). Clark admitted at this second evaluation that he spent an additional year at Kaiser College, majoring in computer programming. (Id. at 1045). Based on her review of Clark's newly disclosed educational background and discussion with Clark about same, Ms. Westmoreland found additional jobs available for Clark, including those of Technical Support Service, Implementation Coordinator, Customer Service Representative, Security Guard, Tax Support Specialist, Guest Service Representative, and Computer Operator were available to Clark. (Id. at 1943 – 1944).

Clark admitted that he never informed Dr. Girault, Dr. Storick, or the vocational evaluators about his prior back injury. (Hrg. Tr. p. 86, line 24; Hrg. Tr. p. 87, line 9).

At the Hearing, Clark testified that he had applied for subsequent jobs but was unable to secure same due to his physical restrictions resulting from his work injury at Philips. (Hrg. Tr. p. 99 – 102). He testified that he applied for jobs at Autozone, a Temp Service in Newberry, and Long's Drug Store. (Id.). Clark stated that he provided these entities with a copy of his medical restrictions. (Id.). Clark testified that he never heard back from these potential employers. (Id.). Defense counsel served subpoenas on employers that Clark testified as to having applied for employment. (Ex. V, W, X, Y). Said subpoenas requested any and all files related to Clark including but not limited to, (1) Applications for employment, (2) correspondences, (3) offer letters, (4) termination letters, (5) wage documents (i.e. pay stubs, pay checks, W-4 forms, W-2 forms, etc.), (6) schedules, (7) any other documents related to Clark's employment or inquiry for employment. (Id.). Every single entity responded that there was not any documentation on file

indicating that Clark had applied for employment. (Ex. V, p. 2160; Ex. W, p. 2164; Ex. X, p. 2167; Ex. Y, p. 2170).

PROCEDURAL HISTORY

A Single Commissioner heard this claim in September 2016 (the “Hearing”). (Hrg Comm’r Tr.). The Commissioner left the record open for receipt of additional documentation in the form of medical record subpoena responses and Dr. Storick’s testimony in relation to the surgical recommendation which was provided to defense counsel the morning of the Hearing. (Hrg Comm’r Tr. p. 5, 24).

Following closure of the record, the Single Commissioner issued an award on December 28, 2017, wherein she held that Clark’s work injury affected multiple parts of his body (back, back affecting right leg, back affecting left leg and resultant psychological overlay). (Hrg Comm’r Order). She ordered the Employer and Insurer to provide causally related medical care as recommended by the authorized treating physicians. (*Id.*). The Single Commissioner found Clark permanently and totally disabled under both §§ 42-9-30 and 42-9-10, entitling him to 500 weeks of benefits, with the Respondents receiving credit for all temporary benefits paid. (*Id.*).

Respondents appealed this decision to the Appellate Panel, arguing that the Single Commissioner erred in finding that Clark’s work injury affected more than one body part, erred in determining that he was permanently and totally disabled and erred in deeming him at MMI as of May 25, 2016. (Form 30). The Appellate Panel heard oral arguments on March 20, 2018. (Panel Ord.). During the oral arguments, one Commissioner on the Panel pointed out the lack of forthrightness during the discovery process by stating “there appears to be a significant lack of candor on the part of Clark, and a little bit of obstructionism on the part of the counsel.” (*Id.* at 13). Another Appellate Panel Commissioner agreed with the concern that Clark was dishonest

about his “significant medical history” and pointed out that “vocational expert reports are built on the foundation of experience, education, skill set.” (Id.).

The Appellate Panel issued a decision on June 5, 2018 which reversed the Single Commissioner’s decision. (Panel Or.). The Appellate panel held that Clark sustained an injury only to his back and is not entitled to additional medical treatment for same. (Id.). Further, the Panel held that Clark is not permanently and totally disabled under either §§ 42-9-30 or 42-9-10, as he sustained a permanent impairment of 20% to his back. (Id.). The Panel held that Clark reached MMI on July 23, 2014, therefore, his permanent rating entitled him to 60 weeks beyond that date. (Id.). As such, the Panel held that Respondents had paid in excess of the awarded amount, so no payment was due to Clark. (Id.). Additionally, the Appellate Panel ordered Clark to reimburse the Employer and Insurer in the amount of \$33,539.31. (Id.). Appellant has appealed this Order.

STANDARD OF REVIEW

Judicial review of a Workers’ Compensation Appellate Panel’s Decision is governed by the substantial evidence rule of the Administrative Procedures Act. Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981). Pursuant to the APA, the Court of Appeals’ review in a workers’ compensation proceeding is limited to deciding whether the decisions of the Appellate Panel of the Workers’ Compensation Commission are unsupported by substantial evidence or is controlled by some error of law. Hall v. Desert Aire, Inc., 376 S.C. 338, 656 S.E.2d 753 (Ct. App 2007).

For purposes of judicial review of the Appellate Panel of the Workers’ Compensation Commission, “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 conclusion the Appellate Panel reached in order to justify its

action. Pratt v. Morris Roofing, Inc. 357 S.C. 619, 594 S.E.2d 272 (2004); Jones v. Georgia-Pacific Corp., 355 S.C. 413, 586 S.E.2d 111 (2003).

The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence. Sharpe v. Case Produce, Inc., 336 S.C. 154, 519 S.E.2d 102 (1999); DuRant v. South Carolina Dep't of Health and Env'tl. Control, 361 S.C. 416, 604 S.E.2d 704 (Ct. App. 2004).

Under the scope of review established by the APA, 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 where the decision is affected by an error of law. Liberty Mut. Ins. Co. v. South Carolina Second Injury Fund, 363 S.C. 612, 611 S.E.2d 297 (Ct. App. 2005); Frame v. Resort Servs. Inc., 357 S.C. 520, 593 S.E.2d 491 (Ct. App. 2004); S.C. Code Ann. § 1-23-380(A)(6)(d)(2005).

ARGUMENT

1. THE APPELLATE DIVISION'S CONCLUSION THAT CLARK IS NOT PERMANENTLY AND TOTALLY DISABLED IS BASED ON THE SUBSTANTIAL EVIDENCE IN THE RECORD, NOT SPECULATION.

a. The Appellate Division's Conclusion that Clark is Not Permanently and Totally Disabled Under § 42-9-10 is Supported by Substantial Evidence in the Record and the Applicable Law.

The Appellate Panel properly determined that Clark is not permanently and totally disabled under § 42-9-10, which is supported by the substantial evidence in the record. Under S.C. Code Ann. § 42-9-10, when the incapacity for work resulting from an injury is total, the Employee may be found permanently and totally disabled. South Carolina Courts treat total disability as an

“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.” Coleman v. Quality Concrete Products, 245 S.C. 625, 142 S.E.2d 43, 44 (1965); Koon v. Spartan Mills, 286 S.C. 190, 332 S.E.2d 544 (Ct. App. 1985). The substantial evidence consisting of the vocational opinions and medical evidence in the record do not support the Claimant being permanently and totally disabled under S.C. Code Ann. § 42-9-10.

i. The vocational opinions in the record do not support Clark being totally incapacitated from working as a result of his injury at Philips.

Clark reported to the vocational evaluators that he had only completed one year of college at Georgia Military College. (Hrg. Tr. p. 66.). In contrast, Clark noted on his 2008 and 2012 SSDI applications that he had *completed* 2 years of college. (Ex. N, p. 1951). At the Hearing, Clark admitted that he attended GA Military College for 1 year and took some courses at Kaiser College, majoring in computer programming. (Hrg. Tr. p. 66).

Clark argues that the Appellate panel relied on speculative evidence to arrive at their conclusion, as there is no evidence that the experts would have given different testimony had they known about Clark’s past. Respondents proved this untrue by obtaining an updated opinion from their vocational expert when the additional information was uncovered.

The vocational opinion of Ms. Jan Westmoreland illustrates the probative value of Clark’s additional year at Kaiser College. On the basis that Clark only had a high school education and 1 year at GA Military College, Ms. Westmoreland determined that Clark could work as a Ticket Taker, Box Office Cashier, Garage Cashier, and Attendance Monitor. (Ex. B, p. 1918 – 45). However, a subsequent evaluation was performed by Ms. Westmoreland on July 18, 2016, after

discovering that Clark spent an additional year at Kaiser College, majoring in computer programming. (Hrg. Trans. p. 1040 – 45). Based on Clark's newly disclosed educational background, Ms. Westmoreland found additional jobs with higher rates of pay, specifically: Technical Support Servicer, Implementation Coordinator, Service Representative, Security Guard, Tax Support Specialist, Guest Service Representative, and Computer Operator; earning up to \$40,000.00 a year in the Columbia, South Carolina area. (Id. at 1943 – 44).

In reality, the only speculative opinions in the record are those of Clark's experts, whose opinions are all based on a hypothetical Claimant – not Clark.

Clark's vocational expert, Dr. Brabham, evidences the emphasis he placed on multiple factors that were inaccurate, and the impact those factors played in his vocational opinion. Dr. Brabham was unaware of Clark's additional schooling, noting that beyond the year at GA Military College "he has received no further training." (APA 13, p. 390). Dr. Brabham noted that Mr. Clark had a "stable" work history. (Id.). This conclusion is contradicted by Clark's multiple SSDI applications, wherein he alleged a complete inability to work. Similarly, Dr. Brabham questioned Clark about any prior work injuries or pre-existing conditions, and Clark informed him only of a "prior left knee injury while attending college." (APA 13, p. 390). Relying on Clark's false history, Dr. Brabham concluded that "Clearly, it is the on-the-job injury in 2011, which began his medical problems which have been the primary basis for his inability to maintain gainful employment." For all of the reasons above, the Appellate Panel properly did not place any weight on Dr. Brabham's vocational opinion. (Id.).

The Panel found Clark's lack of truthfulness throughout the pendency of this matter to be an impediment in many regards. As properly pointed out by the Appellate Panel, a designation of permanent and total disability is determined by vocational abilities. (App. Tr. 15). Specifically,

the Panel Commissioners discussed that a vocational analysis is performed by a vocational evaluator, who rely on what should be truthful information, but the Panel was appropriately concerned that Clark's evaluators were unaware of the full extent of his educational achievements and skill sets. (Id.).

ii. The medical evidence in the record does not support Clark being totally incapacitated from work as a result of his injury at Philips.

Clark argues that there is nothing in the medical evidence to suggest that his condition could be the result of anything other than an acute injury. Had the hearing occurred months prior, Clark's assertion would have been accurate, since it took Respondents years to uncover the voluminous evidence proving that he sustained a significant prior low back injury.

The Appellate Panel found the Claimant to be wholly lacking in credibility, and found that his lack of credibility undermined the medical opinions and treatment received in relation to this claim, as the opinions and conclusions of his providers were based on self-serving assertions of the Claimant. (Panel Or. Findings of Fact ¶ 4).

The Appellate Panel was also persuaded by Clark's lack of candor when it came to his physical condition before and after the work injury at Philips. (Id.). At his May 2013 deposition, Clark denied ever injuring his back prior to the 2011 work accident and also expressly denied ever having a workers' compensation claim. This is directly contradicted by all of the information Respondents obtained (without the help of Clark) which was contained in his prior medical records, SSDI file and Florida workers' compensation file evidencing that Clark not only had a prior work-related back injury at Tile Depot, but the injury was significant enough for him to allege an inability to work for multiple years.

The Appellate Panel further found the authorized treating physicians to be Drs. Holbrook and Storick and properly gave those opinions the greatest weight. (Panel Or. Findings of Fact ¶ 5). Even so, all of Clark's treating physicians including Dr. Holbrook, Dr. Westerkam, Dr. Hutcheson, and Dr. Girault found that Clark was capable of returning to work in the sedentary to light duty capacity. (APA 7, p. 156 – 58; APA 6. P. 128 – 30; APA 10, p. 234 – 37; APA 17, p. 115 – 59; Ex. A).

This Court should affirm the Appellate Panel's decision that Clark did not meet his burden of proving entitlement to permanent and total disability benefits under § 42-9-10, as this Conclusion is supported by the substantial evidence in the record.

b. The Appellate Division's Conclusion that Clark Did Not Sustain 50% or More Loss of Use of His Back and is Therefore Not Entitled to Permanent and Total Benefits Under § 42-9-30(21) is Supported by Substantial Evidence in the Record and the Applicable Law, Not Speculation.

Under § 42-9-30(21), provided a Claimant is found to sustain 50% or more loss of use to the back, the injured employee shall be presumed to be permanently and totally disabled. The extent of loss of use "need not be shown with mathematical precision." Bundrick v. Powell's Garage, 248 S.C. 496, 151 S.E.2d 437 (1966). Nevertheless, the award may not "rest on surmise, conjecture, or speculation; it must be founded on evidence of sufficient substance to afford it a reasonable basis." (Id.).

The Appellate Division concluded that Clark sustained a 20% permanent impairment to his back, taking into account any affects to his legs. (Panel Or. Findings of Fact ¶ 8). The Order indicates that the Panel based this conclusion on the fact that Drs. Holbrook and Storick are Clark's

authorized physicians, are properly afforded more persuasive weight, and both physicians assigned a medical impairment rating of 20%. (Panel Or. Findings of Fact ¶¶ 5, 6, 8).

This Court should affirm the Appellate Panel's decision that Clark did not meet his burden of proving entitlement to permanent and total disability benefits under § 42-9-30(21), as this Conclusion is supported by the substantial evidence in the record, not speculation.

2. THE APPELLATE DIVISION'S ORDER PROPERLY EXPLAINED ALL OF ITS FINDINGS.

Clark argues that the Appellate Division erred in not explaining its findings that (1) only one part of Clark's body had been affected, (2) Clark's earning capacity had not diminished and (3) that he was not entitled to future medical benefits.

a. The Appellate Division's Order Properly Supports its Finding that Only One Part of Clark's Body Had Been Affected.

Clark argues that "we" do not know why the Appellate Panel found that only one part of his body was affected. This is incorrect.

Clark argues that he sustained a back and psychological injury as a result of the work incident, entitling him to seek recovery under S.C. Code Ann. § 42-9-10. The substantial evidence in the record does not support that Clark suffered a psychological injury as a result of the work accident. Rather, the record reveals numerous inconsistencies regarding Clark's pre-existing and current psychological issues and the Appellate Panel properly considered all of this evidence, as detailed in its Order.

The Appellate Panel relied on Clark's 2008 and 2009 SSDI documents which evidenced that he alleged that he was suffering from mental or emotional issues at that time which limited his ability to work, and had been seen by a provider for same. (Panel Or. Findings of Fact ¶ 3; Ex. C.). Clark's 2008 SSDI application evidences that Clark had been seen by a provider for emotional or mental problems *that limited his ability to work*. (Ex. C, p. 608). Further, the Appellate Panel was also persuaded by the fact that Clark maintained his denial of any prior psychological issues at the Hearing, and his medical records are void of any mention to his treating physicians of his prior psychological issues and/or treatment, as detailed in the Order. (Panel Or. Findings of Fact ¶ 3; Hrg. Tr. p. 54- 55.) Given the above findings, the Appellate Panel properly held that Clark sustained an injury to only one body part, his back, as the greater weight of the evidence does not support his alleged psychological issues being causally related to his accident of July 20, 2011. (Panel Or. Findings of Fact ¶ 3).

b. The Appellate Division's Order Properly Supports its Finding that the Claimant's Earning Capacity Had Not Diminished.

Clark argues that "we" do not know why the Appellate Panel found that his earning capacity had not diminished. This is incorrect.

The Appellate Panel's Order details findings relied on in support of this conclusion, all of which are detailed above in Argument Section I. (Panel Or. Findings of Fact ¶ 7). Given the above findings, the Appellate Panel properly held that Clark did not sustain a diminished earning capacity as a result of his work injury at Philips.

c. The Appellate Division's Order Properly Supports its Finding that Clark is Not Entitled to Future Medical Benefits.

Clark argues that “we” do not know why the Appellate Panel found that he is not entitled to future medical benefits. This is incorrect.

The Appellate Panel arrived at this conclusion based on the substantial evidence in the record which shows that the Claimant had a significant pre-existing back condition, sustained an aggravation of same while working for Philips, and his condition has improved significantly since that incident. The Panel took into account the voluminous records proving that the Claimant sustained a significant injury to his low back in 2006 while working for Tile Depot, he failed to inform his physicians, evaluators and the Respondents of same, and he maintained this denial even up to the date of the Hearing. (Panel Or. Findings of Fact ¶ 4). Moreover, the Panel was persuaded by the fact that Clark was treating for his low back and flank pain up to 7 months before his injury at Philips. (*Id.*).

The Appellate Panel was undoubtedly persuaded by Clark's lack of credibility on this issue, as the Panel noted that all of the opinions and conclusions of Clark's providers were based upon self-serving assertions of the Claimant. (Panel Or. Findings of Fact ¶ 4). As is no surprise, Clark disputed all of the medical records which evidenced improvement in his condition following his work injury at Philips, which did not go unnoticed by the Appellate Panel. (Hrg Tr. p. 69-71, 77, 85.). Given the above findings, the Appellate Panel properly held that Clark is not entitled to future medical benefits.

3. THE FINDINGS CONTAINED IN THE APPELLATE DIVISION'S ORDER ARE NOT ERRONEOUS

Clark further argues that the Appellate Division erred in entering three findings that were clearly erroneous: (1) Clark reached MMI on July 23, 2014, (2) Clark sustained a 20% disability to his back and (3) the greater weight of the evidence supported Clark's pre-existing psychological issues.

a. The Appellate Division's Finding that Clark Reached MMI on July 23, 2014 is Supported by the Substantial Evidence in the Record and is Not Erroneous.

MMI is a term used to indicate that a person has reached such a plateau that in the physician's opinion there is no further medical care or treatment which *will tend to lessen the degree of impairment*. O'Banner v. Westinghouse Elect. Co., 319 S.C. 24, 28, 459 S.E.2d 324, 327 (1995) (emphasis added). However, it is well established that the fact that a Claimant has reached MMI does not preclude a finding that a Claimant may still require additional medical care or treatment. Dodge v. Brucoli, Clark, Layman, Inc., 334 S.C. 574, 514 S.E.2d 593 (Ct. App. 1999). In making the determination as to whether additional medical treatment is supplemental to a determination of MMI or whether it prevents MMI, the Court must consider whether, "additional medical treatment may improve [a Claimant's] overall quality of life and ability to cope, but not otherwise impact the finding of maximum medical improvement." Pearson v. JPS Converter & Indus. Corp., 327 S.C. 393, 397, 489 S.E.2d 219, 221 (Ct. App. 1997).

The Appellate Panel properly found that the substantial evidence in the record reveals that Clark reached MMI as of July 23, 2014. (Panel Or. Findings of Fact ¶¶ 5, 6). The Panel based this finding on the fact that Drs. Holbrook and Storick are Clark's authorized physicians and the 14B

completed by Dr. Holbrook, wherein he placed Clark at MMI as of July 23, 2014. (Panel Or. Findings of Fact ¶ 4).

b. The Appellate Division's Finding that Clark Sustained a 20% Disability to his Back is Supported by the Substantial Evidence in the Record and is Not Erroneous.

Similarly, the Appellate Division concluded that Clark sustained a 20% permanent impairment to his back, taking into account any affects to his legs. (Panel Or. Findings of Fact ¶ 8). The Order indicates that the Panel based this conclusion on the fact that Drs. Holbrook and Storick are Clark's authorized physicians and are properly afforded more persuasive weight, both physicians assigned a medical impairment rating of 20%. (Panel Or. Findings of Fact ¶¶ 5, 6, 8).

c. The Appellate Division's Finding that the Greater Weight of the Evidence Supports Clark's Pre-Existing Psychological Issues is Supported by the Substantial Evidence in the Record and is Not Erroneous.

The Appellate Panel's Order details findings relied on in support of this conclusion, all of which are detailed above in Argument Section 2 (a). (Panel Or. Findings of Fact ¶ 3).

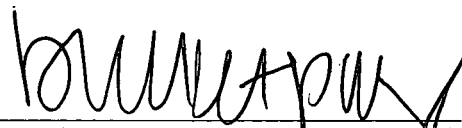
CONCLUSION

For the foregoing reasons, and in light of the accepted and established standard for review for review of the Single Commissioner's Decision and Order by the Full Commission, the Respondents hereby request that the Order of the Appellate Panel be affirmed.

[SIGNATURE ON FOLLOWING PAGE]

RESPECTFULLY SUBMITTED:

PAYNE LAW GROUP, LLC

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Brooke A. Payne (SC Bar# 81086)

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Attorney for Respondents

February 6, 2019

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

T. Scott Beck, Commissioner
Michael Campbell, Commissioner
Susan Barden, Commissioner

W.C.C. File No. 1115485
Case No. 2018-001197

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SC Court of Appeals

Lamar Clark, Claimant,

Appellant,

v.

Philips Electronics, Employer, and Gallagher
Bassett Services, Carrier,

Respondents.

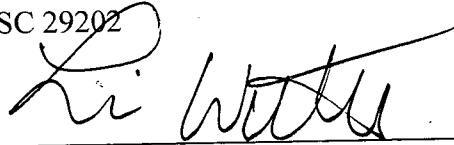
CERTIFICATION OF SERVICE

The undersigned hereby certifies that on the date indicated below she served counsels for the Appellant with a copy of the Respondents' Initial Brief and Designation of Matter on Appeal by mailing copies of the same by United States Mail with first class postage prepaid to the following addresses:

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A handwritten signature in black ink, appearing to read "Lori Wittel", written over a horizontal line.

February 6, 2019

Lori Wittel
PAYNE LAW GROUP, LLC



February 6, 2019

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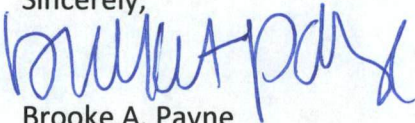
The Honorable Jenny Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

Re: Lamar Clark v. Philips Electronics
SCWCC Clm No. : 1721540
DOI : 9/23/2017
Sedgwick CMS No. : RK-WC-037313
LLH No. : WC-128-0004

Dear Ms. Kitchings,

Please find enclosed for filing the original and one (1) copy of the Initial Brief of Respondents and Designation of Matter to be included in the Record on Appeal in regards to this matter. I have also enclosed a Proof of Service upon counsel for the Appellant. Please return the additional filed copy to me via the enclosed postage prepaid envelope.

Thank you for your attention to this matter. If you have any questions or need any additional information, please do not hesitate to contact me.

Sincerely,

Brooke A. Payne

BAP/lw
cc: Willaim B. Salley, Jr., Esquire; Blake A. Hewitt, Esquire
Enclosures

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