THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION, APPELLATE PANEL

Derrick L. Williams, Commissioner

Susan S. Barden, Commissioner

Avery B. Wilkerson, Jr., Commissioner

WCC File No. 0822094

Thomas Karabees, Jr., Employee, Respondent,

v.

State Board for Tech. & Comp. Education, Employer and , State Accident Fund Carrier, Appellants.

BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

Thomas Karabees (Respondent) has admitted injuries to his neck, left shoulder and back from an October 31, 2008 on the job accident. An initial hearing before the Single Commissioner went forward on January 5, 2011 and the issue at that time was whether the Respondent was out of work due to his work injury or his multiple sclerosis. At that hearing, the Single Commissioner found in Finding of Fact #4 that the sole issue for determination was the Respondent's entitlement to temporary total disability benefits and whether he was out of work due to his job related injury. Finding of Fact #5 found that the Respondent had suffered from multiple sclerosis since 2001 but had been working full time until he went out of work due to his injuries and at no time was he taken out of work due to his multiple sclerosis and had missed no time from his job prior to his injury because of his multiple sclerosis. The Single Commissioner's

Order dated March 18, 2011 awarded the Respondent temporary total disability benefits from November 3, 2009 to present and continuing as he found that he was placed out of work due to his work injuries and not due to multiple sclerosis.

This Decision and Order was appealed by the Appellant's on March 30, 2011. The Full Commission, in a unanimous decision, affirmed all Findings of Facts and Conclusions of Law of the Single Commissioner in their October 26, 2011 Decision and Order.

This Full Commission Decision and Order of October 26, 2011 finding that the Respondent was out of work due solely to his on the job injuries, not his multiple sclerosis, was not appealed by the Appellant's and is therefore the law of the case.

This claim came before the Single Commissioner again on January 4, 2012 on a Form 50 and 51 to determine the Respondent's residual disability. Respondent was at maximum medical improvement for the admitted injured body parts of the neck, back and left shoulder. The same issue came up at this hearing on whether the Respondent's inability to return to work was because of his multiple sclerosis or his job injury. In his March 8, 2012 Decision and Order the Single Commissioner made the following Findings of Fact pertinent to this appeal:

> #4 The Claimant has suffered from multiple sclerosis since 2001 but he worked full-time until he went out of work due to his injuries and at no time was he taken out of work by a doctor due to his multiple sclerosis and missed no time from his job prior to his injury because of his multiple sclerosis.
>
> #5 The fact that the Claimant was already on Social Security Disability based on his multiple sclerosis is not dispositive in this matter as there is direct

medical testimony to the contrary and this testimony is from the Claimant's authorized treating pain management physician.

#6 Claimant's last visit with Dr. Lucas prior to his injury was on September 18, 2008. At that time, Dr. Lucas found, "He generally is doing fairly good". He suggested a follow-up in six months.

#11 Dr. Nolan, the authorized treating physician, indicated Claimant could not work due to his work injuries and this finding is supported by the vocational expert's report of September 16, 2011. Claimant is permanently and totally disabled.

#12 Claimant is entitled to lifetime causally related medical care.

The Appellant's appealed this Decision and Order on March 14, 2012. In another unanimous decision dated September 10, 2012 the Full Commission affirmed, in its entirety, the Single Commissioner's Decision and Order. On October 8, 2012 the Appellant's filed a Notice of Appeal to this honorable Court.

STATEMENT OF FACTS

The Respondent is sixty-three years of age and has been married for thirty-three years with three children and three grandchildren. Respondent graduated from high school in 1966 and graduated from Northern Michigan University in 1971 with a degree in mathematics. He graduated from Pepperdine University in 1975 with a degree in Administration. Respondent also graduated from the University of Evansville in 1985 with a Master in Computer Systems Engineering. (R. pp. 0592-0593)

Respondent had joined the marines in 1971 and was on active duty for seven years. Respondent was active duty in Viet Nam and did combat engineering and also worked on nuclear security in the Philippines. When Respondent got out of the

Marines, he was a Lieutenant. (R. p. 0593). Respondent was chosen as the outstanding Junior Engineering Officer in the Armed Forces. (R. p. 0593).

When the Respondent left the Marines in 1978, he went to work for Trident Technical College and worked there continually from 1978 until April of 2009 for a total of thirty-one years. He originally taught math and physics but then started doing industrial programs and working with industry. He had worked with multiple industries in the area to include Dupont, Robert Bosch, Gates Rubber, ALCOA, DAK America and Cummings. (R. p. 0593).

He did a lot of work in the field and trained students in mechanical, electrical and chemical engineering. The job was physical because he would have to lift motors, relay systems and climb. He had to climb on top of trains and freight cars. He had to climb towers and often crawl or get into machinery in awkward positions. (R. p. 0593).

Prior to October 31, 2008, the date of this injury, the Respondent had never had a workers' compensation case before. Respondent had never been involved in an automobile wreck or any sort of personal injury litigation claim and had no previous injuries to his neck, low back or left shoulder. (R. p. 0593).

Respondent was diagnosed with Multiple Sclerosis in 2001 and treated with Dr. John Lucas for his MS. During his entire time treating for Multiple Sclerosis Respondent was never placed on any work restrictions, placed out of work or missed any work due to his MS. (R. pp. 0079-0104).

On October 31, 2008 Respondent fell down an entire flight of steps carrying a laptop and injured his neck, left shoulder and lower back. He had surgery to his left shoulder with Dr. Kupferman who opined that he suffered 8% permanent impairment to his left upper extremity which converts to a 13.3% permanent impairment to his left shoulder. (R. p. 0106).

The Appellant's authorized Dr. J. Edward Nolan for pain management of the Respondent's neck and lower back. On March 8, 2011 Dr. Nolan placed Respondent at maximum medical improvement with an 8% permanent impairment to his lumbar spine and an 8% permanent impairment to his cervical spine for a combined 15% whole person impairment. Dr. Nolan stated that Respondent will require ongoing treatment to include intermittent therapeutic exercise and modalities, steroid injections for both cervical and lumbar regions (no more than 6 per year), and medication management including muscle relaxers, anti-inflammatory medications and possibly narcotics. Dr. Nolan opined, "I also do not feel he can work in his present condition due to multiple injuries from the fall in October 2008. He would not be able to sit, stand, or walk for prolonged periods and would have to lie down periodically throughout the day which is not conducive to gainful employment. He would also most likely miss an excessive amount of work due to his pain." (R. p. 0255).

Ultimately, as a result of his on the job injuries, Respondent was unable to return to work and was forced to retire.

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act establishes the standard for Judicial review of Decisions of the Workers' Compensation Commission. Lark vs. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981). A reviewing Court may review or modify a Decision of an agency if the findings, inferences, conclusions, or decisions of that agency are "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record". Bass vs. Kenco Group, 366 S.C. 450, 457, 622 S.E. 2d 577, 580, (Ct. App. 2005). Under the scope of review established in the APA this court may not substitute it's Judgement 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 Mutual Insurance Company vs. SC Second Injury Fund, 363 S.C. 612, 611 S.E. 2d 297, (Ct. App. 2005). This Courts review is limited to deciding whether the Appellate Panels Decision is unsupported by substantial evidence or is controlled by some error of law. Rodriquez v. Romero, 363 S.C. 80, 610 S.E. 2d 488 (2005). The Appellate Panel is the ultimate fact finder in workers' compensation cases. Bass vs. Isochern, 365 S.C. 454, 617 S.E. 2d 369 (Ct. App. 2005).

ARGUMENT

I. THERE IS SUBSTANTIAL EVIDENCE TO SUPPORT THE COMMISSIONS FINDING THAT THE RESPONDENT WAS PERMANENTLY AND TOTALLY DISABLED AS A RESULT OF HIS WORK INJURIES AND NOT HIS MULTIPLE SCLEROSIS.

The Appellant's argue the Commission erred in weighing the evidence of this case and finding that the Respondent was permanently and totally disabled as a result

of his work injuries and not his multiple sclerosis. As cited above, under the scope of review established in the APA this court may not substitute it's 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. The Appellant's make no argument there was an error of law only that the Commission, who is the ultimate fact finder, weighed the facts incorrectly. The Respondent disagrees. It is our position that the substantial, if not overwhelming, evidence in the records strongly supports the Commission's finding that the Respondent was permanently and totally disabled as a result of his work injuries and not his multiple sclerosis.

The Respondent had been first diagnosed with multiple sclerosis in October of 2001. He treated with Dr. Lucas. This injury was in October of 2008. During the seven years he treated with Dr. Lucas for multiple sclerosis prior to this injury, he had never missed one day of work due to his multiple sclerosis and had never been taken out of work or put under any restrictions for work due to his multiple sclerosis. (R. pp. 0594-0595). He was not restricted in any way in doing the jobs he previously described and could do all aspects of his job for Trident Tech. (R. pp. 0593-0594).

He saw Dr. Lucas on the 18th of September, 2008 which was only about six weeks before his injury. At that time, he had not had any flare-ups or major problems and it was his opinion his multiple sclerosis was under control. Dr. Lucas' note of September 18, 2008, states, "He generally is doing fairly good. He needs a return appointment in six months." At his deposition on May 6, 2010 when asked, "And he had

been working up until the date of his fall with his multiple sclerosis?" Dr. Lucas answered, "Yes, he had." (R. p. 0076, lines 8-10).

Prior to the injury, the Respondent in his personal life was a scout master and he went camping every month. He also hiked, including hikes on the Appalachian Trial and the Palmetto Trail. Respondent was a lifeguard and water instructor and also routinely went canoeing and kayaking. He also taught martial arts. (R. p. 0594). Respondent was doing those activities up until the date of his injury on October 31, 2008. He was not limited in any of those activities because of his multiple sclerosis.

After the injury, the Respondent went to see Dr. Lucas on March 19, 2009 which was approximately five months after his fall. Dr. Lucas' note of that date states, "Neurologically he is doing fine. He has no MS attacks or flares. No new complaints or difficulties related to his MS." He further notes that he was having neck pain and back pain from the job injury and had been seen by Dr. Wilson. (R. p. 0082).

Respondent had no intention of retiring and his plans were to work as long as he was physically able to do his job. (R. p. 0596).

On October 31, 2008, Respondent fell down the steps carrying a laptop and injured his left shoulder, neck and back. He had surgery to his left shoulder by Dr. Kupferman and was authorized to treat with Dr. Nolan for his neck and back. Dr. Nolan has been his authorized treating physician for over three years. Following his injury, the Respondent continued working and worked until April 11, 2009 and then left due to problems he was having from his on the job injury. He was unable to climb under

things, climb over things, push carts, lift motors and his job required him to do that. At that time, he decided he would leave work and retire. That was less than a month after he had seen Dr. Lucas on March 19, 2009. Dr. Lucas did not instruct him to leave work or tell him that he needed to be out of work for any reason due to his multiple sclerosis. His leaving work had nothing whatsoever to do with his multiple sclerosis. (R. p. 0596).

Respondent now has problems with his shoulder, neck and back. He has a very difficult time lifting and pushing and cannot crawl under equipment. He also cannot climb. He no longer felt he could do his job safely and he left employment.

Respondent has continued under the care of Dr. Nolan and at no time has Dr. Nolan released him to go back to work. Respondent continues to see Dr. Nolan and is receiving steroid injections, physical therapy and uses a TENS unit.

The Respondent's worst pain is in his low back. He has pain there most of the time. He indicates on a daily basis the pain is about five out of ten. It will elevate with any sort of activity like washing dishes or vacuuming. (R. p. 0619). He also has radiating pain into his legs and it goes into both legs but is worse on the left side. That pain level runs about four to five out of ten. The Respondent uses a cane for stability. He finds it difficult to walk especially on uneven terrain or stepping off a curb. He had never been prescribed a cane by Dr. Lucas and had never had to use a cane due to his multiple sclerosis. (R. pp. 0619-0620).

The Respondent has cervical problems to include pain from shoulder to shoulder. He also has pain radiating into his left shoulder. His cervical pain is about a four out of ten and the shoulder pain is about three out of ten.

Respondent estimated he could sit for about thirty minutes, stand for about thirty minutes and walk for about thirty minutes. Respondent estimated he had gained 23 or 24 pounds since the accident. (R. pp. 0621-0622). Respondent reclines to get relief and estimates that during a ten hour period he probably reclines fifty percent of the time. He estimates he can do things for about one hour before he has to change positions and after he changes positions for an hour, he has to recline. He estimated his lifting was less than ten pounds. (R. p. 0623). It is very difficult for Respondent to bend and he cannot bend over to wash a load of dishes. (R. p. 0623). Respondent also has days when he has flare ups and estimated that at least one or two days a week he would have bad days and would be absent if attempting to work. (R. p. 0624).

The Respondent did not feel like there was any way he could return to teaching in his present condition. He could not do a combination of sitting, standing or walking to get through an eight hour day. (R. p. 0625).

The medical records support the Respondent's claim. No where in Dr. Lucas' records does he write him out of work or put him under restrictions or tell him when he will no longer be able to work due to his multiple sclerosis prior to his actual leaving work in April of 2009 due to his job injury.

Dr. Nolan, who was the Claimant's authorized treating physician, testified at his deposition and his medical records reflect that the Claimant was unable to work due to the fall of October of 2008. Specifically, Dr. Nolan opined,

> "I do not feel he can work in his present condition due to multiple injuries form the fall in October 2008. It is my medical opinion that Mr. Karabees inability to work is directly related to his work injury and not his multiple sclerosis as he was working without any significant limitations prior to his work injury. His chronic neck and low back pain contributes significantly to his inability to work. It is also my medical opinion that Mr. Karabees would be able to continue to work in his previous occupation with his multiple sclerosis had he not been injured in October 2008."

(R. p. 0135). He states this also on August 31, 2010 (R. p. 0136) and June 9, 2010 (R. p. 0159).

Accordingly, we feel the substantial, if not overwhelming, evidence in the record supports the Commission's finding that the Respondent is permanently and totally disabled as a result of his on the job injuries and not his multiple sclerosis. Therefore, we respectfully request the finding of the Single Commissioner, which was unanimously affirmed by the Full Commission be affirmed by this Court.

II. THERE IS SUBSTANTIAL EVIDENCE TO SUPPORT THE COMMISIONS FINDING OF FACT #4 AS RESPONDENT'S MULTIPLE SCLEROSIS DID NOT AFFECT HIS ABILTY TO WORK

The Commission's Finding of Fact #4 states, "The Claimant has suffered from multiple sclerosis since 2001 but he worked full-time until he went out of work due to his injuries and at no time was he taken out of work by a doctor due to his multiple sclerosis and missed no time from his job prior to his injury because of his multiple sclerosis."

The Appellant's argue that the Commission erred in this Finding of Fact as there is medical evidence showing Respondent was unable to work because of his multiple sclerosis. As argued above, there is no medical evidence whatsoever that Respondent's ability to work was affected at all by his multiple sclerosis. At Dr. Lucas' deposition on May 6, 2010 when asked, "And he had been working up until the date of his fall with his multiple sclerosis?" Dr. Lucas answered, "Yes, he had." (R. p. 0076). Furthermore, there is not one medical note placing the Respondent out of work or even at restricted duty due to his multiple sclerosis. (R. pp. 0079-0104).

The Appellant's next argue that Finding of Fact #4 is inconsistent with Finding of Fact #5 which notes that Respondent is on Social Security disability due to his multiple sclerosis. This argument is misplaced as the complete Finding of Fact #5 states, "The fact that the Claimant was already on Social Security Disability based on his multiple sclerosis is not dispositive in this matter as there is direct medical testimony to the contrary and this testimony is from the Claimant's authorized treating pain management physician." As the Appellant's point out in their brief, it is the well settled law of this State that where there is a conflict in the evidence, the Commission's findings of fact are conclusive.

Again, the Appellant's make no argument there was an error of law only that the Commission, who is the ultimate fact finder, weighed the facts incorrectly. As cited earlier, this court may not substitute it's Judgment for that of the Appellate Panel as to the weight of the evidence on questions of fact. The Commission properly weighed the

evidence and found that the Respondent's multiple sclerosis did not affect his ability to work as he was diagnosed in 2001 with multiple sclerosis but continued to work full-time until he went out of work due to his injuries and at no time was he taken out of work by a doctor due to his multiple sclerosis and missed no time from his job prior to his injury because of his multiple sclerosis. Therefore, because there is no error of law and the Commission has based their finding on the substantial evidence in the record Finding of Fact #4 should be affirmed.

III. THE COMMISSION DID NOT ERR IN RELYING ON THE OPINION OF DR. NOLAN, THE APPELLANT'S OWN AUTHORIZED PHYSICIAN, AND THE VOCATIONAL EXPERT, WHOM THE APPELLANT'S OFFERED NO VOCATIONAL EVIDENCE TO REFUTE, AS THEIR OPINIONS WERE SUPPORTED BY THE SUBSTANTIAL EVIDENCE IN THE RECORD.

Again, the Appellant's do not allege that any error of law has occurred but merely that the Commission has erroneously relied upon the opinions of Dr. Nolan and vocational expert David Price M.ED. in finding that the Respondent is permanently and totally disabled. The Commission's Finding of Fact #11 states, "Dr. Nolan, the authorized treating physician, indicated Claimant could not work due to his work injuries and this finding is supported by the vocational expert's report of September 16, 2011. Claimant is permanently and totally disabled."

The Commission's finding that the Respondent is permanently and totally disabled as a result of his multiple on the job injuries is based upon the overwhelming and undisputed evidence as a whole.

On July 27, 2011 Dr. Nolan issued a report that the Claimant was at maximum medical improvement as of March 8, 2011. He had a 23% regional impairment to his cervical spine or 8% whole person and 8% for his lumbar injury. He further stated in that report that he did not feel the Claimant could work in his present condition due to multiple injuries from the fall in October of 2008. Claimant would not be able to sit, stand or walk for longer periods and would have to lie down periodically throughout the day which is not conducive to gainful employment. It was also his opinion he would most likely miss an excessive amount of work due to his pain. (R. p. 0255). It is important to note that these debilitating permanent work restrictions are the opinion of the authorized treating physician who was chosen solely by the appellant to treat the Respondent.

The Appellant's argue that Dr. Nolan didn't take into account the Respondent's multiple sclerosis in determining his permanent disability. This argument is misplaced. In his October 12, 2010 note Dr. Nolan opined, "It is my medical opinion that Mr. Karabees inability to work is directly related to his work injury and not his multiple sclerosis as he was working without any significant limitations prior to his work injury." (R. p. 0135). This opinion was further confirmed by Dr. Lucas who testified that the Respondent was working with multiple sclerosis up until his on the job injury.

Respondent was also evaluated by David Price M.ED. and he submitted a report dated September 16, 2011. This report finds that the Claimant is completely totally and permanently disabled from the performance of gainful employment. He will not be

returning to the work force. He is not a valid candidate of vocational rehabilitation. (R. p. 0275). This report is the only vocational evidence in the record. The Appellant's have no vocational evidence to refute that Respondent is permanently and totally disabled as a result of his on the job injuries.

There is no evidence in the record, whatsoever, that the Respondent could work in any capacity in his present condition. He has impairment ratings to his left arm due to his left shoulder injury and an impairment rating to his back due to his lumbar injury and cervical injury. Furthermore, he has significant permanent restrictions from Dr. Nolan.

The Commission correctly relied upon the opinions of Dr. Nolan and David Price M.ED. in finding that the Respondent was permanently and totally disabled as a direct result of his on the job injuries. Therefore the Commissions Finding of Fact #11 should be affirmed.

CONCLUSION

Accordingly, as there were no errors of law alleged and the Commission's Decision and Order was based on the substantial evidence in the record it is respectfully submitted the Order of South Carolina Worker's Compensation Commission should be affirmed in it's entirety.

Respectfully submitted,

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April 10, 2013

THE STATE OF SOUTH CAROLINA

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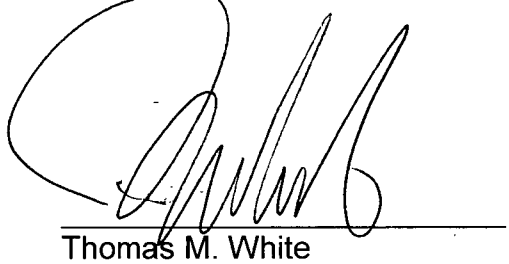
CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Respondent's Final Brief complies with Rule 211(b)

April 11, 2013



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PROOF OF SERVICE

I certify that I have served the Respondent's Brief and Rule 211(b) Certificate of Compliance, on April \\, 2013, via United Sates Mail to the attorneys of record for the Appellant's Margaret M. Urbanic, Esquire Clawson and Staubes LLC 126 Seven Farms Dr. Suite 200 Charleston, SC 29492 and Ellen Goodwin, Esquire State Accident Fund, 800 Dutch Square Blvd. Columbia, SC 29210

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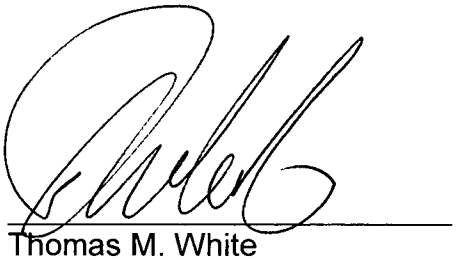

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