THE STATE OF SOUTH CAROLINA
In the Court of Appeals

---

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

---

S.C.W.C.C. File No. 1002925

---

Case No. 2013-000005

---

Neal Beckman, Employee,.....Appellant,

v.

Sysco Columbia, LLC, Employer, and
Gallagher Bassett Services, Inc., Carrier,.....Respondents.

---

# RESPONDENTS' FINAL BRIEF

---

J. Hubert Wood, III
Kathryn Fiehrer Walton
Attorneys for Respondents
Wood Law Group, LLC
P.O. Box 20550
Charleston, SC 29413
(843) 577-5732

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

## Statutes



## Regulations

## STATEMENT OF ISSUES ON APPEAL

I. The Full Commission properly awarded compensation to the Appellant pursuant to S.C. Code Ann. §42-9-30.

II. Substantial evidence supports the Full Commission's finding that the Appellant is only entitled to compensation for permanent loss of use of the back (encompassing the entire spine and alleged radiculitis) pursuant to §42-9-30(21).

## STATEMENT OF THE CASE

The Appellant, Neal Beckman, was employed as a delivery driver with Sysco Columbia, LLC when he was involved in an admitted accident arising out of and in the course of his employment on March 25, 2010. Following the accident, Sysco Columbia, LLC and Gallagher Bassett Services, Inc. (hereinafter "Respondents") provided the Claimant authorized medical care and treatment primarily with Dr. Timothy Zgleszewski. The Appellant also underwent a surgical evaluation with Dr. Scott Boyd. The Respondents paid temporary total disability compensation from March 26, 2010 through the Decision & Order of the single Commissioner dated June 18, 2012.

A Hearing was held before the single Commissioner in Summerville, South Carolina on April 26, 2012 to address the issues set forth in the Respondents' Form 21 pursuant to Regulation 67-506 based on their position that the Appellant reached maximum medical improvement. The Respondents claimed credit for overpayment of temporary disability compensation paid after the Appellant reached maximum medical improvement and sought a final determination concerning the Appellant's entitlement to benefits.

The Respondents asserted that the Appellant reached a level of maximum medical improvement on May 2, 2011 per Dr. Zgleszewski's medical note or alternatively by February 27, 2012 per Dr. Scott Boyd's medical note. The Respondents further asserted that the Appellant should be entitled to permanent disability pursuant to §42-9-30. The Appellant argued that any permanency award should be based on a loss of earnings under §42-9-20.

The record reveals that the Appellant initially treated at Palmetto Health on March 26, 2010 (R.p. 123). Thereafter he treated with Dr. Byron Williams at Coastal Occupational Medicine from March 29, 2010 through April 12, 2010 (R.pp. 123-127). Per recommendation of Dr. Byron Williams, the Claimant underwent a lumbosacral spinal MRI on March 29, 2010, which revealed mild appearing degenerative disc disease at the L3-4 and indirect evidence of paravertebral muscle spasm (R.p. 128). The Appellant also had an MRI of his lumbar spine at Tricounty Radiology Associates on April 14, 2010, which revealed degenerative changes most pronounced at the L3-4 and L4-5 on the left (R.pp. 129-130).

Thereafter, the Appellant treated conservatively with Dr. Zgleszewski at Palmetto Spine and Sports Medicine from April 19, 2010 through September 12, 2011 (R.pp. 131-193). On May 17, 2010, the Appellant underwent EMG/NCS testing. In reviewing the report, Dr. Zgleszewski indicated on June 7, 2010 that the Appellant did not have any radiculopathy in either leg pursuant to the EMG/NCS (R.p. 153). The Appellant's conservative treatment included injections to the SI joint and left L4, L5, S1 transforminal epidural steroid injections (R.pp. 157-165). Following discogram testing, Dr. Zgleszewski also performed a percutaneous discectomy at the L4-L5 level on December 10, 2010 (R.p. 166). Thereafter, the Appellant attempted rehabilitation therapy, a pain management medication regime, and further injections (R.pp. 167-187). Dr. Zgleszewski then ordered a follow up MRI of the lumbar spine, which was reviewed in his office note dated April 11, 2011 (R.p. 189). According to Dr. Zgleszewski's notes, the MRI revealed that the only change was a reduction in the prior lumbar disc injury that was treated with the percutaneous discectomy (R.p. 188). At that point, the Appellant

reported no leg pain and indicated that he did not have pain radiating into his legs (R.p. 188). The Appellant still reported pain in his back with a shooting pain to the left hip (R.p. 188). At the April 11, 2011 appointment, Dr. Zgleszewski ordered a functional capacity evaluation to assess the Appellant's current functional status and help determine his return to work level (R.p. 190). The functional capacity evaluation was performed on April 25, 2011 and the report concluded that the Appellant reached a medium physical demand level, which is a reliable representation of his functional capacity (R.pp. 194-197). Thereafter, Dr. Zgleszewski completed a Form 14B, Physician Statement, dated September 12, 2011 (R.p. 193). On the Form 14B, Dr. Zgleszewski indicated that the Appellant reached maximum medical improvement as of May 2, 2011; he is able to return to medium duty work with the restrictions of no repetitive bending, twisting, or lifting; the Appellant has sustained a 10% medical impairment to the back and a 5% medical impairment to the SI joint for a combined rating of 15% to the back; and the Appellant will need SI joint injections over the next two years, up to two to three per year (R.p. 193).

Pursuant to Consent Order of the parties, the Appellant was also provided with a surgical evaluation (R.pp. 250-251). The surgical evaluation took place with Dr. Scott Boyd on February 27, 2012. Dr. Boyd opined that based on the MRI findings, there is no role for surgery for the Appellant (R.pp. 225-226). Furthermore, Dr. Boyd indicated that he agreed with Dr. Zgleszewski's determination that the Appellant reached maximum medical improvement (R.pp. 225-226). Dr. Boyd also opined that the Appellant has sustained an 8% impairment considering the DRE lumbar category II based on the AMA Guides (R.pp. 225-226). Dr. Boyd also indicated that he agreed with the findings of the

functional capacity evaluation that placed the Appellant at a medium physical demand level for an eight-hour day (R.pp. 225-226). According to Dr. Boyd, the Appellant is likely to have further flare-ups, which have been treated well with pain medication and muscle relaxers; therefore, he recommended that the Appellant receive such medications three to four times per year over the next two years as monitored by a regular medical physician (R.pp. 225-226). Dr. Boyd opined that the Appellant would not benefit from any further procedures or injections (R.pp. 225-226). Further, Dr. Boyd noted that he did not appreciate any significant nerve root compression (R.pp. 225-226).

Vocational assessments were submitted into the record by both the Appellant and the Respondents. The Respondents asserted that the Appellant's vocational assessment was outdated and should not be relied upon as evidence of the Appellant's permanent disability. The Appellant's vocational assessment is dated September 10, 2011 and was performed by David R. Price, M.ED. At the time of Mr. Price's report, the Appellant reported that he could only exercise at a local gym one hour three times weekly, he only fished three times since the injury, and he had been unable to attend church due to his sitting intolerance (R.pp. 199-200). The Appellant was also requiring Oxycodone every eight hours for pain control according to the vocational evaluation by David Price (R.p. 200). David Price concluded that the Appellant would be capable of working at an entry level semi-skilled employment in a range of earnings from approximately $8.00 to $10.00 per hour working an 8-hour day (R.p. 203).

The vocational report submitted into the record by the Respondents was performed by The Directions Group on April 6, 2012. Included in the report were the results of a Beta III examination, which revealed that the Claimant has an IQ of high

average intelligence (R.p. 214). The Appellant reported to The Directions Group vocational evaluator that he is able to sweep/dust, vacuum, make the bed, wash dishes, mop the floor, perform some cooking, and do laundry (R.p. 213). The Appellant indicated that he is able to perform limited yard work and he is able to drive for 45 minutes to 1 hour continuously (R.p. 213). The Appellant further reported that he likes to read books, he attends church every Sunday, he participates in woodworking, and he goes fishing every now and then (R.p. 213). Further, the Appellant confirmed that he works out at Gold's Gym five times per week (R.p. 213). The Directions Group's vocational evaluation concluded that the Appellant can anticipate earnings ranging from $18,200.00 annually up to $27,040.00 annually (R.p. 100).

The Appellant testified at the Hearing that he is 45 years old and has been married for 26 years (R.p. 60, lines 11-14). The Appellant further testified that he graduated from high school and attended courses in architectural engineering at Trident Tech (R.p. 61, lines 8-15). The Appellant testified that he did not graduate from college and he no longer has a commercial drivers' license, although he did at one time (R.p. 61, line 22 – R.p. 62, line 7). The Appellant testified that his job history includes employment with Ceres Marine Terminals as a stevedore on container ships, a driver for Coca-Cola, food service for Monarch, auto repair work, and as a delivery driver at Pearlstein Distributors (a/k/a Budweiser) (R.p. 62, line 8 – R.p. 64, line 10). The Appellant asserted that he is not physically able to do any of the work as he previously performed (R.p. 64, lines 16-19).

In regards to the injury on March 25, 2010, the Appellant testified that he has pain in his left groin, upper inner thigh, left hip radiating to his knee, and SI joints on both

sides (R.pp. 74-81). The Appellant testified pain on his right has subsided but that the left has continued (R.p. 81). The Appellant testified regarding the different exercises that he learned to strengthen his lower back and the muscles around his spine. The Appellant testified that the injections and regular exercise at the gym have been beneficial (R.p. 72, lines 2-9).

The Appellant testified regarding his current workouts. The Appellant testified that he starts on a treadmill or elliptical and uses the arch trainer and nautilus machines for strength training (R.p. 102, lines 13-19). The Appellant testified that he has been going to the gym since he was 15 years old and he would like his gym membership to be paid by the insurance Carrier (R.p. 102, lines 2-8).

In regards to his current condition, the Appellant testified that his worst symptom remains his lower back. The Appellant testified that his last flare-up was on February 14, 2012 (R.p. 75, line 24 – R.p. 76, line 1). The Appellant confirmed that Dr. Scott Boyd's evaluation took place after that flare-up (R.p. 76, lines 21-25). The Appellant testified that during that flare-up, he took Oxycodone, which was left over from his initial visit with Dr. Zgleszewski (R.p. 78, lines 13-17).

The Appellant went on to testify regarding his pain in his sacrolitic joint, as well as his left hip that bothers him constantly (R.p. 81, lines 5-25). According to the Appellant, he has pain that radiates to his knee when his back flares up (R.p. 82, lines 9-11). Furthermore, the Appellant testified that he has pain in his groin, but it does not happen as often as it was (R.p. 82, lines 16-22). The Appellant testified that he is able to drive, but that he still has limits with his activities (R.p. 87, lines 8-24). The Appellant testified that he cannot walk as long as he used to, but he can probably walk for 45

minutes to an hour while sitting down and taking breaks (R.pp. 85-86). The Appellant further testified that he has problems sitting for longer to 30 to 45 minutes before it gets really uncomfortable (R.p. 86, lines 8-10).

Following the Hearing, the single Commissioner issued her Decision and Order, wherein she set forth the following Findings of Fact:

1. Claimant injured his low back in an admitted accident on March 25, 2010.

2. Claimant alleges that his admitted injury also affects his buttocks, legs, right foot, and right SI joint.

3. Claimant is 45 years of age (testimony of Claimant).

4. Claimant is a high school graduate. He attended one year of technical college when he studied to be an architectural engineer (testimony of Claimant; Claimant's APA #7, page 81; Defendants' APA #19, page 179).

5. Claimant's IQ is "high average" per Defendants' vocational expert. Claimant's vocational expert states that Claimant's word reading is the grade equivalent of 12.9, his sentence comprehension is the equivalent of 12.9, and his math computation is the equivalent of 12.9. Claimant enjoys reading books and magazines relating to guns (Defendants' APA #19, page 182; Claimant's APA #7, page 81).

6. Claimant's employment history includes work (a) as a stevedore (foreman) on container ships, (b) as a delivery driver for Coke and a beer distributor, and (c) in auto body repair (testimony of Claimant; Defendants' APA #19, pages 179-180; Claimant's APA #7, pages 81-82).

7. Claimant's job with Employer was delivery driver of food and restaurant supplies. This job is considered heavy (testimony of Claimant; Claimant's APA #7, page 81; Defendants' APA #19, page 175; Claimant's APA #10).

8. Claimant is a six-year employee (testimony of Claimant).

9. The objective evidence is interpreted by the authorized treating physician as showing "shallow protrusions, but no significant nerve root compromise" (Defendants' APA #12, page 106; *See also* Claimant's APA #4; Defendants' APA #16).

10. There is no objective evidence of radiculopathy. The authorized treating physician diagnoses radiculitis based upon Claimant's subjective

complaints. At one point (post discectomy on April 2011), Claimant reported no leg pain at all (Defendants' APA #14, pages 110 and 115).

11. The Claimant also underwent an EMG/NCS study that revealed normal results with no objective evidence of radiculopathy.

12. I was not persuaded by Claimant's testimony regarding the alleged nine-day episode, including his (a) having to drag his left foot/leg behind him, and (b) description of having the posture/gait of a "mummy" (testimony of Claimant; Claimant's APA #11, containing a photograph of Claimant).

13. Because of his work-related injury, Claimant underwent injections, physical therapy, and a percutaneous discectomy (Claimant's APA #5, page 46).

14. Claimant reached maximum medical improvement on February 27, 2012 (Defendants' APA #12, page 106).

15. The authorized treating physician assigned a 15% combined impairment rating for the back and SI joint. Defendants' IME assigned an 8% impairment rating (Claimant's APA #5, page 73; Defendants' APA #14, page 108; Defendants' APA #12, page 106; Claimant's APA #8, page 86).

16. My observations of Claimant's sitting tolerance at the hearing are very different than those noted by Claimant's vocational expert, as I noted no difficulties during the hour-long hearing. Claimant told Defendants' vocational expert that he attends church "every Sunday", but told his own vocational expert that is "unable to attend church due to his sitting intolerance" of greater than 30 minutes (observations of the undersigned; Claimant's APA #7, pages 79-80; *Cf.* Defendants' APA #19, page 181).

17. Claimant works out at Gold's Gym five days each week, and has lost approximately 40 lbs. since the date of the accident (testimony of Claimant; Defendants' surveillance video; Defendants' APA #19, page 181).

18. Claimant's statement to his vocational expert that he is socially withdrawn and can no longer tolerate being in crowds is inconsistent with his ability/desire to work out at Gold's Gym five days a week (Claimant's APA #7, page 80).

19. Claimant is able to drive (testimony of Claimant; Defendants' surveillance video).

20. Claimant is able to engage in his hobby of woodworking (testimony of Claimant).

21. Claimant takes no medication on a daily basis. No prescriptions have been written for Claimant within a year's time prior to the date of the hearing (testimony of Claimant).

22. Claimant showed "good" effort in his FCE, and the test results were considered valid by the evaluator (Defendants' APA #12, pages 106 and 111).

23. The restrictions from the FCE limit Claimant to medium duty work, and preclude him from returning to any of his pre-accident jobs (Claimant's APA #5, page 73; Defendants' APA #14, pages 108 and 111; Claimant's APA #6).

24. I give greater weight to the conclusions of Defendants' vocational expert. I base this finding on my review of the medical evidence and on my observations of Claimant at the hearing (Claimant's APA #7; Defendants' APA #19).

25. As to future medicals, Claimant is entitled to receive injections per the recommendation of the authorized treating physician, Dr. Zgleszewski. The surgical opinion by Dr. Scott Boyd suggests future medications although Claimant does not presently take any (Claimant's APA #5, page 73; Defendants' APA #14, page 108; Defendants' APA #8, page 86).

26. The Claimant has sustained a 35% permanent loss of use of the spine (encompassing Claimant's entire spine and including any alleged radiculitis) pursuant to §42-9-30(21).

27. I find that the greater weight of the evidence shows only the Claimant's back was affected by the March 25, 2010 admitted injury by accident.

28. Claimant is to receive his award in lump sum.

29. Claimant's request that Defendants provide him with a gym membership is denied. Claimant has worked out at gyms since he was 15 years of age, and worked out at Gold's Gym prior to the date of the injury (testimony of Claimant).

30. Claimant's average weekly wage is $1,062.94, yielding a compensation rate of $689.71.

(R.pp. 12-17, Decision & Order dated June 18, 2012).

As support for the aforementioned findings, the single Commissioner issued the following Rulings of Law:

1. Under §42-1-130, the Claimant was a covered employee, and under §42-1-140, the Employer was a covered Employer at the time in question.

2. Under §42-1-160, the Claimant sustained injuries to his low back only in an accident arising out of and in the course of his employment on March 25, 2010.

3. Under §42-15-60, the Defendants provided the Claimant proper and adequate medical care and treatment and the Claimant reached maximum medical improvement for his injuries sustained as a result of the March 25, 2010 accident by February 27, 2012. Further under §42-15-60, the Defendants shall be responsible for the causally related medical care and treatment which they authorized and which was incurred on or before February 27, 2012, the date of maximum medical improvement. Further under §42-15-60, the Defendants are responsible for the Claimant's injections per the recommendations of the authorized treating physician, Dr. Zgleszewski, and the Claimant's causally related future medications as outlined by Dr. Scott Boyd as is necessary to lessen the Claimant's causally related disability resulting from the March 25, 2010 injury by accident.

4. Under §42-9-260 and Regulation 67-506, the Defendants are entitled to stop payment of temporary disability compensation and that shall be effective February 27, 2012, the date the Claimant reached maximum medical improvement.

5. Under §42-9-10, §42-9-20, §42-9-260, and Regulations 67-501 through 510, the Defendants have paid all temporary disability compensation for which they are liable and have no liability for any further temporary disability compensation.

6. Under §42-9-30(21), the Claimant sustained a 35% permanent loss of use to his back as a result of the accident on March 25, 2010.

7. Under §42-9-210, all temporary disability compensation paid to the Claimant for the period after February 27, 2012 constitutes payment towards the permanent partial disability award set forth herein and the Defendants are entitled to credit for all temporary disability compensation paid to the Claimant for the period after February 27, 2012 against liability for further compensation benefits awarded herein.

8. The Claimant is entitled to a lump sum payment pursuant to Regulations 67-1605(A) and 67-1605(E).

9. Under §42-1-40, the Claimant's average weekly wage is $1,062.94 with a resulting weekly compensation rate of $689.71.

(R.pp. 17-19, Decision & Order dated June 18, 2012).

From this Decision and Order, the Claimant timely filed a Form 30, Request for Full Commission Review. The Full Commission affirmed the single Commissioner's Decision and Order in its entirety by Order dated December 5, 2012. (R.p. 21-32). The Appellant appeals the December 5, 2012 Order to this Honorable Court.

## STANDARD OF REVIEW

The Administrative Procedures Act establishes the standard for judicial review of the Workers' Compensation Commission's decisions. *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 134-135, 276 S.E.2d 304, 306 (1981). The Appellate Court can reverse or modify a decision if the findings and conclusions of the agency are affected by error of law, clearly erroneous in view of the reliable, probative and substantial evidence on the whole record, or arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. *See Gray v. Club Group, Ltd.,* 339 S.C. 173, 528 S.E.2d 435 (Ct. App. 2000); *See also* S.C. Code Ann. §1-23-380(G) (1986, as amended). In considering an appeal from a Decision and Order of the Commission, the Court's role is of an appellate capacity and is limited to deciding whether the Commission's decision is supported by substantial evidence or is controlled by some error of law. *See Rogers v. Kunja Knitting Mills Co.*, 312 S.C. 377, 440 S.E.2d 401, re-hearing denied (Ct. App. 1994). In an appeal from the Commission, the Court may not substitute its judgment for that of the Commission as to the weight of the evidence on questions of fact, but may

reverse where the decision is affected by an error of law. *See Gibson v. Spartanburg School Dist. No. 3*, 338 S.C. 510, 526 S.E.2d 725 (Ct. App. 2000), citing S.C. Code Ann. § 1-23-380(a)(6) (1976, as amended). A decision of the Commission must be affirmed if factual findings are supported by substantial evidence. *See Stokes v. First National Bank*, 306 S.C. 46, 410 S.E.2d 248 (1991).

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 administrative agency reached in order to justify its action. *Pratt v. Morris Roofing, Inc.*, 357 S.C. 619, 622, 594 S.E.2d 272, 274 (2004). Substantial evidence is that evidence which would require refusal to direct a verdict if the matter were before a jury and is something less than the weight of the evidence. *See Hoxit v. Michelin Tire Corporation*, 304 S.C. 461, 405 S.E.2d 407 (1991). The possibility of drawing two inconsistent conclusions from the evidence does not prevent administrative findings from being supported by substantial evidence. *Id.* If the factual findings of the Commission are supported by substantial evidence, the Commission's conclusions must be affirmed. *See Ross v. American Red Cross*, 298 S.C. 490, 381 S.E.2d 728 (1989).

## ARGUMENT

I. The Full Commission properly awarded the Appellant compensation pursuant to S.C. Code Ann. §42-9-30.

As the Court addressed recently in *Colonna*, an individual is limited to scheduled compensation pursuant to §42-9-30 where there is no impairment to any other part of the body and an individual is not limited to scheduled benefits under section 42-9-30 if the individual can show additional injuries. *Colona v. Marlboro Park Hospital*, Opinion No.

5117, filed April 17, 2013 *citing Singleton v. Young Lumbar Company,* 236 S.C. 454, 471, 845, 114 S.E.2d 837, 845 (1960) and *Wigfall v. Tideland Utils., Inc.*, 354 S.C. 100, 106, 580 S.E.2d 100, 103. The Court also referenced that the individual must prove that another body part was impaired or injured otherwise the individual is limited to the scheduled compensation pursuant to §42-9-30. *Id. citing Singleton* at 471, 845 and *Wigfall* at 106, 103. As in *Colona*, the Appellant in this matter has failed to establish that he has sustained impairment to an additional body part other than the back.

The Appellate Panel of the Commission is reserved the task of weighing the evidence and in weighing the evidence it ultimately concluded that the Appellant's disability is contained to the back. *See Shealy v. Aiken Cnty.*, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000) (holding the appellate panel is specifically reserved the task of assessing the credibility of the witnesses and the weight to be afforded evidence). The MRI and EMG/NCS do not support the Appellant's alleged radiculopathy (R.pp. 153, 206, 228-232). Further, the SI joint was addressed by the authorized treating physician as a portion of the back (R.p. 193). Therefore, the Commission in reviewing the evidence found that the Appellant's disability is contained to the spine. As the finder of fact, the Commission has the authority to reach this conclusion so long as there is substantial evidence to support such in the record.

The Appellant argues that the *Singleton* case requires that he be compensated based on a loss of earnings capacity due to injury to two or more body parts; however, the Appellant failed to show that some other part of his body was affected by the March 25, 2010 accident. *Singleton v. Young Lumbar Company*, 236 S.C. 454, 114 S.E.2d 837

(1960). As outlined herein below, there is substantial evidence in the record to find that only the Appellant's back was affected by the March 25, 2010 accident.

II. Substantial evidence supports the Full Commission's Decision that the Claimant is only entitled to compensation for permanent loss of use of the back (encompassing the entire spine and alleged radiculitis) pursuant to §42-9-30(21).

The Commission's findings of fact are conclusive; therefore, only substantial evidence is required to support the Commission's finding that the Claimant has sustained a 35% permanent loss of use of the spine (encompassing Claimant's entire spine and including any alleged radiculitis) pursuant to §42-9-30(21). *See Ross v. American Red Cross*, 298 S.C. 490, 381 S.E.2d 728 (1989). The Appellant alleges that the Commission erred in finding that there was no other affected body part other than the back in light of the finding that the Appellant was entitled to treatment for his SI joint and the fact that the treating physician references radiculopathy. The Respondents however assert that the Appellant's impairment to his SI joint was included in the authorized treating physician's rating of 15% to the spine and there is no evidence of any impairment to the lower extremities to allow the Appellant to be compensated for a loss of earnings as opposed to a scheduled award.

A. SI joint.

The Form 14B, Physician's Statement, completed by Dr. Zgleszewski on September 12, 2011 states the Appellant has a 10% impairment to the back/spine and a 5% impairment to the SI joint for a combined rating of 15% (R.p. 193). As such, the Respondents contend that the Appellant has a total impairment of 15% to the back, which takes into account any SI joint impairment. Further, the Respondents contend that the SI

joint is not required to be considered a separate unscheduled body part as the sacrum is a portion of the spine located below the lumbar vertebral column.

Although the Supreme Court confirmed in *Gilliam* that the hip socket is part of the pelvis, the SI joint was not specifically addressed. *Gilliam v. Woodside Mills,* 461 S.E.2d 818, 319 S.C. 385 (1995). Appellant's assertion that this is the same issue as in *Gilliam* is in error. When the Commission has addressed the SI joint in the disability award to the back, the decision has previously been upheld by this Court. The Respondents assert that this scenario is similar to *Sanders* wherein the Claimant's disability for his SI joint and his lumbar spine was compensated based on his loss of use of his back. *See Sanders v. MeadWestvaco Corp.,* 371 S.C. 284, 638 S.E.2d 66 (S.C.App. 2006) (An award of benefits to a workers' compensation claimant for "permanent loss of the use of the lumbar spine and sacroiliac joint (SI joint)" was not reversible error, even though the statute that provided for compensation for an injury to the back did not specifically mention the lumbar spine or the SI joint; the order and record reflected that claimant's injury and subsequent disability was to his back). In *Sanders*, the Court of Appeals stated:

> [E]ven though the SI joint and lumbar spine are not specifically mentioned in section 42-9-30, we find no reversible error in the manner in which the Appellate Panel characterized Sanders' injuries. A review of the Appellate Panel's order and the record reflects Sanders' injury and subsequent disability was clearly to his back. This approach is consistent with our policy of liberally construing the Workers' Compensation Act in favor of coverage. *Schulknight v. City of N. Charleston,* 352 S.C. 175, 178, 574 S.E.2d 194, 195 (2002); *see also Mgmt. Recruiters v. R.J.R. Mech., Inc.,* 304 S.C. 399, 401, 404 S.E.2d 908, 909 (Ct.App.1991) (finding when construing a judgment, the determinative factor is the "intent of the officer who wrote it, as gathered not from an isolated part of the judgment, but from all parts thereof").
>
> *Sanders* at 69-70, 290-291.

Dr. Zgleszewski clearly addressed the SI joint in the "combined" rating of 15% to the back; therefore, the SI joint was included in the Appellant's impairment to his back (R.p. 193). As such, the Commission awarded the Appellant compensation based on his disability to his back.

B. Radiculopathy.

The Appellant's subjective complaint is the only evidence of his back injury affecting any other body part. The single Commissioner had the opportunity view the Appellant at the Hearing and weigh his testimony verse the objective medical evidence in the record. The Appellant has alleged that Dr. Zgleszewski's notes referencing the Appellants subjective radicular complaints are the only evidence in the record; however, a surgical opinion was rendered by Dr. Boyd and diagnostics were performed (Appellant's Brief page 14). As referenced by the Commission's Finding of Fact No. 9, the Appellant's MRIs did not show any significant nerve root compromise to explain the alleged radiculopathy complaints (R.pp. 206, 228-232). Furthermore, Dr. Boyd performed a surgical evaluation on February 27, 2012 and specifically indicated that he does not appreciate any significant nerve root compromise (R.p. 206). Dr. Boyd noted that the Appellant had normal power in his lower extremities and a steady gait (R.p. 205). In addition to the MRIs, the Appellant also underwent an EMG/NCS study. Dr. Zgleszewski reviewed the results of the EMG/NCS with the Claimant on June 7, 2010 (R.p. 152). At that time, Dr. Zgleszewski noted that the Claimant's bilateral lower extremity motor examination was normal (R.p. 153). Dr. Zgleszewski indicated that based on the EMG/NCS, the Claimant does not have radiculopathy in either leg (R.p. 153). Although Dr. Zgleszewski also noted that the EMG/NCS can be an imperfect

diagnostic tool for determining radiculopathy, there is no other evidence of any radiculopathy aside from the Appellant's subjective complaints and reference to such by Dr. Zgleszewski (R.p. 153).

The Appellant's complaints also continued to decrease throughout the course of his conservative treatment. At the Appellant's visit on July 9, 2010, his bilateral lower extremity motor examination was normal and Dr. Zgleszewski indicated that they ruled out lumbar facet pain and left SI joint pain (R.p. 158). On November 10, 2010, Dr. Zgleszewski also indicated that the Appellant had a normal bilateral lower extremity motor examination (R.p. 164). The Appellant underwent a mechanical percutaneous discectomy at the L4/L5 level on December 10, 2010 (R.p. 166). Following the discectomy, the Appellant presented for follow up on January 21, 2011 and noted reduced radiating left hip pain (R.p. 167). The Appellant also had a bilateral lower extremity examination at that time, which was stable and unchanged (R.p. 168). On February 14, 2011, the Appellant again had a bilateral lower extremity examination that was stable and unchanged (R.p. 176). At the visit on March 14, 2011, Dr. Zgleszewski indicated that the Appellant was expected to reach maximum medical improvement within two weeks (R.p. 180). The Appellant then returned to Dr. Zgleszewski on March 21, 2011 referencing an increase in his left lateral upper thigh pain radiating down to the foot, which was increasing over the weekend (R.p. 182). That said, Dr. Zgleszewski noted that the Appellant's gait and station was non-antalgic and he was able to raise up on his heels and toes (R.p. 183). The Appellant also had a stable and unchanged bilateral lower extremity examination (R.p. 183). The Appellant then was referred for a functional

capacity evaluation, which was performed on April 25, 2011, showing the Appellant could work in a medium physical demand capacity (R.pp. 194-197).

Importantly, at the Appellant's visit with Dr. Zgleszewski on April 11, 2011 another MRI was reviewed and he had no changes to his spine (R.p. 188). The Appellant also reported no leg pain and no pain radiating into his legs (R.p. 188). Respondents assert that this report from April 11, 2011 is the best indication of the Appellant's complaints immediately prior to his release from treatment (R.p. 188). At the return visit on May 2, 2011, the Appellant's gait and station was noted to be non-antalgic and he was able to raise up on his heels and toes (R.p. 191). Further, the Appellant's bilateral lower extremity examination was still stable and unchanged from the previous exam (R.p. 191). As such, Dr. Zgleszewski indicated that the Appellant reached maximum medical improvement (R.p. 191). On the Form 14B, Dr. Zgleszewski indicated that the Appellant reached maximum medical improvement as of May 2, 2011; he is able to return to medium duty work with the restriction of no repetitive bending, twisting, or lifting; the Claimant had sustained a 10% medical impairment to the back and a 5% medical impairment to the SI joint for a combined rating of 15% to the back (R.p. 193).

The Court in *Fishburne* addressed facts similar to this situation. *Fishburne v. ATI Systems Intern,* 384 S.C. 76, 681 S.E.2d 595 (Ct.App., 2009). In *Fishburne*, the Claimant did not have any objective evidence to support her radicular complaints according to the EMG/NCS and MRI. *Id.* at 87-88, 601. The Court upheld the decision of Appellate Panel of the Commission which found the Claimant was not entitled to a separate award for permanent partial disability benefits for her right lower extremity after having determined that the ten percent permanent partial disability award for the Claimant's back

injury encompassed any right lower extremity radiculopathy. *Id.* at 89, 601. Further, the Court stated that the Claimant presented no evidence that she had sustained a specific injury to her right lower extremity and the orthopedic physician noted he did not see indication of any disc disease that would cause all of her symptoms. *Id.* at 89, 601. The Appellant also lacks objective evidence to support an award of permanent partial disability to his lower extremity. Further, there is substantial evidence to support the award of 35% permanent partial disability to the Appellant's back including the alleged radiculopathy.

The Appellant relies on *Hutson* to argue that he should be entitled to compensation based on the loss of earnings capacity pursuant to §42-9-20; however, the facts are distinguishable. *Hutson v. SC State Ports Authority,* 390 S.C. 108, 700 S.E.2d 462 (Ct.App. 2010), *reversed on other grounds.* The Claimant in *Hutson* had an affected right leg and back which was recognized by the hearing Commissioner. *Id.* at 116, 467. Further, the Order in *Hutson* contained a finding that the Claimant suffered from radicular symptoms in his right leg that affected the functioning of that limb. *Id.* at 117, 467. Therefore the Claimant had established a prima facia case for compensating his leg injury in addition to his back injury. *Id.* The opposite is the situation in this case where the single Commissioner found that the Appellant did not suffer injury to any body part other than his back.

In short, the Respondents assert that substantial evidence in the record suggests that the Appellant does not have any impairment to any body part other than his low back. Dr. Zgleszewski confirmed that the Appellant's EMG/NCS revealed that he did not have radiculopathy in either leg (R.p. 153). Furthermore, immediately before being

released from treatment by Dr. Zgleszewski, the Appellant reported that he did not have any leg pain or pain radiating into his legs (R.p. 188). Throughout the Appellant's entire treatment with Dr. Zgleszewski, his bilateral lower extremity examination was stable. Although the Appellant had various complaints of radiculopathy in his buttocks, legs, and right foot, Dr. Boyd confirmed on February 27, 2012 that there was not any significant nerve root compromise (R.p. 206). Furthermore, Dr. Boyd noted that the Appellant had normal power in his lower extremities and a steady gait (R.p. 205). According to the functional capacity evaluation, the Appellant is able to work medium duty (R.pp. 194-197) and the Appellant's physical strength can be reviewed in the surveillance submitted of him working out at Gold's Gym (R.p. 249). As such, the Commission found that greater weight should be afforded to the objective evidence showing that the Appellant did not have any radiculopathy as opposed to the Appellant's subjective complaints. The Respondents further assert that the award of 35% permanent loss of use to the back under §42-9-30(21) more than compensates the Appellant for his disability in view of Dr. Boyd's opinion that the Appellant had an 8% permanent impairment to his back and Dr. Zgleszewski's opinion that the Appellant had a 15% combined impairment rating to the back.

As outlined above, there is substantial evidence in the record to support the Commission's finding that the Appellant's radicular complaints are contradicted by the objective evidence. This finding is not based on the single Commissioner's medical opinion as alleged by the Appellant in referencing the *Burnette* decision. (Appellant's Initial Brief, p. 13). In *Burnette,* the record lacked evidence to support the single Commissioner's statements regarding the medical evidence. *Burnette v. City of*

*Greenville,* Opinion No. 5059, filed December 5, 2012. In this situation, Dr. Boyd was the person who interpreted the MRI and determined that there was no nerve root impingement (R.p. 205). Further, Dr. Zgleszewski reviewed the EMG/NCS and indicated the results were normal (R.p. 153). Both physicians provided physical examinations of the lower extremities and noted the normal gait. Although Dr. Zgleszewski indicated that the EMG/NCS is an imperfect tool, there is other competent evidence in the record, such as the MRIs and Dr. Boyd's surgical evaluation, to support the finding that only the Claimant's back was the only affected body part.

## CONCLUSION

The Respondents respectfully request that the Commission's Order dated December 5, 2012 be affirmed in full based on the substantial evidence in the record and the applicable law.

RESPECTFULLY SUBMITTED:
Wood Law Group, LLC
P.O. Box 20550
Charleston, SC 29413

By: _____
J. Hubert Wood, III, Esquire
Kathryn F. Walton, Esquire
Attorneys for Respondents

Date: September 12, 2013

Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

---

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

---

SCWCC File No. 1002925

---

Case No. 2013-000005

---

Neal Beckman, Employee,.....Appellant,

v.

Sysco Columbia, LLC, Employer, and
Gallagher Bassett Services, Inc., Carrier,.....Respondents.

---

CERTIFICATE OF COUNSEL

---

The undersigned certifies that the Respondents' Final Brief complies with Rule 211(b) of the South Carolina Appellate Court Rules.

Wood Law Group, LLC
P.O. Box 20550
Charleston, SC 29413
(843) 577-5732

By: _____
Kathryn F. Walton, Esquire
Attorney for Respondents

Charleston, South Carolina
September 12, 2013

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION



SCWCC File No. 1002925

Case No. 2013-000005

Neal Beckman, Employee,.....Appellant,

v.

Sysco Columbia, LLC, Employer, and
Gallagher Bassett Services, Inc., Carrier,.....Respondents.

PROOF OF SERVICE

I certify that I have served the Respondents' Final Brief on all interested parties by depositing a copy of each in the United States Mail, postage prepaid, on September 12, 2013, addressed to the Appellant's attorneys of record Fred W. Riesen, Jr., Esquire, 3660 West Montague Ave., North Charleston, South Carolina, 29418 and Steven B. Samuels, Esquire, P.O. Box 50349, Columbia, South Carolina, 29250.

Kathryn F. Walton, Esquire
WOOD LAW GROUP, LLC
P.O. Box 20550
Charleston, South Carolina 29413
(843) 577-5732
Attorney for Respondents