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THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

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SC Court of Appeals

SCWCC No. 0920040

John R. Bowen, Respondent/Appellant,

v.

Vinyl Services, Inc. South Carolina Builders SIF and Bridgefield Casualty Ins. Co., Defendants,

Of whom Vinyl Services, Inc. and Bridgefield Casualty Ins. Co. are Appellants/Respondents.

and South Carolina Builders SIF is Respondent.

RESPONDENTS' BRIEF OF APPELLANTS/RESPONDENTS

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STATEMENT OF ISSUES ON APPEAL

I. DID THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION PROPERLY DETERMINE THAT BOWEN'S AVERAGE WEEKLY WAGE FOR HIS ALLEGED 2009 INJURY IS $645.75, FOR A CORRESPONDING COMPENSATION RATE OF $430.52?

II. DID THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION CORRECTLY DETERMINE THAT BOWEN IS ENTITLED TO TEMPORARY TOTAL DISABILITY COMPENSATION BENEFITS FROM DECEMBER 20, 2009 TO THE PRESENT AND CONTINUING?

STATEMENT OF THE CASE

On March 22, 2004, John R. Bowen ("Bowen") sustained an injury to his neck, lower back, and right upper extremity arising out of and in the course of his employment with Vinyl Services, Inc. ("Vinyl Services"). (R. p. 39). Vinyl Services' workers' compensation carrier at the time of Bowen's March 22, 2004 work accident was South Carolina Home Builders Self Insured Fund ("Home Builders"). (R. p. 37). A hearing was held on March 7, 2006 to determine if Bowen was entitled to an award of permanent partial disability and to determine if Bowen was entitled to additional medical treatment. Id.

On August 9, 2006, Commissioner George F. Funderburk issued a Decision and Order finding that Bowen had sustained 35% permanent partial disability to his back and 10% permanent partial disability to his right lower extremity as a result of his March 22, 2004 work accident. (R. p. 47). Commissioner Funderburk further found that, pursuant to Dodge v. Bruccoli, 334 S.C. 574, 514 S.E.2d 593 (Ct. App. 1999), Bowen was entitled to continuing medical treatment for his neck, back, and right lower extremity injuries in order to maintain his current level of functioning, prevent further deterioration of his condition, and allow him to continue working. (R. p. 48).

In April of 2007, Bowen contacted Home Builders and indicated that he needed to return to Dr. McCallum, the authorized treating physician for his 2004 workers' compensation claim, because his right ankle had become symptomatic. (R. p. 21, lines 19-24; R. p. 280). On April 23, 2007, Bowen was seen by Dr. McCallum. (R. p. 280). Dr. McCallum performed arthroscopic surgery on Bowen's right ankle on July 10, 2007,

and on October 22, 2007, Dr. McCallum opined that Bowen had reached maximum medical improvement with no additional impairment. (R. pp. 282-84; R. p. 430).

On February 19, 2010, Bowen filed a Form 50 Request for Hearing in his March 22, 2004 claim alleging that he had sustained a change of condition and alleging injuries to his back, right lower extremity, right foot, neck, left upper extremity, and psychological overlay. (R. p. 50). On February 23, 2010, Vinyl Services and Home Builders filed a Form 51 denying that Bowen was entitled to any additional benefits as a result of his March 22, 2004 claim.

Bowen also filed a second Form 50 on February 19, 2010 alleging an injury to his back, right lower extremity, right foot, neck, left upper extremity, and psychological overlay as the result of repetitive trauma culminating on November 11, 2009. (R. p. 51). On March 17, 2010, Vinyl Services and Bridgefield Casualty Insurance Company ("Bridgefield"), Vinyl Services' workers' compensation carrier on November 11, 2009, filed a Form 51 denying that Bowen sustained a compensable injury by repetitive trauma arising out of and in the course of his employment. (R. p. 52).

On May 17, 2010, the Commission issued an Order consolidating Bowen's March 22, 2004 claim (WCC File #0402800) and Bowen's November 11, 2009 claim (WCC File #0920040), and a hearing was subsequently scheduled in front of Commissioner Avery B. Wilkerson on June 24, 2010 in Anderson, South Carolina. (R. pp. 15 & 36).

At the hearing, Bowen alleged that he sustained a change of condition for the worse to his back and right lower extremity resulting from his March 22, 2004 workers' compensation claim. (R. p. 67, lines 20-22). Bowen also alleged that he sustained an injury by repetitive trauma to his low back on November 11, 2009. (R. p. 67, lines 22-25).

Bowen sought additional medical treatment as recommended by Dr. Lucas. (R. p. 68, lines 9-11). He also sought an award of temporary total disabilty beneftis from November 11, 2009 and continuing. (R. p. 68, lines 7-9). Home Builders, the carrier on March 22, 2004, denied that Bowen sustained a compensable change of condition. (R. p. 69, lines 6-9). Home Builders contended that Bowen's current condition was not causally related to his March 22, 2004 work accident and that his current alleged condition was the result of repetitive trauma. (R. p. 69, lines 11-13). Bridgefield, the carrier on November 11, 2009, maintained that Bowen did not sustain a compensable repetitive trauma injury culminating on November 11, 2009. (R. p. 70, lines 22-25). Bridgefield contended that Bowen's job was not a repetitive job, that Bowen's injury was not an accident because there was no unexpected result, and that Bowen's job was one of many factors that caused his current problems. Bridgefield further contended that Bowen's current back condition was related to his March 22, 2004 work accident. (R. p. 71, line 1 – p. 75, line 5). Bridgefield also contended that even assuming Bowen sustained a compensable repetitive trauma injury culminating on November 11, 2004, Bowen's claim was barred because he failed to provide proper notice to Vinyl Services pursuant to S.C. Code Ann. § 42-15-20(C). (R. p. 73, lines 13-24).

On November 18, 2010, Commissioner Wilkerson issued an Order finding that Bowen sustained a compensable injury to his low back as the result of repetitive trauma culminating on November 11, 2009. (R. pp. 15 & 29). Commissioner Wilkerson further found that Bridgefield was responsible for all causally related medical treatment incurred to date as a result of Bowen's injury by repetitive trauma and also for additional related medical treatment as directed by Dr. Lucas. (R. p. 34). Finally, Commissioner Wilkerson

found that Bridgefield was responsible for temporary total disability benefits at the compensation rate of $430.52 from December 20, 2009 to the present and continuing. Id.

On December 1, 2010, Bridgefield filed an appeal to the Appellate Panel of the Workers' Compensation Commission, and on December 6, 2010, Bowen filed an appeal to the Appellate Panel of the Workers' Compensation Commission. (R. pp. 53-56). Oral argument was heard before the Appellate Panel on April 18, 2011. (R. p. 1). On July 21, 2011, the Appellate Panel issued a Decision and Order fully affirming Commissioner Wilkerson's Decision and Order. (R. pp. 1-14).

Bridgefield filed a Notice of Appeal with the South Carolina Court of Appeals on July 28, 2011. (R. pp. 57-61). Bowen filed a Notice of Cross-Appeal with the South Carolina Court of Appeals on August 1, 2011. This appeal follows.

STATEMENT OF THE FACTS

On March 22, 2004, Bowen sustained an injury to his neck, back, and right upper extremity arising out of and in the course of his employment with Vinyl Services when he fell approximately 18 feet from a scaffold to the ground. (R. p. 44). On the day of his accident, Bowen presented to Oconee Memorial Hospital with complaints of pain in his lumbar spine, both ankles, and right foot. (R. p. 265). Bowen was diagnosed with a lumbar strain and sprain of both ankles and instructed to follow up at Blue Ridge Orthopaedics. (R. pp. 266-67).

Following his accident, Bowen received treatment for his right ankle and right foot injury from Dr. P. Sean McCallum at Blue Ridge Orthopaedics. (R. pp. 274-79). On May 28, 2004, Dr. McCallum opined that Bowen had reached maximum medical improvement for his right ankle and right foot injury and that Bowen had sustained 5% permanent partial impairment to his right lower extremity as a result of his March 22, 2004 work injury. (R. p. 279).

Bowen also received treatment from Dr. S. Emmett Lucas for the neck and back injuries that he sustained as a result of his March 22, 2004 work accident. (R. pp. 298-307). On January 24, 2005, Dr. Lucas performed a C5-6 anterior cervical diskectomy and interbody fusion on Bowen's cervical spine. (R. pp. 317-19). Following his surgery, Bowen continued to treat with Dr. Lucas. (R. pp. 305-07). On April 24, 2005, Dr. Lucas opined that Bowen had reached maximum medical improvement and that Bowen had sustained 15% permanent impairment as a result of his injury. (R. p. 43).

On February 15, 2006, Bowen presented to Dr. Robert A. Dameron, Jr. for an independent medical evaluation. (R. p. 320). Dr. Dameron noted that as a result of the

injuries Bowen sustained in his March 22, 2004 work accident, "[h]is activities of daily living have been impaired." (R. p. 321). Dr. Dameron further noted that Bowen "was unable to put in heavy work on his farm because heavy work aggravates his low back pain." Id. Dr. Dameron also noted that Bowen stated that at work "he can do reasonably well for about two and half hours before he starts having pain." (R. pp. 320-21). After evaluating Bowen, Dr. Dameron opined that as a result of his March 22, 2004 work accident, Bowen had sustained 11% impairment to the lumbar spine, 80% impairment to the cervical spine, 5% impairment to the left upper extremity, and 9% impairment to the right lower extremity. (R. p. 322).

A hearing was held in Bowen's March 22, 2004 workers' compensation claim on March 7, 2006 before Commissioner George F. Funderburk. (R. p. 37). On August 9, 2006, Commissioner Funderburk issued an Order and specifically noted that "[Bowen] testified he continues to experience pain and difficulty in his neck, low back, and right ankle." (R. p. 40). He further noted that "[Bowen] stated that he has low back pain consistently but that it is worse on some days than others" and that Bowen "stated that he has bad days with his low back about three times per week, and he cannot function much when that happens." Id. Commissioner Funderburk found that Bowen had sustained 35% loss of use of his spine and 10% loss of use of his right lower extremity as a result of his March 22, 2004 work accident. (R. p. 47). Commissioner Funderburk further found that Home Builders was responsible for "continuing medical treatment for his neck, back, and right lower extremity injuries, including medications, as is needed to maintain his current level of functioning, prevent further deterioration of his condition, and allow him to continue working." (R. pp. 48-49).

In April of 2007, Bowen contacted Home Builders indicating that he needed to return to Dr. McCallum because his right ankle had become symptomatic. (R. p. 21, lines 19-24; R. p. 280). On April 23, 2007, Bowen was evaluated by Dr. McCallum, who recommended an MRI of his right ankle. (R. p. 280). Following the MRI of his right ankle Dr. McCallum recommended surgery to address Bowen's right ankle complaints. (R. p. 281). On July 10, 2007, Dr. McCallum performed arthroscopic surgery on Bowen's right ankle. (R. pp. 282-84). Following his right ankle surgery, Bowen continued to treat with Dr. McCallum, and on October 22, 2007, Dr. McCallum opined that Bowen had reached maximum medical improvement with no additional impairment. (R. p. 430).

On May 20, 2009, Bowen presented to Dr. Edward H. Booker, his family doctor, with complaints of back pain. (R. p. 402). Dr. Booker noted that Bowen had "back pain s/p work accident 5 years ago." Id.

On November 11, 2009, Bowen went out of work because business was slow and Vinyl Services had a temporary layoff. (R. p. 103, lines 3-11). After going out of work, Bowen began drawing full unemployment benefits. (R. p. 103, lines 12-14).

On December 28, 2009, a little over a month after he went out of work, Bowen presented to Dr. Booker with complaints of back pain and leg pain. (R. p. 399). Dr. Booker noted that Bowen's back pain was chronic. Id. He specifically indicated that Bowen "presents with back and leg pain that has reached a crisis point. He fell at work 4 years ago and has been suffering since then." Id. Dr. Booker noted that Bowen had contacted his workers' compensation company, Home Builders, and that Home Builders

was arranging a follow up appointment with his original workers' compensation physician, Dr. Lucas. (R. p. 400).

Home Builders authorized treatment with Dr. Lucas, and on January 20, 2010, Bowen presented to Dr. Lucas for an evaluation of his lower back problems. (R. pp. 308 & 368). Prior to the evaluation, Bowen completed a Patient Information Form and related his lower back pain to his March 22, 2004 work accident. (R. p. 364). In his January 20, 2010 note, Dr. Lucas indicated that since his March 2004 work accident, Bowen "says he has always had some chronic back pain, but it has been worsening in the last 2 years with no specific injury." (R. p. 308). Dr. Lucas recommended MRIs of Bowen's cervical spine and lumbar spine. (R. p. 309). Dr. Lucas also wrote Bowen out of work. (R. p. 310). Following the MRIs of his cervical spine and lumbar spine, Bowen returned to Dr. Lucas for a follow up appointment on February 3, 2010. (R. p. 311). Dr. Lucas specifically noted that the onset date of Bowen's complaints was March 22, 2004. Id. Dr. Lucas reviewed Bowen's MRIs and recommended a series of lumbar steroid injections. Id. Bowen underwent his first epidural steroid injection on February 3, 2010. Id. In addition to paying for Bowen's evaluations with Dr. Lucas, Home Builders, Vinyl Services' workers' compensation carrier for his March 22, 2004 work accident, authorized and paid for Bowen's MRIs and steroid injection. (R. pp. 367-70).

In January of 2010, February of 2010, and April of 2010, Bowen completed several short-term disability forms and indicated that his current lower back condition was a result of his March 22, 2004 work accident. (R. pp. 376-78; R. pp. 380-82). Dr. Lucas also completed multiple Attending Physician's Statements for Bowen's short-term

disability application, and he opined in each statement that Bowen's current back condition resulted from his fall at work on March 22, 2004. (R. pp. 379 & 382).

As noted above, on February 19, 2010, Bowen filed a Form 50 Request for Hearing in his March 22, 2004 claim alleging that he had sustained a change of condition and alleging injuries to his back, right lower extremity, right foot, neck, left upper extremity, and psychological overlay. (R. p. 50). Bowen also filed a Form 50 on February 19, 2010 alleging an injury to his back, right lower extremity, right foot, neck, left upper extremity, and psychological overlay as the result of repetitive trauma culminating on November 11, 2009. (R. p. 51). On February 23, 2010, Vinyl Services and Home Builders filed a Form 51 denying that Bowen was entitled to any additional benefits as a result of his March 22, 2004 claim. On March 17, 2010, Vinyl Services and Bridgefield, Vinyl Services' workers' compensation carrier on November 11, 2009, filed a Form 51 denying that Bowen sustained a compensable injury by repetitive trauma arising out of and in the course of his employment. (R. p. 52).

On May 12, 2010, the parties took the deposition of Dr. S. Emmett Lucas. (R. p. 193). After reviewing Bowen's prior medical records and the prior Order from the South Carolina Workers' Compensation Commission dated August 9, 2006, Dr. Lucas testified that Bowen has had a fairly significant degree of ongoing chronic back pain in his lower back since his March 22, 2004 work injury. (R. p. 238, lines 5-21). With regards to Bowen's February 2, 2010 MRI of the lumbar spine, Dr. Lucas testified that most of the findings in the MRI were degenerative in nature. (R. p. 214, lines 5-9). Dr. Lucas also testified that Bowen's condition has progressed since his 2004 lower back injury and that his progression is consistent with the progression of degenerative changes over time. (R.

p. 214, lines 13-25). While Dr. Lucas testified that he believed Bowen's job activities aggravated his preexisting back problems, Dr. Lucas also testified that multiple factors could have been the precipitator of Bowen's current back problems, including another fall from a scaffold, deer hunting a couple of times per week, any vigorous activity, and any activity that required Bowen to bend and lift, including picking laundry off of the floor. (R. p. 224, lines 3-25; R. p. 236, lines 21-25). Dr. Lucas also testified that Bowen's preexisting degenerative disc disease could have developed idiopathically. (R. p. 27, lines 16-21). Dr. Lucas specifically testified that Bowen's current condition could be multifactorial and that if Bowen continued to perform other activities, such as hunting, after he went out of work in November of 2009, those activities could be contributing to his current back condition. (R. p. 28, lines 2-4; R. p. 29, lines 16-21).

At the hearing, Bowen testified that he worked as a crew foreman for Vinyl Services and that his job with Vinyl Services required him to go to different houses or businesses and perform different types of projects. (R. p. 78, lines 11-16; R. p. 113, lines 18-25). He testified that his job required him to build scaffolds, to install vinyl siding, to install windows, to install Hardie board, to set columns, to install doors, and to load and unload materials that are used on the job site. (R. p. 78, lines 11-16; R. p. 114, lines 1-6). Bowen specifically testified that every job he performed for Vinyl Services is different and that each job required him to do a variety of different tasks throughout the day. (R. p. 113, lines 22-25; R. p. 114, lines 7-9).

Bowen testified that his prior workers' compensation claim on March 22, 2004 was his third workers' compensation claim with Vinyl Services. (R. p. 106, lines 9-10). With regards to his March 22, 2004 work accident, Bowen testified that he fell off of a

walk board and that he sustained injuries to his right ankle, neck, and lower back. (R. p. 80, lines 15-24). Bowen testified that following his March 22, 2004 work accident, he returned to work for Vinyl Services in May of 2005. (R. p. 92, lines 17-19). When specifically asked about his prior lower back injury, Bowen testified that he sustained a fairly significant injury to his lower back on March 22, 2004 and that he continued to have problems with his lower back at his prior workers' compensation hearing in March of 2006. (R. p. 94, lines 19-25). Bowen further testified that he has continued to have lower back problems since his 2004 injury and that his problems have gotten worse over time. (R. p. 95, lines 20-23). Bowen testified that his job duties with Vinyl Services, specifically bending, lifting, and carrying the Hardie board, which weighed up to 100 pounds, caused his back problems to get worse. (R. p. 85, lines 11-20).

Bowen testified that he has known for some years, at least since 2008, that his current back problems was being caused by his job duties with Vinyl Services. (R. p. 97, lines 8-11). However, Bowen testified that he never told Vinyl Services that his job was causing the pain in his lower back to increase. (R. p. 97, lines 12-18). Bowen also testified that a couple of years before the hearing, he fell off of an eight foot walk board while working for Vinyl Services and that his fall off of the walk board caused some pain and "a shocking feeling" in his lower back. (R. p. 95, line 24–p. 96, line 12).

Bowen testified that when he did not think he could perform his job any more because of his back problems, he contacted Home Builders, the workers' compensation carrier for his 2004 work accident, because Home Builders was supposed to provide him with continued medical care for his back. (R. p. 97, line 22–p. 100, line 11). Bowen

testified that Home Builders initially sent him back to Dr. Lucas for treatment to his back. (R. p. 100, lines 12-15).

Finally, Bowen testified that after he went out of work on November 11, 2009 due to Vinyl Services' temporary layoff, he hunted twice per week and that he stocked his freezer full of deer that season. (R. p. 103, line 24–p. 104, line 7). Bowen specifically testified that when he hunts, he rides his four-wheeler to his tripod and that he climbs up and hunts in his tripod, which is approximately 12 feet off of the ground. (R. p. 106, line 16–p. 107, line 18).

After the original hearing on June 24, 2010, the Commissioner Wilkerson left the record open for Bridgefield and Vinyl Services to submit a proper Form 20. (R. p. 65, line 23–p. 66, line 18). A Form 20, which was completed on June 29, 2010, indicates that Bowen's average weekly wage was $645.75, with a corresponding compensation rate of $430.52. (R. p. 441). Along with the Form 20, Vinyl Services attached supporting documentation and an Affidavit of Larry Bolt. (R. p. 440-96). In his Affidavit, Mr. Bolt confirmed that Bowen's proper gross wages for the four quarters preceding the alleged date of incident were attached to the Form 20. (R. p. 440). Mr. Bolt also confirmed in his Affidavit that Bowen was a salaried employee in 2008 and that in 2009, Bowen began being paid hourly wages due to a change in business operations. Id. Mr. Bolt's Affidavit was notarized by Luann B. Certain, a Notary Public for South Carolina. Id.

STANDARD OF REVIEW

In workers' compensation cases, the South Carolina Workers' Compensation Commission is the trier of fact. Hunter v. Patrick Construction Co., 289 S.C. 46, 344 S.E.2d 613 (1986). The appellate court's review of these findings of fact is limited to determining whether the findings are clearly unsupported by substantial evidence in the record. Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981); Howell v. Pacific Columbia Mills, 291 S.C. 469, 354 S.E.2d 384 (1987). "Substantial evidence" necessary to support a decision of the Commission is:

> such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. . . . It must be enough to justify, if the trial were [sic] to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury. . . . This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.

Lark v. Bi-Lo, Inc., 276 S.C. at 136, 276 S.E.2d at 307.

The appellate court is prohibited from overturning findings of fact of the Commission, unless there is no reasonable probability that the facts could be as related by the witness upon whose testimony the finding was based. Lowe v. Am-Can Transport Services, Inc., 283 S.C. 534, 324 S.E.2d 87 (Ct. App. 1984). The appellate court is not permitted to re-weigh the evidence and to substitute its own findings of fact for those of the Commission. Brown v. Jordan Oil Co., 291 S.C. 272, 353 S.E.2d 280 (1987).

Section 1-23-380(A)(5) of the South Carolina Code also provides:

> The Court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. The Court may affirm the decision of the agency or remand a case for further proceedings. The Court may

> reverse or modify the decision if substantial rights of the Appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are . . . (d) affected by other error of law; (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. . . .

S.C. Code Ann., § 1-23-380(A)(5) (2007)(emphasis added).

An appellate court has the power upon review to reverse or modify a decision of an administrative agency if the findings and conclusions of the agency are (1) affected by an error of law, (2) clearly erroneous in view of the reliable and substantial evidence on the whole record, or (3) arbitrary or capricious or characterized by abuse of discretion or a clearly unwarranted exercise of discretion. Gray v. Club Group, Ltd., 339 S.C. 173, 182, 528 S.E.2d 435, 440 (Ct. App. 2000). "The determination of legislative intent is a matter of law." Charleston County Parks & Rec. Comm'n v. Somers, 319 S.C. 65, 67, 459 S.E.2d 841 (1995).

ARGUMENTS

I.

THE COMMISSION PROPERLY DETERMINED THAT BOWEN'S AVERAGE WEEKLY WAGE FOR HIS ALLEGED NOVEMBER 11, 2009 REPETITIVE TRAUMA CLAIM IS $645.75, FOR A CORRESPONDING COMPENSATION RATE OF $430.52.

The evidence in the record clearly supports the Commission's determination that Bowen's average weekly wage for his alleged November 11, 2009 repetitive trauma claim is $645.75, with a corresponding compensation rate of $430.52.

South Carolina Code Ann. § 42-1-40 (2007) defines "Average weekly wage" as "the earnings of the injured employee in the employment in which he was working at the time of the injury during the period of fifty-two weeks immediately preceding the date of injury..." When employment, prior to the injury, extends for over a period of fifty-two weeks, S.C. Code Ann. § 42-1-40 specifically states that "average weekly wage **must** be calculated by taking the total wages paid for the last four quarters immediately preceding the quarter in which the injury occurred . . . divided by fifty-two or by the actual number of weeks for which wages were paid, whichever is less." (emphasis added).

When interpreting statutes, the primary rule of statutory construction requires that legislative intent prevail if it can reasonably be discovered in language used construed in light of the intended purpose. Stephen v. Avins Construction Co., 324 S.C. 334, 478 S.E.2d 74 (Ct. App. 1996). Words must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation. Id. Additionally, under the rules of statutory interpretation, use of words such

as "shall" or **"<u>must</u>"** indicates the legislature's intent to enact a **mandatory** requirement. <u>Bradley v. Doe</u>, 374 S.C. 622, 649 S.E.2d 153 (Ct. App. 2007)(emphasis added).

In the present case, Bowen's alleged injury occurred on November 11, 2009. (R. p. 51). While an accurate Form 20 was not available at the original hearing, the Hearing Commissioner left the record open for Bridgefield to submit a Form 20 for Bowen's alleged November 11, 2009 claim. (R. p. 65, line 23–p. 66, line 18). Following the hearing, Bridgefield submitted a Form 20 with Bowen's proper gross wages for the four quarters preceding his alleged November 11, 2009 injury. (R. p. 441). Along with the Form 20, Bridgefield submitted supporting documentation, as well as an Affidavit from Vinyl Services confirming the accuracy of the Form 20. (R. pp. 440-496). Pursuant to S.C. Code Ann. § 42-1-40, the Form 20 that was submitted to the Hearing Commissioner properly calculated Bowen's average weekly as $645.75, with a corresponding compensation rate of $430.52. (R. p. 441). Thus, the Hearing Commission determined that Bowen's average weekly wage was $645.75. (R. p. 32). This finding was affirmed by the Commission's Appellate Panel. (R. p. 11).

As noted above, when employment, prior to the injury, extends for over a period of fifty-two weeks, S.C. Code Ann. § 42-1-40 specifically states that "average weekly wage **<u>must</u>** be calculated by taking the total wages paid for the last four quarters immediately preceding the quarter in which the injury occurred . . . divided by fifty-two or by the actual number of weeks for which wages were paid, whichever is less." (emphasis added). Because the Commission made no error in calculating Bowen's average weekly wage based on this portion of S.C. Code Ann. § 42-1-40, Bridgefield

respectfully requests that the Court affirm the Commission's calculation of Bowen's average weekly wage.

In his brief, Bowen alleges that the Commission erred in calculating his average weekly wage because there were exceptional reasons to justify deviation from the usual way of calculating average weekly wage in this case. In support of his position, Bowen relies on the following portion of S.C. Code Ann. § 42-1-40:

> "When for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury."

However, substantial evidence clearly indicates that there were no exceptional reasons in this case to deviate from the normal calculation of average weekly wage pursuant to S.C. Code Ann. § 42-1-40.

First, Bowen alleges that the Commission erred in failing to use exceptional reasons in calculating his average weekly wage because Bridgefield failed to provide an accurate Form 20 at the underlying hearing in this matter. Bowen relies on Regulation 67-1603(G), which states that failure to properly file or serve the Form 20 "**may** result in a fine and/or the commissioner or claims mediator determining the average weekly wage and compensation rate from information in the Commission's file and statements or evidence presented at the hearing or conference." 42 S.C. Code Ann. Regs. 67-1603(G) (2007)(emphasis added). **The term "may" expressly recognizes substantial discretion.** Haig v. Agee, 453 U.S. 280 (1981)(emphasis added).

While Bowen contends that the Commission erred in leaving the record open for Bridgefield to file a proper Form 20 and that the Commission erred in failing to rely

solely on the information in the file at the time of the hearing, specifically Bowen's 2008 tax returns, it is clear that the Commission had discretion to leave the record open to allow Bridgefield to submit a proper Form 20. As the Supreme Court of South Carolina has previously held, the Court will not disturb the trial judge's decision on appeal unless a manifest abuse of discretion is found resulting in an error of law. Graham v. Beverly, 235 S.C. 222, 110 S.E.2d 923 (1959). Moreover, the error of law must be so opposed to the trial judge's sound discretion as to amount to a deprivation of the legal rights of the party. O'Shields v. Caldwell, 208 S.C. 245, 37 S.E.2d 665 (1946). In the present case, it is clear that the Commission did not abuse its discretion or deprive Bowen of his legal rights by leaving the record open and allowing Bridgefield to submit a correct Form 20, which included supporting documentation and an affidavit from Vinyl Services confirming the accuracy of the Form 20. As such, Bridgefield requests that the Court affirm the Commission's finding regarding Bowen's average weekly wage and compensation rate.

Additionally, Bowen alleges that the Commission erred in failing to use the figures in his 2008 W-2 to calculate his average weekly wage. Bowen specifically contends that his 2008 W-2 is the best indication of Bowen's probable future earning capacity. However, Bowen's argument is obviously flawed. Bowen was a salaried employee in 2008. (R. p. 440). In early 2009, Bowen was taken off of salary and was subsequently paid at an hourly rate due to a change in the business operation. Id. Thus, Bowen's probable future earning capacity is not indicated by his 2008 W-2, which was based solely on Bowen's previous salary. If anything, the best indication of Bowen's probable future earning capacity would be based on his wages for the time he was an

hourly employee, which would result in a lower average weekly wage of $552.58, yielding a corresponding compensation rate of $368.40.

However, since Bridgefield did not appeal the calculation of Bowen's average weekly wage, Bridgefield respectfully requests that the Court affirm the Commission's finding that Bowen's average weekly wage for his alleged November 11, 2009 repetitive trauma claim is $645.75, for a corresponding compensation rate of $430.52.

II.

SUBSTANTIAL EVIDENCE SUPPORTS THE COMMISSION'S DECISION REGARDING BOWEN'S ENTITLEMENT TO TEMPORARY TOTAL DISABILITY BENEFITS.

Assuming arguendo that Bowen's job with Vinyl Services was a repetitive job under S.C. Code Ann. § 42-1-172, which Bridgefield adamantly denies, the Commission properly determined that Bowen was entitled to temporary total disability benefits from December 20, 2009, not November 11, 2009.

Bowen contends that he is entitled to temporary total disability benefits from November 11, 2009 to the present and continuing. However, **Bowen was not written out of work by a physician until January 20, 2010**, when Dr. Lucas wrote Bowen "out of work from 11/11/2009 until he is seen back after his MRI." (R. p. 310). While Dr. Lucas wrote Bowen out of work on January 20, 2010 from November 11, 2009 and continuing, it is clear from Bowen's testimony that he did not go out of work on November 11, 2009 because of his alleged back problems. First, Bowen testified that work was slow around November of 2009. (R. p. 102, lines 9-17). In fact, he further testified that prior to going out of work in November of 2009, he was drawing some partial unemployment because work was slow:

Q: (Mr. Lewis) Okay. Now, you testified a little about November of 2009, and I'm going to clarify some of this?

A: (Bowen) Okay.

Q: You indicated that you had a conversation with Mr. Bolt; is that right?

A: Yes.

Q: Okay. Now, isn't what really happened is – and work was slow at that time; is that right?

A: That's correct.

Q: In fact, you were already drawing some partial unemployment weren't you?

A: That's correct.

Q: Because work had slowed down?

A: Correct.

(R. p. 102, lines 9-22). Additionally, Bowen specifically testified at the hearing that he originally went out of work on November 11, 2009 because business was slow and there was a temporary layoff:

Q: (Mr. Lewis) Okay. And then essentially – really what happened in November, around November 11th or 13th of 2009, is that there was a temporary type layoff; is that right?

A: (Bowen) I would say, yes.

(R. p. 103, lines 3-6)(emphasis added). As a result of the temporary layoff, Bowen began drawing full unemployment benefits:

Q: (Mr. Lewis) Okay. All right. And then when you went out you started drawing your full unemployment; is that right?

A: (Bowen) Right.

(R. p. 103, lines 12-14). It is clear from Bowen's testimony that he went out of work on or about November 11, 2009 because of a temporary layoff, not because he was unable to

work. Thus, substantial evidence clearly supports the Commission's decision that Bowen was entitled to temporary total disability benefits from December 20, 2009, not November 11, 2009.

Finally, and most importantly, following the original hearing, the Hearing Commissioner held a telephone conference with the parties and to discuss the inconsistencies in the Hearing Commissioner's Order Instructions. **During the telephone conference the parties agreed to temporary total disability benefits starting on December 20, 2009 and continuing.**

Therefore, assuming that Bowen's alleged November 11, 2009 repetitive trauma injury is compensable, which Bridgefield denies, Bridgefield respectfully requests that the Court affirms the Commission's finding regarding Bowen's entitlement to temporary total disability benefits.

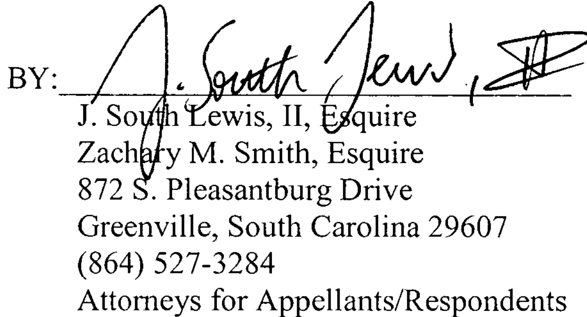
CONCLUSION

Respondent Bridgefield continues to deny that Bowen's alleged November 11, 2009 repetitive trauma injury is compensable. However, assuming arguendo that the South Carolina Court of Appeals affirms the South Carolina Workers' Compensation Commission's decision regarding compensability, Bridgefield respectfully requests, based on the foregoing, that the Court also affirms the Commission's findings regarding average weekly wage and temporary total disability benefits.

Respectfully submitted,

WILLSON JONES CARTER & BAXLEY, P.A.

BY:



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March 15, 2012

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

SCWCC No. 0920040

John R. Bowen, Respondent/Appellant,

v.

Vinyl Services, Inc. South Carolina Builders
SIF and Bridgefield Casualty Ins. Co., Defendants,

Of whom Vinyl Services, Inc. and Bridgefield
Casualty Ins. Co. are Appellants/Respondents.

CERTIFICATE OF COUNSEL

The undersigned certifies that the Final Briefs comply with Rule 211(b), SCACR.

March 19, 2012

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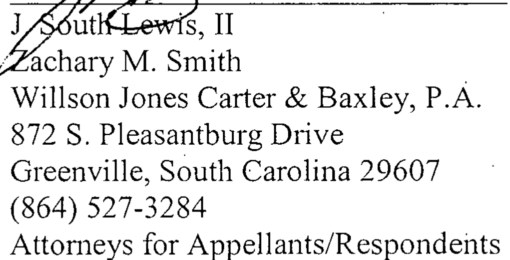
PROOF OF SERVICE

I certify that I have served the Final Brief of Appellants, Final Reply Brief of Appellants, and Final Brief of Respondents on John R. Bowen by depositing a copy of it in the United State Mail, postage prepaid, on March 19, 2012, addressed to his attorney of record, Kathryn Williams, Esquire, Kathryn Williams, P.A., P.O. Box 10693, Greenville, South Carolina 29603.

March 19, 2012



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