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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

WCC File No. 1406130

Billy Wayne Herndon, Employee, Claimant .....Appellant-Respondent,

v.

G & G Logging, Inc., Employer, and
Palmetto Timber S.I. Fund c/o Walker,
Hunter & Associates, Inc., Carrier..... Respondents-Appellants.

PETITION FOR REHEARING

Pursuant to Rules 221 and 240, SCACR, Respondents-Appellants G & G Logging, Inc. and Palmetto Timber S.I. Fund c/o Walker, Hunter & Associates, Inc. (jointly referred to herein as "Respondents"), hereby petition this Court to rehear its Unpublished Opinion No. 2019-UP-305, filed August 21, 2019. This Court overlooked or misapprehended the fact there is no evidence to support a conclusion that Claimant Billy Wayne Herndon would have continued to work after he reached the $15,000 earnings cap, and/or that he was aware of the change in the IRS statute argued by his counsel. This Court also overlooked or misapprehended relevant and controlling precedent in holding that the determination of whether exceptional reasons exist under S.C. Code Ann. § 42-1-40 is purely a question of law. This Court erred in reversing the Commission's that finding exceptional circumstances exist to deviate from the standard method

of calculating Claimant's average weekly wage ("AWW"), that Respondents are not entitled to a credit for overpayment of TTD benefits in this case, and then remanding for a re-determination of the same. This Court erred in determining that it was proper to give more weight to Dr. Johnson's evaluation on the sole basis that it occurred nearly three weeks after Dr. Gee's evaluation. This Court also erred and usurped the Commission's fact-finding role by modifying the Full Commission's finding that Claimant suffered a second, separate injury to his left upper extremity, and subsequently finding, as a finding of fact, that "his neck (cervical spine) injury negatively affected and impaired his left upper extremity, entitling him to total and permanent disability."

ARGUMENTS

I. This Court erred in reversing the Commission's that finding exceptional circumstances exist in this case, and then remanding for a re-determination of the same.

A. The determination of whether exceptional circumstances exist to deviate from the primary method of calculating AWW is not purely a matter of law.

This Court accepted Claimant's argument that "[d]etermining whether an exceptional reason exists 'for purposes of applying the standard wage calculation method provided by the Workers' Compensation Act is a question of law,'" citing Elliott v. South Carolina Dept. of Transp., 362 S.C. 234, 237, 607 S.E.2d 90, 92 (Ct. App. 2004). The actual finding in Elliott was that "[t]he determination of *whether Elliott's raise constitutes an 'exceptional reason'* for purposes of applying the standard wage calculation method provided by the Workers' Compensation Act is a question of law." Id. (emphasis added). In Elliott, the parties had stipulated to the facts, including that the claimant had obtained her CDL license which resulted

in a five percent raise effective 11 days before her injury. Whether that pay raise constituted an exceptional reason was a matter of law, but the underlying fact establishing the pay raise on which the legal conclusion rested was not. Furthermore, where the facts are not in dispute, as was the case in Elliott, reviewing courts are free to determine the matter as they see fit. *See also* Whitworth v. Window World, Inc., 377 S.C. 637, 640, 661 S.E.2d 333, 335 (2008) (where the relevant facts are not disputed, a reviewing court is free to determine issues as a matter of law). In contrast, here the facts underlying the calculation of AWW are in dispute and the Commission's resolution of the conflict in the evidence must be upheld by a reviewing court if supported by substantial evidence., *see, e.g.*, Anderson v. Baptist Med. Ctr., 343 S.C. 487, 492-93, 541 S.E.2d 526, 528 (2001) (where there is a conflict in the evidence, either by different witnesses or the testimony of the same witness, the factual findings of the Commission are conclusive); Sharpe v. Case Prod., Inc., 336 S.C. 154, 160, 519 S.E.2d 102, 105 (1999) ("[w]here there is a conflict in the evidence, the Commission's findings of fact are conclusive"), which it is in this case.

In other words, while the determination of whether a particular set of facts, as found by the Commission, constitutes exceptional circumstance under Section 42-1-40 is a matter of law, much as whether a hip joint is part of the leg or the pelvis for workers' compensation purposes is a matter of law, Gilliam v. Woodside Mills, 319 S.C. 385, 387 461 S.E.2d 818, 819 (1995) (affirming this Court's determination as "a matter of law whether the hip socket is part of the pelvis or part of the leg"), or whether the rotator cuff is part of the shoulder, Therrell v. Jerry's, Inc., 370 S.C. 22, 26, 633 S.E.2d 893, 895 (2006) (deciding, as a matter of law, "whether compensation for a torn rotator cuff is limited to the scheduled recovery for the loss of use of an

arm, or whether the injury is instead an unscheduled injury under *§ 42-9-30(20)*"), the duty to find those underlying facts, particularly where they are in conflict, lies with the Commission, not the reviewing court. Put differently, determining the circumstances surrounding a claimant's work and pay history are findings of fact; determining whether those circumstances are exceptional for purposes of calculating AWW under Section 42-1-40 is a matter of law. Here, the Court has combined both the fact finding and the legal reasoning part of the exercise, rather than accepting the facts relative to AWW as found by the Commission and then applying the law to those facts.

In Bennett v. Gary Smith Builders, 271 S.C. 94, 245 S.E.2d 129 (1978), the Supreme Court observed that S.C. Code Ann. 42-1-40 "obviously takes into consideration the *fact* that unusual circumstances relative to employment may occur," and, as a result, "[a]n elasticity or flexibility is permitted with a view toward always achieving the ultimate objective of reflecting fairly a claimant's probable future earning loss." 271 S.C. at 98, 245 S.E.2d at 131 (emphasis added). In reality, it is a mixed finding of fact and law. *See, for example*, Brunson v. Wal-Mart Stores, Inc., 344 S.C. 107, 112-113, 542 S.E.2d 732, 734-735 (Ct. App. 2001) (remanding to the Commission "for the purpose of making a *factual finding* as to how long Brunson would have worked both jobs during the holidays. Upon making this factual determination, the full commission should reconsider the calculation of Brunson's average weekly wage in light of the exceptional reason of his temporary dual employment solely over the holiday season") (emphasis added); Forrest v. A.S. Price Mech., 373 S.C. 303, 309, 644 S.E.2d 784, 787 (Ct. App. 2007) (analyzing the Commission's determination that exceptional circumstances exist by relying on five *factual* findings made by the Commission, including the claimant's relative youth, his work

ethic, his work history the employer's knowledge of same, the severity of his injury). Moreover, the Commission possesses "broad discretion in determining [whether] exceptional circumstances exist[]" based on the facts before it. Forrest, 373 S.C. at 309, 644 S.E.2d at 787.

In fact, in Sellers v. Pinedale Res. Ctr., 350 S.C. 183, 564 S.E.2d 694 (Ct. App. 2002), this Court specifically found "*substantial evidence in the record* to support the commission's determination that Sellers most probably would have been earning and was thus entitled to a compensation rate of an electrician were it not for his spinal cord injury." 350 S.C. at 192, 564 S.E.2d at 699 (emphasis added). Here, however, the Court can search the record (as opposed to counsel's legal argument) and will find no evidence that Claimant was aware of or would have continued to work at the same pace because of the change in IRS regulations concerning the earning cap.

In this case, the Commission found that: 1) Claimant voluntarily retied in 2012; 2) he returned to the workforce to work *part-time* in order to supplement his income; 3) in 2012, he earned $7,780.00 and in 2013, he earned $8,806.50 while working for Bootle; 4) in 2014 he was hired part-time by G&G and, prior to his accident, had made $9,284.00; 5) "Claimant testified that it was his intention in 2014 following his voluntary retirement to limit his earnings up to the Social Security retirement offset cap of $15,480.00 so as to avoid his retirement benefits being offset"; and, 6) Claimant advised George Page during a vocational evaluation with George Page of "his plan to limit his earnings up to the Social Security retirement offset amount of $15,000.00 so his retirement benefits would not be reduced." (R. p. 42). Those findings are supported by substantial evidence in the record, (R. pp. 117-120, 141, 288), and, therefore, must be upheld on appeal. Anderson, 343 S.C. at 492-93, 541 S.E.2d at 528; Sharpe, 336 S.C. at 160, 519 S.E.2d at

105. Furthermore, those findings of fact are adequate to support the Commission's conclusion of law that exceptional reasons exist to calculate Claimant's wages in a manner that obtains a result that is fair and just to both parties. *See* Sellers, 271 S.C. at 98-99, 245 S.E.2d at 131; *see also* Foreman v. Jackson Minit Markets, Inc., 265 S.C. 164, 169, 217 S.E.2d 214, 216 (1975) ("[t]he rule [of fairness] operates impartially in both directions")

There was no finding, and there is no evidence to support this Court's conclusion that Claimant would have known about the change in the Social Security earnings cap and, if so, that he would have continued to work at the same pace and rate the remainder of the year and for years following that. The first reference to the change in Social Security law was in Claimant's brief to the Full Commission. (Supp. R. pp. 61-67) (arguing against applying "the vagaries of the social security law to reach the outcome" Respondents sought pursuant to Bennett). Claimant's counsel speculated that "Claimant may have needed to work as much as his employer required in order to keep his job" with G&G, and argued that his earnings record with Bootle did not count because that was a different employer. Claimant's counsel followed with a discussion of social security law, the withholding amount if he had exceeded the earnings cap in 2014 and, under current law, the change in that cap once he reached the age of 66. However, argument of counsel is not evidence. *See, e.g.*, Bowers v. Bowers, 304 S.C. 65, 68, 403 S.E.2d 127, 129 (Ct. App. 1991). There is nothing in the record that suggests Claimant was aware of this change in the law and/or that he would have earned an annual amount significantly greater than that which he had earned the prior years following his retirement. As the Commission found, Claimant went back to work part-time to supplement, not replace, his social security income. As a result,

finding as a matter of fact that Claimant was aware of and/or would have continued to work past the earnings cap is pure speculation.

Claimant's counsel made much of the fact that, once Claimant turned 66, he no longer would be subject to an earnings cap. This Court appears to have agreed that this point distinguishes the instant case from Bennett. However, as was pointed out at oral argument, the facts in Bennett with respect to when the earnings cap would have disappeared are quite similar to the instant case. Bennett quit work at age 62, nine years prior to his May 6, 1975 injury, meaning he was 71 at the time he was injured. 271 S.C. at 96, 245 S.E.2d at 130. In 1954, the age at which the Retirement Earnings Test ("RET") "no longer applied was reduced from 75 to 72." Larry DeWitt, SSA Historian, "Special Study #7: The History and Development of the Social Security Retirement Earnings Test, August 1999, p. 3.[1] In 1972, the law was further changed such that "the $1 for $1 reduction was replaced entirely by a $1 for $2 reduction for all earnings above the exempt amount. This meant that no beneficiary would suffer a net loss of income due to additional earnings." (Id., p. 4). Thus, at the time of his injury, Bennett was a year away from not facing any earnings cap and, in addition, adjustments had been made to the deductions so that "no beneficiary would suffer a net loss of income due to additional earnings." (Special Study #7, p. 4). These are the very arguments that Claimant's counsel put forward to distinguish Bennett from the instant case. (Supp. R. pp. 64-67). However, in light of the historical evolution of the earnings cap, when and how it was applied, the two cases are in

[1] The relevant excerpts, which the undersigned offered to provide to the Court at oral argument, are attached hereto as Exhibit A. The full version of Special Study #7 can be obtained at https://www.ssa.gov/history/ret2.html.

substantively similar postures. As a result, the ruling in Bennett is controlling and should dictate the outcome of this case.

To the extent this Court focused on Claimant's testimony that he would work whenever he was needed and that he had no intention of not exceeding the earnings threshold in 2012 and 2013, his earnings history first two years at Bootle following his voluntary retirement indicate otherwise. If, in fact, Bootle only needed him on a limited basis, nothing prevented Claimant from picking up extra part-time work with another company during those two years. But he did not. Like the claimant in Bennett, Claimant, "for reasons satisfactory to himself, while fully capable of working, quit and withdrew his services from the labor market" after he had earned $7,780.00 in 2012 and $8,806.50 in 2013. 271 S.C. at 98, 245 S.E.2d at 131. There is no evidence that his financial circumstances worsened between the years he worked part-time for Bootle and when he started working part-time for G&G. Therefore, there is no reason to believe (and no facts to support a finding that) he would have continued to work for G&G once he reached the earnings cap. The fact that Claimant testified that he and G&G had talked about what to do after he reached the earnings threshold and would make a decision at that point, does not support a conclusion, based on the other evidence in this record that he would have continued to work. This is especially so where Claimant specifically testified that he intended to limit his earnings in 2014 so as to not exceed the earnings cap. (R. pp. 119). Anderson, 343 S.C. at 492-93, 541 S.E.2d at 528 (where there is a conflict in the evidence, either by different witnesses or the testimony of the same witness, the factual findings of the Commission are conclusive); Sharpe, 336 S.C. at 160, 519 S.E.2d at 105 ("[w]here there is a conflict in the evidence, the Commission's findings of fact are conclusive"). Furthermore, there is no evidence that G&G

would have had as much work available to Claimant the rest of the year as they had prior to his injury.

For all the reasons stated above, this Court should grant rehearing and affirm the Commission's determination that exceptional reasons exist to deviate from the standard calculation of Claimant's AWW and that, based on controlling case law, including Bennett, the Commission properly determined Claimant's AWW was $297.63 with a corresponding compensation rate of $198.47.

B. This Court erred in reversing the Commission's award of a credit to Respondents for TTD payments.

Pursuant to established precedent, an employer is entitled to credit for TTD benefits that were made when not due and payable. *See, e.g.*, Brittle v. Raybestos-Manhattan, Inc., 241 S.C. 255, 257, 127 S.E.2d 884, 885 (1962) ("[t]he payments contemplated by [what is currently S.C. Code Ann. § 42-9-210], for which credit may be allowed, are those made by the employer to the employee for disability, which by the terms of the Workmen's Compensation Act were not due and payable when made"); *see also* Muir v. C.R. Bard, Inc., 336 S.C. 266, 298, 519 S.E.2d 583, 599 (Ct. App. 1999) (Commission's decisions to award or deny a credit is binding on appeal "unless there is an absence of competent evidence to support them"). Because this Court reversed the Commission's finding that exceptional reasons exist to deviate from the standard wage calculation and the Commission's determination of the same, it also reversed the Commission's award of a credit. Logically, however, should this Court correctly determine that the Commission's findings of fact regarding Claimant's AWW support its discretionary finding that exceptional reasons exist and that Claimant's AWW properly should be $297.63, with a

corresponding compensation rate of $198.47, Respondents are entitled to a credit of overpayment of TTD. Moreover, in light of the fact that the only reason this Court overturned the credit to Respondents was because it disagreed with the Commission's calculation of Claimant's AWW and corresponding compensation rate, once Claimant's AWW is determined, and assuming that the corresponding compensation rate is less than $463.36, Respondents are entitled to a credit for any overpayment.

This Court should grant rehearing and clarify that the only reason it reversed the grant of a credit to Respondents was because it overturned the Commission's determination of Claimant's AWW and, once that issue is properly resolved, Respondents are entitled to a credit of any TTD payments, assuming Claimant's correct compensation rate is $198.47 or, in any event, an amount less than $463.36.

C. This Court erred in reversing the Commission's determination that exceptional circumstances exist in this case, and then remanding for a re-determination of the same.

This Court's reversal and remand on the AWW issue is problematic on a number of fronts. First, as noted above, because this Court erred in reversing the Commission's determination that exceptional reasons exist to deviate from the primary method of calculating Claimant's AWW, that finding by the Commission should, instead, be affirmed.

In addition, however, this Court "reverse[d] the Full Commission's finding that exceptional reasons existed to deviate from the standard wage calculation and its recalculation of Claimant's AWW," which issues were remanded "to the Full Commission to determine whether there were exceptional reasons to deviate from the standard wage calculation, to calculate the proper amount of Claimant's AWW, and to determine if Employers are entitled to a credit for

overpaid TTD benefits." Furthermore, "[o]n remand, the record may be opened to allow either party to present evidence as to the AWW or that exceptional reasons have arisen since the Full Commission's order to deviate from the standard wage calculation and to recalculate Claimant's AWW." (Op. No. 2019-UP-305, pp. 10, 15).

Because this Court did not find a lack of evidence to support the Commission's calculation of the AWW, it is unclear what evidence this Court envisions will be submitted at the remand hearing. If the purpose of this remand is so that Claimant can elicit or create testimony or other evidence showing that he was aware of the change in IRS law and/or that he did intend to work over the existing earnings cap, that is tantamount to an admission that Claimant failed to present any such evidence, as opposed to argument of counsel, to the Commission.

Parties are required to present all their relevant evidence at the Single Commissioner hearing. S.C. Code Reg. § 67-613(a) ("[e]ach party shall arrange and present all evidence at the hearing"). In addition, the fact that "[t]he average weekly wage and compensation rate is an issue for determination at the hearing unless stipulated by the parties," S.C. Code Reg. § 67-606(a), lends even more weight to the requirement that both sides present all their relevant evidence concerning the wage calculation at the evidentiary hearing. Remanding so that Claimant can create or produce additional evidence to support a higher AWW at this time unfairly would allow him a second bite at proving his claim. *See*, Therrell, 370 S.C. at 30, 633 S.E.2d at 896 (no reason to remand to the Commission to allow the claimant a "second bite at the apple"); *see also* Spruill v. Richland County Sc. Dist. 2, 363 S.C. 61, 65, 609 S.E.2d 524, 526 (2005) (upholding the Commission's interpretation of S.C. Code Reg. § 67-609 because, "even if

it were ambiguous,[2] we would defer to the commission's interpretation since it reflects a sound policy decision not to permit disgruntled claimants a second 'bite at the apple'"); *cf.* Clade v. Champion Labs, 330 S.C. 8, 11, 496 S.E.2d 856, 858 (1998) (the claimant has the burden of proving he or she is entitled to benefits under the Act). There is no evidence in this case that Claimant was prevented from presenting his entire case or any relevant evidence at the Single Commissioner hearing. Thus, there is no reason to allow him another chance to prove his claim, including his AWW.

It is difficult to discern what this Court envisions by referring to evidence as to whether exceptional reasons might "have arisen *since* the Full Commission's order to deviate from the standard wage calculation." (Op. No. 2019-UP-305, p. 10) (emphasis added). Since a post-injury wage increase is not relevant to a determination of a claimant's AWW, Roberts v. McNair Law Firm, 366 S.C. 50, 54, 619 S.E.2d 453, 456 (Ct. App. 2005), it is difficult to conceive of factual developments after Claimant's injury, in fact after the Full Commission Decision, that would be legally appropriate to consider in calculating his AWW.

As a result, this Court should grant rehearing and hold that the Commission properly determined that, based on the evidence before it, exceptional reasons exist to deviate from the standard wage calculation.

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[2] Here, the Commission's regulations unambiguously provide that, "[w]hen using a Form 20 results in a compensation rate that is *not fair and just to either the employer or the claimant*, an alternative method of computing the average weekly wage may be used which will most nearly approximate the amount the injured employee would be earning were it not for the injury." S.C. Code Reg. § 67-1603(A) (emphasis added). The Commission interpreted and applied this regulation properly.

II. This Court erred in determining that it was proper to give more weight to Dr. Johnson's evaluation on the sole basis that it occurred almost three weeks after Dr. Gee's evaluation.

While this Court correctly determined that affording more weight to Dr. Johnson's opinion on the basis of the location of his office versus Dr. Gee's office was arbitrary, it overlooked or misapprehended the significance of the less than three weeks separating Dr. Johnson's evaluation from Dr. Gee's. While in certain circumstances it may be rational to rely more heavily on the most recent medical evaluation, where the time separating two evaluations is less than three weeks, without more, any such reliance is arbitrary and capricious.

First, there is absolutely nothing in Dr. Johnson's opinion that indicates any worsening of symptoms since Claimant saw Dr. Gee, (R. pp. 269-271), as this Court's Opinion appears to suggest. (Op. No. 2019-UP-305, p. 11). Furthermore, Claimant did not testify that his symptoms worsened between seeing Dr. Gee and Dr. Johnson. (R. pp. 86-68). In fact, Claimant testified that the MRI reviewed by Dr. Johnson was the one taken at the emergency room when he thought he was having a heart attack. (R. p. 123). That was performed in June following his May 12, 2014 accident. (R. pp. 102-103). Dr. Johnson conducted his evaluation in June 2015, nearly a year later. Thus, there simply is no evidence in this record that Dr. Johnson's evaluation captured some change in Claimant's condition from his condition when he saw Dr. Gee three weeks earlier.

While there may be a legitimate concern about medical evidence that is stale or outdated by the passage of time, *see* Smith v. South Carolina Dep't of Mental Health, 329 S.C. 485, 499, 494 S.E.2d 630, 637 (Ct. App. 1997) (expressing concern over relying on medical evidence that was "more than two years old at the time of the hearing"), where there is no evidence whatsoever

that a claimant's condition has changed or worsened between two medical evaluations close in time, as is the case here, it is inherently arbitrary and capricious to afford greater weight to the latter evaluation just because it is slightly later. As Respondents have pointed out previously, this Court's Opinion, if not corrected on rehearing, will result in a "race" among parties to schedule doctors' visits, with each side vying to schedule the last possible appointment prior to hearing so as to secure the greatest weight from the Commission. Such a result is irrational, and is incompatible with the Act.

And, while it is the Commission's role and prerogative to resolve conflicts in the evidence, Anderson, 343 S.C. at 492-93, 541 S.E.2d at 528; Sharpe, 336 S.C. at 160, 519 S.E.2d at 105, to do so for arbitrary and capricious reasons is in violation of the Administrative Procedures Act, and constitutes reversible error. S.C. Code Ann. § 1-23-380(A)(5); *see also* Trimmier v. S.C. Dep't of Labor, 405 S.C. 239, 246, 746 S.E.2d 491, 495 (Ct. App. 2013) ("[a] decision is arbitrary if it is without a rational basis, is based alone on one's will and not upon any course of reasoning and exercise of judgment, is made at pleasure, without adequate determining principles, or is governed by no fixed rules or standards"), *quoting* Deese v. S.C. State Bd. Of Dentistry, 286 S.C. 182, 184-85, 332 S.E.2d 539, 541 (Ct. App. 1985).

As a result, this Court should grant rehearing and reverse the Commission's decision to afford greater weight to Dr. Johnson's evaluation and rating on bases that are arbitrary and capricious.

III. This Court erred and usurped the Commission's fact-finding role by modifying the Full Commission's finding that Claimant suffered a second, separate injury to his left upper extremity, and subsequently finding, as a factual matter, that "his neck (cervical spine) injury negatively affected and impaired his left upper extremity, entitling him to total and permanent disability."

As this Court noted, the Commission based its finding of total and permanent disability on the premise that Claimant suffered "additional causally-related injuries to his left shoulder, left arm, left hand, and fingers." (R. p. 43). The Commission did not determine that Claimant's left shoulder, left arm, left hand and fingers had been affected by his work-related accident, pursuant to Singleton v. Young Lumber Co., 236 S.C. 454, 471, 114 S.E.2d 837, 845 (1960) ("[w]here [an] injury is confined to a scheduled member, and there is no *impairment* of any other part of the body because of such injury, the employee is limited to the scheduled compensation") (emphasis added), and its progeny.[3] And while this Court notes that "every doctor Claimant saw noted Claimant's continued complaints of both neck and left upper extremity pain" and pain down his left arm, this Court failed to acknowledge that, after he performed surgery on Claimant's cervical spine, Dr. Pacult noted that Claimant's pain and numbness were markedly improved and that Claimant had an essentially normal neurological examination. Dr. Pacult testified that a normal neurological examination meant Claimant did not have paralysis or numbness and did not have weakness in the left arm. Claimant's only symptom was *subjective pain complaints*. (R. pp. 274, 279, Pacult Dep. p. 9, lines 4-13, p. 26, lines 1-13). Dr. Pacult also opined there were no objective findings to support the subjective complaints of pain. (R. p.

[3] *See also* Wigfall v. Tideland Utils., 354 S.C. 100, 104, 580 S.E.2d 100, 102 (2003) ("[t]he *Singleton* Court intended "impairment" to encompass a physical deficiency"); Bixby v. City of Charleston, 300 S.C. 390, 397, 388 S.E.2d 258, 262 (Ct. App. 1989) (equating "affect" to another body part with a "residual disability" to another body part).

275, Pacult Dep. p. 10, lines 11-14; p. 11, lines 17-20). Dr. Pacult further elaborated and testified, "[s]ame in this situation. Patient comes, says, 'I have pain,' but objectively there is no weakness, there is no numbness, there is no change of reflex. So subjectively he has radiculopathy; objectively he does not have." (R. p. 279, Pacult Dep. p. 26, lines 7-10). Dr. Pacult confirmed that Claimant "did not have an injury to his left arm, no, to the extremity itself, no." (R. p. 278, Dr. Pacult Dep., p. 22, lines 4-8). Dr. Gee specifically noted Claimant "does not have radicular pain or paresthesias in the left arm as he did prior to surgery." (R. p. 184).

As Respondents pointed out previously, to hold a claimant has proven injury to a second body part based solely on subjective complaints of pain alone with no supporting objective medical evidence of injury to a second body part, would allow claimants to avoid the limitations of Section 42-9-30 simply by claiming to have pain or numbness or tingling in a body part secondary to a compensable injury. Such a ruling, if upheld, would unfairly create a windfall to claimants and place an unreasonable burden on employers, who have no way of disputing purely subjective complaints of pain.

Rather than reversing the Commission and remanding for clearer or further findings of fact on this issue, this Court found, as a matter of fact and law, that Claimant's "initial injury had a disabling effect on his left upper extremity entitling him to total and permanent disability under section 49-2-10." In doing so, this Court exceeded its appellate role and engaged in fact finding, which is the Commission's role in the first instance. *See, e.g.*, McGuffin v. Schlumberger-Sangamo, 307 S.C. 184, 186, 414 S.E.2d 162, 163 (1992) (the findings of the Full Commission are presumed correct and can be set aside only if unsupported by substantial evidence or based on an error of law). And, as noted above, where the facts are not in dispute, a reviewing court is

free to determine issues as a matter of law, Whitworth, 377 S.C. at 640, 661 S.E.2d at 335, here, Claimant's authorized treating physician essentially said the only "effect" he could discern to Claimant's other alleged body parts was alleged pain complaints. "Same in this situation. Patient comes, says, 'I have pain,' but objectively there is no weakness, there is no numbness, there is no change of reflex. So subjectively he has radiculopathy; objectively he does not have." (R. p. 279, Pacult Dep. p. 26, lines 7-10). "The duty to determine facts is placed solely on the Commission and the court reviewing the decision of the Commission has no authority to determine factual issues but must remand the matter to the Commission for further proceedings. The reviewing court may not make findings of fact as to basic issues of liability for compensation, where, to do so, would impose upon the court the function of determining such facts from conflicting evidence." Bartley v. Allendale County Sch. Dist., 392 S.C. 300, 310-311, 709 S.E.2d 619, 624 (2001).

Therefore, because there is substantial evidence from Claimant's authorized treating physician that disputes that he has suffered "a disabling effect on his left upper extremity" that would entitle "him to total and permanent disability under section 49-2-10," this Court should grant rehearing, hold that it may not engage in independent fact finding where the facts are in dispute, and reverse the Commission's finding of total and permanent disability because Claimant has not proven he "suffered a second, separate injury to his left upper extremity."

CONCLUSION

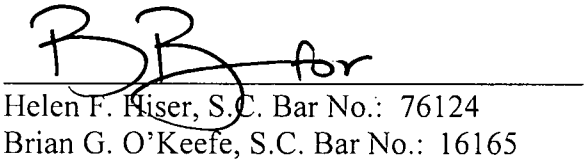
For all the reasons stated herein, Respondents respectfully request that this Court grant rehearing and 1) hold that, based on the evidence before it, the Commission properly determined exceptional reasons exist to deviate from the standard method of calculating Claimant's AWW,

affirm as a matter of fact and law the Commission's determination of Claimant's AWW as $297.63 with a corresponding compensation rate of $198.47, and affirm the award of a credit to Respondents; 2) reverse the Commission's decision to assign greater weight to Dr. Johnson's medical opinion and little weight to Dr. Gee's medical opinion, as that decision is based on irrelevant distinctions that render it arbitrary and capricious; and, 3) reverse the Commission's findings that Claimant suffered additional injuries to his left shoulder, left arm, and left hand and fingers and hold that, therefore, Claimant is not entitled to total and permanent compensation pursuant to Section 42-9-10.

Respectfully submitted,

MCANGUS GOUDELOCK & COURIE

September 3, 2019



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Special Studies

Special Study #7:

The History and Development of the Social Security Retirement Earnings Test

by Larry DeWitt,
SSA Historian

August 1999

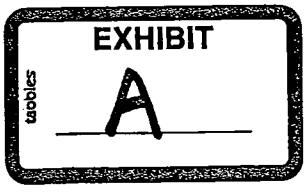
In his 1999 State-of-the-Union address, President Clinton announced his support for the idea of eliminating the Social Security Retirement Earnings Test (RET). The RET is unpopular with beneficiaries who want to have their retirement benefits and continue to work. Eliminating the RET has long been a favorite proposal in Congress. With the President's support, it is likely that the RET will soon undergo historic change. This paper examines the role and development of the RET; how it came to be part of the Social Security program, why it was created and how it evolved over the years.

The Social Security Act of 1935

The Social Security Act of 1935 contained two programs of economic security for the aged: Title I of the Act provided non-contributory, means-tested, *old-age pensions*, in the form of state welfare programs with federal funding. Title II of the Act, what is now thought of as Social Security, provided *old-age insurance* through a contributory social insurance scheme. The old-age insurance program required retirement from gainful employment as a condition of benefit receipt. For wage earners, this requirement was and is measured primarily by a test of earnings levels, hence the RET. The RET is simply the administrative form of the principle that one must be retired in order to collect retirement benefits from Social Security's old-age insurance program. The exact form of this requirement has changed considerably over the years, as we shall see, but the general principle has characterized the program from its inception.

The Retirement Test

In 1991 the House Ways & Means Subcommittee on Social Security held a hearing on the Social Security retirement test. Many of the witnesses testified in favor of repealing the RET, and several agreed with the observation of a senior Congressman from Arizona who stated: "*Social Security, when it was created in 1935, sought to*



achieve two goals-moving older workers out of the work force to make way for younger workers, and to partially replace lost income due to retirement. Those goals were applicable in 1935, but are not in 1991."(1) Around the same time, a member of Congress from California authored a column in the *Los Angeles Times* in which he stated: "*So how did this regressive and unproductive test become policy? It was born out of Depression-era reforms in 1935 to create jobs during the most grim economic period in U.S. history. Millions of older Americans were discouraged from staying employed. The earnings test reduced their overall income, making it unproductive for them to work beyond retirement age. This meant younger workers with families could have jobs.*"(2) A recent monograph for the Third Millennium group put it this way: ". . . *the paramount short-term factor in Social Security's birth-the Great Depression . . . For the short term, it was considered imperative to get the elderly out of the job market. . . Social Security still carries out this Depression-fighting aim, despite the fact that there is no longer any goal to be served by pushing seniors out of the workforce.*" (3)

This idea about the origins of the RET is very common and is often advanced in discussions about the RET.(4) Essentially, it attributes the rationale for the RET to a set of unique economic circumstances prevailing during the Great Depression and to a supposed industrial policy of removing older workers from the workforce during that period. The gist of the argument is that since this set of economic circumstances no longer obtains, and the industrial policy objective is no longer desirable, there is no present rationale for the inclusion of the RET in the Social Security program.

The problem of the "superannuated worker" is a traditional one in industrial policy and pension theory. Since the onset of the Industrial Age, older workers began to find themselves at the end of their productive working lives, often without means of support. Such older workers often tried to remain employed and employers sometimes tried to find ways to move them out of the workforce. So the idea that this industrial policy objective underlies the RET, has an initial plausibility. But it is, as we will see, largely a historical myth which has grown over time and assumed the status of "common knowledge."

The retirement decision is a complex, multi-variate phenomenon, involving considerations of health, lifestyle, workplace circumstances and psychology, as well as economics. Whether any single economic incentive, such as the RET, could have a major impact on this decision is still an open question, with the available evidence inconclusive.(5) In any case, that question is beyond the scope of this paper. We are concerned only with whether the RET could plausibly have provided such incentive effects in the context of the mid-1930s, and whether or not such incentive effects were part of the intentions and goals of the program's designers.

* * * * *

The 1952 and 1954 Amendments

Following the outbreak of the Korean War, wages and prices again soared. The administration and the Congress realized that an adjustment in the RET earnings level was in order. In the 1952 Act the exempt amounts were raised (to $75 for monthly wages and $900 a year for the self-employed), but no other significant changes were made.

Shortly after taking office, President Eisenhower announced a comprehensive review of Social Security, including the RET. Despite wide-spread criticism of the RET, the President did not propose its elimination, but did recommend further liberalizations. In a January 1954 message to Congress, President Eisenhower suggested the monthly test should be replaced by an annual test under which the first $1,000 of earnings had no impact and earnings above $1,000 would result in a monthly benefit being suspended only for each additional $80 in earnings. In providing his rationale for these changes, the President made a sweeping criticism of the RET, in terms that have resonance with contemporary criticisms:

"*. . . present law imposes an undue restraint on enterprise and initiative. Retired persons should be encouraged to continue their contributions to the productive needs of the nation. I am convinced that the great majority of our able-bodied older citizens are happier and better off when they continue in some productive work after reaching retirement age. Moreover, the Nation's economy will derive large benefits from the wisdom and experience of older citizens who remain employed in jobs commensurate with their strength.*" (41)

As a result of these many criticisms, the 1954 amendments again made significant changes in the RET. Wages were put on an annual test, like self-employment income. This was a considerable liberalization because it meant one could earn over the monthly exempt amount for several months each year without any loss of benefits provided the total earnings stayed under the annual exempt amount. However, the test was still "all or none," with the full benefit withheld when the limits were exceeded. The exempt amount was raised again, to $1,200 annually. Non-covered earnings were counted for the first time. The age at which the RET no longer applied was reduced from 75 to 72. The argument again was one of equity; that lowering the RET cap would make the program fairer to self-employed farmers, who were being covered for the first time.

The 1960 Amendments

The 1960 Amendments brought another key change in the operation of the RET. For the first time, earnings over the exempt amount did not always produce a total loss of benefits. For earnings between $1,200 and $1,500 the reduction was $1 for every $2 of earnings. For earnings over $1,500 the old rule applied. This was done to alleviate the perverse result of earnings above the exempt amount sometimes yielding a net decrease

in income, compared with simply earning up to the exempt amount. This was one of the inequities so criticized in the 1950s. From this point forward, the RET would utilize this principle.

Interestingly, neither the House nor the Senate version of the bill contained this provision as reported by the Committees of jurisdiction. The House bill had no provision regarding the RET and the Senate bill only contemplated an increase in the annual exempt amount from $1,200 to $1,800. During the House debate Ways and Means Chairman Wilbur Mills explicitly stated that no changes were suggested in the RET due to cost constraints. And since the bill was before the House on a "closed rule" no amendments were offered regarding the RET, even though several members spoke in favor of raising the exempt amount. The Senate passed the bill with the Committee provision unamended. During the Conference on the bill, the House receded to the Senate position on the exempt amount and added the provision for the $1 for $2 offset.

The 1972 Amendments

The 1972 amendments introduced another important innovation-the Delayed Retirement Credit (DRC). This credit increases the benefit amount for those workers who delay retirement past the Normal Retirement Age (NRA). The credit was initially set at 1 percent per year. This amount was raised to 3 percent in 1977. The 1983 amendments raised this credit to an eventual level of 8 percent (by 2009). For any month in which a benefit is paid, a DRC cannot be claimed. The cost of paying additional benefits to persons who continue working (if the RET were eliminated) would thus be offset by the loss of DRCs for such persons. From a cost perspective, the RET could be eliminated at the NRA in 2009 without any long-term programmatic cost.

According to Myers (42), DRCs were added to the law as a partial offset to the RET. The argument was one of fairness. It was argued that if program participants continue to work after 65, and forgo benefits due to the RET, it is only fair that they receive some additional compensation for their extra work.

This argument makes little sense in the social insurance view of the RET, since to withhold benefits in the absence of actual income loss is simply the insurance principle at work. Although DRCs can be seen as having an industrial policy objective (encouraging continued work) they do not fit neatly with the industrial policy thesis of the RET either since they imply that we have adopted two industrial policies with competing objectives (the RET encouraging retirement and the DRCs encouraging continued work). In the context of the RET, DRCs seem to make sense primarily in political or budgetary terms rather than in terms of underlying program rationale.

Also as part of the 1972 law, the $1 for $1 reduction was replaced entirely by a $1 for $2 reduction for all earnings above the exempt amount. This meant that no beneficiary would suffer a net loss of income due to additional earnings. (Because earnings were

taxable and benefits were not, substituting a dollar of earnings for a dollar of benefits could result in a net decrease in income.)

The 1972 act introduced one other very important innovation. Previously, the RET exempt amounts were only raised when a specific act of Congress mandated an increase. The 1972 law put the increases "on automatic" by tying them to increases in average earnings, starting in 1975.

The 1977 Amendments

The 1977 amendments brought considerable legislative activity surrounding the RET. The House passed a bill eliminating the RET at age 65. The Senate passed a similar bill setting the end age at 70. The Conference accepted the Senate position and the final legislation ended the RET at age 70, effective in 1982. (An amendment in 1981 later pushed the effective date back to 1983 due to short-term cost concerns.)

The 1977 law also separated the cohort aged 62-64 from the 65-69 cohort, creating a more generous RET for the second group. This was accomplished by a series of ad-hoc increases for the older group, starting in 1978, after which the automatic increases would again apply-locking in place the advantage for the older cohort. This more advantageous treatment of those past Normal Retirement Age (NRA) continues to be a prominent feature of the RET.

A final change in 1977 eliminated the monthly earnings test for all years after the year of retirement. This "de-liberalization" was done to prevent the seemingly unfair result of workers with large annual incomes receiving full benefits for months in which they did not work, whereas workers with much smaller incomes could fail to receive any benefits at all if their income happened to be spread over the entire year. Both the Ford and Carter administrations had recommended this change and it was supported by the 1975 Advisory Council as well. This is one of the few changes made in the RET over the years that had the effect of making the test less generous.

Changes in the 1980s

The 1980 Amendments partly reversed course on the monthly test question. Eliminating the monthly test for years after the initial year could result in anomalies for certain self-employed individuals and for auxiliary beneficiaries when their benefits terminated. For example, if a student received benefits while in school but graduated and went to work half-way through the year, his annual earnings might make him overpaid for the months in which he legitimately received student benefits.

As a result, the monthly test was restored for certain auxiliary beneficiaries in the year of benefit termination as well as the year of initial entitlement, and earnings from self-employment derived from work performed prior to retirement, was not counted for purposes of the RET, except in the year of initial entitlement.

The 1983 Amendments increased the offset from $1 for every $2 of excess earnings to $1 for every $3-but only for the NRA cohort. Even though this change was legislated in 1983, its effective date was 1990. This was because the thrust of the 1983 Amendments was to address short-range solvency problems and Congress did not want provisions such as this one, which had a programmatic cost, from taking effect during the 1980s while solvency was being restored.

Legislation in 1988 made two minor changes regarding the RET in death cases. Previously, in a death case the exempt amount was prorated for the months in which the beneficiary was alive. The new rule granted the full annual exempt amount. Also, the higher exempt amount for the NRA cohort was granted if the beneficiary would have attained NRA during the year even if he in fact died before reaching NRA. These two minor changes were made to prevent overpayments after death in cases where the beneficiary had properly received payments based on the annual exempt amount and then had this annual amount reduced after the fact, as it were, because of his death.

1996 Legislation

Following the 1972 changes in the law, increases in the exempt amounts were no longer determined solely by legislative fiat but were indexed to increases in average wage levels in the economy. This had the dual effect of providing regular increases and of constraining the level of those increases. However, the Contract with America Advancement Act, passed in 1996, made another departure from the indexing by again making ad-hoc increases in the exempt amounts for the NRA cohort. A schedule of increases were programmed into the law which dramatically raised the exempt levels between 1996 and 2002. Indeed, the value of the exempt amount was more than doubled, by the estimates of the Congressional Budget Office. (43)

Also, this second set of ad-hoc increases for the NRA cohort had the effect of increasing the disparity between this cohort and the age 62-64 cohort. Under the 1977 law, the exempt amount for the 62-64 group was only 72% of that for the NRA cohort in 1995. Under the estimates in the 1996 law, the percentage would fall to 35% by 2002. This can be seen as a strong disincentive for early retirement. However, since the amount for the NRA group is fixed in law, and the amount for the 62-64 group fluctuates with average wage levels, it is possible that the differential will vary slightly from the estimates by 2002.

This doubling of the exempt level also will significantly reduce the relative impact of the RET for the NRA cohort. In 1995, the most recent year for which an analysis is available, 960,000 beneficiaries were impacted by the RET as a result of earnings for the NRA group. Of this total, 806,000 were beneficiaries in the age cohort itself (the others were younger auxiliaries), who had a total of $4.1 billion in benefits withheld as a result of the RET. These figures have risen very little since 1989 when 758,000 beneficiaries in the age cohort had an identical $4.1 billion in benefits withheld. (44) Because of the indexing of

the exempt amounts, the relative impact of the RET has not changed much during this period. However, the doubling of the exempt level as a result of the 1996 changes, will eventually have a dramatic effect on the relative impact of the RET on the NRA cohort. In future years, there should be a significant drop (relatively) in the number of beneficiaries in the NRA cohort who are affected by the RET.

Also noteworthy in the context of the 1996 changes is the degree to which these changes were met with virtually universal support. Both Congressional leaders and the Administration joined in advancing the provisions, disagreeing only on the appropriate cost-offset in order to make the proposal deficit-neutral.

Significance of the Legislative Changes

The 1935 Social Security Act adopted the RET to honor the social insurance precept that the insured individual must suffer a loss of income to qualify for a benefit. Placing a dollar value on the RET in 1939 was an administrative clarification, not a policy change. Placing a dollar amount on the concept of "retired" was a technique for clarifying the test so that program administrators would not become hopelessly entangled in disputes with beneficiaries over whether or not they were in fact retired. Having accepted this principle, that retirement can be measured against a dollar standard, we can reasonably say that all subsequent increases in the exempt amount are likewise consistent with the original intent of the RET. They can be viewed, in the words of the 1947-1948 Advisory Council, as honoring the idea that the social insurance principle is "*to prevent the payment of benefits to persons who continue working for wages at or near the level of those earned during much of their working lives; such persons have not suffered the loss of earnings against which the system insures.*"

Likewise, changing the offset from an "all-or-none" character to a graduated offset, as first done in the 1960 law, does not violate the original intent of the RET, broadly construed. The graduated offset is simply another adjustment mechanism to fine tune the test to the "*wages at or near the level of those earned during much of their working lives*" construction.

The differential treatment between the age 62-64 cohort and the NRA age cohort, introduced in the 1977 Amendments and expanded many times since, adds a new policy wrinkle to the operation of the RET. From that point on, policymakers have shown a clear and persistent tendency to treat the NRA cohort more favorably, either because the negative impacts of the RET are thought to be more onerous for this group, or to discourage early retirement for the younger group, or perhaps both. This preference is not always clearly articulated in these terms, especially the disincentive for early retirement, but these are twin effects from the differential treatment.

While the application of the exempt amounts and the offsets do not fundamentally alter the basic character of the RET, we certainly cannot say the same of the elimination of the RET at ages 75, 72 and 70, as provided in the 1950, 1954 and 1977 laws. These were

fundamental shifts in the conception of the RET. For those at or above the exempt age, Social Security retirement benefits have become annuities rather than a replacement for lost earnings. Even so, it is pertinent to observe that these changes were not motivated by industrial policy concerns about workforce participation by older workers. Rather, these changes were introduced to provide greater equity to certain groups of workers and to achieve what would have to be described as a political accommodation with the natural desire on the part of beneficiaries to collect payments even though not retired.

The introduction of the Delayed Retirement Credits in 1972 is another important factor in the dynamics of the RET. In addition to creating incentives not to retire, the DRCs have the very significant effect of reducing and eventually eliminating the long-range program costs of eliminating the RET. This could well prove to be a decisive factor in future legislative activity regarding the RET.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

WCC File No. 1406130

Billy Wayne Herndon, Employee/Claimant ..... Appellant, Cross-Respondent

v.

G & G Logging, Inc., Employer, and

Palmetto Timber S.I. Fund c/o Walker,
Hunter & Associates, Inc., Carrier..... Respondents, Cross-Appellants.

PROOF OF SERVICE

I certify that I have served the Respondents' **Petition for Rehearing** on Billy Wayne Herndon by depositing a copy of it in the United States Mail, postage prepaid, on September 3, 2019, addressed to his attorney of record:

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September 3, 2019

Via Hand Delivery
The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

RE: Billy Wayne Herndon v. G & G Logging, Inc. and Palmetto Timber S.I. Fund c/o Walker, Hunter & Associates, Inc.
Date of Accident: May 12, 2014
WCC File No.: 1406130
Our File No.: 2069.14023
Claim No.: 247-92-7471
Appeal No.: 2017-000692

Dear Ms. Kitchings:

Enclosed please find the original and seven (7) copies of Respondents' Petition for Rehearing, and the original and one copy of the Proof of Service in the above-referenced matter. Please file the originals and return a clocked-in copy to the courier who delivers this filing. Also enclosed is our firm's check in the amount of $50 for filing the Petition.

If you have any questions, please do not hesitate to contact me.

Sincerely,
McAngus Goudelock & Courie, LLC

Helen F. Hiser for

Enclosures

cc: Andrea C. Roche, Esq.