THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

APPELLATE CASE NO. 2019-886

FREDDIE TARVER,

APPELLANT,

VS.

BEECH ISLAND RURAL COMMUNITY, EMPLOYER, AND AUTO-OWNERS INSURANCE COMPANY, CARRIER,

RESPONDENTS.

FINAL BRIEF OF RESPONDENTS

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The SCWCC properly determined that Tarver was not permanently and totally disabled by virtue of his ability to work and the limited significance of his injury prior to his self-imposed retirement.

The SCWCC properly determined that Tarver was not permanently and totally disabled under the "Wage Loss Model."

The SCWCC properly determined that Tarver did not sustain separate and distinct injuries to his lower extremities.

The SCWCC properly calculated the applicable compensation rate.

STATEMENT OF THE CASE / FACTS

The Appellant, Freddie Tarver ("Tarver"), sustained admitted accidental injuries primarily to the pelvis and back on April 15, 2014 when the truck he was operating slipped out of gear resulting in his having been dragged 20 to 30 feet before the truck came to a stop. He was taken from the scene to the Medical College of Georgia from which he was discharged on April 17, 2014, with diagnoses of unspecified closed fracture of the pelvis, bilateral fracture of the pubic rami, fracture of the spine, sacrum or coccyx without spinal injury, anemia associated with blood loss, contusion of soft tissue and a lumbar transverse process fracture. His subsequent treatment consisted primarily of participation in a physical therapy program and returned to his regular, full-duty job on June 17, 2014. He continued to work in that capacity until March 27, 2015, at which point he advised the Respondent/Employer of his intention to retire. Tarver confirmed that upon his return to work that he did not seek light duty work or any form of accommodation and that he continued to perform his usual job duties until the point at which he unilaterally determined that he would retire.

Since his retirement from the Respondent/Employer, Tarver continued to run a plumbing business (which he had been doing on the side while employed with the Respondent/Employer) as well as serving as an assistant preacher at his church. He also admitted that at the point at which he retired, he didn't have any restrictions from a doctor or any indication from a doctor saying that he was unable to perform the duties he had been performing for the past nine (9) months. Additionally, Tarver gave no indication to the Respondent/Employer that he could not do the work and that as far as the Respondent/Employer was concerned or as far as they knew, he was perfectly capable of

doing what he was doing. Tarver also acknowledged that since he retired his condition had deteriorated and was made worse as the result of sitting. In fact, he acknowledged that the activities that he was engaged in at work could have helped him to avoid the deterioration of his condition and that sitting at home in his retirement may have aggravated it.

A hearing on the merits was held on September 27, 2016, before The Honorable Avery B. Wilkerson, Jr., who issued a Decision and Order dated December 5, 2016, finding that Tarver sustained an injury to his back and pelvis and awarded compensation under 42-9-30 for a single body part, specifically, a 25% permanent partial disability to the back. Commissioner Wilkerson further:

- found that Tarver was not permanently and totally disabled;
- denied Tarver's request for additional medical care;
- found maximum medical improvement ("MMI") was reached on the approximate date of his return to work (*i.e.,* July 10, 2014); and
- denied compensability for any other body parts claimed by Tarver.

Tarver thereafter appealed that decision to the full commission of the South Carolina Workers' Compensation Commission ("SCWCC"). In an order dated January 22, 2019, the Full Commission reversed Commissioner Wilkerson's denial of compensation for the loss of the two teeth and ordered that the matter be remanded for additional findings of facts and conclusions of law. On June 4, 2018, Commissioner Wilkerson issued an order in which he determined that Tarver was entitled to 2% to the hip, two weeks for the loss of each tooth and concluded that S.C Code Sections 42-9-10 and 42-9-20 of the Act were inapplicable under the facts of the case. Tarver appealed that order as well and it was fully affirmed by the Full Commission. This appeal follows therefrom.

ARGUMENT

Tarver seeks to augment his retirement income by convincing this Court that he is permanently and totally disabled. Unfortunately for Tarver, neither the facts nor the law provides him with the applicable vehicle to do so.

I. STANDARD OF REVIEW

The Administrative Procedures Act ("APA") establishes the standard of review of decisions by the SCWCC. A reviewing court can reverse or modify the SCWCC's decision only if the appellant's substantial rights have been prejudiced because the decision is affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. S.C. Code Ann. § 1-23-380(5) (Supp. 2008); *Shealy v. Aiken County*, 341 S.C. 448, 454, 535 S.E.2d 438, 442 (2000). "Substantial evidence is not a mere scintilla of evidence nor evidence viewed from one side, but such evidence, when the whole record is considered, as would allow reasonable minds to reach the conclusion the [Appellate Panel] reached." *Shealy*, 341 S.C. at 455, 535 S.E.2d at 442. The possibility of drawing two inconsistent conclusions does not prevent conclusions from being supported by substantial evidence. *Tiller v. Nat'l Health Care Ctr.*, 334 S.C. 333, 513 S.E.2d 843 (1999). The final determination of witness credibility and the weight to be accorded evidence is reserved to the Appellate Panel. *Shealy*, 341 S.C. at 455, 535 S.E.2d at 442.

Appellate courts may not decide an issue neither presented below nor raised by proper exception on appeal. *Connolly v. People's Life Ins. Co. of South Carolina*, 299 S.C. 348, 384 S.E.2d 738 (1989). "Issue preservation requires a party to preserve an issue both at trial and in presentation of the issue on appeal." *Beverly S. v. Kayla R.*, 395 S.C. 399, 401,

718 S.E.2d 224, 225 (Ct. App. 2011) (citing S.C. Dep't of Transp. v. M & T Enters. of Mt. Pleasant, LLC, 379 S.C. 645, 659, 667 S.E.2d 7, 15 (Ct. App. 2008)). Nevertheless, a respondent "may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court." I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000); see also Rule 220(c), *SCACR.*

II. THE SCWCC PROPERLY DETERMINED THAT TARVER WAS NOT PERMANENTLY AND TOTALLY DISABLED BY VIRTUE OF HIS ABILITY TO WORK AND THE LIMITED SIGNIFICANCE OF HIS INJURY PRIOR TO HIS SELF-IMPOSED RETIREMENT.

The whole of the record in this matter reflects that following this accident Tarver was hospitalized for a couple of days after which he remained out of work undergoing physical therapy for approximately eight (8) weeks. He then returned to his full regular duty job on June 17, 2014, and continued to work in that capacity until March 27, 2015, when he advised the Respondent/Employer of his unilateral intention to retire. Tarver's retirement was not medically driven; in fact, no physician prior to Tarver's retirement ever viewed his post-injury limitations to be so significant as to render him permanently and totally disabled.

According to the testimony of Tarver's supervisor, David Scott, during the nine (9) month period after Tarver returned to work following the accident, he would occasionally complain of soreness though not in a manner which suggested that these complaints were any more significant than the normal soreness and tiredness that everyone experiences. Scott also noted that Tarver made similar complaints prior to the occurrence of this accident. *Record on Appeal* ("*R.*") at pp. 297-298. Scott's testimony as to the nature of

Tarver's employment was consistent with Tarver's testimony that his post-injury job responsibilities involved manual labor including operating backhoes, jackhammers, lifting meters weighing 100 pounds or more (with the assistance of others), digging ditches and lifting heavy objects onto a truck or frontend loader. Id. pp. 277-281; 298; see R. p. 141-143.

Tarver admitted that he did not have any restrictions from a doctor or any indication from any provider that he was unable to perform those duties. R. pp. 170-172. Further, Tarver did not give any indication to the Respondent/Employer that he could not do the work and that as far as the Respondent/Employer was concerned or as far as they knew, Tarver was perfectly capable of doing his job. Id. p. 172. Tarver also confirmed Scott's testimony that he never told Scott anything to suggest that he was not able to respond to calls as the result of the medications that he was taking. Id. pp. 173-174.

Tarver acknowledged that at the point he made his decision to retire, he did not have any kind of note or excuse from a doctor indicating that he was no longer able to do the work. Id. pp. 174-175. It is interesting to note that though Tarver testified to the deterioration of his condition since the point at which he retired, the primary aggravating factor he described had been sitting at home. In fact, Tarver conceded that the activities engaged in at work may have helped him to avoid the deterioration of his condition and that sitting at home in his retirement may have aggravated it. Id. pp. 174-176. This is significant in that the findings of Dr. Justin Hutcheson and Dr. Glen Adams, which were relied upon by Tarver in support of his contention that he is permanently and totally disabled, were not rendered until ***over nine (9) months after the point which he retired.***

By contrast, in his December 10, 2014 report[1], Dr. Westerkam concluded that Tarver had reached maximum medical improvement with an impairment rating of 10% to the spine or a 13% lumbar regional spine impairment. Though Tarver notes that Dr. Westerkam provided a lifting limitation of 50 pounds and the recommendation that Tarver avoid repetitive squatting, the uncontradicted evidence in the record as to his work activities during the nine (9) month period in which he returned to work would suggest that he was capable of doing more than that. ***Again, the impairment ratings relied upon by Tarver were not rendered until almost a year after the point at which he voluntarily retired.***

Tarver, however, takes the position that the mere fact that he went back to his original job after the accident is not dispositive of the question of whether he is permanently and totally disabled as prescribed by the South Carolina Workers' Compensation Act (the "Act"). In support of that position, Tarver cites several cases that are in fact inapposite to his position.

In *Clemmons v. Lowes Home Center, et al.*, 420 S.C. 282, 803 S.E.2d 268 (2017), the claimant was a cashier at Lowe's who slipped and fell, injuring his upper back. After treatment, he was released by his authorized treating physician who assigned Clemmons a twenty-five percent (25%) whole person impairment rating based on the injury to his cervical spine. Clemmons was assigned work restrictions and returned to work for Lowe's in the same position as a cashier, working eight-hour days, 40-hours per week, for two years with only minor accommodations. Lowe's eventually moved to terminate temporary total disability benefits and for a determination of permanency, if any. Clemmons obtained

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1 Generated approximately three (3) months prior to Tarver's retirement.

two other physician opinions, both stating he had lost more than 50% of the use of his back, and an opinion by a physical therapist that he had sustained a 28% impairment to his whole person, which she converted to an 80% cervical spine impairment rating. Based on the authorized treating physician's impairment rating, the Commission awarded Clemmons a 48% disability to his back under §42-9-30(21) of the Act and also determined that he had not proven he was totally disabled under §42-9-10.

Clemmons appealed and the Court of Appeals affirmed. The Supreme Court, however, reversed based on arguments that Clemmons raised for the first time before that Court. Relying on Clemmons' argument that the authorized treating physician's 25% whole person impairment rating converted to a 78% impairment to the cervical spine, the Supreme Court held that the Commission's 48% disability award was not supported by substantial evidence because, in that Court's view, all of the medical evidence supported a finding that the Claimant suffered a greater than 50% loss of use of the back. That finding raised the presumption under § 42-9-30(21) that Clemmons was totally and permanently disabled, which presumption is rebuttable.

By contrast, the record in this case reflects that Tarver returned to work without restrictions from any treating physicians and returned to his regular heavy duty employment for approximately one year which he continued to perform without the indication of the inability to do so or request for accommodation until the point at which he voluntarily made the determination to retire. The record additionally reflects that despite his having retired from his job at Beech Island, Tarver continued to run his own plumbing business and continued his ministry work through his church.

As the Court in *Clemmons* also noted, all of the physicians providing an opinion as to impairment found him to have greater than 50% impairment to the back. Here, even Tarver's own IME physicians did not provide him with an impairment rating anywhere close to 50% to the back. Therefore, the Respondents contend that the facts in *Clemmons* are quite different from the facts in this case and, as such, *Clemmons* is clearly distinguishable from the case at hand.

In *Eaddy v. Smurfit-Stone Container Corp.*, 355 S.C. 154, 584 S.E.2d 390 (Ct. App. 2003), the claimant sustained a compensable hernia which (interestingly enough) rendered him permanently and totally disabled in the eyes of the SCWCC. The employer/carrier appealed that determination (along with several others) and, in addressing the issue of whether Eaddy was permanently and totally disabled, stated as follows:

> Total disability does not require complete helplessness; rather the inability to perform common labor is considered total disability for one who is not qualified by training or experience for any other employment. Wynn v. Peoples Natural Gas Co. of S.C., 238 S.C. 1, 11, 118 S.E.2d 812, 817 (1961). On the other hand, if an employee is capable of performing other work that is continuously available to him, he will not be deemed totally disabled simply because he is unable to resume the duties of the particular occupation in which he is engaged at the time of his injury. Id. at 11, 118 S.E.2d at 817-18. In order to be entitled to total and permanent disability workers' compensation benefits for a work injury, the claimant must be unable to perform services other than those that are so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist. Id. at 12, 118 S.E.2d at 818; Colvin v. E. I. DuPont de Nemours Co., 227 S.C. 465, 474, 88 S.E.2d 581, 585 (1955). See also Stephenson v. Rice Servs., Inc., 323 S.C. 113, 118, 473 S.E.2d 699, 702 (1996) ("Employees who because of a work-related injury can perform only limited tasks for which no reasonably stable market exists are considered totally disabled notwithstanding their nominal earning capacity.")

355 S.C. at 163, 584 S.E.2d at 395. By comparison, Tarver was both capable of doing the work he was doing before the accident ***and*** work was continuously provided to him.

It is uncontradicted that Tarver made the unilateral decision to remove himself from the workforce without any treating physician, authorized or unauthorized, indicating that it was medically necessary for him to do so. By the time any physician rendered Tarver unable to work, he had long been out of the workplace and subject to deleterious living conditions which clearly and admittedly contributed to his condition. The facts necessary to render Tarver's work-related injuries permanently and totally disabling are simply not present in this case.

III. THE SCWCC PROPERLY DETERMINED THAT TARVER WAS NOT PERMANENTLY AND TOTALLY DISABLED UNDER THE "WAGE LOSS MODEL."

Respondents assert that Tarver's brief made only a passing reference to the "Wage Loss Model." Failing to make any substantial argument on that issue renders it abandoned on appeal. *See* *Matthews v. City of Greenwood*, 305 S.C. 267, 407 S.E.2d 668 (Ct. App. 1991). In the event this Court determines that the issue is properly before it for consideration, Respondents contend that it lacks any merit.

No accidental injury or any limitation or condition resulting therefrom created any inability on Tarver's part to earn the same or similar wages as he did pre-injury. In fact, the only things preventing Tarver from being able to earn the same or similar wages post-accident are (1) his self-imposed retirement and (2) his lack of physical resolve post-retirement that led to the deterioration of his condition. In this case it is impossible to take a snapshot of Tarver's employability ***at the time of his retirement***. The only evidence as to

his employability at that time operates to Tarver's detriment as no doctor told him not to work and it is uncontradicted that he was in fact working without limitation and that he took himself out of the workforce without any input from the employer. The SCWCC properly examined Tarver's case and considered all of the above ***as well as the evidence*** cited by Tarver in his Brief and came to the proper conclusion that no matter which argument is proffered as to permanent and total disability, that argument fails.

IV. THE SCWCC PROPERLY DETERMINED THAT TARVER DID NOT SUSTAIN SEPARATE AND DISTINCT INJURIES TO HIS LOWER EXTREMITIES.

Tarver contends that the SCWCC erroneously concluded that the only affected body parts were his back, hip and two (2) teeth and that there should have been an award for each lower extremity as well. However, a review of the SCWCC's award and the medical evidence relied upon by Tarver for support of his position clearly shows the flaw in his theory.

In its Order, the SCWCC assigned a "Twenty-Five (25%) percent permanent partial disability to the back ***to include radiculopathy."*** *R.* pp. 1-14 ***(emphasis*** added). The referenced radiculopathy clearly applies to the lower extremities. The FCE referenced by Tarver in his Brief addresses the lower extremities only as affected by the hip issues:

> Mr. Tarver also qualifies for an impairment rating for loss of bilateral hip active range of motion. Please refer to the Functional Capacity Evaluation for range of motion measurements. According to Table 17-9 on page 537, he qualifies for a lower extremity impairment rating of 5% ***for each hip due to limited bilateral hip flexion range of motion.*** He does not qualify for any additional impairment rating for loss of any other hip range of motion. He does not qualify for any additional impairment rating for loss of bilateral hip strength as he has normal bilateral hip strength.

R. pp. 339-341 ***(emphasis*** added). Similarly, the opinion of Dr. Hutchinson referenced by Tarver does exactly the same thing:

> Comments: Patient with work-related accident that resulted in injuries to lumbar spine and pelvis. He is at MMI. Impairment -14% WPI = 16% lumbar spine, 5% lower extremity impairment rating each hip ***due to limited hip flexion range of motion.***

R. p. 313 ***(emphasis*** added).

The SCWCC, by virtue of awarding disability based on radiculopathy and disability to the hip, addressed any issues with the lower extremities. Any issues with the lower extremities are inextricably tied to the issues with the hip and the radiculopathy from the back. As such, it would have been duplicitous of the SCWCC to make additional awards for each lower extremity as they were obviously covered by the award of disability to the hip. The SCWCC committed no error by declining to make separate awards for each lower extremity.

V. THE SCWCC PROPERLY CALCULATED THE APPLICABLE COMPENSATION RATE.

Lastly, Tarver contends that the SCWCC should have considered Tarver's outside income in calculating the applicable average weekly wage and resulting compensation rate. Regulation 67-1603 of the Regulations applicable to the Act provides the methods for calculating the applicable compensation rate. That Regulation provides under Subsection A that the employers representative shall calculate the Claimant's compensation rate by completing a Form 20, Statement of Earnings of Injured Employee. It goes on to note that when 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 average weekly wage may

be used which will most nearly approximate the amount the injured employee should be earning were it not for the injury.

There are two (2) noteworthy points in the second sentence which are applicable in this situation. First, this sentence contemplates an evidentiary showing that the use of the Form 20 under the circumstances is not fair and just. Secondly, it indicates that the goal is to most nearly approximate the amount the injured employee would be earning ***were it not for the injury***. The Regulation also provides in Subsection H that "if the Claimant alleges that he or she worked for two (2) or more employers when the injury occurred, the Claimant may request that the additional wages be included as part of his or her average weekly wage. The Claimant shall obtain a completed Form 20 from each of the other employers and file the Form 20s with the Claims Department." *S.C. Reg. 67-1603.*

In Tarver's case, a Form 20 was obtained by the Respondent and filed with the SCWCC's claims department. That Form 20 reflected an average weekly wage of $1,037.49 for a resultant compensation rate of $691.69. Though Tarver is contending that he had earned income from two (2) alternative sources, a plumbing business he owned and operated and as an assistant preacher, there was no evidence offered to suggest that it was neither fair nor just for him to obtain and file a Form 20 as to those alternative employments. Additionally, since he testified that he continued to pursue both of those forms of employment post-injury and there was no evidence to suggest that he has ever been unable to do so, including those wages in calculating Tarver's average weekly wage would have been wholly improper as there was no evidence that the injury had any impact on his ability to earn those wages. *See* *Foreman v. Jackson Minit Markets, Inc.*, 265 S.C. 164, 217 S.E.2d 214 (1975)(It is evident that the aim in calculating a wage base is to fairly

approximate the employee's earning capacity, and that method may be resorted to which will most nearly approximate the amount which the injured employee would be earning were it not for the injury).

CONCLUSION

The SCWCC properly determined that Tarver sustained injuries to his back, hip and two (2) teeth. Neither the extent of any of those injuries nor the combination thereof operated to thrust Tarver's injury to the level of permanent and total disability. The applicable compensation rate was arrived at properly and in accordance with the Act and its regulations. Respondents respectfully request that this Court fully affirm the SCWCC's findings and conclusions on these issues.

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January 15, 2020

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this *Final Brief of Respondents* complies with Rule 211(b), *SCRAP*.

Andrew E. Haselden, Esquire