DECISION AND ORDER OF THE APPELLATE PANEL OF THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

WCC FILE NUMBER: 1618027

FREDERICK NELSON, Employee, Respondent,

-Vs.-

CITY OF NORTH CHARLESTON, Employer,

and

CITY OF NORTH CHARLESTON, Carrier. Appellants

Appellate Panel Review
Columbia, South Carolina
November 19, 2019

Appellate Panel Decision and Order, assigned to Commissioner Beck, filed on March 27 2020

Malcolm M. Crosland, Jr., Esquire, of Steinberg Law Firm, L.L.P., on behalf of Respondent.

Johnnie W. Baxley, Esquire, of Willson, Jones, Carter, & Baxley, PA, on behalf of the Employer and Carrier/Appellants.

PROCEDURAL HISTORY

The claim was heard before the Single Commissioner on July 12, 2018. The Single Commissioner issued a Decision and Order dated September 19, 2018. The stipulations of the parties and the parties APA submissions are fully set forth in the Single Commissioner's Order and are fully incorporated herein. The Single Commissioner found the Claimant was not at maximum medical improvement and was entitled to a left knee MRI, a left knee brace, and right ankle custom orthotic as recommended by Dr. Adam Schaaf. All other issues, including the Defendants' right to a credit for over payment of temporary total disability and permanency, were held in abeyance.

The Defendants timely requested review of the Findings of Fact the Claimant had not reached maximum medical improvement and was entitled to the medical treatment recommended by Dr. Schaaf on the grounds the Single Commissioner failed to provide a basis for giving greater weight to the opinion of Dr. Schaaf over the opinion of the authorized treating physician, Dr. Kenneth Caldwell.

The Appellate Panel issued its Decision and Order dated April 22, 2019 finding the Claimant had reached maximum medical improvement on February 8, 2018, granting the Defendants a credit for overpayment of temporary total compensation after that date, ruling the Claimant was not entitled to additional medical treatment, and remanding the claim back to the original hearing Commissioner to determine the extent of the Claimant's permanent disability based on the record as of April 22, 2019 hearing.

The Single Commissioner issued his Order dated August 16, 2019 which made the following findings of Fact and Conclusions of Law:

FINDINGS OF FACT

FIRST: It is stipulated the South Carolina Workers' Compensation Commission has jurisdiction over the parties and subject matter of this claim.

SECOND: It is stipulated venue is proper in Charleston County.

THIRD: It is stipulated the Claimant sustained admitted injuries by accident arising out of and in course of his employment on November 29, 2016 when he tripped and fell over the blade of a forklift.

FOURTH: It is stipulated the Claimant was a covered employee, the Employer was a covered Employer, and an Employee/Employer relationship existed at the time of the Claimant's admitted accidental injury.

FIFTH: It is stipulated this claim was heard by the undersigned Commissioner on July 12, 2018 in accordance with notices timely served upon all parties.

SIXTH: It is stipulated the Claimant's average weekly wage was $863.51 making the corresponding compensation rate $575.70 per week.

SEVENTH: The Claimant testified at the hearing. He answered questions in a forthright manner. His description of his injuries and resulting problems was consistent with the medical evidence and my observations of his injuries at the hearing.

EIGHTH: The Claimant is closely approaching advanced age. He is 59 years old.

NINTH: The Claimant has a limited or less education. He hasn't completed the ninth grade. He received a certificate from a non-accredited correspondence school that does not qualify as a GED. Vocational aptitude testing performed by both parties' vocational experts placed the Claimant at a 9.4 grade level for sentence comprehension

and at a 4.8 grade level for math computation. IQ testing by the vocational experts placed the Claimant in the borderline intellectual functioning to lower than average intelligence range.

ELEVENTH: The Claimant is married. He had five (5) children but only one remains dependent upon him for support.

TWELFTH: The Claimant has a good work history with no gaps in employment. He worked continuously for the City of North Charleston, the job in which he was injured, for over 30 years. He has always worked jobs in the medium to heavy, unskilled to semi-skilled category. He worked for Moore Drums for a year and a half loading and unloading 55-gallon oil drums weighing 60 to 110 pounds. He worked for the South Carolina State Ports Authority for a year loading and unloading trucks and rail cars frequently lifting and moving 90 to 110 pounds. After the Ports Authority the Claimant began working for the City of North Charleston. His last job classification for the City was an "Equipment Operator II." He was required to have a CDL Class A driver's license, to frequently lift up to 50 pounds and occasionally lift up to 100 pounds. He normally operated a street sweeper but also operated other equipment when his street sweeper was being serviced or was broken down. He was frequently required to climb in and out of the street sweeper using handrails, like climbing a ladder, to remove debris in the roadway or stuck in the sweeper's suction hood. His work required frequent stooping, twisting, and bending.

THIRTEENTH: Prior to his admitted injuries the Claimant was not having any problems with or receiving any medical treatment for his right ankle, left knee, or right thumb.

FOURTEENTH: The Claimant suffered admitted injuries to his right ankle, left knee, and right thumb November 29, 2016. The Claimant received treatment for his right ankle by Dr. Robert Lowery, for his left knee by Dr. Kenneth Caldwell who performed arthroscopic surgery, and for his right thumb by Dr. John Ernst who performed release surgery. The Claimant also received IME evaluations from Dr. Schaff for his left knee and right ankle and from Dr. Wartinbee for his right thumb. The Claimant was assigned permanent impairment ratings of 0% to 5% for his right ankle; of 5% to 12% for his right hand; and of 11% to 14% to his left knee.

FIFTEENTH: The Claimant testified he continues to experience swelling in his right ankle when he walks for thirty minutes, walks uphill, or climbs stairs. The Claimant removed his shoe and sock and the undersigned noted swelling of his right foot. The Claimant testified experiences pain from a level of 3 to 7 on a scale of 10. He testified his right ankle aggravates his left knee injury. The Claimant testified he continues to experience pain in his left knee since his surgery. He testified he can walk approximately fifteen minutes before having to stop because of pain. He testified, unless something is done to improve his left knee pain, he is unable to return to any job he has performed in the past including truck driving. Dr. Caldwell noted the Claimant has developed a mild antalgic gait, complained of a "popping" in knee when climbing stairs, and exhibited persistent atrophy of his left thigh musculature. The Claimant testified he experiences knee pain from a level of 4 to 6 on a scale of 10. The Claimant testified and the undersigned observed he is unable to make a fist because of his right thumb injury. He testified he has lost about 50% of the grip strength in his right hand and experiences a sharp, stabbing pain that makes it difficult to grab and lift heavy objects with his right

hand. The Claimant testified he experiences right thumb pain from a level of 2 to 4 on a scale of 10.

SIXTEENTH: The Claimant completed an FCE ordered by Dr. Caldwell on January 23, 2018. The FCE tested the consistency and reliability of the Claimant's subjective reports of pain. The evaluator concluded the Claimant's subjective ratings of pain and repetitive movements matched well with distraction-based clinical observations. The evaluator noted, "... high levels of effort on [the Claimant's] behalf." The evaluator concluded the testing, combined with clinical observations, were a reliable report of pain and disability. The evaluator referenced the *Dictionary of Occupational Titles* and stated the Claimant's job was in the medium to heavy range of work and required climbing, balancing, stooping, crouching, crawling, static and dynamic standing, walking, and sitting up to 1/3 of the day. Based on the results of the FCE the evaluator concluded, "Mr. Nelson is not capable of performing the physical demand of the target job of municipal maintenance worker." (emphasis added)

SEVENTEENTH: Based on the results of the FCE, Dr. Caldwell concluded the Claimant would be limited to light to medium work with limited kneeling and squatting, and no lifting over 35 pounds precluding him from returning to the job with the City he had performed for over thirty years.

EIGHTEENTH: Based on the limitations given by Dr. Caldwell, the City determined it was unable to provide the Claimant with other suitable employment and approved the Claimant for retirement.

NINETEENTH: The Claimant was evaluated by David R. Price, M. ED., CRC, a vocational consultant. In his report dated April 20, 2018 Mr. Price noted his restrictions

prevented the Claimant from returned to his job and was required to take early retirement. Mr. Price noted the Claimant's entire work experience involved heavy, manual labor. He concluded the Claimant lacked education or transferable skills to transfer into clerical, administrative, managerial, or technical work. He concluded the Claimant's knee pain, swelling, and intolerance to prolonged sitting would preclude him from performing sedentary work. He further concluded the same symptoms would preclude him from being able to work on his feet or at a sustained, productive pace. He concluded the Claimant is unemployable, cannot compete in the open labor market, and is not a candidate for vocational rehabilitation.

TWENTIETH: The Claimant was also evaluated by Joel D. Leonard, CRC, CVE, a vocational consultant, on June 8, 2018. Mr. Leonard reviewed the Claimant's subjective descriptions of his injuries and medical treatment in detail. He observed the Claimant's behavior during the evaluation and noted the Claimant attended the evaluation in a diligent manner, shifted his posture (up/down) during throughout the evaluation, extended and contracted his left leg in a recurring manner, and walked in an augmented manner favoring his left leg. He noted the Claimant's favorable employment history. He noted the Claimant possesses a CDL driver's license but failed to mention his lack of a current medical certificate. He noted the Claimant has no meaningful computer skills, has a limited base of acquired skills, and his test scores both preclude various work fields and are not supportive of further training. Mr. Leonard postulated three separate employment profiles he labeled as A, B, C. Profile A would accept the Claimant's description of the severity of his physical limitations and conclude the Claimant is vocationally disabled. Profile B would defer any opinion concerning employability until

after the Claimant received further evaluation and treatment for his left knee pain. Profile B is no longer applicable because the Appellate Panel ruled the Claimant reached MMI on February 8, 2018 and is not entitled to further medical treatment. And, Profile C would discount the Claimant's subjective description of his symptoms and limitations and consider only to the impairment ratings of the treating physicians and FCE and conclude, although the Claimant is precluded from returning to past work, there are other jobs the Claimant can still perform.

TWENTY-FIRST: The Defendants submitted an investigative videotape of the Claimant but it was not found to be particularly probative of any issue in the case. Mr. Leonard also viewed the videotape and concluded it did not show the Claimant engaging in any activities inconsistent with his described symptoms and limitations.

TWENTY-SECOND: The Claimant testified he diligently applied for numerous jobs. He submitted copies the applications he submitted to various potential employers. He testified he cannot type and lacks computer skills disqualifying him from many jobs. He got two interviews and no job offers.

CONCLUSIONS OF LAW

Based upon the findings of fact set forth above, the undersigned Commissioner makes the following conclusions of law as required by S.C. Code Anno., § 42-17-40, 1976, as amended:

FIRST: The burden of proof applicable to a claim for Workers' Compensation benefits is preponderance of the evidence. The Claimant must establish facts that entitle him to an award by the preponderance of the evidence. Walsh v. U.S. Rubber Co., 120 S.E.2d 685 (S.C. 1961).

SECOND: Under S.C. Code Anno., § 42-1-130, the Claimant was a covered employee at the time of his accident on November 29, 2016.

THIRD: Under S.C. Code Anno., § 42-1-140, the Defendant/Employer was a covered employer under the Act at the time of the Claimant's admitted injuries on November 29, 2016

FOURTH: Under S.C. Code Anno., § 42-1-140, Average Weekly Wage is defined.

FIFTH: Under S.C. Code Anno., § 42-1-160, the Claimant sustained admitted compensable injuries by accident to his right ankle, left knee, and right thumb.

SIXTH: Maximum medical improvement is a term used to indicate that a person has reached such a plateau that in the physician's opinion, there no further medical care or treatment which will lessen the degree of impairment. O'Banner v. Westinghouse Elec. Corp. 459 S.E.2d 324, 327 (Ct. App.1995). The Appellate Panel, the Claimant reached maximum medical improvement on February 8, 2018.

SEVENTH: Because the Claimant suffered admitted injuries to his right ankle, left knee, and right thumb, he is not limited to a scheduled award under S.C. Code Anno., § 42-9-30. The policy behind allowing a Claimant to proceed under the general disability provision of S.C. Code Anno., §42-9-10, allows the Claimant whose injury affects more than one scheduled body part provides a claimant with the opportunity to establish a disability greater than the presumptive disability provided under the scheduled member section by proving a loss of wage earning capacity. Brown v. Owens Steel Co, Inc. 316 SC 278, 450 S.E.2d 57 (S.C. App. 1994).

NINTH: Total disability does not require complete helplessness. Inability to perform common labor is total disabling for one who is not qualified by training or experience for any other employment. Wynn v. Peoples Natural Gas Co. 238 S.C.1, 118 S. E. 2d 812 (1961); Colvin v. E. I. DuPont De Nemours and Co. 227 S.C. 465, 88 S.E. 2d 581 (1955); Coleman v Quality Concrete Products Inc. 245 S.C. 626, 142 S.E. 2d 143 (1965)

TENTH: The greater weight of the evidence establishes the Claimant is disabled from gainful employment and has suffered the loss of his wage-earning capacity. Claimant testified at the hearing in a forthright manner. He has a solid work history having worked for the Defendant employer for over 30 years. His description of his injuries and resulting symptoms was consistent with the medical evidence and consistent with my observations of his injuries at the hearing. The authorized treating physician, Dr. Caldwell, and the City agreed the Claimant was unable to return to his prior job as an equipment operator. The City was unable to find other suitable employment for the Claimant consistent with his physical restrictions. The FCE ordered by Dr. Caldwell tested the consistency and reliability of the Claimant's subjective reports of pain. The evaluator concluded the Claimant's subjective ratings of pain and repetitive movements matched well with distraction-based clinical observations. The evaluator noted, "... high levels of effort on [the Claimant's] behalf." The evaluator concluded the testing, combined with clinical observations, were a reliable report of pain and disability. The surveillance video reviewed by the undersigned and the Defendant's vocational expert did not show the Claimant engaging in any activities inconsistent with his description of his symptoms. The Claimant diligently applied for numerous jobs, received only two interviews, and no

job offers after he was released by Dr. Caldwell. I conclude the Claimant's descriptions of his symptoms and limitations are reliable. Based on the Claimant advanced age, his limited or less education, lack of transferable skills, his medical impairment ratings to his right ankle, left knee, and right thumb, his complaints of pain, and based on the vocational opinions of Mr. Price and Profile A of the vocational evaluation of Mr. Leonard, I conclude the Claimant is totally disabled and entitled to benefits under S.C. Code Anno., §42-9-10(A).

Based upon the record on remand and the Findings of Fact and Conclusions of Law above, to the Hearing Commissioner, the Single Commissioner issued his Decision and Order as follows:

> "Based on the foregoing findings of fact and conclusions of law it is hereby:
>
> **ORDERED**, Adjudged, and Decreed the Claimant has met his burden of proof, established he has been rendered permanently and totally disabled under the provisions of pursuant to § 42-9-10 (A), and is entitled to receive weekly compensation at his compensation rate of Five Hundred and Seventy-five and 70/100 ($575.70), for a period of Five Hundred weeks from the date of his admitted injury on November 29, 2016; and it is
>
> **ORDERED**, Adjudged, and Decreed the Defendants are entitled to credit for all weeks of temporary total compensation paid to date, including any temporary total compensation paid after the Claimant reached maximum medical improvement on February 8, 2018; and it is

ORDERED, Adjudged, and Decreed the Defendants shall be responsible for all medical expenses related to the Claimant's treatment by the authorized treating physicians, Dr. Lowery, Dr. Ernst, and Dr. Caldwell, including any hospital and surgical expenses incurred; and it is

ORDERED, Adjudged, and Decreed that the Claimant does not require any medical treatment or modalities at the present time."

Following the issuance of the Single Commissioner's Decision and Order, the Defendants timely filed a WCC Form 30 Request for Commission Review asserting the following grounds for review:

1. **It is respectfully submitted that the single Commissioner erred in finding as fact that Claimant is permanently and totally disabled (Findings of Fact #7, #13, #14, #15, #16, #17, #18, #19, #20, #21; Conclusions of Law #9 and #10; and Order), error being that the preponderance of the evidence in the record does not support such an award. The preponderance of the evidence in the record does not support the factual findings made by the Commissioner that form the basis for his opinion that Claimant is totally disabled. Further, the single Commissioner failed to provide to provide a basis or explanation as to how he weighed the evidence or why he completely disregarded certain evidence. These findings/conclusions are also errors of law.**

The Defendant's request for appellate panel review was heard before the Appellate Panel of the South Carolina Workers' Compensation Commission on November 19, 2019 after both parties submitted Memoranda of Law in support of their positions.

After careful review of the entire record below, as well as the parties Memoranda of Law in support of their positions and arguments of counsel, the undersigned members of the Appellate Panel of the South Carolina Workers' Compensation Commission considered the matter and affirm, in its entirety, the Decision and Order of the single Commissioner dated August 16, 2019.

Based on the foregoing, the Appellate Panel of the South Carolina Workers' Compensation make the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

FIRST: It is stipulated the South Carolina Workers' Compensation Commission has jurisdiction over the parties and subject matter of this claim.

SECOND: Venue is proper in Richland County for this Appeal.

THIRD: It is stipulated the Claimant sustained admitted injuries by accident arising out of and in course of his employment on November 29, 2016 when he tripped and fell over the blade of a forklift.

FOURTH: It is stipulated the Claimant was a covered employee, the Employer was a covered Employer, and an Employee/Employer relationship existed at the time of the Claimant's admitted accidental injury.

FIFTH: This claim was heard by the undersigned Appellate Panel on November 19, 2019 in accordance with notices timely served upon all parties.

SIXTH: It is stipulated the Claimant's average weekly wage was $863.51 making the corresponding compensation rate $575.70 per week.

SEVENTH: The Claimant testified at the hearing before the single Commissioner. He answered questions in a forthright manner. His description of his injuries and resulting problems was consistent with the medical evidence and the hearing Commissioner's observations of his injuries at the hearing.

EIGHTH: The Claimant is closely approaching advanced age. He was 59 years old at the time of the hearing before the single Commissioner.

NINTH: The Claimant has a limited or less education. He hasn't completed the ninth grade. He received a certificate from a non-accredited correspondence school that does not qualify as a GED. Vocational aptitude testing, performed by both parties' vocational experts who evaluated him, placed the Claimant at a 9.4 grade level for sentence comprehension and at a 4.8 grade level for math computation. IQ testing by the vocational experts placed the Claimant in the borderline intellectual functioning to lower than average intelligence range.

ELEVENTH: The Claimant is married. He had five (5) children but only one remains dependent upon him for support.

TWELFTH: The Claimant has a good work history with no gaps in employment. He worked continuously for the City of North Charleston, the job in which he was injured, for over 30 years. He has always worked jobs in the medium to heavy, unskilled to semi-skilled category. He worked for Moore Drums for a year and a half loading and unloading 55-gallon oil drums weighing 60 to 110 pounds. He worked for the South Carolina State Ports Authority for a year loading and unloading trucks and rail cars frequently lifting and moving 90 to 110 pounds. After the Ports Authority the Claimant began working for the City of North Charleston. His last job classification for the City was

an "Equipment Operator II." He was required to have a CDL Class A driver's license, to frequently lift up to 50 pounds and occasionally lift up to 100 pounds. He normally operated a street sweeper but also operated other equipment when his street sweeper was being serviced or was broken down. He was frequently required to climb in and out of the street sweeper using handrails, like climbing a ladder, to remove debris in the roadway or stuck in the sweeper's suction hood. His work required frequent stooping, twisting, and bending.

THIRTEENTH: Prior to his admitted injuries the Claimant was not having any problems with or receiving any medical treatment for his right ankle, left knee, or right thumb.

FOURTEENTH: The Claimant suffered admitted injuries to his right ankle, left knee, and right thumb November 29, 2016. The Claimant received treatment for his right ankle by Dr. Robert Lowery, for his left knee by Dr. Kenneth Caldwell who performed arthroscopic surgery, and for his right thumb by Dr. John Ernst who performed release surgery. The Claimant also received IME evaluations from Dr. Adam Schaaf for his left knee and right ankle and from Dr. Daniel Wartinbee for his right thumb. The Claimant was assigned permanent impairment ratings of 0% to 5% for his right ankle; of 5% to 12% for his right hand; and of 11% to 14% to his left knee.

FIFTEENTH: The Claimant testified he continues to experience swelling in his right ankle when he walks for thirty minutes, walks uphill, or climbs stairs. The Claimant removed his shoe and sock and the single commissioner noted swelling of his right foot. The Claimant testified experiences pain from a level of 3 to 7 on a scale of 10. He testified his right ankle aggravates his left knee injury. The Claimant testified he

continues to experience pain in his left knee since his surgery. He testified he can walk approximately fifteen minutes before having to stop because of pain. He testified, unless something is done to improve his left knee pain, he is unable to return to any job he has performed in the past including truck driving. Dr. Caldwell noted the Claimant has developed a mild antalgic gait, complained of a "popping" in knee when climbing stairs, and exhibited persistent atrophy of his left thigh musculature. The Claimant testified he experiences knee pain from a level of 4 to 6 on a scale of 10. The Claimant testified and the single commissioner observed he is unable to make a fist because of his right thumb injury. He testified he has lost about 50% of the grip strength in his right hand and experiences a sharp, stabbing pain that makes it difficult to grab and lift heavy objects with his right hand. The Claimant testified he experiences right thumb pain from a level of 2 to 4 on a scale of 10.

SIXTEENTH: The Claimant completed an FCE ordered by Dr. Caldwell on January 23, 2018. The FCE tested the consistency and reliability of the Claimant's subjective reports of pain. The evaluator concluded the Claimant's subjective ratings of pain and repetitive movements matched well with distraction-based clinical observations. The evaluator noted, "... high levels of effort on [the Claimant's] behalf." The evaluator concluded the testing, combined with clinical observations, were a reliable report of pain and disability. The evaluator referenced the *Dictionary of Occupational Titles* and stated the Claimant's job was in the medium to heavy range of work and required climbing, balancing, stooping, crouching, crawling, static and dynamic standing, walking, and sitting up to 1/3 of the day. Based on the results of the FCE the evaluator concluded, "Mr.

Nelson is not capable of performing the physical demand of the target job of municipal maintenance worker." (emphasis added)

SEVENTEENTH: Based on the results of the FCE, Dr. Caldwell concluded the Claimant would be limited to light to medium work with limited kneeling and squatting, and no lifting over 35 pounds precluding him from returning to the job with the City he had performed for over thirty years.

EIGHTEENTH: Based on the limitations given by Dr. Caldwell, the City determined it was unable to provide the Claimant with other suitable employment and approved the Claimant for retirement.

NINETEENTH: The Claimant was evaluated by David R. Price, M. ED., CRC, a vocational consultant. In his report dated April 20, 2018 Mr. Price noted his restrictions prevented the Claimant from returned to his job and was required to take early retirement. Mr. Price noted the Claimant's entire work experience involved heavy, manual labor. He concluded the Claimant lacked education or transferable skills to transfer into clerical, administrative, managerial, or technical work. He concluded the Claimant's knee pain, swelling, and intolerance to prolonged sitting would preclude him from performing sedentary work. He further concluded the same symptoms would preclude him from being able to work on his feet or at a sustained, productive pace. He concluded the Claimant is unemployable, cannot compete in the open labor market, and is not a candidate for vocational rehabilitation.

TWENTIETH: The Claimant was also evaluated by Joel D. Leonard, CRC, CVE, a vocational consultant, on June 8, 2018. Mr. Leonard reviewed the Claimant's subjective descriptions of his injuries and medical treatment in detail. He observed the

Claimant's behavior during the evaluation and noted the Claimant attended the evaluation in a diligent manner, shifted his posture (up/down) during throughout the evaluation, extended and contracted his left leg in a recurring manner, and walked in an augmented manner favoring his left leg. He noted the Claimant's favorable employment history. He noted the Claimant possesses a CDL driver's license but failed to mention his lack of a current medical certificate. He noted the Claimant has no meaningful computer skills, has a limited base of acquired skills, and his test scores both preclude various work fields and are not supportive of further training. Mr. Leonard postulated three separate employment profiles he labeled as A, B, C. Profile A would accept the Claimant's description of the severity of his physical limitations and conclude the Claimant is vocationally disabled. Profile B would defer any opinion concerning employability until after the Claimant received further evaluation and treatment for his left knee pain. Profile B is no longer applicable because the Appellate Panel ruled the Claimant reached MMI on February 8, 2018 and is not entitled to further medical treatment. And, Profile C would discount the Claimant's subjective description of his symptoms and limitations and consider only to the impairment ratings of the treating physicians and FCE and conclude, although the Claimant is precluded from returning to past work, there are other jobs the Claimant can still perform.

TWENTY-FIRST: The Defendants submitted an investigative videotape of the Claimant but it was not found to be particularly probative of any issue in the case. Mr. Leonard also viewed the videotape and concluded it did not show the Claimant engaging in any activities inconsistent with his described symptoms and limitations.

TWENTY-SECOND: The Claimant testified he diligently applied for numerous jobs. He submitted copies the applications he submitted to various potential employers. He testified he cannot type and lacks computer skills disqualifying him from many jobs. He got two interviews and no job offers.

CONCLUSIONS OF LAW

Based upon the findings of fact set forth above, the Appellate Panel makes the following conclusions of law:

FIRST: The burden of proof applicable to a claim for Workers' Compensation benefits is preponderance of the evidence. The Claimant must establish facts that entitle him to an award by the preponderance of the evidence. Walsh v. U.S. Rubber Co., 120 S.E.2d 685 (S.C. 1961).

SECOND: Under S.C. Code Anno., § 42-1-130, the Claimant was a covered employee at the time of his accident on November 29, 2016.

THIRD: Under S.C. Code Anno., § 42-1-140, the Defendant/Employer was a covered employer under the Act at the time of the Claimant's admitted injuries on November 29, 2016

FOURTH: Under S.C. Code Anno., § 42-1-140, Average Weekly Wage is defined.

FIFTH: Under S.C. Code Anno., § 42-1-160, the Claimant sustained admitted compensable injuries by accident to his right ankle, left knee, and right thumb.

SIXTH: Maximum medical improvement is a term used to indicate that a person has reached such a plateau that in the physician's opinion, there no further medical care or treatment which will lessen the degree of impairment. O'Banner v.

Westinghouse Elec. Corp. 459 S.E.2d 324, 327 (Ct. App.1995). The Appellate Panel finds the Claimant reached maximum medical improvement on February 8, 2018.

SEVENTH: Because the Claimant suffered admitted injuries to his right ankle, left knee, and right thumb, he is not limited to a scheduled award under S.C. Code Anno., § 42-9-30. The policy behind allowing a Claimant to proceed under the general disability provision of S.C. Code Anno., §42-9-10, allows the Claimant whose injury affects more than one scheduled body part, provides a claimant with the opportunity to establish a disability greater than the presumptive disability provided under the scheduled member section by proving a loss of wage earning capacity. Brown v. Owens Steel Co, Inc. 316 SC 278, 450 S.E.2d 57 (S.C. App. 1994).

NINTH: Total disability does not require complete helplessness. Inability to perform common labor is totally disabling for one who is not qualified by training or experience for any other employment. Wynn v. Peoples Natural Gas Co. 238 S.C.1, 118 S. E. 2d 812 (1961); Colvin v. E. I. DuPont De Nemours and Co. 227 S.C. 465, 88 S.E. 2d 581 (1955); Coleman v Quality Concrete Products Inc. 245 S.C. 626, 142 S.E. 2d 143 (1965)

TENTH: The greater weight of the evidence establishes the Claimant is disabled from gainful employment and has suffered the loss of his wage-earning capacity. Claimant testified at the hearing in a forthright manner. He has a solid work history having worked for the Defendant employer for over 30 years. His description of his injuries and resulting symptoms was consistent with the medical evidence and consistent with the single Commissioner's observations of his injuries at the hearing. The authorized treating physician, Dr. Caldwell, and the City agreed the Claimant was unable to return to his prior

job as an equipment operator. The City was unable to find other suitable employment for the Claimant consistent with his physical restrictions. The FCE ordered by Dr. Caldwell tested the consistency and reliability of the Claimant's subjective reports of pain. The evaluator concluded the Claimant's subjective ratings of pain and repetitive movements matched well with distraction-based clinical observations. The evaluator noted, "... high levels of effort on [the Claimant's] behalf." The evaluator concluded the testing, combined with clinical observations, were a reliable report of pain and disability. The surveillance video and the Defendant's vocational expert did not show the Claimant engaging in any activities inconsistent with his description of his symptoms. The Claimant diligently applied for numerous jobs, received only two interviews, and no job offers after he was released by Dr. Caldwell. We conclude the Claimant's descriptions of his symptoms and limitations are reliable. Based on the Claimant advanced age, his limited or less education, lack of transferable skills, his medical impairment ratings to his right ankle, left knee, and right thumb, his complaints of pain, and based on the vocational opinions of Mr. Price and Profile A of the vocational evaluation of Mr. Leonard, we conclude the Claimant is totally disabled and entitled to benefits under S.C. Code Anno., §42-9-10(A).

AWARD

Now, based on the foregoing findings of fact and conclusions of law, and in keeping with § 42-17-50 and § 42-17-60, S.C. Code of Laws, 1976 as amended it is hereby:

ORDERED, Adjudged, and Decreed the Claimant has met his burden of proof, established he has been rendered permanently and totally disabled under the provisions of pursuant to § 42-9-10 (A), and is entitled to receive weekly compensation at his compensation rate of Five Hundred and Seventy-five and 70/100 ($575.70), for a period

of Five Hundred weeks from the date of his admitted injury on November 29, 2016; and it is

ORDERED, Adjudged and Decreed, the Decision and Order of the Hearing Commissioner filed August 16, 2019 is affirmed in its entirety.

ORDERED, Adjudged, and Decreed the Defendants are entitled to credit for all weeks of temporary total compensation paid to date, including any temporary total compensation paid after the Claimant reached maximum medical improvement on February 8, 2018; and it is

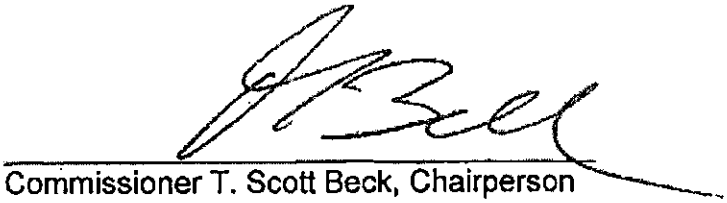
ORDERED, Adjudged, and Decreed the Defendants shall be responsible for all medical expenses related to the Claimant's treatment by the authorized treating physicians, Dr. Lowery, Dr. Ernst, and Dr. Caldwell, including any hospital and surgical expenses incurred; and it is

ORDERED, Adjudged, and Decreed that the Claimant does not require any medical treatment or modalities at the present time.

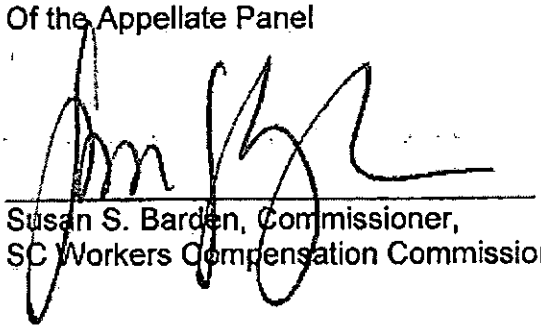
AND IT IS SO ORDERED.

No hearing costs are assessed.

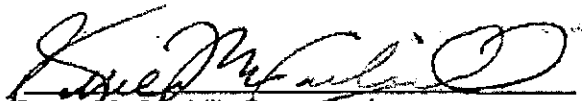
Appellate Panel of the South Carolina Workers Compensation Commission



Commissioner T. Scott Beck, Chairperson
Of the Appellate Panel



Susan S. Barden, Commissioner,
SC Workers Compensation Commission



Gene McCaskill, Commissioner,
SC Workers Compensation Commission

Order Served via E-Mail:

Johnnie W. Baxley, III Wilson, Jones, Carter, and Baxley jwbaxley@wjlaw.net	Malcolm M. Crosland mcrosland@steinberglawfirm.com

CERTIFICATE OF SERVICE

This is to certify that the undersigned has on this date served a copy of this order in the above entitled action upon all parties to this case by sending an electronic copy hereof by electronic mail addressed to the attorneys for said parties; or if there is an unrepresented party(ies), by depositing a copy hereof, postage paid in the United States mail, first class, addressed to the unrepresented party(ies) and to the attorney(s) for the represented party(ies).

By Eugenia Hollmon on March 27, 2020