

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA WORKERS'  
COMPENSATION COMMISSION

Appellate Case No.2020-000723

**RECEIVED**

**Aug 05 2020**

**SC Court of Appeals**

Frederick Nelson, Employee, ..... Respondent,

v.

City of North Charleston, Employer  
And Carrier, ..... Appellant.

INITIAL BRIEF OF RESPONDENT

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## FACTS

The facts under judicial review are detailed in the Appellate Panel's Decision and Order filed on March 27, 2020. (Appellate Panel Decision and Order filed 3/27/20, pp. 13 – 19, findings of fact 1<sup>st</sup> to 22<sup>nd</sup>). The Commission's first six findings were stipulations the Commission had jurisdiction and venue was proper, an employer – employee relationship existed, the compensation rate of \$575.70 is applicable to the claim, and that the Respondent suffered admitted injuries by accident arising out of and in the course of his employment with the Appellant on November 29, 2016. (Appellate Panel Decision and Order filed 3/27/20, p. 13, findings of fact 1<sup>st</sup> to 6<sup>th</sup>).

The Commission found the Respondent testified in a forthright manner consistent with the medical evidence and the hearing Commissioner's observations of his injuries during the hearing. (Appellate Panel Decision and Order filed 3/27/20, p. 14, finding of fact 7<sup>th</sup>; Tr., p. 48, line 21 to p. 49, line 24).

The Commission found the Respondent was closely approaching advanced age at age 59. (Appellate Panel Decision and Order filed 3/27/20, p. 14, finding of fact 8<sup>th</sup>; Tr. p. 13, lines 3 – 24). The Commission found the Respondent had a limited or less education having left school in the 9<sup>th</sup> grade and his non-accredited certificate did not qualify as a GED. (Appellate Panel Decision and Order filed 3/27/20, finding of fact 9<sup>th</sup>; Tr., p. 14, lines 11 – 13; APA 10, p. 144). The Commission found educational testing placed the Respondent at the 9.4 grade level for sentence comprehension and 4.8 grade level for math. (Appellate Panel Decision and Order filed 3/27/20, p. 14,

finding of fact 9<sup>th</sup>; APA 10, p. 144). The Commission found IQ testing ranged from 71 to 86 placing the Respondent in the borderline to lower than average range of intelligence. (Appellate Panel Decision and Order filed 3/27/20, p. 14, finding of fact 9<sup>th</sup>; Appellant's Notice of Submission, APA 6, p. 122<sup>1</sup>; APA 10, p. 144).

The Commission found the Respondent was married and had 5 children, one of whom remains dependent. (Appellate Panel Decision and Order filed 3/27/20, p. 14, finding of fact 11<sup>th</sup>; Tr., p. 13, lines 21 -22; p. 13 line 25 to p. 14, line 3). The Commission found the Respondent had a good work history with no gaps in employment and worked for the Appellant for over 30 years. (Appellate Panel Decision and Order filed 3/27/20, p. 14, finding of fact 12<sup>th</sup>; Tr. 17, line 25 to p. 18, line 12). The Commission found the Respondent worked medium to heavy, unskilled to semi-skilled jobs prior to working for the Appellant. (Appellate Panel Decision and Order filed 3/27/20, p. 14, finding of fact 12<sup>th</sup>; Tr., p. 14, line 18 to p. 17, line 22). The Commission found the Respondent's job with the Appellant was a street sweeper and equipment operator. (Appellate Panel Decision and Order filed 3/27/20, p. 14, finding of fact 12<sup>th</sup>; Tr, p. 17, line 22 to p. 18, line 6). The Commission found the Respondent was required to have a CDL license, to frequently lift up to 50 pounds, occasionally

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<sup>1</sup> It appears APA 6 was inadvertently left off the list of APA Submissions in hearing Commissioner's Decision and Order filed on September 19, 2018. (Hearing Commissioner's Decision and Order filed 9/19/18, p. 3). There is a gap between submissions 5 and 7. Appellant's Notice of Submissions included No. 6, Joel Leonard, vocational expert. (Appellant's Notice of APA Submissions dated 9/19/18). The hearing Commissioner referred to the vocational report in his review of the evidence. (Decision and Order of Commissioner Campbell dated 9/18/18, p. 13).

lift up to 100 pounds, climb in and out of the equipment, and to frequently stoop, twist, and bend. (Appellate Panel Decision and Order filed 3/27/20, p. 14 - 15, finding of fact 12<sup>th</sup>; Tr., p. 20, line 8 to p. 27, line 13).

The Commission found prior to his admitted injuries, the Respondent had no problems with and was not receiving medical treatment related to his right ankle, left knee, or right thumb. (Appellate Panel Decision and Order filed 3/27/20, p. 15, finding of fact 13<sup>th</sup>; Tr., p. 18, line 7 to p. 19, line 2). The Commission found the Respondent suffered admitted injuries to his right ankle, left knee, and right thumb on November 29, 2016. (Appellate Panel Decision and Order filed 3/27/20, p. 15, finding of fact 14<sup>th</sup>; Responses to Forms 58, questions 10 and 11). The Commission found the Respondent received treatment for his right ankle from Dr. Robert Lowery; for his left knee by Dr. Kenneth Caldwell who performed arthroscopic surgery, and for his right thumb by Dr. John Ernst. The Commissioner found the Respondent received IME evaluations from Dr. Adam Schaaf for his left knee and right ankle and from Dr. Daniel Wartinbee for his right thumb. (Appellate Panel Decision and Order filed 3/27/20, p. 15, finding of fact 14<sup>th</sup>; Responses to Forms 58, questions 10 and 11). The Commission found the Respondent was assigned permanent impairment ratings of 0% to 5% for his right ankle, 5% to 12% for his right hand, and 11% to 14% for his left knee. (Appellate Panel Decision and Order filed 3/27/20, p. 15, finding of fact 14<sup>th</sup> APA 1, p. 8, APA 2, p. 32 - 33' APA 3, p. 60b to 61; APA 8, p. 134; APA 9, p. 139).

The Commission found the Respondent complains of swelling in his right ankle after walking for thirty minutes, walking uphill, or climbing stairs and that his right ankle pain aggravates his left knee injury making it impossible for him to perform any job he's done in the past. (Appellate Panel Decision and Order, p. 15, finding of fact 15<sup>th</sup>; Tr., p. 30, line 6 to p. 34, line 3). The Commission found the Respondent complains of left knee pain after walking for fifteen minutes, a popping noise in his knee when climbing stairs, muscle atrophy in his left thigh, and walks with an antalgic gait. (Appellate Panel Decision and Order filed 3/27/20, p. 15 - 16, finding of fact 15<sup>th</sup>; Tr., p. 34, line 15 to p. 36, line 11; Tr., p. 39, lines 12 - 21). The Commission found the hearing Commissioner observed the Respondent was unable to make a fist with his right thumb. (Appellate Panel Decision and Order, p. 15 - 16, finding of fact 15<sup>th</sup>; Tr., p. 27, line 14 to p. 28, line 23). The Commission found the Respondent testified he lost 50% of his grip strength making it difficult to grab and lift heavy objects. (Appellate Panel Decision and Order, p. 15 - 16, finding of fact 15<sup>th</sup>; Tr., p. 28 line 19 to p. 29, line 18).

The Commission found the Respondent underwent a functional capacity evaluation (FCE) on January 23, 2018 ordered by Dr. Caldwell during which the evaluator found the Respondents complaints of pain were consistent and reliable and matched well with clinical observations. (Appellate Panel Decision and Order filed 3/27/20, p. 16, finding of fact 16<sup>th</sup>; APA 5, p. 97). The Commission found the FCE evaluation determined the Respondent was unable to return to his former job.

(Appellate Panel Decision and Order filed 3/27/20, p. 17, finding of fact 17<sup>th</sup>; APA 5, p. 98). The Commission found Dr. Caldwell also concluded the Claimant could not return to his former job based on the FCE and restricted the Respondent to light to medium work with limited kneeling and squatting, and no lifting over 35 pounds. (Appellate Panel Decision and Order filed 3/27/20, p. 17, finding of fact 17<sup>th</sup>; APA 3, pp. 60A to 61). The Commission found the Appellant was unable to accommodate the Respondent's restrictions and approved him for retirement. (Appellate Panel Decision and Order filed 3/27/20, p. 17, finding of fact 18<sup>th</sup>; Tr., p. 57, lines 2 – 7).

The Commission found the vocational evaluation by David R. Price, M. ED, CRC, concluded the Respondent was unable to return to his former job and, based upon his advanced age, limited education, lack of transferable job skill, and medical restrictions, was unable to compete in the labor market, unemployable, and not a candidate for vocational rehabilitation. (Appellate Panel Decision and Order filed 3/27/20, p. 17, finding of fact 19<sup>th</sup>; APA 10, p. 145 – 147).

The Commission found the vocational evaluation by Joel D. Leonard, CRC, CVE, observed the Respondent diligently attended the evaluation, shifted positions throughout the evaluation, and walked favoring his left leg. (Appellate Panel Decision and Order filed 3/27/20, p. 17 - 18, finding of fact 20<sup>th</sup>; APA 6). The Commission found, although Mr. Leonard reported the Respondent had a CDL, he failed to mention the Respondent does not have a current medical certificate. (Appellate Panel Decision and Order filed 3/27/20, p.18, finding of fact 20<sup>th</sup>; APA 6). The Commission found Mr.

Leonard postulated three employment profiles, two of which remained viable after the Appellate Panel found the Respondent reached MMI on February 8, 2018. (Appellate Panel Decision and Order filed 4/22/19). The Commission found Mr. Leonard's first profile assumed the Respondent's complaints of pain were credible and concluded the Respondent was totally disabled while his second profile assumed the Respondent complaints were not credible and concluded, although he could not return to his former job, there were other jobs the Respondent could perform. Appellate Panel Decision and Order filed 3/27/20, p.18, finding of fact 20<sup>th</sup>; APA 6, p. 126 – 127).

The Commission found a surveillance video tape failed to show the Respondent engaging in activities inconsistent with his described symptoms and medical restrictions. (Appellate Panel Decision and Order filed 3/27/20, p.18, finding of fact 21<sup>st</sup>).

The Commission found the Respondent diligently applied for numerous jobs but got only two interviews and no job offers. (Appellate Panel Decision and Order filed 3/27/20, p.19, finding of fact 22<sup>nd</sup>; Tr., p. 40, line 11 to p. 42, line 4).

#### STANDARD OF REVIEW

Appellate courts are bound by the Commission's findings of fact. "The award of the commission ... is conclusive and binding as to all questions of fact." § 42-17-60, *S.C. Code Anno.*, as amended 2007. "The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact." *S.C.*

*Code Anno.*, § 1-23-380(5), as amended 2008. Appellate courts may reverse a decision of the Commission only if it is affected by an error of law or clearly erroneous in view of the substantial evidence on the whole record. *Sturkie v. Ballenger*, 268 S.C. 536, 235 S.E.2d 120 (1977); *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 276 S.E.2d 304 (1981). The findings of the Commission must be sufficiently detailed to enable the reviewing court to determine whether the evidence supports the finding. *Frame v. Resort Services, Inc.*, 357 S.C. 520, 593 S.E.2d 491 (S.C. App. 2004).

### ARGUMENT

- I. The Commissions detailed findings were supported by substantial evidence.

The substantial evidence required to support a factual finding by the Commission is not the evidence viewed from one side of the case but evidence which would allow reasonable minds to reach the conclusion the Commission reached. *Etheredge v. Monsanto Co.*, 349 S.C. 452, 652 S.E.2d 679 (2002). The Commission's detailed findings of fact set forth above were each supported by the substantial evidence cited in the record. The Commission considered and weighed the testimony of the Respondent, the only witness called to testify. The Commission considered and weighed the medical reports of the physicians, the FCE evaluator, and the vocational experts offered by both sides. The Commission found the Respondent's testimony to be forthright and reliable based on his demeanor at the hearing, the hearing Commissioner's observations of his injuries during the hearing, and the FCE

evaluation ordered by Dr. Caldwell. These findings are binding on this Court because they are supported by substantial evidence.

Appellant substitutes its judgement for that of the Commission as to the weight of the evidence and credibility of the witnesses, blindly views the evidence from its side of the case, and resolves all conflicts in the evidence in its favor. The Appellant draws different conclusions from its version of the facts but that does not prevent the Commission's conclusions from its findings of the facts from being supported by substantial evidence. The possibility of drawing different or inconsistent conclusions from the evidence does not prevent the Commission's finding from being supported by substantial evidence. *Tiller v. Nat' Health Care Ctr. Of Sumter*, 334 S.C. 333, 513 S.E.2d 843 (1999).

The Commission's findings were sufficiently detailed to facilitate judicial review. The Commission's findings were not conclusory and do leave the Court to guess how the Commission came to the conclusion the Respondent was permanently and totally disabled. The Commission explained its conclusion:

The greater weight of the evidence establishes the [Respondent] is disabled from gainful employment and has suffered the loss of his wage-earning capacity. [Respondent] testified at the hearing in a forthright manner. He has a solid work history having worked for the [Appellant] 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 [Appellant] agreed the [Respondent] was unable to return

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

(Appellate Panel Decision and Order filed 3/27/20, pp. 20 – 21, conclusion of law 10<sup>th</sup>).

The Commission's conclusion the Respondent is permanently and totally disabled is supported by substantial evidence.

- II. The Commission's award of permanent and total disability was not affected by an error of law.

The Commission ruled the Respondent was not limited to a scheduled award under *S.C. Code Anno.*, § 42-9-30, as amended 2007, because he suffered admitted injuries to his right ankle, left knee, and right thumb. The Commission further ruled

the Respondent was, therefore, entitled to wage loss benefits under *S.C. Code Anno.*, § 42-9-10, as amended 2007. *Brown v. Owens Steel Co., Inc.*, 316 S.C. 278, 450 S.E.2d 57 (S.C. App. 1994). (Appellate Panel Decision and Order filed 2/10/10, p. 20, conclusion of law 7<sup>th</sup>). The Commission ruled permanent and total disability does not require complete helplessness and the inability to perform common labor is totally disabling for one who is not qualified by training or experience for any other employment. *Coleman v. Quality Concrete Products Inc.*, 245 S.C. 616, 142 S.E.2d 143 (1965); *Wynn v. Peoples Natural Gas Co.*, 227 S.C. 465, 88 S.E.2d 581 (1961); *Colvin v. E.I. DuPont De Nemours and Co.*, 227 S.C. 465, 88 S.E.2d 581 (1955). (Appellate Panel Decision and Order filed 2/10/10, p. 20, conclusion of law 9<sup>th</sup>).

The Commission did not improperly rely on its findings of fact the Respondent was unable to return to the job he had performed for over thirty years or that the Appellant was unable to accommodate his medical restrictions in awarding permanent and total disability. It combined those findings with the Respondent's advanced age, limited or less education, borderline or lower than average intelligence, lack of transferrable skills, medical restrictions, and physical complaints of pain in determining he was permanently and totally disabled. (Appellate Panel Decision and Order filed 2/10/10, p. 20, conclusion of law 10<sup>th</sup>). The Commission's ruling the Respondent is permanently and totally disabled is supported by substantial evidence and not affected by an error of law.

III. The Commission resolved the conflicting vocational testimony.

David R. Price, M. ED, CRC, was unequivocal when he concluded the Respondent was unable to return to his former job and, based upon his advanced age, limited education, lack of transferable job skill, and medical restrictions, was unable to compete in the labor market, unemployable, and not a candidate for vocational rehabilitation. (Appellate Panel Decision and Order filed 3/27/20, p. 17, finding of fact nineteenth; APA 10, p. 145 – 147). Joel D. Leonard, CRC, CVE, equivocated by offering different employment profiles. Under Mr. Leonard's first profile, which assumed the Respondent's complaints of pain were, Mr. Leonard agreed the Respondent would be permanently and totally disabled. Under his second profile, which assumed the Respondents complaints were not credible, Mr. Leonard concluded there would be other jobs the Respondent could perform. (Appellate Panel Decision and Order filed 3/27/20, p.18, finding of fact 20<sup>th</sup>; APA 6, p. 126 – 127). The Commission resolved the conflict in the vocational evidence, both between Mr. Price and Mr. Leonard and between Mr. Leonard's conflicting profiles by finding the Respondent's complaints were credible. The Commission's resolution of conflicting vocational evidence, either of different witnesses or of the same witness, are conclusive. *Walsh v. U.S. Rubber Co.*, 238 S.C. 411, 120 S.E.2d 685 (1961).

IV. The Commission's finding the Respondent's complaints were credible is supported by substantial evidence.

The Commission found the Respondent testified in a forthright manner, consistent with the medical evidence, and the hearing Commissioner's observation of

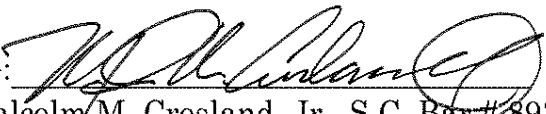
his injuries during the hearing. (Appellate Panel Decision and Order filed 3/27/20, p. 14, finding of fact 7<sup>th</sup>; Tr., p. 48, line 21 to p. 49, line 24). The Commission found the Respondent had a good work history with no gaps in employment and worked for the Appellant for over 30 years. (Appellate Panel Decision and Order filed 3/27/20, p. 14, finding of fact 12<sup>th</sup>; Tr. 17, line 25 to p. 18, line 12). The Commission found the FCE evaluator determined the Respondents complaints of pain were consistent and reliable and matched well with clinical observations. (Appellate Panel Decision and Order filed 3/27/20, p. 16, finding of fact 16<sup>th</sup>; APA 5, p. 97). Questions as to the credibility of the witnesses are reserved to the Commission. *Houston v. Deloach & Deloach*, 378 S.C. 543, 663 S.E.2d 85 (S.C. App. 2008). The Commission's finding the Respondent complaints were credible is supported by substantial evidence.

### CONCLUSION

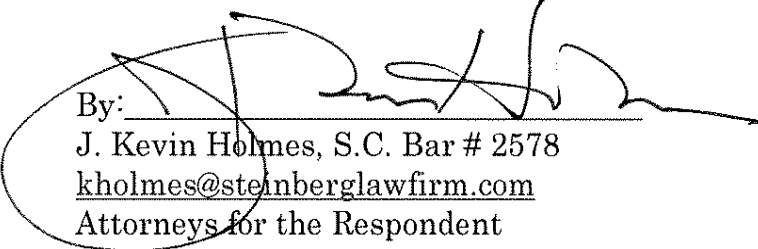
The Commission's detailed findings of fact are supported by substantial evidence and, considered together form a reasonable basis for the Commission's determination the Respondent is permanently and totally disabled. The Commission did not confuse the inability to return to a prior job with total disability. The Commission considered the Respondent's inability to return to his job of thirty years and the Appellant Employer's inability to accommodate his medical restrictions together with other vocational information to determine the Respondent is permanently and totally disabled. The Appellate Panel's Decision and Order filed on March 27, 2020 is supported by substantial evidence and not affected by an error of

law and should be affirmed. This appeal can be decided based upon long established precedent. No novel issue is presented. The Court may wish to consider dispensing with oral argument and deciding the case by issuing a per curiam decision.

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5<sup>th</sup> day of August, 2020.

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA  
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Appellate Case No.: 2020-000723

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PROOF OF SERVICE

I hereby certify I have served a copy of the Respondent's Initial Brief and Designation of Additional Matter to be Included in the Record on Appeal upon opposing counsel of record, Johnnie W. Baxley, Willson Jones Carter & Baxley, PA by depositing a copy in the United States mail, postage prepaid addressed to him at his address of record 421 Wando Park Boulevard, Suite 100, Mount Pleasant, SC 29464.

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August 5, 2020

Via facsimile @ (803) 734-1839  
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**SC Court of Appeals**

Re: Frederick Nelson v. City of North Charleston  
 Appellate Case No.: 2020-000723

Dear Ms. Kitchings:

Attached for filing please find one copy of the Respondent's Initial Brief and Designation of Additional Matter to be Included in the Record on Appeal together with Proof of Service on opposing counsel of record.

With kindest regards, I am

Very truly yours,

J. Kevin Holmes  
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JKH/gmh  
 Enclosures  
 cc: Johnnie W. Baxley, Esquire

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**Aug 05 2020**

**SC Court of Appeals**

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 DATE: August 5, 2020  
 RE: Frederick Nelson v. City of North Charleston  
 Appellate Case No.: 2020-000723

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