

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

---

APPEAL FROM THE SOUTH CAROLINA WORKERS'  
COMPENSATION COMMISSION

---

Appellate Case No.2020-000723

---

**RECEIVED**

**Oct 01 2020**

**SC Court of Appeals**

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

v.

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

---

**BRIEF OF RESPONDENT**

---

Malcolm M. Crosland, Jr.  
J. Kevin Holmes  
**THE STEINBERG LAW FIRM, L.L.P.**  
61 Broad Street  
Post Office Box 9  
Charleston, South Carolina 29402  
(843) 720-2800  
Attorneys for the Respondent

## TABLE OF CONTENTS

Table of Authorities .....	ii
Facts .....	1
Standard of Review.....	6
Arguments	
I.    The Commissions detailed findings were supported by substantial evidence .....	6
II.   The Commission’s award of permanent and total disability was not affected by an error of law.....	8
III.  The Commission resolved the conflicting vocational Evidence .....	9
IV.  The Commission’s finding the Respondent was credible was supported by substantial evidence .....	10
Conclusion.....	11

TABLE OF AUTHORITIES

Cases

*Brown v. Owens Steel Co., Inc.*, 316 S.C. 278, 450 S.E.2d 57  
(S.C. App. 1994) .....9

*Coleman v. Quality Concrete Products Inc.*, 245 S.C. 616  
142 S.E.2d 143 (1965) .....9

*Colvin v. E.I. DuPont D. Nemours and Co.*, 227 S.C. 465  
88 S.E.2d 581 (1955) .....9

*Etheredge v. Monsanto Co.*, 349 S.C. 452, 652 S.E.2d 679 (2002).....6

*Frame v. Resort Services, Inc.*, 357 S.C. 520, 593 S.E.2d491  
(S.C. App. 2004) .....7

*Houston v. Deloach & Deloach*, 378 S.C. 543, 663 S.E.2d 85  
(S.C. App. 2008).....11

*Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 276 S.E.2d 304 (1981).....6

*Sturkie v. Ballenger*, 268 S.C. 536, 235 S.E.2d 120 (1977).....6

*Tiller v. Nat’ Health Care Ctr. Of Sumter*, 334 S.C. 333,  
513 S.E.2d 843 (1999).....7

*Walsh v. U.S. Rubber Co.*, 238 S.C. 411, 120 S.E.2d 685 (1961).....9

*Wynn v. Peoples Natural Gas Co.*, 227 S.C. 465, 88 S.E.2d 581  
(1961).....9

Statutes

*S.C. Code Anno.*, §1-23-380(5), as amended 2008.....6

*S.C. Code Anno.*, § 42-9-10, as amended 2007.....10

*S.C. Code Anno.*, § 42-9-30, as amended 2007.....8

*S.C. Code Anno.*, § 42-17-60, as amended 2007.....6

## FACTS

The facts subject to judicial review in this appeal are detailed in the Appellate Panel's Decision and Order filed on March 27, 2020. (R., pp. 87 – 93). 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. (R., p. 87, findings of fact first through sixth).

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. (R., p. 88, finding of fact seventh; R., p. 146, line 21 to p. 147, line 24).

The Commission found the Respondent was closely approaching advanced age at age 59. (R., p. 88, finding of fact eighth; R., p. 111, 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 whose non-accredited certificate did not qualify as a GED. (R., p. 88, finding of fact ninth; R. 112, lines 11 – 13; R., p. 348). The Commission found educational testing placed the Respondent at the 9.4 grade level for sentence comprehension and 4.8 grade level for math. (R., p. 88, finding of fact ninth; R. 348). The Commission found IQ testing ranged from 71 to 86 placing the Respondent in the

borderline to lower than average range of intelligence. (R., p. 88, finding of fact ninth; R., p. 321<sup>1</sup>; R., p. 348).

The Commission found the Respondent was married and had 5 children, one of whom remains dependent. (R., p. 88, finding of fact eleventh; R., p. 111, lines 21 – 22; R., p. 111, line 25 to p. 112, 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. (R., p. 112, finding of fact twelfth; R., p. 115, line 25 to p. 116, line 12). The Commission found the Respondent worked medium to heavy, unskilled to semi-skilled jobs prior to working for the Appellant. (R., p. 89, finding of fact twelfth; R., p. 112, line 18 to p. 113, line 22). The Commission found the Respondent's job with the Appellant was operating a street sweeper and other equipment. (R., p. 88, finding of fact twelfth; R., 115, line 22 to p. 116, line 6). The Commission found the Respondent was required to have a CDL license, required to frequently lift up to 50 pounds and occasionally lift up to 100 pounds, climb in and out of the equipment, and to frequently stoop, twist, and bend. (R., pp. 88 – 89, finding of fact twelfth; R., 118, line 8 to p. 125, line 13).

The Commission found prior to his admitted injuries, the Respondent was not having problems with or receiving medical treatment related to his right ankle, left

---

<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. (R., p. 4). There is a gap between submissions 5 and 7. Appellant's Notice of Submissions included No. 6, Joel Leonard, vocational expert. (R., 331). The hearing Commissioner referred to the vocational report in his review of the evidence. (R., p. 14).

knee, or right thumb. (R., p. 89, finding of fact thirteenth; R., p. 116, line 7 to p. 117, line 2). The Commission found the Respondent suffered admitted injuries to his right ankle, left knee, and right thumb on November 29, 2016. (R., p. 89, finding of fact fourteenth). 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. (R., p. 89, finding of fact fourteenth; R., p. 188, responses to Form 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. (R., p. 89, finding of fact fourteenth; R., p. 198; R., p. 223 – 225; R., pp. 255 – 257; R., 338; R., p. 343).

The Commission found the Respondent testified he experiences 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. (R., p. 89, finding of fact fifteenth; R., p. 128, line 6 to p. 132, line 3). The Commission found the Respondent testified he continues to experience left knee pain after walking for fifteen minutes, has a popping noise in his knee when climbing stairs, has muscle atrophy in his left thigh, and walks with an antalgic gait. (R., p. 89 – 90, finding of fact fifteenth; R., p. 132, line 15 to p. 134, line 11; R., 137, lines 12 – 21). The Commission found the hearing Commissioner

observed the Respondent was unable to make a fist with his right thumb. (R., p. 89 – 90, finding of fact fifteenth). The Commission found the Respondent testified he lost 50% of his grip strength making it difficult to grab and lift heavy objects. (R., p. 89 – 90, finding of fact fifteenth; R., p. 126, line 19 to p. 127, 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. (R., p. 90, finding of fact sixteenth; R., 29; R., p. 295). The Commission found the FCE evaluation determined the Respondent was unable to return to his former job. (R., p. 91, finding of fact seventeenth; R., p. 296). 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. (R., p. 91, finding of fact seventeenth; R., pp. 264 – 265). The Commission found the Appellant was unable to accommodate the Respondent's restrictions and approved him for retirement. (R., p. 91, finding of fact eighteenth; R., p. 155, 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. (R., p. 91, finding of fact nineteenth; R., pp. 349 – 351).

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. (R., pp. 91 – 92, finding of fact twentieth; R., pp. 318 – 327). 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. (R., p. 92, finding of fact twentieth). 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. (R., pp. 91 – 92, finding of fact twentieth). 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. (R., pp. 91 – 92, finding of fact twentieth; R., 325 – 326).

The Commission found a surveillance video tape failed to show the Respondent engaging in activities inconsistent with his described symptoms and medical restrictions. (R., p. 92, finding of fact twenty-first).

The Commission found the Respondent diligently applied for numerous jobs but got only two interviews and no job offers. (R., p. 93, finding of fact twenty-second; R., 138, line 11 to p. 139, 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." § 1-23-380(5), *S.C. Code Anno.*, 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).

## 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 observations of his injuries by the hearing Commissioner during the hearing, and the FCE evaluation

ordered by Dr. Caldwell. Sitting as an appellate court, this Court is bound by these findings.

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). 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 different or inconsistent conclusions it draws from the evidence does not prevent the Commission's finding from being supported by substantial evidence.

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). The Commission's findings were not conclusory and do leave the Court to guess why it came to the conclusion the Respondent was totally and permanently disabled. Based on the Commission's detailed findings of fact, the Commission concluded:

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).

(R., pp. 95 – 96, conclusion of law tenth). The Commission's detailed findings of fact supporting its ruling the Respondent is permanently and totally disabled are supported by substantial evidence.

**II. The Commission's award of total and permanent 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 ruled the Respondent as entitled to seek permanent and total disability under *S.C. Code Anno.*,

§ 42-9-30, 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 seventh). The Commission ruled permanent and 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. *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). (R., p. 94, conclusion of law ninth).

The Commission did not improperly rely on its findings of fact the Respondent was unable to return to the job he had performed for the Appellant for over thirty years and 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 to determine he was permanently and totally disabled. (R., pp. 94 – 95, conclusion of law tenth). The Commission's ruling the Respondent is permanently and totally disabled is not affected by an error of law.

### **III. The Commission resolved the conflicting vocational testimony.**

The Commission's resolution of conflicting 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). 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. (R., p. 91, finding of fact nineteenth; R., pp. 349 – 351). Joel D. Leonard, CRC, CVE, equivocated by offering different opinions based on different profiles. Under Leonard’s first profile, if the Respondent’s complaints of pain were credible, the Respondent was permanently and totally disabled while under his second profile, if the Respondents complaints were not credible, there were other jobs the Respondent could perform. (R., p. 92, finding of fact twentieth; R., pp. 325 – 326). The Commission resolved the conflict in the evidence, both between Mr. Price and Mr. Leonard and between Mr. Leonard’s conflicting opinions in favor a finding of permanent and total disability. The Commission’s resolution of the conflicting vocational evidence is conclusive.

**IV. The Commission’s finding the Respondent was 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. (R., p. 88, finding of fact seventh; R., p. 146, line 21 to p. 147, 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. (R., p. 88, finding of fact twelfth; R., p. 115, line 25 to p. 116, line 12). The Commission found the FCE evaluator determined the Respondents complaints of pain were consistent

and reliable and matched well with clinical observations. (R., p. 90, finding of fact sixteenth; R., p. 295). The Commission's finding the Respondent was credible is supported by substantial evidence. 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 (Ct. App. 2008).

## CONCLUSION

The Commission's individual findings of fact are supported by substantial evidence and, taken together, for a reasonable basis for the Commission's conclusion the Respondent is permanently and totally disabled. The Appellate Panel Decision and Order filed on March 27, 2020 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 the issuance of a per curiam decision.

**THE STEINBERG LAW FIRM, L.L.P.**  
61 Broad Street  
Post Office Box 9  
Charleston, South Carolina 29402  
(843) 720-2800

By: s/ Malcolm M. Crosland, Jr.  
Malcolm M. Crosland, Jr., S.C. Bar # 8934  
mrosland@steinberglasfirm.com

and

By: s/ J. Kevin Holmes  
J. Kevin Holmes, S.C. Bar # 2578  
[kholmes@steinberglawfirm.com](mailto:kholmes@steinberglawfirm.com)  
Attorneys for the Respondent

Charleston, South Carolina

1<sup>st</sup> day of October, 2020.