THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE WORKERS' COMPENSATION COMMISSION
Aisha Taylor, Commissioner
Melody L. James, Commissioner
Avery B. Wilkerson, Commissioner

W.C.C. FILE NO.: 182225

Appellate Case No. 2020-001474

David Casey, Employee, Respondent

v.

APTIM Federal Services, LLC, Employer, and XL Specialty Insurance Company, Carrier, Appellants.

FINAL BRIEF OF RESPONDENT

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COUNTER-STATEMENT OF ISSUE ON APPEAL

1. Whether the Appellate Panel's award of TTD was proper based on a preponderance of the evidence in the record.

STATEMENT OF THE CASE

This matter was before the Full Commission's Appellate Panel (hereinafter "Full Commission") pursuant to Respondent's Form 30, requesting review of Single Commissioner R. Michael Campbell's (hereinafter "Single Commissioner") December 12, 2019 Decision and Order. This matter was before the Single Commissioner on July 2, 2019 in Columbia, South Carolina pursuant to Claimant's Form 50 and Defendants' Form 51, specifically to determine compensability of injuries, to determine entitlement to past, present and future total disability benefits, and to determine entitlement to future medical care.

Claimant sustained an injury arising out of and in the course and scope of his employment due to a motor vehicle accident on December 10, 2018. Claimant is an Unexploded Ordnance Technician for APTIM Federal Services (hereinafter "Defendant Employer"). While on assignment in Chesapeake, Virginia, he sustained injuries to his back when he was pinned between his vehicle and another vehicle in the parking lot of his hotel.

Claimant was under work restrictions as of December 11, 2018, which precluded performance of his normal job duties. Claimant contends that he missed nineteen (19) weeks of work due to his restrictions between December 14, 2018 and May 13, 2019 (with the exception of 19 days he was accommodated with work within his restrictions). Claimant argued he was owed TTD for this period during which Defendants were unable to accommodate his work-related restrictions.

The Single Commissioner found Claimant sustained a compensable injury to his back, he

was entitled to additional medical treatment, and he was entitled to reimbursement for all causally related out-of-pocket expenses. The Single Commissioner did not find Claimant met his burden of proof entitling him to temporary total disability benefits (hereinafter "TTD"). (R. pp. 7-11).

Respondent timely filed a Form 30 Request for Commission Review to address the TTD finding. (R. pp. 37-39). Respondent is the only party that properly filed a Form 30 appealing any issues to the Full Commission. Respondent took the position that he met his burden of proof establishing that he was entitled to TTD relying on his testimony and a preponderance of the medical evidence submitted by both parties. Appellants took the position that Respondent was not entitled to TTD. The Full Commission issued an order reversing the Single Commissioner's decision regarding TTD and awarded benefits from January 18, 2019 through May 12, 2019 (less the ten days Respondent worked on light duty). (R. pp. 13-28). Appellants filed a Motion to Reconsider, which the Full Commission denied. (R. pp. 65-69; R. pp. 29 -30). On November 4, 2020, Appellants filed this Notice of Appeal. (R. pp. 88-92).

STANDARD OF REVIEW

The Administrative Procedures Act (APA) establishes the standard for judicial review of decisions of the Workers' Compensation Commission. Code 1976, § 1–23–380.

South Carolina Code Ann. § 1-23-380 establishes the "substantial evidence" rule as the standard of review for decisions of the Workers' Compensation Commission. *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 276 S.E.2d 304 (1981). Pursuant to that rule, a reviewing court may reverse or modify a decision of an administrative agency if the findings, inferences, conclusions, or decisions of that agency are clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. Code 1976, § 1–23–380(5)(e). Substantial evidence is defined as: "Such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. It must be enough

to justify, if the trial went to a jury, refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury. This is something less than the weight of the evidence and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." Workers' Compensation Commission. *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 276 S.E.2d 304 (1981) at 135-136, 276 S.E.2d at 307.

Appellate courts are not at liberty to substitute their view of the evidence for that rendered by the Commission. Rather, "[t]he Circuit Court's role is appellate only and is limited to deciding whether the Commission's decision is not supported by substantial evidence or is controlled by some error of law." *Rogers v. Kunja Knitting Mills Co.*, 312 S.C. 377, 440 S.E.2d 401 (Ct. App. 1994). When reviewing an appeal from the Workers' Compensation Commission, the appellate court may not weigh the evidence or substitute its judgment for that of the Full Commission as to the weight of the evidence and questions of fact. *Therrell v. Jerry's, Inc.*, 370 S.C. 22, 26, 633 S.E.2d 893, 894-895 (2006).

Moreover, "the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Palmetto Alliance, Inc. v. S.C. Pub. Serv. Comm'n*, 282 S.C. 430, 432, 319 S.E.2d 695, 696 (1984). In workers' compensation cases, the Appellate Panel is the ultimate finder of fact. *Shealy v. Aiken County*, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000). When the evidence is conflicting over a factual issue, the findings of the Appellate Panel are conclusive. *Hargrove v. Titan Textile Co.*, 360 S.C. 276, 290, 599 S.E.2d 604, 611 (Ct. App. 2004). The final determination of witness credibility and the weight to be accorded evidence is reserved for the Appellate Panel. *Bass v. Kenco Group*, 366 S.C. 450, 458, 622 S.E.2d 577, 581 (Ct. App. 2005).

ARGUMENT

I. Under § 42-9-10, the Full Commission award of TTD because Respondent was not accommodated was proper based on a preponderance of the evidence in the record and should be expanded back to December 14, 2018.

In determining entitlement to TTD, the claimant bears the burden of proving entitlement to TTD. For TTD, "a claimant must prove only that work restrictions prevent him from performing the job he had before the injury, and that his current employer has not offered him light-duty employment. . . . [T]he claimant satisfies his burden by proving work restrictions that prevent him from performing his regular job and the unavailability of light-duty employment through the same employer." *Lee v. Bondex, Inc.,* 406 S.C. 97, 749 S.E.2d 155 (2013).

Medical Evidence

While compensability was and is not at issue on appeal, it is necessary to discuss key portions of the medical evidence to support Respondent's testimony and contention that he is entitled to TTD. Respondent was taken by ambulance to Chesapeake Regional on the day of the accident (R. pp. 183-188). On December 11, 2018, Respondent was evaluated at Bayview Urgent Care in Virginia at the direction of Appellants (R. pp. 225-232). The records noted Respondent was only there for two more days for work, so they were releasing him to full duty, and he needed to contact his case manager with any further problems (R. pp. 227). However, further review of the urgent care records shows this was not exactly a full duty release. The release states Respondent could return to work with attention not to aggravate his injury and would have restrictions while still in Virginia of lifting less than ten (10) pounds occasionally (R. pp. 231).

Respondent testified before the Single Commissioner (discussed in detail below) that after returning from Virginia he spent the next few weeks doing as little as possible hoping to get better.

He went back to work in the second week of January in a construction support position, and his problems persisted. After returning from this assignment, Respondent sought treatment at the Veterans Administration on January 18, 2019 (R. pp. 189). At that visit, he was advised not to return to work until medically cleared and given a work restriction of lifting no more than ten (10) pounds (R. pp. 189). Respondent then followed up with his primary care physician where he was referred for physical therapy (R. pp. 190-191). After completing several sessions of physical therapy, Appellants finally directed Respondent to Midlands Orthopaedic for an evaluation by Dr. LaMotta (R. pp. 196-201). On March 14, 2019, Dr. LaMotta evaluated Respondent and altered his restrictions to lifting no more than forty to forty-five (40-45) pounds (R. pp. 201). Dr. LaMotta saw Respondent again on May 9, 2019, and he released Respondent to full duty with no restrictions. (R. pp. 198, 202).

Respondent Hearing Testimony

Respondent testified on his own behalf at the hearing. Respondent works for Appellant Employer as an unexploded ordnance technician (hereinafter "UXO"), which involves working on active ranges or flood sites doing metal detection for unexploded ordnance and then, if necessary, disposing of any ordnance (R. p. 100, line 20 - p. 101, line 17). Respondent testified that he had been working consistently for the Employer since March 2017, and he had worked all over the country at different sites (R. p. 101, line 18 - p. 103, line 8). He discussed the high physical demands of his work, which include extensive digging and lifting items as heavy as 80 pounds (R. p. 103, lines 11-17). He further testified that to perform his normal UXO work when he first started working for the Employer, he was required to pass an OSHA physical and be able to lift a minimum of 40-45 pounds. That amount was increased to 50 pounds at some point after he went out of work from this accident. (R. p.105, line 12 – p. 106, line 3).

On December 10, 2018, Respondent was putting something in the back seat of his truck when the car beside him started backing up, and the driver cut his wheel too quickly, hitting Respondent's door and pinning him between the door and the door frame. Respondent testified that he went to the emergency room that day and an urgent care in Virginia the next day, at the direction of his employer. (R. p. 106, lines 7-15). He finished his work on December 13, 2018 and returned home. Medical records note that the work he was doing in December was in a supervisory role with no rigorous physical activity required (R. p. 195). He testified that the urgent care released him to full duty since they were not going to be seeing him again because his current assignment in Virginia was ending in a couple days, not because he was not injured. Despite repeated and repetitive cross examination about being released to full duty, Respondent testified that the "full duty" release clearly said not to do anything that would aggravate his injury. (R. p. 142, lines 17-24).

While under these restrictions, Respondent testified that he was given another light duty construction support assignment by the Employer that started on January 7, 2019 and ran for approximately a week until January 15, 2019 (R. p. 109, lines 6-22). It was during this return to work that he really started to notice the pain in his back, and this was when he started seeking follow up care. He testified that he was advised by XL Specialty Insurance Company's adjuster (hereinafter "Appellant Carrier") to seek treatment with his primary care physician and get notes so Appellant Carrier could address future care, which is exactly what he did. For the next six weeks or so, he testified that he was strung along by Appellant Carrier until he finally got an attorney. He testified that his case was then (appropriately) transferred to the proper jurisdiction in South Carolina, and he was authorized to see Dr. LaMotta in March 2019. At this point, he had already completed a round of physical therapy that had been ordered by his primary care physician, and Dr. LaMotta advised him to continue those exercises he learned in physical therapy (R. p. 111, line 6 – p. 114, line 18).

Claimant testified that he returned to Dr. LaMotta on May 9, 2019 wherein he requested to be released to full duty because he could not continue to be held out of work without pay (R. p. 115, lines 6-20).

Respondent testified that from the time he left his assignment where he was injured in December until he was released to full duty, he worked approximately one week in construction support in January, four or five days in March, and three or four days in April. He testified that all the jobs he was able to work while under restrictions were construction support. (R. p. 103, line 3 – p. 104, line 8; p. 116, line 19 – p. 117, line 15). Respondent testified that he missed out on several job opportunities with the Employer as a UXO because he was under restrictions from his work injury that precluded him from being assigned to those jobs. He testified about a job that was available in December in Quantico, Virginia as well as other opportunities in Dam Neck, Virginia and Adak, Alaska. (R. p. 107, line 18 – p. 109, line 15). No testimony or evidence was put forth to rebut these assertions.

Respondent testified further that Appellants admitted to him in January that he was injured and unable to return to full duty, so he would be compensated through Workers' Compensation. (R. p. 144, line 3 – p. 145, line 22; R. pp. 204-218). Respondent also discussed emails from Appellant Carrier where they noted they were confirming the last date he worked so they could start paying him temporary benefits while he was out. (R. p. 155, lines 7-18; R. pp. 204-218). Respondent reiterated later in testimony about his restrictions that precluded him from working several assignments that came up while he was under restrictions until he was released and returned to work in May 2019 (R. p.145, line 23 – p. 148, line 8). Again, no testimony or evidence was put forth to rebut these assertions.

Full Commission Ruling and Error of Single Commissioner

As Respondent argued before the Full Commission, the Single Commissioner ignored parts of and/or misconstrued Respondent's hearing testimony, which led to an error in the Single

Commissioner's Finding of Fact 11 and Conclusion of Law 4. Specifically, the Single Commissioner erred by finding Respondent's work restrictions were accommodated by Defendants and that Respondent did not meet his burden proving entitlement to TTD (R. pp. 9-10). While Finding of Fact 11 is accurate regarding Respondent not providing a physician note writing him completely out of work, it is inaccurate that Appellants accommodated his restrictions continuously throughout the period he was under restrictions. While the Single Commissioner's finding is flawed in noting Appellants accommodated Respondent, it is worth noting that the Single Commissioner did not find that Respondent failed to produce work restrictions, nor did he find Respondent's work restrictions were unrelated to his work injury.

Section 42-1-120 of the South Carolina Code (1985) defines disability as the "incapacity because of injury to earn the wages which an employee was receiving at the time of the injury in the same or some other employment." During the period of disability, an employer may pay temporary total or partial compensation, or salary in lieu of compensation, to the injured employee. *See* 25A S.C. Code Ann. Regs. 67-503(B) (Supp.2011); *Cranford v. Hutchinson Construction*, 399 S.C. 65, 731 S.E.2d 303 (Ct. App. 2012).

As discussed above, Respondent testified at length about being under restrictions from Bayview Urgent Care as of December 11, 2018 (initially with, among other restrictions, a 10-pound lifting restriction and then "with attention not to aggravate his injury") (R. p. 231; R. p. 142, lines 17-24). He testified that shortly after his assignment in Chesapeake ended on December 13, 2018, he could have transferred to a position in Quantico, but that position required full duty, which he was not capable of performing based on the urgent care restrictions (R. p. 107, line 8 – p. 108, line 19; p. 142, lines 14 – p. 143, line 15). No testimony or evidence was put forth to rebut these assertions.

Respondent testified regarding only three assignments where Defendants were able to

accommodate him between December 13, 2018 (the day his assignment in Chesapeake ended) and May 9, 2019 (the day Dr. LaMotta released him to full duty and placed him at MMI). These assignments were in construction support, which were within his restrictions of taking attention not to aggravate his injury, which is the only reason he was able to work them. The evidence shows Respondent was under restrictions during this period of temporary disability, and there is no evidence to contradict Respondent's testimony that he was accommodated for only eighteen (18) days (2.5714 weeks) of the one hundred and fifty-one (151) days (21.5714 weeks) during which he was under restrictions. As a result of this error in Finding of Fact 11, the Single Commissioner incorrectly concluded as law that Respondent had not met his burden under *Lee v. Bondex, Inc.* that his work restrictions prevented him from performing the job he had before the injury, and his employer had not offered him light duty (R. p. 10).

At the Full Commission, Respondent argued he met his burden of proof under *Lee v. Bondex, Inc.* by establishing a compensable injury with work-related restrictions that Appellants did not accommodate (with the exception of 2.5714 weeks) during the period from December 14, 2018 (the day after his Chesapeake assignment ended) through May 9, 2019 (the day Dr. LaMotta released him to full duty at MMI).

Lee v. Bondex, Inc. makes clear that claimants must prove they have work restrictions that prevented performing the job they had before the injury and have not been offered light duty employment. *Lee v. Bondex, Inc.* 406 S.C. 97, 749 S.E.2d 155 (2013). While Appellants appear to be attempting to shift the focus to the contract/temporary nature of Respondent's assignments for Appellant Employer, this argument is irrelevant because the case hinges on whether the restrictions prevented performance of the job he had before the injury with Appellants. *Lee v. Bondex, Inc.* goes further stating a claimant is not required to prove he could not find any

employment; rather, the burden is only proving the work restrictions prevented performing his regular job and the unavailability of light duty employment **through the same employer** (*Id.*).

Based on Respondent's testimony and the evidence in the record, there can be no dispute that Appellants did not continuously accommodate Respondent's work restrictions. Respondent testified, without contradiction, concerning multiple assignments that were available between December 14, 2018 and May 9, 2019 that he was unable to perform due to his work restrictions (R. p. 142, lines 17-24; p. 107, line 8 – p. 108, line 19; p. 142, line 14 – p. 143, line 15). The preponderance of the evidence in the record, in combination with that testimony, shows Appellants were unable to accommodate his restrictions (with the exception of 2.5714 weeks). A more in-depth discussion of his Bayview Urgent Care restrictions is below, but putting that argument aside briefly, a review of the totality of the evidence in the record supports finding that his restrictions from the VA were work-related.

First, there is the evidence of the initial 10-pound restriction from the urgent care (R. p. 231). Second, Respondent testified that after returning from his assignment in January that he sought treatment for his back at the VA and his primary care physician (R. p. 109, lines 4-25; p. 111, lines 2-20). Third, you have the actual VA restrictions that are in the record (R. p. 189). Finally, Respondent provided multiple e-mails showing correspondence with Appellant Carrier regarding obtaining updated work restrictions and starting his TTD since they could not accommodate Respondent (R. pp. 204-218). Through these emails, Appellants admitted Respondent would be entitled to TTD. In reviewing this evidence together, it is clear the Full Commission's decision to award TTD was not based on surmise, conjecture, or speculation. Additionally, a thorough review of these e-mails clearly shows Appellants were not properly directing his care, so to hide behind an argument now that the restrictions were from an unauthorized treating source is arbitrary.

Returning to the Bayview Urgent Care restrictions from December 2018, Respondent's position, as it was before the Full Commission, is that releasing someone with the specific instruction of "with attention not to aggravate his injury" is tantamount to a work restriction. Respondent further asserts that the Full Commission did not specifically rule on this issue, as there is no finding of fact concerning this work restriction. The Full Commission only found that Respondent did provide a physician statement with restrictions that Appellants were unable to accommodate (R. p. 24, Finding of Fact 11). Appellants argument very clearly assumes the Full Commission rejected this argument when in fact no such determination was made (Appellant's Initial Brief, p. 19). For this reason, Respondent does not believe the law of this case includes any ruling regarding the Bayview Urgent Care work restrictions.

As it pertains to the actual argument regarding the restrictions, Appellants incorrectly attempt to blend the analysis of the different restrictions in *Cranford* to support this not being a work restriction. However, the court in *Cranford* clearly found that the case of *Grayson v. Carter Rhoad Furniture,* 312 S.C. 250, 439 S.E.2d 859 (Ct.App.1993), *aff'd as modified by Grayson v. Carter Rhoad Furniture,* 317 S.C. 306, 454 S.E.2d 320 (1995), was instructive. Grayson was employed with Carter Rhoad to lift and move furniture. *Grayson,* 312 S.C. at 252, 439 S.E.2d at 860. In August 1990, he injured his back while working. *Id.* In December 1990, the treating physician, Dr. Graziano, released him to return to work, although he advised Grayson to be "somewhat careful with lifting." *Id.* at 252-53, 439 S.E.2d at 860.

It is Respondent's position that the restrictions in *Grayson* to "be somewhat careful with lifting" and in *Cranford* to "refrain from heavy lifting" and "strenuous activity" and to "take it easy" are virtually synonymous with Respondent's restriction of "with attention not to aggravate his injury." It is also worth noting that the Bayview Urgent Care doctor clearly was only releasing

Respondent because he was leaving Virginia on December 13, 2018, and he was to follow up with Appellants if he had problems (R. p. 231). When reviewing the evidence as a whole, this is clearly a restriction on Respondent's ability to work, which, again, he testified about limiting his ability to work because he could not transfer to other locations after this assignment ended.

The Full Commission reversed the Single Commissioner's decision and found Respondent was owed TTD under the Act. If there is error in the Full Commission's decision, it is that they did not consider the period between December 13, 2018 and January 17, 2019 when Respondent was under restrictions and unable to work. Again, there was no evidence provided to contradict Respondent missing out on work. Concerning the different periods that Respondent has alleged he was accommodated and not, Appellants forget that there were three separate periods totaling 19 days between December 13, 2018 and his release by Dr. LaMotta in May 2019 wherein Respondent was accommodated with light duty work. The Full Commission finding Respondent was accommodated for ten days is not contrary to his own arguments, as Respondent argued he was accommodated for ten days between January 18, 2019 and his release by Dr. LaMotta. Appellants forget the period prior to January 18, 2019 where Respondent was accommodated for nine days.

Additionally, Appellants argue that Dr. LaMotta altering Respondent's restrictions in March 2019 did not preclude him from performing any job for Appellant Employer. However, Respondent testified that the requirements for lifting were increased to 50 pounds at some point after he went out of work from this accident, which would preclude returning to work. (R. P. 105, line 12 – p. 106, line 3). The basis for whether TTD is owed under *Lee* also requires showing the unavailability of work. There was no testimony to contradict Respondent's testimony that work was not available to him when his restrictions changed in March 2019.

CONCLUSION

For the reasons set forth above, Respondent respectfully asserts the Full Commission only erred in not finding he was entitled to TTD from December 13, 2018 through January 17, 2019 (less the nine days he was accommodated during this period). Respondent requests the Court of Appeals reverse the Full Commission's decision, in part, and find the preponderance of the evidence supports finding Respondent met his burden of proof establishing entitlement to benefits under the Act.

Respectfully submitted,

By: _____

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June 23rd, 2021
North Charleston, South Carolina

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PROOF OF SERVICE

The undersigned certifies that on June 23rd, 2021, he served counsel for Appellants' with a copy of **Respondent's Final Brief** by depositing a copy of the same as described below:

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Call For Additional Office Locations

June 23, 2021

The Honorable Jenny Kitchings
1220 Senate Street
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RE: David Casey v. APTIM Federal Services LLC
Carrier: XL Specialty Insurance Company
Date of Loss: 12/10/2018
WCC File #: 1822255

Dear Ms. Kitchings,

Please find enclosed our ***Claimant/Respondent's Final Brief*** together with the Certificate of Service on behalf of David Casey, Claimant/Appellant. By copy of this letter to Daniel B. Eller, Esq. & William Childers, Esq., we are notifying them of this submission and serving a copy of the same.

Sincerely,

Chip Alexander

Richard C. Alexander
Attorney at Law

RCA/fy

cc: Daniel B. Eller, Esq. (w/encls)
William Childers, Esq. (w/encls)