

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Gene McCaskill, Commissioner
Derrick L. Williams, Commissioner
Avery B. Wilkinson, Jr., Commissioner

Appellate Tracking/File No. 2013-000413
W.C.C. File No. 0818089

Rubenia B. Hammond,

Employee, Claimant/Appellant,

v.

Aiken Regional Medical Center
ACE American Insurance Company c/o
Sedgwick Claims Management Services, Inc.,

Employer, Carrier/Respondents.

INITIAL BRIEF OF APPELLANT

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SC Court of Appeals

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April 24, 2013

TABLE OF CONTENTS

Table of Authorities.....3,

Statement of Issues on Appeal.....4

Statement of the Case and acts.....4

Arguments

1. **The Commission erred as a matter of fact and/or law in finding and concluding that the Claimant’s position that she suffered a work-related injury to her right shoulder and right arm was/is not supported by the greater weight of the evidence in the record.**
2. **The Commission erred as a matter of fact and/or law in finding and concluding that the Claimant did not satisfy her burden of proving entitlement to total and permanent disability benefits.**
3. **The Commission erred as a matter of fact and/or law in finding and concluding that the Claimant is not entitled to surgery as part of the future casually-related medical treatment pursuant to Dodge v. Bruccoli, Clark, Layman, Inc., 334 S.C. 574 (S.C. Ct. App. 1999).**

Conclusion.....19

TABLE OF AUTHORITIES

CASES

1. Dodge v. Bruccoli, Clark, Layman, Inc., 334 S.C. 574 (S.C. Ct. App. 1999)
2. Wigfall v. Tideland Utilities, Inc., 354 S.C. 100, 103, 580 S.E.2d 100, 101 (2003)
3. Peoples v. Henry Co., 364 S.C. 123, 611 S.E.2d 527 (Ct. App. 2005)
4. Mixson v. Westinghouse Elec. Corp., 304 S.C. 31, 402 S.E.2d 893 (Ct. App. 2005)
5. Simmons v. City of Charleston, 349 S.C. 64, 75, 562 S.E.2d 476, 482 (Ct.App.2002)
6. Roper v. Kimbrell's of Greenville, 232 S.C. 453, 99 S.E. 2d 52 (1957)

STATUTES AND REGULATIONS

1. S.C. Code Ann. § 42-9-10 (1976)
2. S.C. Code Ann. § 42-9-30 (1976)
3. S.C. Code Ann. § 42-9-30(21) (1976)
4. S.C. Code Ann. § 42-15-60(1976)
5. S.C. Code Ann. § 42-1-160(D) (1976).
6. S.C. Code Ann Reg. 67-505
7. S.C. Code Ann Reg. 67-502
8. S.C. Code Ann Reg. 67-509

STATEMENT OF ISSUES ON APPEAL

1. WHETHER THE COMMISSION ERRED AS A MATTER OF FACT AND/OR LAW IN FINDING AND CONCLUDING THAT THE CLAIMANT'S POSITION THAT SHE SUFFERED A WORK-RELATED INJURY TO HER RIGHT SHOULDER AND RIGHT ARM WAS/IS NOT SUPPORTED BY THE GREATER WEIGHT OF THE EVIDENCE IN THE RECORD. **(SEE CLAIMANT'S FORM 30, EXCEPTIONS 1, 2 10, 14, 15 AND 21)**
2. WHETHER THE COMMISSION ERRED AS A MATTER OF FACT AND/OR LAW IN FINDING AND CONCLUDING THAT THE CLAIMANT DID NOT SATISFY HER BURDEN OF PROVING ENTITLEMENT TO TOTAL AND PERMANENT DISABILITY BENEFITS. **(SEE CLAIMANT'S FORM 30 , EXCEPTIONS 3, 4,5,6, 7, 8, 9, 11, 12, 16, 17, 18, 19 AND 22)**
3. WHETHER THE COMMISSION ERRED AS A MATTER OF FACT AND/OR LAW IN FINDING AND CONCLUDING THAT THE CLAIMANT IS NOT ENTITLED TO SURGERY AS PART OF THE FUTURE CASUALLY-RELATED MEDICAL TREATMENT PURSUANT TO **DODGE V. BRUCCOLI, CLARK, LAYMAN, INC., 334 S.C. 574 (S.C. CT. APP. 1999)**. **(SEE CLAIMANT'S FORM 30, EXCEPTIONS 13, 20 AND 23)**

STATEMENT OF THE CASE AND FACTS

This is an appeal of the Order of the Full Commission filed on January 31, 2013. The Order in this matter followed an Oral Argument before the Full Commission on December 18, 2012. The Claimant/Appellant was represented by J. Bradley Baker, Esquire and the Defendants/Respondents were represented by Jason W. Lockhart, Esquire. The purpose of the hearing was to determine the issues as set forth in the Claimant's Form 30. The Claimant maintained that she sustained a compensable injury to her neck, right shoulder, right arm, back and right hip as a result of the Claimant's November 10, 2008 admitted work related injury. The Claimant took the position that she was entitled to an award for permanent and total disability, pursuant to Section 42-9-10 or Section 42-9-30(21), as well as lifetime causally-related medical treatment pursuant to Dodge v. Bruccoli, Clark, Layman, Inc., 334 S.C. 574 (S.C. Ct. App. 1999) to include surgery, physical

therapy, injections, pain management and prescription pain medications. The Defendants admitted that the Claimant sustained compensable injuries to the neck, back, and right hip, but denied that the Claimant sustained a compensable injury to the right shoulder and/or right arm. The Defendants maintained that the Claimant was not entitled to an award of total and permanent disability benefits, but would be entitled to an award of permanent partial disability benefits to the back and right hip pursuant to Section 42-9-30 of the Act. Both parties agreed that there are future medicals that are necessary and established in the medical records, but the parties disagreed on the specific nature of the future medicals related to the injury. The appeal to the Full Commission followed a hearing before Single Commissioner Melody James which was held on May 3, 2012. The Single Commission Order was filed August 13, 2012 with the South Carolina Workers' Compensation Commission.

At the hearing before the Single Commissioner the Claimant was the only witness to testify. The Claimant stated that she was 66 years of age, and resides in North Augusta, South Carolina with her husband. (Tr. p. 6, lines 06 - 23) The Claimant indicated that she was employed with the Defendants as an administrative assistant on the date of her November 2008 work-related accident. (Tr. p. 9, lines 22 - 25) The Claimant testified that she has not worked since leaving her employment, and is currently receiving Social Security Retirement Benefits, which she began receiving in December 2008. (Tr. p. 27, lines 01 - 25) The Claimant testified that she gave notice to the Defendants in 2008 that she was retiring, and that the Defendants requested that the Claimant stay until the end of the year. (Tr. p. 22, lines 01 - 25 and Tr. p. 23, Lines 01 - 03) The Claimant accepted the offer to stay, and agreed to work part-time thereafter when the work was available. According to the Claimant, that meant that she would work when the switchboard operator was out, or when someone in billing was out temporarily. (Tr. p. 22, lines 04 - 13) While the Claimant

testified that she planned to retire in 2008, she also testified that she planned to work part time thereafter until she was 70 years old. (Tr. p. 22, lines 02 - 07)

The Claimant indicated she sustained an injury on November 10, 2008 while in the course and scope of her employment as an administrative assistant with the Defendants. (Tr. p. 9, lines 12 - 25) She testified that she fell at work as she was walking through a doorway with an armful of charts, and was ultimately taken by ambulance to the emergency room as a result of the fall. (Tr. p. 10, lines 16 - 25) The Claimant testified that the Defendants made her an appointment with Dr. Holford on November 17, 2008. At that time she was having pain in her right hip (Tr. p. 11, lines 15 - 20). Dr. Holford has been the Claimant's authorized treating physician since this accident. (Tr. p. 11, lines 15 - 25). The Claimant explained that she received injections from Dr. Holford for her right hip pain. After being referred to Dr. Daniel for an M.R.I. and pain management, the Claimant further testified that the pain was actually coming from her back. (Tr. p. 12, lines 04 - 23). The Claimant was also treated by Dr. Downey for pain related to the accident according to the Claimant. (Tr. p. 14, lines 20 - 25) The Claimant stated that she has sought and received medical treatment from the above-referenced physicians in the form of injections, and prescription medications. (Tr. p. 14, lines 02 - 22) The Claimant testified that she most recently received two injections into her neck, which were administered by Dr. Holford. (Tr. p. 14, lines 02 - 08).

The Claimant testified that she currently experiences neck pain, which radiates into the right upper extremity (Tr. p. 18, lines 02 - 04). The Claimant stated that she also currently experiences lower back and right hip pain, which limits the Claimant's ability to bend at the waist (Tr. p. 18, lines 04 - 20). The Claimant indicated that she is also unable to sit and/or stand for extended periods following her on the job injuries. (Tr. p. 18, lines 04 - 20) The Claimant also testified that she was of the opinion that she has/had lost greater than 50% of the use of her back as a result of her November 2008 work-related accident. (Tr. p. 24, lines 01 - 04).

The Claimant testified that she was released back to work light duty but she could not return to work because of significant pain, the affects of pain medication which she must take to control her pain and lack of sleep. (Tr. p. 14, lines 23 - 25 and Tr. p. 15, lines 01 - 05). Ms. Hammond also testified that she had bad days about 4 days a week in which she is in bed with a heating pad and taking pain pills (Tr. p. 20, lines 07 - 12). In addition, the Claimant stated that, prior to the date of her November 2008 work-related accident, she had informed the Defendants that she was interested in retiring at the conclusion of 2008 and had actually applied for Social Security Retirement Benefits. (Tr. p. 46, lines 19 - 22).

The Defendants authorized the Claimant to treat with Carolina Musculoskeletal Institute, PA on a number of occasions between November 17, 2008 and November 3, 2011. (APA 58 - 112) According to Dr. Holford's report, dated December 1, 2008, the results of the MRI of the Claimant's lumbar spine showed some degenerative disc disease and facet arthropathy, with no significant disc herniation. A consultation for epidural steroids was recommended. (APA 103). Both Dr. Daniel and Dr. Holford provided treatment for the Claimant's chronic low back pain for approximately two years. The Claimant was treated with physical therapy, medication and injections including epidural steroids (APA 71-81). According to medical notes dated September 26, 2011, Dr. Daniel treated the Claimant with another epidural steroid injection, and noted that she had been suffering pain and discomfort in her lower back for the duration of his treatment of the Claimant. (APA 62). Within that same note, Dr. Daniels recommends that Ms. Hammond consider spinal stimulation. (APA 62). On August 11, 2011 Dr. Holford, the authorized treating physician, completed a questionnaire regarding future medical treatment related to the Claimant's neck injury. (APA 69-70). Within the questionnaire, Dr. Holford is asked "To a reasonable degree of medical certainty, will Ms. Hammond need future causally related medical treatment, including but not limited to, surgery, physical therapy, injections, pain management and prescription pain medications, to tend to lessen her period

of disability so that she can maintain her current level of functioning as a result of her neck injury sustained on or about November 10, 2008?" Dr. Holford responded "Yes" to the question. With regards to the Claimant's hip injury, Dr. Holford indicated that the Claimant will require NSAID, pain management, and trigger point injections. (APA 86).

The Claimant's records from her family physician indicate continued right hip and right leg pain as of January 22, 2009, despite receiving steroid injections into her right hip. (APA 147). The Claimant's physical therapy records indicate she had approximately one month of treatment from May 8, 2009 to June 5, 2009.(APA 157 - 168). The Claimant's physical therapy records from May 29, 2009 indicate the Claimant continued suffering with head and neck pain, and that the Claimant started Prednisone 20 mg a day for five days at that time. (APA 159)

Dr. Downey initially examined the Claimant in November 2009. (Downey Depo. Pg. 4, lines 16 - 17) According to Dr. Downey's deposition testimony, which was handed up at the hearing and made part of the record, he diagnosed the Claimant with cervical and lumbar degenerative disc disease, which was aggravated by the Claimant's November 2008 work-related accident. (Downey Depo. Pg. 5, lines 03 - 06) Dr. Downey stated that he most recently examined the Claimant on January 12, 2012, and the Claimant provided Dr. Downey with complaints of ongoing neck pain with radiculopathy into the right upper extremity. (Downey Depo. Pg. 7, line 17 and Pg. 8, lines 01 - 05) Dr. Downey indicated that he provided the Claimant with treatment in the form of prescription medication and recommended that the Claimant undergo physical therapy, but he had no record of the Claimant having undergone the physical therapy which was prescribed. (Downey Depo. Pg.4, line 21 and Pg. 6, Line 9) Dr. Downey testified that the Claimant reached maximum medical improvement on July 26, 2011, and remained at maximum medical improvement. (Downey Depo. Pg. 13, lines 18 - 23). With regards to the Claimant's need for future medical treatment, Dr. Downey stated that the Claimant would need future medical treatment in the form of Cymbalta, and that the

Claimant could receive future prescription medications from the Claimant's family physician. (Downey Depo. Pg. 15, lines 01 - 07).

Dr. Downey testified that the medical records reflected that the Claimant was involved in a motor vehicle accident in October 2011. (Downey Depo. Pg. , lines 03 - 06) Dr. Downey stated that the Claimant's October 2011 motor vehicle accident did not result in the aggravation and/or exacerbation of the Claimant's work-related injuries. (Downey Depo. Pg. 22, lines 20 - 21). Furthermore, Dr. Downey indicated that the Claimant did not sustain additional injuries to the cervical spine or lumbar spine as a result of the Claimant's October 2011 motor vehicle accident. (Downey Depo. Pg. 12, lines 01 - 05) Dr. Downey reaffirmed the 15% whole person impairment rating, which he previously provided to the Claimant, and indicated that the impairment rating was based on the 5th Ed. of the AMA Guides to Permanent Impairment. (Downey Depo. Pg. 10, lines 12 - 22). More specifically, Dr. Downey testified that the impairment rating was based on the Claimant having possessed cervical degenerative disc disease with verifiable complaints of radiculopathy. (Downey Depo. Pg. 11, lines 02 - 05).

Ms. Hammond saw Joel Leonard, CRC, CVE on February 21, 2012. Mr. Leonard's professional opinion was that Ms. Hammond was/is totally disabled within the directing parameters of "quality, dependability and quantity" if not totally disabled in an outright manner. (APA 8) Within his report he concluded that in the end the clinical and functional evidence of the record does not provide the necessary foundation required to endorse the performance of gainful work activity. (APA 8) Mr. Leonard opined that: To come to a conclusion supportive of employment one would have to discount the general nature of Ms. Hammond's assertions, most notably, one would have to dismiss complaints related to the use of her upper and lower extremities as well as her subjective assertions of chronic pain. (APA 9) Mr. Leonard went on to state: given the clinical evidence of record, to include the cited findings from the NCS as well as the most recent functional commentary

of Dr. Daniel, he was not inclined to engage in such actions - certainly not in the absence of any compelling evidence to the alternative. (APA 8).

Mr. Leonard concludes that given the results of Ms. Hammond's vocational evaluation, it would appear that she has experienced a catastrophic demise in her ability to access the open labor market or her ability to garner a competitive wage. (APA 8) Additionally, it would appear that such circumstances are reasonably correlated to the November 8, 2010 injury. (APA 8)

The Single Commissioner determined that the Claimant sustained an injury to her back and her right hip. The Single Commissioner found that the Claimant did not sustain an injury to her right shoulder and right arm, nor was the Claimant found to be totally and permanently disabled. The Single Commissioner determined that the Claimant was entitled to an award of indemnity (90) weeks of permanent disability benefits, representing 30% permanent partial disability to her neck and thirty nine and 2/10ths (39.2) weeks of permanent disability benefits representing 14% permanent partial disability to her right hip. The aggregate of the award of permanent partial disability benefits was the sum of Thirty Seven Thousand Five Hundred Fifty Four and 56/100 (\$37,554.56) Dollars. The Commissioner found that the Claimant was entitled to future medical treatment pursuant to Dodge v. Bruccolli, Clark, Layman, Inc., 334 S.C. 574 (S.C. Ct. App. 1999) but limited the Claimant's future medical treatment to NSAIDs (specifically Cymbalta), pain management, and trigger point injections. The Claimant appealed that Single Commissioner's order. By Order of the Full Commission filed January 31, 2013, the Single Commissioner's Order was affirmed.

ARGUMENTS

- 1. THE COMMISSIONER ERRED AS A MATTER OF FACT AND/OR LAW IN FINDING AND CONCLUDING THAT THE CLAIMANT'S POSITION THAT SHE SUFFERED A WORK-RELATED INJURY TO HER RIGHT SHOULDER AND**

RIGHT ARM WAS/IS NOT SUPPORTED BY THE GREATER WEIGHT OF THE EVIDENCE IN THE RECORD. (SEE GROUNDS FOR APPEAL 1, 2, 10, 14, 15 AND 21)

In the Claimant's amended Form 50 requesting a hearing the Claimant listed the Claimant's Neck, Right Shoulder, Right Arm, Back and Right Hip. This Form 50 was filed on February 10, 2012. The Claimant listed the same body parts on her Form 58 pre-hearing brief.

Following this admitted accident, the Claimant began to treat with Dr. John Martin Downey, DO of the Royal Pain Center in Augusta Georgia. Within a questionnaire dated February 7, 2012, Dr. Downey opined that the work related injury of November 10, 2008 has affected the use of Ms. Hammond's right shoulder and right arm in that she continues to experience radiating pain into her right shoulder and right arm. (APA 12). Throughout the records of Dr. Downey the right shoulder and right arm are noted as being painful as well as weak and it is noted that "her right arm is giving her a lot of pain and when she tries to pick something up, she has no control over it. (APA 30) The Claimant is noted to have weakness of the shoulder external rotators and forearm supinator muscles. (APA 30) The Claimant is noted to have the same symptoms at APA 36.

During his treatment of the Claimant, Dr. Downey performed an EMG based on complaints of neck and right shoulder-region pain with parasthesias. The results revealed evidence of chronic right C5 radiculopathy with evidence of reinnervation activity. Within the EMG report it is noted that the physical exam reveals weakness in the right C5/C-6 myotome. (APA 46). Dr. Downey's note of November 25, 2009, indicates that the Claimant presents with pain of 8-9 on a scale of 10, localized primarily in the upper thoracic/cervical region, favoring the right shoulder girdle, with radiating pain into the right upper extremity, in the lower back and into the right leg.

While treating with the authorized physicians, Dr. Holford and Dr. Daniels the Claimant completed a spine patient questionnaire and noted weakness in her arms and hands and numbness

in the arms and hands on the right (APA 63- 67) (see also APA 87- 89). Furthermore, Dr. Holford's note of November 17, 2008 reflects that the Claimant has radiating pain and tenderness into the shoulders. (APA 105).

During her treatment the Claimant was sent by the workers compensation carrier to have an FCE. The FCE report indicates that the right shoulder flexion was limited to 145 degrees, abduction to 138, extension 38, internal rotation 70 and external 74 degrees.(APA 137 and 142).

Based on the record pointed out above, the Claimant has clearly suffered impairment and loss of use to her right shoulder and right upper extremity. Despite the evidence presented the Single Commissioner held that the Claimant's right shoulder and right arm are not additional injured members. The Single Commissioner's decision was affirmed by the Full Commission. It is the Claimant's position that this finding of the Commission is clearly erroneous in view of the reliable, probative and substantial evidence in the records and is not supported by the greater weight of the evidence in the record. The decision is also affected by an error of law. It does not matter that Claimant's upper extremity pain and weakness is a radicular component of her neck/back injury rather than a direct injury.

The South Carolina Supreme Court has stated: "The Singleton Court intended 'impairment' to encompass a physical deficiency." Wigfall v. Tideland Utilities, Inc., 354 S.C. 100, 103, 580 S.E.2d 100, 101 (2003). Peoples v. Henry Co., 364 S.C. 123, 611 S.E.2d 527 (Ct. App. 2005)(award of 68% to leg affirmed because ruptured Achilles tendon not limited to foot because pain traveled up into leg); Mixson v. Westinghouse Elec. Corp., 304 S.C. 31, 402 S.E.2d 893 (Ct. App. 2005)(for workers' compensation purposes, there is no requirement that loss of use, or partial loss of use, of member of body requires evidence of direct injury to member itself). See also Simmons v. City of Charleston, 349 S.C. 64, 75, 562 S.E.2d 476, 482 (Ct.App.2002) (injury to scheduled member that

affected other parts of body compensable as general disability). It is enough that the other body part be *affected*. There is no requirement that a separate impairment rating be given to obtain an award of permanency. The substantial evidence in the record supports a finding of permanency and loss of use to the Claimant's right shoulder and right upper extremity. In Roper v. Kimbrell's of Greenville the Supreme Court of South Carolina stated "loss of use" and "partial loss of use" are simple, everyday, unambiguous words, and are to be given their ordinary, generally accepted meaning." Roper v. Kimbrell's of Greenville, 232 S.C. 453, 99 S.E. 2d 52 (1957). The evidence proves that the Claimant has weakness in her shoulder and arm as well as loss of range of motion. This clearly falls into the definition of "loss of use". Therefore a finding that the Claimant is not entitled to a permanency award is clearly erroneous in view of the reliable, probative and substantial evidence in the record. To hold that the Claimant is not entitled to a permanency award to the right shoulder and arm amounts to a misapplication of the law and error of law and is arbitrary and capricious and an abuse of discretion.

2. THE COMMISSION ERRED AS A MATTER OF FACT AND/OR LAW IN FINDING AND CONCLUDING THAT THE CLAIMANT DID NOT SATISFY HER BURDEN OF PROVING ENTITLEMENT TO TOTAL AND PERMANENT DISABILITY BENEFITS.(SEE GROUNDS FOR APPEAL 3, 4, 5, 6, 7, 8, 9, 11, 12, 16, 17, 18, 19 AND 22)

The Claimant took the position that she was entitled to an award for permanent and total disability, pursuant to Section 42-9-10 or Section 42-9-30(21). This position was based upon Ms. Hammond's vocational evaluation performed by Joel Leonard, CRC, CVE on February 21, 2012. Mr. Leonard's professional opinion was that Ms. Hammond was/is totally disabled within the directing parameters of "quality, dependability and quantity" if not totally disabled in an outright

manner. There was no vocational report submitted by the Defense. Mr. Leonard's report alone satisfies the Claimant's burden of proving total and permanent disability. To state and hold that the Claimant has not satisfied her burden is a misstatement of the record, clearly erroneous in view of the evidence, is an error of law and amounts to an abuse of discretion.

Within his report, Mr. Leonard considered the possibility that Ms. Hammond is capable of engaging in some form of alternative work activity, since her work history is accented by various clerical and process driven pursuits. (APA 8) As well as some aspects of her physio vocational status come relatively close to supporting some form of work activity. (APA 8) However, in the end the clinical and functional evidence of the record does not provide the necessary foundation required to endorse the performance of gainful work activity. Mr. Leonard opined that: To come to a conclusion supportive of employment one would have to discount the general nature of Ms. Hammond's assertions, most notably, one would have to dismiss complaints related to the use of her upper and lower extremities as well as her subjective assertions of chronic pain. (APA 8) Mr. Leonard went on to state: given the clinical evidence of record, to include the cited findings from the NCS as well as the most recent functional commentary of Dr. Daniel, he was not inclined to engage in such actions - certainly not in the absence of any compelling evidence to the alternative. (APA 8)

Mr. Leonard concludes that given the results of Ms. Hammond's vocational evaluation, it would appear that she has experienced a catastrophic demise in her ability to access the open labor market or her ability to garner a competitive wage. Additionally, it would appear that such circumstances are reasonably correlated to the November 8, 2010 injury.(APA 8)

The Defendants did not have a vocational evaluation performed on the Claimant. So there is no expert report that contradicts the opinions of Mr. Leonard. Instead the Defense relied on an FCE performed on December 3, 2009. It is important to note that at the time of the FCE in 2009 the

Claimant's Neck was not an accepted aspect of the Claimant's claim. Following the FCE the Claimant received over two years of treatment for her cervical spine, back and hip problems. It is also clear that the affects of the neck injury began to show up more prominently in the records after the FCE. Mr. Leonard had the opportunity to review the FCE and did not find it persuasive or conclusive regarding the Claimant's ability to work when he evaluated her in February of 2012.

In holding that the Claimant was not permanently and totally disabled, the Commission seems to have been persuaded by the testimony of the Claimant that she had intended to retire the year of her injury. (Tr. p. 22, lines 05 - 07) The Claimant testified that she had notified her employer that she was going to retire. (Tr. p. 22, lines 24 - 25 and Tr. p. 23, lines 01 - 02) At the employer's request she stayed on to finish the year. (Tr. p. 23, lines 03 - 13) Before the year was out she was injured. The Claimant's plans to retire does not change the fact that the Claimant had an injury that has had a catastrophic impact on her ability to earn income. At Finding of Fact 8 the Commission infers that the Claimant's testimony was not consistent regarding retirement and plans to work thereafter. The Claimant testified she intended to work until she was 70 years old. (Tr. p. 22, line 04) This is easily explained by her testimony that she was going to try and continue to work part time for the employer after her retirement. (Tr. p. 23, lines 11 - 13) The Claimant's testimony was not contrary or inconsistent. The fact is that the injury prevented the Claimant from finishing out the year as requested by the employer and the injury prevented her from working part-time after her retirement. The Claimant's testimony was consistent on this issue. Furthermore, the Claimant should not be penalized because she had plans to retire before she suffered an injury which has now destroyed her earning capacity.

The substantial evidence in the record supports a finding that the Claimant is totally and permanently disabled following her admitted on the job injury of November 10, 2008. The report

of Joel Leonard is mentioned above. The Claimant also testified that she was of the opinion that she has/had lost greater than 50% of the use of her back as a result of her November 2008 work-related accident. (Tr. p. 24, lines 01 - 04). The Claimant testified extensively about how this admitted accident has affected her ability to function. Such testimony should not be discounted. It is clear from the medical records that she suffers from significant pain. It is important to note that there has been no finding or holding that the Claimant is not credible. Her testimony was clearly honest and forthright and supported by other evidence submitted.

The Commission's finding and holding that the Claimant has not met her burden of proving entitlement to permanent and total disability pursuant to Section 42-9-10 or Section 42-9-30(21) is clearly erroneous in view of the reliable, probative and substantial evidence in the records and is not supported by the greater weight of the evidence in the record. The decision is also affected by an error of law and an abuse of discretion. The decision should be overturned based on the evidence in the record and there should be a holding that the Claimant is totally and permanently disabled. At a minimum, the matter should be remanded to the Commission for further findings to explain the basis of ignoring the evidence that the Claimant is totally disabled to include the expert opinion of Joel Leonard and the testimony of the Claimant.

3. THE COMMISSION ERRED AS A MATTER OF FACT AND/OR LAW IN FINDING AND CONCLUDING THAT THE CLAIMANT IS NOT ENTITLED TO SURGERY AS PART OF THE FUTURE CASUALLY-RELATED MEDICAL TREATMENT PURSUANT TO DODGE V. BRUCCOLLI, CLARK, LAYMAN, INC., 334 S.C. 574 (S.C. CT. APP. 1999).(SEE GROUNDS FOR APPEAL 13, 20 AND 23)

On August 11, 2011, Dr. Holford, the authorized treating physician, completed a questionnaire regarding future medical treatment related to the Claimant's neck injury. (APA 69-70).

Within the questionnaire, Dr. Holford is asked “To a reasonable degree of medical certainty, will Ms. Hammond need future causally related medical treatment, including but not limited to, surgery, physical therapy, injections, pain management and prescription pain medications, to tend to lessen her period of disability so that she can maintain her current level of functioning as a result of her neck injury sustained on or about November 10, 2008?” Dr. Holford responded “Yes” to the question. The opinion of Dr. Holford satisfies the requirements of South Carolina Code § 42-15-60 and specifically mentions “surgery”. The opinion is supported by the note of Dr. Daniels, also an authorized treating physician, who opined that Ms. Hammond was a candidate and should consider a spinal cord stimulator.(APA 62). The implantation of such a device certainly would involve surgery.

South Carolina Code § 42-15-60 (A) states in part: “The employer shall provide medical, surgical, hospital, and other treatment, including medical and surgical supplies as reasonably may be required, for a period not exceeding ten weeks from the date of an injury, to effect a cure or give relief and for an additional time as in the judgment of the commission will tend to lessen the period of disability as evidenced by expert medical evidence...” The Claimant has submitted expert medical evidence in the form of a questionnaire from Dr. Holford who has opined to a reasonable degree of medical certainty that the Claimant will need future causally related medical to include “surgery”. Dr. Holford also opined that such treatment would tend to lessen the Claimant’s period of disability. There is not explanation for why the expert opinion of Dr. Holford, who was the authorized treating physician, was ignored by the Commission.

It is important to note that throughout the South Carolina Workers’ Compensation Act the opinion of the authorized treating physician and medical providers are given great deference. In South Carolina the employer/carrier is given the authority to pick and authorize the selection of the

authorized treating physician pursuant S.C. Code Ann. § 42-15-60 and S.C. Code Ann. Reg. 67-509. In the case of Rubenia Hammond the Defendants selected Dr. Holford and Dr. Daniels as the authorized treating physicians. Clearly this is a very powerful tool for the employer and carrier in the South Carolina Workers' Compensation system. In fact, if an injured employee refuses to accept medical treatment provided by the employer this can be grounds for termination of further compensation until the refusal ceases. South Carolina Code § 42-15-60. Other examples of the Workers' Compensation Act giving great deference to the opinions of the authorized treating physician can be found within South Carolina Code Ann. § 42-1-160(D) (1976)(mental injuries). Also S.C. Code Ann. Reg. 505 grants the employer/carrier the right to terminate temporary total benefits when the authorized health care provider reports that an injured worker is able to return to work. Within S.C. Code Ann. Reg 67-502 the phrase "Return to work without restriction" is defined as "A statement of the authorized health care provider..." The opinion of the authorized health care provider is also controlling when an employer wants to terminate temporary total compensation after 150 days pursuant to S.C. Reg. 67-506. The Commission has also created a Form 14B which is to be completed by the authorized health care provider. This form is entitled "Physician's Statement". Clearly the opinion of the authorized treating physician or provider should be given great deference.

The opinions of Dr. Holford and Daniels are clear. The Claimant should be entitled to "surgery" as part of her future medical treatment. There is substantial evidence within the record to support the Claimant's position that she is entitled to surgery as part of her Dodge v. Bruccolli, Clark, Layman, Inc., 334 S.C. 574 (S.C. Ct. App. 1999) future medical. Future medical treatment should have been ordered and surgery should have been specifically mentioned. To hold that the Claimant is not entitled to surgery is clearly erroneous in view of the reliable, probative and substantial evidence in the records and is not supported by the greater weight of the evidence in the

record. The decision is also affected by an error of law and is a misapplication of the law. The decision to exclude surgery from the Claimant's future medical care should be overturned and this Court should hold that pursuant to South Carolina Code § 42-15-60 and Dodge v. Bruccolli, Clark, Layman, Inc., 334 S.C. 574 (S.C. Ct. App. 1999) the Claimant is entitled to surgery in the future. At a minimum, this matter should be remanded for further explanation of why the Commission chose to ignore the opinion of the authorized treating physician regarding the need for future surgery.

CONCLUSION

The Claimant moves the South Carolina Court of Appeals to reverse the findings and conclusions of the South Carolina Workers' Compensation Commission and to find that the Claimant has suffered a compensable injury to her right shoulder and right arm and is entitled to a permanency award for the injuries. The Claimant should be deemed totally and permanently disabled and "surgery" should be included in the future medical that the Claimant is entitled to pursuant to Dodge v. Bruccolli, Clark, Layman, Inc., 334 S.C. 574 (S.C. Ct. App. 1999).



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April 24, 2013