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**Jun 21 2022**

**SC Court of Appeals**

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

FILE NO.: 1809996

**William D. Downes**, Employee-Claimant,

Respondent-Appellant,

vs.

**Bon Secours Mercy Health, Inc.**, Employer, and  
**Safety Nat'l Cas. Corp.**, Carrier-Defendants,

Appellants-Respondents.

Appellate Panel Review held virtually  
on March 21, 2022, per notice timely  
and properly served upon all parties of interest.

Appearances: Don Kamb, Esq. of Williams & Kamb, LLC of Greenville, South  
Carolina for claimant

Ashley R. Forbes, Esq. of McAngus, Goudelock & Courie, LLC of  
Greenville, SC for defendants.

Purpose: Appellate Panel Review of issues set forth on the parties'  
respective Form 30 Requests for Commission Review

Filed: June 8, 2022

## STATEMENT OF CASE

This claim initially came before the Commission on claimant's Form 50 seeking additional benefits for an admitted injury by accident that occurred on April 17, 2018 while he was working for employer-defendant. Claimant has received some authorized treatment for his low back and his left leg, and he is continuing to receive weekly temporary total disability compensation benefits. At the hearing, claimant contended he needs and is entitled to additional medical treatment for his back, specifically low back surgery recommended by neurosurgeon Dr. Esce. Defendants responded contending that such surgery is not warranted based on the opinions of the other physicians who have seen claimant, including neurosurgeons Dr. Bucci and Dr. Kanos. By stipulation, the only issue for determination at the hearing was claimant's entitlement to this low back surgery. All other issues, including permanency, were held in abeyance.

By Order dated October 22, 2021, the hearing Commissioner determined that claimant has not reached MMI and is entitled to the treatment and surgery recommended by Dr. Esce. Specifically, the Commissioner made the following findings, conclusions, and order:

### *FINDINGS OF FACT*

- 1. An employee/employer relationship existed between the parties at the time of claimant's injury. This finding is based on the parties' stipulation.*
- 2. Claimant's average weekly wage is \$1,260.00, for a corresponding compensation rate of \$838.21. This finding is based on the parties' stipulation.*
- 3. Claimant sustained admitted injuries to his low back and left Achilles tendon arising out of and in the course and scope of his employment on April 17, 2018. This finding is based on all the evidence on the record, including but not limited to defendants' admission.*
- 4. Claimant underwent various evaluations and treatments for his admitted work-related injuries, including but not limited to medications, injections, and physical therapy for his back injury and surgery and physical therapy for his Achilles injury. This finding is based on all the evidence on the record, including but not limited to claimant's*

testimony and the medical records of Workwell Occupational Medicine, Dr. Bucci, and Dr. Han.

5. On August 20, 2018, in his medical notes, authorized treating physician Dr. Michael N. Bucci of SSA Piedmont Spine and Neurosurgical Group opined: "Nonsurgical. Pain management referral. He has been seeing a chiropractor weekly and was encouraged to continue on with this for the time being. No follow-up indicated here currently." (Cl's APA p. 25) This finding is based on the medical records of Dr. Bucci.

6. On April 1, 2020, in his medical notes, authorized, treating physician Dr. Sung J. Han of Piedmont Comprehensive Pain Management Group, LLC opined: "Not a surgical candidate for lumbar spine, has seen Dr. Bucci." (Cl's APA p. 46) This finding is based on the medical records of Dr. Han.

7. On September 23, 2020, on a Form 14B, Dr. Ping Gao of AnMed Health Occupational Medicine opined to a reasonable degree of medical certainty that claimant was at MMI as of April 1, 2020, assigned a 1% medical impairment to the low back, assigned no permanent physical limitations, and recommended no additional medical treatment. (Defs' APA p. 21) Dr. Gao, who is not a surgeon, did not provide treatment for claimant but was retained by defendants to provide an impairment rating and other Form 14B information. This finding is based on the medical records of Dr. Gao.

8. On January 6, 2021, in her medical notes, nurse practitioner Julie Justice of Carolina Orthopaedic & Neurosurgical Associates opined: "Apparently, the patient has a history of a lumbar disc herniation that occurred following a work-related injury. I do not have any recent imaging. We will go ahead and get a lumbar MRI to further evaluate and I would like for him to follow up with Dr. Esce after he has this for further direction." (Cl's APA p. 57) Ms. Justice, who is not a surgeon, did not provide treatment for claimant but was sought out by him in an attempt to obtain another medical opinion on his low back condition when he was not allowed to return to Dr. Bucci. This finding is based on all the evidence on the record, including but not limited to claimant's testimony and the medical records of Nurse Justice and Carolina Orthopaedic & Neurosurgical Associates.

9. On January 9, 2021, in an independent examination obtained by claimant, Dr. William Devault of the Orthopaedic Center opined: "Within a reasonable degree of medical certainty, William Downes has reached maximum medical improvement for these injuries. Based on the American Medical Association Guides to the Evaluation of Permanent Impairment, Fifth Edition, William Downes has 17% lumbar spine permanent and partial impairment under DRE lumbar category three, table 153-3, page 384... In order to maintain his current level of function, William Downes will need six physician visits per year and 15 physical therapy visits per year for treatment of acute exacerbations of his lumbar spine and left lower extremity conditions. Additional lumbar spine evaluation and treatment may be necessary. William Downes is suitable only for sedentary desk type work at this time." (Defs' APA p. 10) Dr. DeVault did not provide treatment for claimant but was retained by him to provide an additional impairment rating and other permanency information. This finding is based on the medical records of Dr. DeVault.

10. On February 4, 2021, in a follow-up appointment at Carolina Orthopaedic & Neurosurgical Associates scheduled by Nurse Justice, neurosurgeon Dr. Philip Esce opined: "MRI reviewed done at Piedmont Imaging shows L5-S1 moderate disc herniation central extending to the left side with decreased disc height...Plan is for a left L5-S1 micro-

discectomy. Risk, benefits, and details of the procedure have been explained to the patient." (CI's APA pgs. 61-62) This finding is based on the medical records of Dr. Esce.

11. On March 1, 2021, on a questionnaire obtained by claimant, Dr. Esce opined to a reasonable degree of medical certainty: "It is more likely than not that Danny Downes low back injury, including but not limited to lumbar disc protrusion at L5-S1 with radiculopathy, was either caused or was aggravated by his work accident on or about April 17, 2018 when a patient fell on him. The medical treatment provided to or recommended for Danny Downes, including but not limited to L5-S1 micro discectomy, was either provided or recommended in an effort to affect a cure, give relief, and reduce the period of disability stemming from his work-related low back injury." (CI's APA pgs. 66-67) This finding is based on the medical records of Dr. Esce.

12. On May 17, 2021, in an IME obtained by defendants, Dr. Kanos of Prisma Health Southeastern Neurosurgical & Spine Institute opined: "I reviewed his MRI and there is relatively mild bulge at L5-S1. Is not causing significant stenosis. He does not have classic radicular pain but he will have tingling with occasional pain. He's got calf atrophy and the EHL weakness as a result of his Achilles injury and was told that some of the symptoms in the feet are related to that. In terms of the L5-S1 discectomy, I am not inclined to recommend that. I think the odds of getting significant improvement in the back are low as his pain is strongly non-mechanical. Also, radiculopathy is not his main complaint. His symptoms are approximate 80% back/20% leg. I feel he is at MMI with a 5% impairment rating to his lumbar spine based on the AMA Sixth Edition. He had an FCE that showed sedentary activity, and I have no reason to dispute this. I think further medical treatment should include [pain management, medication, therapy or possible facet blocks or other injections]." (Defs' APA p. 25) This finding is based on the medical records of Dr. Kanos.

13. On June 28, 2021, at a follow-up appointment, Dr. Esce opined: "Workers' Comp then sent him over to Prisma, where he was Dr. Kanos who did not recommend surgery, but recommended further conservative care. Repeating the injections and physical therapy again. The patient then returned to my office with continued persistent complaints of severe back pain and lumbar radiculopathy, worse on the left side than right side, weakness with movement of his foot... Overall, I feel that given the fact he has really done everything possible for this but with no relief, a microdiscectomy at L5-S1 would be the next best available option. We are going ahead and try to get him set up for surgery." (CI's APA pgs. 63 & 65) This finding is based on the medical records of Dr. Esce.

14. On August 12, 2021, at the hearing before the undersigned Commissioner, claimant testified regarding his work-related accident, the medical treatment he has received and the issues he continues to have.

(A) Claimant testified that on April 17, 2018, claimant was assisting with a large patient in the CT scanning area. When the patient began to fall, he caught her and immediately felt a painful pop in his low back. The pain radiated into both legs.

(B) Claimant stated he was sent to Workwell Occupational Medicine for evaluation and treatment, but he testified that the treatment provided did not help him.

(C) A lumbar MRI scan was obtained, and claimant stated that he was sent to Dr. Bucci and then to Dr. Han. Claimant testified that he was treated with four rounds of injections and some 18 months of physical therapy.

(D) Claimant testified that the injections and other conservative treatment he received provided only temporary relief and that his low back and leg pain never entirely went away.

(E) Claimant sustained another injury to his left Achilles during evaluation and treatment at Workwell. He later underwent surgery for that injury and spent some time in a walking boot. Claimant testified that the boot affected his gait and increased his back pain.

(F) Claimant testified that he inquired about returning to see Dr. Bucci again but explained that he was not allowed to do so. He stated that he therefore sought out further evaluation on his own at Carolina Orthopaedic & Neurosurgery, where he eventually saw Dr. Esce. Claimant stated that Dr. Esce recommended surgery to repair a disc in his low back.

(G) Claimant testified that rather than providing the surgery recommended, the insurance carrier sent him to Dr. Kanos for another opinion, and Dr. Kanos recommended continued conservative treatment rather than surgery. However, claimant testified that he has already undergone such conservative medical treatment since his accident on April 2018, and it has not made him any better.

(H) Claimant testified that he needs and wants the surgery recommended by Dr. Esce so that his low back problem can be addressed and he can become more functional.

*This finding is based on claimant's testimony.*

15. Given that Dr. Esce and Dr. Kanos are the only physicians in the record that had the benefit of the most recent MRI of claimant's back, I give their opinions the greatest weight, as compared to the physicians who saw claimant prior to the most recent MRI. This finding is based on all the evidence on the record, including but not limited to claimant's testimony and the medical records of Workwell Occupational Medicine, Dr. Bucci, Dr. Han, Dr. Esce, and Dr. Kanos.

16. Furthermore, given that Dr. Kanos only evaluated the claimant on one occasion, I give greater weight to the opinions of Dr. Esce, who along with his assistant saw and evaluated claimant on several occasions. This finding is based on all the evidence on the record, including but not limited to claimant's testimony and the medical records of Dr. Esce and Dr. Kanos.

17. Therefore, based on the opinions of Dr. Esce, as well as claimant's sworn testimony at the hearing, I hereby find claimant is not at MMI for his admitted low back injury. This finding is based on all the evidence on the record, including but not limited to claimant's testimony and the medical records of Workwell Occupational Medicine, Dr. Bucci, Dr. Han, Dr. Esce, and Dr. Kanos.

18. Based on Dr. Esce's recommendation, claimant is entitled to the back surgery recommended and requested, and all causally-related medical treatment, by a physician of the defendants' choosing with a specialty to the back. This finding is based on all the evidence on the record, including but not limited to claimant's testimony and the medical records.

19. *A determination of permanency is premature at this time.*
20. *All other issues are held in abeyance at this time.*

#### *RULINGS OF LAW*

1. *Under S.C. Code Ann. §§ 42-1-130 to -150, the South Carolina Workers' Compensation Commission has jurisdiction over claimant's claim for benefits.*
2. *Under S.C. Code Ann. § 42-1-40 and S.C. Code Reg. 67-1603, claimant's average weekly wage is \$1,260.00, for a corresponding compensation rate of \$838.21.*
3. *Under S.C. Code Ann. § 42-1-160, claimant sustained compensable injury by accident arising out of and in the course of his employment with employer-defendant on April 17, 2018 causing compensable injuries to his low back and left Achilles tendon (leg).*
4. *Claimant has not reached maximum medical improvement from his injuries. See Dodge v. Bruccoli, Clark, Layman, Inc., 334 S.C. 574, 514 S.E. 2d 593 (Ct. App. 1999)(maximum medical improvement is plateau at which no further medical care or treatment will lessen the degree of impairment.*
6. *Under S.C. Code Ann. § 42-15-60, claimant is entitled to and defendants are responsible for the back surgery recommended by Dr. Esce by a physician of the defendants' choosing with a specialty to the back.*

#### *ORDER*

*It is ordered that defendants shall provide the back surgery recommended by Dr. Esce by a physician of the defendants' choosing with a specialty to the back.*

Within the statutory period, both claimant and defendants filed an Application for Review in the case, a copy of which was furnished to all parties prior to briefing and oral argument before the Appellate Panel. By appeal, defendants respectfully submitted that the Commissioner erred as follows:

1. The Hearing Commissioner erred in placing lesser weight on the opinions of five physicians who evaluated Claimant prior to the Claimant's lumbar MRI on January 20, 2021.
  - a. The Hearing Commissioner provided no reasoning as to why there was a "benefit" to having reviewed the most recent MRI.
  - b. The reliable and probative evidence in the record establishes that there was no overall interval change in the MRI.
2. The Hearing Commissioner erred in placing greater weight on the opinion of Dr. Esce as compared to Dr. Kanos where Dr. Esce had only one more encounter with the Claimant.

3. The Hearing Commissioner erred in failing to find that the preponderance of the neurosurgical medical evidence establishes that a lumbar surgery is not a recommended treatment option.
4. The Hearing Commissioner erred in failing to find that the preponderance of the evidence establishes Claimant has reached maximum medical improvement.

By appeal, claimant respectfully submitted the Commissioner erred as follows:

1. The Hearing Commissioner erred in failing to designate Dr. Esce as the surgeon to provide the ordered treatment and surgery.

All proffered testimony and documentary evidence has been taken and delivered to the individual members of the Appellate Panel for their study and consideration.

#### **EVIDENCE OF THE CASE**

At the hearing before the single Commissioner, the following summarized evidence was presented:

Claimant testified that he has worked for employer-defendant for 27 years as a respiratory therapist, which involves treating patients with lung diseases or who are on ventilators and requires lifting and transporting patients. He stated that prior to April 17, 2018, he had no significant low back problems or treatment. He has had some chiropractic adjustments.

On April 17, 2018, claimant was assisting with a large patient in the CT scanning area. When the patient began to fall, he caught her and immediately felt a painful pop in his low back. The pain radiated down both legs. Claimant stated he was sent to Workwell Occupational Medicine for evaluation and treatment, but he testified that the treatment provided did not

help him. An MRI scan was obtained, and claimant stated that he was sent to Dr. Bucci and then to Dr. Han. Claimant testified that he was treated with four rounds of injections and some 18 months of physical therapy. He stated that this provided only temporary relief and that his low back and leg pain never entirely went away.

Of note, claimant sustained another injury to his left Achilles during evaluation and treatment at Workwell. He later underwent surgery for that injury and spent some time in a walking boot. Claimant stated that the boot affected his gait and increased his back pain.

Concerning his back, claimant testified that he inquired about returning to see Dr. Bucci again but explained that he was not allowed to do so. He therefore sought out further evaluation on his own at Carolina Orthopaedic & Neurosurgery, where he eventually saw Dr. Esce. Claimant stated that Dr. Esce recommended surgery to repair a disc in his low back. He was instead sent by the insurance carrier to Dr. Kanos for another opinion, and Dr. Kanos recommended continued conservative treatment rather than surgery. However, claimant testified that he has already undergone such conservative medical treatment since his accident on April 2018, and it has not made him any better. He stated that he needs and wants the surgery recommended by Dr. Esce so that his low back problem can be addressed, and he can become more functional.

A review of the medical evidence submitted into the record shows that following his injury, claimant was initially evaluated and treated at Workwell Occupational Health. He was seen on multiple occasions, was first diagnosed with "low back pain/strain," and treated with medication and work restrictions. He was allowed to attend chiropractic treatment for

a period of time and was eventually referred for MRI scanning and neurosurgical evaluation when symptoms were determined to potentially include radiculopathy.

Neurosurgeon Dr. Michael Bucci saw claimant on August 20, 2018 and, after examination, opined in his office note as follows: "Nonsurgical. Pain management referral. He has been seeing a chiropractor weekly and was encouraged to continue on with this for the time being. No follow-up indicated here currently." From the submitted evidence, this appears to be claimant's only visit with Dr. Bucci.

Pain management physician Dr. Sung Han began treating claimant on October 17, 2018 with epidural steroid injections, physical therapy, and continued work restrictions. These conservative treatment measures continued until April 1, 2020, when Dr. Han placed claimant at MMI and noted again that he is "[n]ot a surgical candidate for lumbar spine, has seen Dr. Bucci."

Defendants then sent claimant to occupational medicine physician Dr. Ping Gao on September 23, 2020 for an impairment assessment and Form 14B. Dr. Gao noted that he had not seen or reviewed any of the radiology studies or related reports. However, he opined that claimant was at MMI as of that date, had a 1% medical impairment to the low back, had no permanent physical limitations, and was not in need of additional medical treatment. This appears to be claimant's only visit with Dr. Gao.

On January 6, 2021, claimant saw Julie Justice N.P. of Carolina Orthopaedic & Neurosurgical Associates. Ms. Justice noted that "[a]pparently, the patient has a history of a lumbar disc herniation that occurred following a work-related injury. I do not have any recent

imaging. We will go ahead and get a lumbar MRI to further evaluate and I would like for him to follow up with Dr. Esce after he has this for further direction."

Dr. William DeVault performed another impairment rating evaluation of claimant on January 9, 2021. He opined that "[w]ithin a reasonable degree of medical certainty, William Downes has reached maximum medical improvement for these injuries. Based on the American Medical Association Guides to the Evaluation of Permanent Impairment, Fifth Edition, William Downes has 17% lumbar spine permanent and partial impairment under DRE lumbar category three, table 153-3, page 384... In order to maintain his current level of function, William Downes will need six physician visits per year and 15 physical therapy visits per year for treatment of acute exacerbations of his lumbar spine and left lower extremity conditions. Additional lumbar spine evaluation and treatment may be necessary. William Downes is suitable only for sedentary desk type work at this time." There is no evidence that claimant saw Dr. DeVault again.

On February 4, 2021, claimant returned to Carolina Orthopaedic & Neurosurgical Associates and was evaluated by neurosurgeon Dr. Philip Esce. Dr. Esce reviewed the updated MRI scan and ultimately opined that "MRI reviewed done at Piedmont Imaging shows L5-S1 moderate disc herniation central extending to the left side with decreased disc height... Plan is for a left L5-S1 micro- discectomy. Risk, benefits, and details of the procedure have been explained to the patient."

On a questionnaire dated March 1, 2021, Dr. Esce opined to a reasonable degree of medical certainty: "It is more likely than not that Danny Downes low back injury, including but not limited to lumbar disc protrusion at L5-S1 with radiculopathy, was either caused or

was aggravated by his work accident on or about April 17, 2018 when a patient fell on him. The medical treatment provided to or recommended for Danny Downes, including but not limited to L5- S1 micro discectomy, was either provided or recommended in an effort to affect a cure, give relief, and reduce the period of disability stemming from his work-related low back injury."

Defendants responded by sending claimant for an IME with neurosurgeon Dr. Charles Kanos of Prisma Health Southeastern Neurosurgical & Spine. Dr. Kanos opined: "I reviewed his MRI and there is relatively mild bulge at L5-S1. Is not causing significant stenosis. He does not have classic radicular pain but he will have tingling with occasional pain. He's got calf atrophy and the EHL weakness as a result of his Achilles injury and was told that some of the symptoms in the feet are related to that. In terms of the L5- S1 discectomy, I am not inclined to recommend that. I think the odds of getting significant improvement in the back are low as his pain is strongly non-mechanical. Also, radiculopathy is not his main complaint. His symptoms are approximate 80% back/20% leg. I feel he is at MMI with a 5% impairment rating to his lumbar spine based on the AMA Sixth Edition. He had an FCE that showed sedentary activity and I have no reason to dispute this. I think further medical treatment should include PM, medication, therapy or possible facet blocks or other injections." This was claimant's only visit with Dr. Kanos.

Claimant returned to Dr. Esce on June 28, 2021. He opined: "Workers' Comp then sent him over to Prisma, where he was Dr. Kanas who did not recommend surgery, but recommended further conservative care. Repeating the injections and physical therapy again. The patient then returned to my office with continued persistent complaints of severe

back pain and lumbar radiculopathy, worse on the left side than right side, weakness with movement of his foot... Overall, I feel that given the fact he has really done everything possible for this but with no relief, a microdiscectomy at L5- S1 would be the next best available option. We are going ahead and try to get him set up for surgery."

### **DECISION**

Under S.C. Code Ann. § 42-17-50, an Appellate Panel is empowered to review the appealed award, weigh the evidence as presented at the initial hearing, and, if good grounds are shown therefore, make its own factual findings and legal conclusions consistent with or inconsistent with the Hearing Commissioner.

Based upon its review of all the evidence, the Panel hereby affirms in part and reverses in part the Order of the Hearing Commissioner. The Panel makes the following Findings of Fact and Conclusions of Law:

### **FINDINGS OF FACT**

1. An employee/employer relationship existed between the parties at the time of claimant's injury. This finding is based on the parties' stipulation.
2. Claimant's average weekly wage is \$1,260.00, for a corresponding compensation rate of \$838.21. This finding is based on the parties' stipulation.
3. Claimant sustained admitted injuries to his low back and left Achilles tendon arising out of and in the course and scope of his employment on April 17, 2018. This finding is based on all the evidence on the record, including but not limited to defendants' admission.

4. Claimant underwent various evaluations and treatments for his admitted work-related injuries, including but not limited to medications, injections, and physical therapy for his back injury and surgery and physical therapy for his Achilles injury. This finding is based on all the evidence on the record, including but not limited to claimant's testimony and the medical records of Workwell Occupational Medicine, Dr. Bucci, and Dr. Han.

5. On August 20, 2018, in his medical notes, authorized treating physician Dr. Michael N. Bucci of SSA Piedmont Spine and Neurosurgical Group opined: "Nonsurgical. Pain management referral. He has been seeing a chiropractor weekly and was encouraged to continue on with this for the time being. No follow-up indicated here currently." (CI's APA p. 25) This finding is based on the medical records of Dr. Bucci.

6. On April 1, 2020, in his medical notes, authorized, treating physician Dr. Sung J. Han of Piedmont Comprehensive Pain Management Group, LLC opined: "Not a surgical candidate for lumbar spine, has seen Dr. Bucci." (CI's APA p. 46) This finding is based on the medical records of Dr. Han.

7. On September 23, 2020, on a Form 14B, Dr. Ping Gao of AnMed Health Occupational Medicine opined to a reasonable degree of medical certainty that claimant was at MMI as of April 1, 2020, assigned a 1% medical impairment to the low back, assigned no permanent physical limitations, and recommended no additional medical treatment. (Defs' APA p. 21) Dr. Gao, who is not a surgeon, did not provide treatment for claimant but was retained by defendants to provide an impairment rating and other Form 14B information. This finding is based on the medical records of Dr. Gao.

8. On January 6, 2021, in her medical notes, nurse practitioner Julie Justice of Carolina Orthopaedic & Neurosurgical Associates opined: "Apparently, the patient has a history of a lumbar disc herniation that occurred following a work-related injury. I do not have any recent imaging. We will go ahead and get a lumbar MRI to further evaluate and I would like for him to follow up with Dr. Esce after he has this for further direction." (CI's APA p. 57) Ms. Justice, who is not a surgeon, did not provide treatment for claimant but was sought out by him in an attempt to obtain another medical opinion on his low back condition when he was not allowed to return to Dr. Bucci. This finding is based on all the evidence on the record, including but not limited to claimant's testimony and the medical records of Nurse Justice and Carolina Orthopaedic & Neurosurgical Associates.

9. On January 9, 2021, in an independent examination obtained by claimant, Dr. William Devault of the Orthopaedic Center opined: "Within a reasonable degree of medical certainty, William Downes has reached maximum medical improvement for these injuries. Based on the American Medical Association Guides to the Evaluation of Permanent Impairment, Fifth Edition, William Downes has 17% lumbar spine permanent and partial impairment under DRE lumbar category three, table 153-3, page 384... In order to maintain his current level of function, William Downes will need six physician visits per year and 15 physical therapy visits per year for treatment of acute exacerbations of his lumbar spine and left lower extremity conditions. Additional lumbar spine evaluation and treatment may be necessary. William Downes is suitable only for sedentary desk type work at this time." (Defs' APA p. 10) Dr. DeVault did not provide treatment for claimant but

was retained by him to provide an additional impairment rating and other permanency information. This finding is based on the medical records of Dr. DeVault.

10. On February 4, 2021, in a follow-up appointment at Carolina Orthopaedic & Neurosurgical Associates scheduled by Nurse Justice, neurosurgeon Dr. Philip Esce opined: "MRI reviewed done at Piedmont Imaging shows L5-S1 moderate disc herniation central extending to the left side with decreased disc height...Plan is for a left L5-S1 microdiscectomy. Risk, benefits, and details of the procedure have been explained to the patient." (CI's APA pgs. 61-62) This finding is based on the medical records of Dr. Esce.

11. On March 1, 2021, on a questionnaire obtained by claimant, Dr. Esce opined to a reasonable degree of medical certainty: "It is more likely than not that Danny Downes low back injury, including but not limited to lumbar disc protrusion at L5-S1 with radiculopathy, was either caused or was aggravated by his work accident on or about April 17, 2018 when a patient fell on him. The medical treatment provided to or recommended for Danny Downes, including but not limited to L5- S1 micro discectomy, was either provided or recommended in an effort to affect a cure, give relief, and reduce the period of disability stemming from his work-related low back injury." (CI's APA pgs. 66-67) This finding is based on the medical records of Dr. Esce.

12. On May 17, 2021, in an IME obtained by defendants, Dr. Kanos of Prisma Health Southeastern Neurosurgical & Spine Institute opined: "I reviewed his MRI and there is relatively mild bulge at L5-S1. Is not causing significant stenosis. He does not have classic radicular pain but he will have tingling with occasional pain. He's got calf atrophy and the EHL weakness as a result of his Achilles injury and was told that some of

the symptoms in the feet are related to that. In terms of the L5- S1 discectomy, I am not inclined to recommend that. I think the odds of getting significant improvement in the back are low as his pain is strongly non-mechanical. Also, radiculopathy is not his main complaint. His symptoms are approximate 80% back/20% leg. I feel he is at MMI with a 5% impairment rating to his lumbar spine based on the AMA Sixth Edition. He had an FCE that showed sedentary activity, and I have no reason to dispute this. I think further medical treatment should include [pain management, medication, therapy or possible facet blocks or other injections." (Defs' APA p. 25) This finding is based on the medical records of Dr. Kanos.

13. On June 28, 2021, at a follow-up appointment, Dr. Esce opined: "Workers' Comp then sent him over to Prisma, where he was Dr. Kanos who did not recommend surgery, but recommended further conservative care. Repeating the injections and physical therapy again. The patient then returned to my office with continued persistent complaints of severe back pain and lumbar radiculopathy, worse on the left side than right side, weakness with movement of his foot... Overall, I feel that given the fact he has really done everything possible for this but with no relief, a microdiscectomy at L5- S1 would be the next best available option. We are going ahead and try to get him set up for surgery." (CI's APA pgs. 63 & 65) This finding is based on the medical records of Dr. Esce.

14. On August 12, 2021, at the hearing before the single Commissioner, claimant testified regarding his work-related accident, the medical treatment he has received and the issues he continues to have.

(A) Claimant testified that on April 17, 2018, claimant was assisting with a large patient in the CT scanning area. When the patient began to fall, he caught her and immediately felt a painful pop in his low back. The pain radiated into both legs.

(B) Claimant stated he was sent to Workwell Occupational Medicine for evaluation and treatment, but he testified that the treatment provided did not help him.

(C) A lumbar MRI scan was obtained, and claimant stated that he was sent to Dr. Bucci and then to Dr. Han. Claimant testified that he was treated with four rounds of injections and some 18 months of physical therapy.

(D) Claimant testified that the injections and other conservative treatment he received provided only temporary relief and that his low back and leg pain never entirely went away.

(E) Claimant sustained another injury to his left Achilles during evaluation and treatment at Workwell. He later underwent surgery for that injury and spent some time in a walking boot. Claimant testified that the boot affected his gait and increased his back pain.

(F) Claimant testified that he inquired about returning to see Dr. Bucci again but explained that he was not allowed to do so. He stated that he therefore sought out further evaluation on his own at Carolina Orthopaedic & Neurosurgery, where he eventually saw Dr. Esce. Claimant stated that Dr. Esce recommended surgery to repair a disc in his low back.

(G) Claimant testified that rather than providing the surgery recommended, the insurance carrier sent him to Dr. Kanos for another opinion, and Dr.

Kanos recommended continued conservative treatment rather than surgery. However, claimant testified that he has already undergone such conservative medical treatment since his accident on April 2018, and it has not made him any better.

(H) Claimant testified that he needs and wants the surgery recommended by Dr. Esce so that his low back problem can be addressed and he can become more functional.

This finding is based on claimant's testimony.

15. Given that Dr. Esce and Dr. Kanos are the only physicians in the record that had the benefit of the most recent MRI of claimant's back, their opinions are given the greatest weight, as compared to the physicians who saw claimant prior to the most recent MRI. This finding is based on all the evidence on the record, including but not limited to claimant's testimony and the medical records of Workwell Occupational Medicine, Dr. Bucci, Dr. Han, Dr. Esce, and Dr. Kanos.

16. Furthermore, given that Dr. Kanos only evaluated the claimant on one occasion, greater weight is given to the opinions of Dr. Esce, who along with his assistant saw and evaluated claimant on several occasions. This finding is based on all the evidence on the record, including but not limited to claimant's testimony and the medical records of Dr. Esce and Dr. Kanos.

17. Therefore, based on the opinions of Dr. Esce, as well as claimant's sworn testimony at the hearing, claimant is not at MMI for his admitted low back injury. This finding is based on all the evidence on the record, including but not limited to claimant's

testimony and the medical records of Workwell Occupational Medicine, Dr. Bucci, Dr. Han, Dr. Esce, and Dr. Kanos.

18. Based on Dr. Esce's recommendation, claimant is entitled to the back surgery recommended and requested, and all causally-related medical treatment, with such surgery and treatment to be provided by Dr. Esce. This finding is based on all the evidence on the record, including but not limited to claimant's testimony and the medical records.

19. Dr. Esce is hereby designated as the authorized treating physician. Defendants' denial of the recommended medical procedure and the differing opinions of the neurosurgeons constitutes good cause to designate a new authorized treating physician. This finding is based on all the evidence on the record, including but not limited to claimant's testimony and the medical records and opinions of Dr. Esce and Dr. Kanos.

20. A determination of permanency is premature at this time.

21. All other issues are held in abeyance at this time.

#### **RULINGS OF LAW**

1. Under S.C. Code Ann. § 42-17-50, the Appellate Panel is empowered to review the appealed award, weigh the evidence as presented at the initial hearing, and, if good grounds are shown therefore, make its own factual findings and legal conclusions consistent with or inconsistent with the Hearing Commissioner.

2. Under S.C. Code Ann. §§ 42-1-130 to -150, the South Carolina Workers' Compensation Commission has jurisdiction over claimant's claim for benefits.

3. Under S.C. Code Ann. § 42-1-40 and S.C. Code Reg. 67-1603, claimant's average weekly wage is \$1,260.00, for a corresponding compensation rate of \$838.21.

4. Under S.C. Code Ann. § 42-1-160, claimant sustained compensable injury by accident arising out of and in the course of his employment with employer-defendant on April 17, 2018 causing compensable injuries to his low back and left Achilles tendon (leg).

5. Claimant has not reached maximum medical improvement from his injuries. See Dodge v. Brucoli, Clark, Layman, Inc., 334 S.C. 574, 514 S.E. 2d 593 (Ct. App. 1999)(maximum medical improvement is plateau at which no further medical care or treatment will lessen the degree of impairment.

6. Under S.C. Code Ann. § 42-15-60, claimant is entitled to and defendants are responsible for the back surgery recommended by Dr. Esce.

7. Under S.C. Code Ann. § 42-15-60, and for good cause shown, Dr. Esce is hereby designated as the authorized treating physician.

**ORDER**

**IT IS, THEREFORE, ORDERED** that the Order of the Hearing Commissioner is hereby affirmed in part and reversed in part.

**IT IS FURTHER ORDERED** that defendants shall provide the back surgery recommended by Dr. Esce and that Dr. Esce is hereby designated as the authorized treating physician.

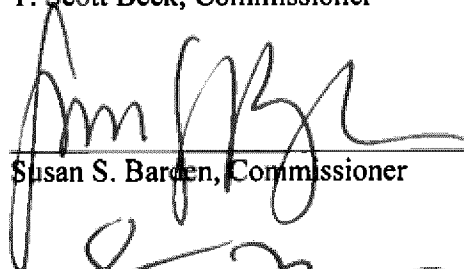
**AND IT IS SO ORDERED.**

**S.C. WORKERS' COMPENSATION COMMISSION**



T. Scott Beck, Commissioner

CONCUR:



Susan S. Barden, Commissioner



Gene McCaskill, Commissioner

Date: June 6, 2022

**Order Served via E-Mail:**

Donald E. Kamb, Jr. Williams & Kamb <a href="mailto:dkamb@williamskamb.com">dkamb@williamskamb.com</a>	Ashley Rudsill Forbes McAngus, Goudelock, & Courie, LLC <a href="mailto:Ashley.forbes@mgclaw.com">Ashley.forbes@mgclaw.com</a>
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**CERTIFICATE OF SERVICE**

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

***By Eugenia Hollmon on June 8, 2022***