

Timothy B. Killen

Reply to: Charleston
direct: (843) 277-0826
fax: (843) 589-9000
tkillen@hplplaw.com

July 22, 2022

VIA EMAIL ONLY – ctappfilings@sccourts.org

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
PO Box 11629
Columbia, SC 29211

RECEIVED

Jul 22 2022

SC Court of Appeals

Re: Randy Jordan, Employee, Respondent,
v.
S.C. Department of Transportation, Employer, and State Accident Fund, Carrier,
Appellants.
Appellate Case No. 2022-000409

Dear Ms. Kitchings:

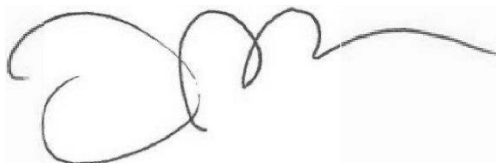
Enclosed please find the Record on Appeal in the above referenced case.

A copy of the Record on Appeal is being provided directly to Respondent's attorney
Stephen Wukela via email.

Should you have any questions or concerns, please feel free to contact me.

Sincerely,

HOLDER PADGETT LITTLEJOHN + PRICKETT



Timothy B. Killen

TBK/maa
Enclosure

cc: Stephen Wukela, Esquire (via email)
Traci Brunson (via email)

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM
THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
APPELLATE CASE NO. 2022-000409
SCWCC FILE NO. 1602438

Randy Jordan, Employee, Respondent,

v.

S. C. Department of Transportation, Employer, and State Accident Fund, Carrier, Appellants.

RECORD ON APPEAL

Timothy B. Killen, Esquire
Holder Padgett Littlejohn + Prickett, LLC
945 Houston Northcutt Boulevard
Mt. Pleasant, South Carolina 29464

Stephen J. Wukela, Esquire
Wukela Law Office
Post Office Box 13057
Florence, SC 29504

INDEX

(1) Orders

Single Commissioner Order on Motion for Reconsideration, June 22, 2021	1
Order of Single Commissioner, June 1, 2021	3
Appellate Panel Decision and Order, March 2, 2022	21
Order of Single Commissioner, September 18, 2018	49

(2) Pleadings

Form 30, June 9, 2021	60
Motion to Reconsider before Single Commissioner, June 4, 2021	82
Form 51, January 5, 2021	95
Form 50, December 7, 2020	97
Form 51, August 27, 2019	98
Form 50, August 9, 2019	99

(3) Transcripts

Transcript of the Argument Before the Appellate Panel	100
Transcript of Hearing Before the Single Commissioner	124

(4) Exhibits

Deposition of Dr. O'Dell, December 3, 2020	146
Claimant's APA Submissions	171
Email from Claimant's attorney withdrawing Form 50, September 30, 2019	510
Form 14B, July 11, 2017	511

(5) Other Materials and Documents

Form 16A, September 7, 2018	512
Certificate of Counsel	513

BEFORE THE
SOUTH CAROLINA WORKERS' COMPENSATION
COMMISSION

WCC FILE NO. 1602438

Randy Jordan,

Claimant,

MOTION ORDER

vs.

S.C. Department of Transportation,

Employer,

S.C. State Accident Fund,

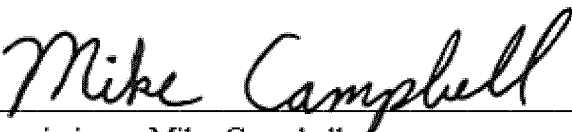
Carrier/Defendant,

A Motion regarding the following issues(s) has been received:

Claimant moves this Commission for Reconsideration of the Decision and Order dated June 1, 2021.

The following disposition has been made:

Claimant's Motion for Reconsideration is hereby denied.



Commissioner Mike Campbell

Parties served via Email:

Stephen J. Wukela, Esquire: stephen@wukelalaw.com

Sarah Verstraten, Esquire: SVerstraten@hplplaw.com

CERTIFICATE OF SERVICE

This is to certify the undersigned has this date served this order in the above entitled action upon all parties to this cause by sending an electronic copy hereof by electronic mail addressed to the attorney or attorneys for said parties or by depositing a copy hereof, postage paid, in the United States certified mail addressed to any unrepresented party.

June 22, 2021

By: Barbara Cheeseboro, Administrative Assistant to Commissioner Campbell

**BEFORE THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
W.C.C. FILE NO. 1602438**

RANDY JORDAN,
Employee/Claimant,

v.

SC DEPARTMENT OF
TRANSPORTATION,

Employers,

and

STATE ACCIDENT FUND,

Defendants.

DECISION AND ORDER

Hearing: Held in Florence, South Carolina on March 2, 2021.

Appearances: Stephen Wukela, Esquire, of Wukela Law Firm on behalf of Claimant.

Sarah G. J. Verstraten, Esquire, of Holder Padgett Littlejohn + Prickett, LLC on behalf of SC Department of Transportation and State Accident Fund.

Purpose of Hearing: To determine the issues as set forth in the Form 50 submitted by the Claimant.

Commissioner: The Honorable R. Michael Campbell, II, Commissioner.

Filed: June 1, 2021

STIPULATIONS

It was stipulated and agreed at the time of this hearing that:

1. The purpose of the hearing is to determine the issues as set forth in the Form 50 and Form 51 filed by the parties and any other issues which may timely come before the Commission.
2. That the Claimant's accident occurred on February 4, 2016.
3. The Claimant's average weekly wage was \$819.77 with a corresponding compensation rate of \$546.54 per week.
4. Notices were timely and properly served upon all parties of interest.
5. Venue set in Florence County is proper as agreed by all parties.
6. That the South Carolina Workers' Compensation Commission has jurisdiction over the parties and issues involved.
7. The issues for determination are whether the Claimant timely filed a change of condition for the worse claim with the Commission in accordance with the law of this case and the requirements of the Act, and whether the Defendants are responsible for any medical treatment going forward for the Claimant's work-related injuries.

APA SUBMISSIONS

Prior to the taking of testimony and pursuant to notices timely filed and served, the following records were submitted into evidence pursuant to the South Carolina Administrative Procedures Act and S.C. Code. Reg. 67-612.

Submissions of SC Department of Transportation

APA#	DOCTOR	DATES	PAGE #'s
Exhibit A	SCWCC E-Case Print Out	2/19/2021	1-5

Exhibit B	Decision and Order	9/18/2018	6-16
Exhibit C	Agreement for Permanent Disability 16(A)	9/18/2018	17
Exhibit D	Status Report Compensation Receipt (Form 19)	10/9/2018	18

Submissions of Claimant

APA#	DOCTOR	PROVIDER	DATES	PAGE #'s
1		McLeod Health	2/4/2016	1-19
2		Carolina Radiology Associates	2/4/2016	20-26
3	Dr. Christina Biester	CareSouth	2/8/2016 2/12/2016	27-36
4	Amanda Kiker, P.A. David Anderson, M.D. Ronald VanDerNoord, M.D. Jeffery Daily, M.D.	OrthoCarolina	3/9/2016- 11/17/2016 6/29/2017	37-70
5		Camden Open MRI	3/21/2016	71
6		Cheraw Physical Therapy and Rehabilitation Center, LLC	5/4/2016 5/18/2016 6/8/2016 12/6/2017	72-94
7		Lancaster Imaging Center	9/9/2016 2/15/2017	95-100
8	Dr. W.S. Bill Edwards	Pee Dee Orthopaedic Associates	6/9/2016- 12/7/2017	101-169
9		Palmetto Health Toumey	12/12/2016	170
10		Cora Rehabilitation Clinic (FCE)	6/13/2017	171-189
11	Willie S. Edwards, M.D.	Attending Physician's Statement		190-191
12		Photos of Claimant's Left and Right ankle		192-19813
13		Deposition of Dr. W.S. Bill Edwards	1/26/2017	
14		Deposition of Dr. W.S. Bill Edwards	2/22/2018	
15		Form 16A	9/7/2018	199
16		Decision and Order	9/18/2018	200-210
17	Dr. Jason O'Dell	McLeod Orthopaedics	6/18/2019- 4/24/2020	211-238

18	Dr. W.S. Bill Edwards Dr. Bruce Johnson	McLeod Spine Center	2/8/2018 10/22/2020	239-307
19	Dr. William James Richardson	Duke University	7/22/2020	308-313
20		Tucker v. S.C. DOT	12/23/2020	314-319
21		Deposition of Dr. Jason B. O'Dell	12/3/2020	

STATEMENT OF THE CASE

This case was heard by the undersigned Commissioner in Florence, South Carolina, on March 2, 2021. The Commission's file in this claim reflects that this is an admitted February 4, 2016, date of accident, at which time the Claimant, a DOT employee, was struck by a vehicle sustaining injuries to his neck, back, and left ankle. The carrier provided causally related medical treatment and both parties agree that the Claimant reached maximum medical improvement and settled this case on a Form 16A on September 7, 2018.

The Form 16A approved by the Commission on September 26, 2018, shows the Claimant was paid 5% percentage of loss of use to the left leg and 10% percentage of loss of use to the whole spine (neck and back) for a total of \$21,724.97. The Form 16A cites to the Form 14B Physicians' Statement dated July 11, 2017, showing no additional medical treatment was ordered by the Claimant's authorized treating providers. On September 18, 2018, pursuant to the July 18, 2018, hearing in this matter on the issue of causally related past and future medical treatment related to the claim, Commissioner Melody James issued an Order confirming what medical treatment Defendants would be responsible for going forward and specifically laying out a deadline for filing a change of condition claim with the Commission.

It is the Claimant's position that the Form 16A sets up that the employer has an obligation to provide medical care as set out in the Order of Commissioner James dated September 18, 2018. The Claimant admits he began seeking medical treatment on his own to his left ankle without

approval from the carrier in the summer of 2019 with Dr. O'Dell, an unauthorized physician; however, he argues that because he submitted a Form 50 on August 9, 2019, alleging a change of condition for the worse and seeking additional medical treatment and benefits, he met the time requirements of S.C. Code Ann. Sec. 42-17-90 as the Form 50 was filed within one year from the Form 16A settlement. While the Claimant concedes he subsequently withdrew his Form 50 requesting a hearing on September 30, 2019 asking the Commission to return the claim to general files without adjudicating his change of condition claim or seeking an Order on additional benefits, the Claimant asserts the filing of the Form 50 on August 9, 2019, preserved the statute in this case.

After withdrawing his Form 50 requesting a hearing on September 30, 2019, the Claimant readily admits he treated on his own with various providers including Dr. O'Dell, Dr. Johnson, and Dr. Edwards without authorization from the carrier and that he did not re-file a Form 50 with the Commission until December 11, 2020. Nevertheless, it is the Claimant's position that he would be entitled to treatment with these physicians under Sec. 40-15-60. Further, because the Claimant was able to obtain deposition testimony from Dr. O'Dell on December 3, 2020, stating the Claimant developed a change of condition for the worse and that the treatment rendered to the Claimant was necessary as a result of the change of condition, the Claimant argues he is entitled to an Order from the Commission finding he sustained a change of condition for the worse; that he is entitled to treatment with Dr. O'Dell, Dr. Johnson, and Dr. Edwards going forward; and that he is entitled to indemnity benefits due to uncontradicted evidence in the record.

It is Defendants' position that the final Decision and Order from Commissioner Melody James dated September 18, 2018, is the law of this case, and that the Order specifically holds that the Claimant would have up to *one year from the date of the signed Order to return to see his authorized treating providers* for any change of condition for the worse and to seek medical treatment to the left ankle and spine. (emphasis added). Defendants argue the Claimant in this

matter did not return to see any of his authorized treating providers (i.e. Dr. Daily, Dr. VanDerNoord, and/or Dr. Anderson), as required by the terms of the September 18, 2018, Order. Instead, the Claimant elected to see his own choice of doctor in June 2019 and again in July 2019 under his own private health insurance, without any request for treatment or notice submitted to the carrier, and without filing a claim, without filing a hearing request, or seeking any additional treatment.

Defendants argue it would be improper for the Commissioner to disregard the September 18, 2018, Order in this matter as it is the law of the case. Further, Defendants assert the Claimant elected his remedy by opting to treat on his own beginning in the summer of 2019 with providers of his own choosing under his own health insurance without giving Defendants the opportunity to investigate his alleged change of condition claim and/or to determine if further treatment would be causally related to the original injury. Defendants assert that the Claimant usurped Defendants' rights under the statute to control medical treatment. In addition, Defendants argue that the doctrine of laches, an equitable doctrine, supports the notion that the Claimant slept on his rights by failing to timely seek treatment as required by the findings in the Order from Commissioner James and that his unreasonable delay in seeking benefits or treatment would preclude any obligation by Defendants to provide further benefits.

Defendants point to the fact that a Form 50 was not timely re-filed in this matter after it was withdrawn by the Claimant in August 2019 and returned to general files with no effort by the Claimant to seek treatment or benefits through the carrier. Rather, the Form 50 was not refiled until December 7, 2020, nearly fifteen months after it was withdrawn. Defendants assert that while the Claimant's Form 50 filed on August 9, 2019, was within one year of the 16A settlement arguably meeting the statute, the Claimant was out of compliance with the terms of the September 18, 2018, Order from Commissioner James which is the law of this case. Further, Defendants

argue that the evidence shows the Claimant's filing of the Form 50 in August 2019 and then subsequent withdrawal of the hearing request returning the claim to general files without making any attempt to seek medical treatment through Defendants with his authorized providers as directed in the Order, was orchestrated to intentionally delay a hearing in the hope that evidence would later develop to support a change of condition claim. Defendants assert this conduct by the Claimant should have no chance at success pursuant to the findings of the Court in *Tucker v. DOT*.

Defendants assert that the Claimant elected his remedy by treating on his own outside of the confines of the Workers' Compensation Act; outside of the law of this case by failing to comply with the September 18, 2018, Decision and Order from Commissioner James; and by failing to timely meet his burden of proof for a change of condition claim pursuant to the Act; therefore, Defendants assert no benefits are owed for any alleged change of condition for the worse and/or as a result of the original work related injury.

EVIDENCE OF THE CASE

On February 4, 2016, the Claimant, a DOT employee, was struck by a vehicle. He sustained admitted injuries to his neck, back, and left ankle. The carrier provided medical treatment with a variety of doctors and both parties agree and stipulate that the Claimant reached maximum medical improvement and settled this case on a Form 16A on September 7, 2018. (APA 199). Specifically, the Claimant was paid 5% percentage of loss of use to the left leg and 10% percentage of loss of use to the whole spine (neck and back) for a total of \$21,724.97. *Id.* The Form 16A cites to the Form 14B Physicians' Statement dated July 11, 2017, showing no additional medical treatment was ordered. *Id.* A Form 19 was approved by the Commission on or about October 9, 2018, reflecting the terms of the agreement and final release and that the sum of \$21,724.97 was indeed paid to the Claimant. (Defendants' APA page 19).

The Claimant argues that the Form 16A sets up that the employer will provide medical care

as set out in the Order of Commissioner James dated September 18, 2018. The Order confirms the carrier provided a variety of authorized medical treatment to the Claimant with orthopedic specialists, but that the Claimant also treated with an unauthorized orthopedist, Dr. Edwards, a spine surgeon in Florence, South Carolina, who performed cervical fusion. (APA pages 200-210). The Order states the carrier is not responsible for the fusion surgery performed by Dr. Edwards because there is no evidence in the record that it lessened the Claimant's period of disability, it was not authorized, and it was not emergent. (APA page 208). In regard to the Claimant's neck and back symptoms, however, Commissioner James ordered that the Claimant would have up to *one year from the date of the signed Order to return to see his authorized treating providers* for any change in condition for the worse and receive medical treatment to the neck or back as related to the February 4, 2016 accident. (APA page 208) (emphasis added).

The Claimant continued to work for the DOT and in the summer of 2019 began experiencing worsening of his left ankle symptoms. Despite the language in the Order from Commissioner James, the Claimant went on his own and under his private health insurance to Dr. O'Dell, an unauthorized physician, on June 18, 2019, to have the left ankle evaluated. (APA page 211). Dr. O'Dell sent the Claimant for an MRI of his ankle which he also sought on his own under his own health insurance. (APA 212). He went back to Dr. O'Dell July 9, 2019, and had an injection to the ankle. (APA 218-219). After undergoing this treatment on his own and without authorization from the carrier, on August 9, 2019, the Claimant filed a Form 50 hearing request with the Commission alleging a change of condition for the worse as a result of his accident at work and seeking additional medical treatment and benefits. The Claimant argues his Form 50 request for treatment was timely filed within one year from the Form 16A settlement as required by South Carolina Code Ann. Section 42-17-90.

Defendants timely filed a responsive Form 51 on August 27, 2019, denying the Claimant's

change of condition claim as no requests for treatment or other medical evidence was submitted to the carrier. The Commission scheduled the case for a hearing. On September 30, 2019, however, before any evidence was presented or a hearing could be held on the issues in controversy, the Claimant's attorney wrote the Commission and copied defense counsel stating he was withdrawing his hearing request pending additional discovery. The Claimant's attorney requested to have the case returned to general files. The request from Claimant's counsel was received by Miss Hutto in the Commissioner's office who responded confirming she removed the hearing from the docket.

After the hearing request was withdrawn on September 30, 2019, the Claimant concedes he continued to treat with Dr. O'Dell on his own, without any notice to Defendants, and under his own health insurance where he received injections to the ankle. (See APA pages 211-238). The treatment was not paid for or authorized by Defendants. During that time frame, Dr. O'Dell also noted the Claimant's complaints of worsening back symptoms. Id. Dr. O'Dell sent the Claimant to Dr. Johnson, a pain management doctor, who injected the spine on several occasions. (See APA pages 239-307). This treatment was not authorized by or paid for by Defendants. Dr. Johnson referred the Claimant over to orthopedic surgeon Dr. Edwards who treated him for worsening neck and back symptoms and took him out of work in June 2020. Id. Again, none of this treatment incurred by the Claimant was authorized by or paid for by Defendants.

The Claimant asserts the filing of the Form 50 on August 9, 2019, preserved the statute in this case. In the interest of simplicity, the Claimant asserts the request was not to have the carrier pay for the medical treatment previously incurred at the hands of Dr. O'Dell, Dr. Johnson, and Dr. Edwards, although he believes he would be entitled to that under Sec. 40-15-60. Rather, he asserts the request was filed to seek medical treatment at the hands of those doctors going forward. The Claimant argues that because he was able to later obtain deposition testimony from Dr. O'Dell

stating the Claimant did have a change of condition for the worse and that the treatment he rendered to the Claimant was necessary as a result of the change of condition, the Claimant is entitled to an Order from the Commission finding he sustained a change of condition for the worse; that he is entitled to treatment with Dr. O'Dell, Dr. Johnson, and Dr. Edwards going forward; and that he is entitled to indemnity benefits as the evidence is uncontradicted in the record. (APA 21).

The Claimant argues that the Court's decision in *Tucker v. SCDOT*, supports his position that he has not violated the statute of limitations in that "hearing requests are different than claims". (APA 20). To wit, "you file a claim within one year and you've met the statute." The Claimant further contends that this is a free country and that he is not prohibited from seeing whatever doctor he sees fit. The Claimant asserts the opinions of the unauthorized treating physician submitted into evidence are uncontradicted and that the Commission is bound to consider the opinions. Without other substantive evidence disputing their opinions, he argues the opinions of the unauthorized doctors provide substantial evidence upon which to rule.

Defendants argue that the final Decision and Order from Commissioner Melody James dated September 18, 2018, is the law of this case. (Defendants APA pages 6-16). In that Order, Commissioner James finds in "Conclusion of Law #6", that under Section 42-15-60 there is no evidence that any additional medical treatment would tend to lessen the Claimant's period of disability for his left ankle, back, or neck injuries; however, the Claimant has up to *one year from the date of the signed Order to return to see his authorized treating providers* for any change of condition for the worse and to seek medical treatment to the left ankle and spine. (Defendants APA page 15) (emphasis added). Further, in "Finding of Fact #12", Commissioner James reiterates that the Claimant has up to *one year from the date of the signed Order to return to see his authorized treating providers* for any change of condition for the worse. (Defendants APA page 14) (emphasis added). Defendants argue the Claimant in this matter did not return to see any of his authorized

treating providers (i.e. Dr. Daily, Dr. VanDerNoord, and/or Dr. Anderson), as required by the terms of the September 18, 2018, Order. Instead, the Claimant elected to see his own choice of doctor in June 2019 and again in July 2019 under his own private health insurance, without any request for treatment or notice submitted to the carrier, and without filing a claim or a hearing request before seeking the treatment on his own.

While Defendants agree with the Claimant that this is a “free country” where a person can see whatever doctor he wants to, Defendants cite to the South Carolina Workers’ Compensation Act and assert that Defendants have the right to control medical treatment including the right to choose the doctor if Defendants are to be liable for the treatment. Defendants assert that they did not deny medical treatment in June or July 2019 when the Claimant went and sought treatment on his own. Rather, Defendants were unaware of the Claimant’s treatment because the Claimant never called, never sent correspondence to the insurance carrier, never notified or called any legal office seeking treatment, never obtained a statement of causation from any medical provider that would meet the legal standard, and did not file a Form 50 asserting a change of condition claim until after he underwent the treatment on his own. He then withdrew the hearing request a month later with no explanation other than that he wanted to conduct additional “discovery” and to have the claim returned to general files.

Defendants argue it would be improper for the Commissioner to disregard the September 18, 2018, Order in this matter as it is the law of the case. Further, Defendants assert the Claimant elected his remedy by opting to treat on his own with providers of his own choosing under his own health insurance without giving Defendants any opportunity to investigate his alleged change of condition claim and/or to determine if further treatment would be causally related to the original injury. Defendants assert that the Claimant usurped the Defendants rights under the statute to control medical treatment. In addition, Defendants argue that the doctrine of laches, an equitable

doctrine, supports the notion that the Claimant slept on his rights by failing to timely seek treatment as required by the findings in the Order from Commissioner James and that his unreasonable delay in seeking benefits or treatment would preclude any obligation by Defendants to provide further benefits.

In support of their argument, Defendants point to the fact that a Form 50 was not timely re-filed in this matter after it was withdrawn by the Claimant in August 2019 and returned to general files with no effort by the Claimant to seek treatment or benefits through the carrier. Rather, the Form 50 was not refiled until December 7, 2020, nearly fifteen months after it was withdrawn. Defendants assert that while the Claimant's Form 50 filed on August 9, 2019, was within one year of the 16A settlement, the Claimant was out of compliance with the terms of the September 18, 2018, Order from Commissioner James which is the law of this case. Further, Defendants argue that the evidence shows the Claimant's filing of the Form 50 in August 2019 and then subsequent withdrawal of the hearing request returning the claim to general files without making any attempt to seek medical treatment through Defendants with his authorized providers as directed in the Order, was intentional. Defendants assert that *Tucker v. SCDOT*, 427 S.C. 299 (2019), is directly on point to address the fallacy in the Claimant's conduct in this matter. To wit, the Court in *Tucker* specifically states,

[a]t oral argument, we discussed with counsel the possibility a Claimant may file a Form 50 within twelve months, and then intentionally delay a hearing in the hope that evidence will later develop to support a change of condition claim . . . [i]n the case before us, there is no indication whatsoever Tucker or his counsel attempted to do this . . . [s]uch an improper effort, as we have explained, should have no chance of success.

Defendants argue that in contrast to the Claimant in *Tucker*, the Claimant in this matter filed a Form 50 on August 9, 2019, without making any effort to seek medical attention with his authorized providers as required by the September 18, 2018 Order and without obtaining any statements of causation regarding a change of condition for the worse within the one-year statutory

timing requirement. He then withdrew the Form 50 requesting a hearing on September 18, 2019, asking the claim to be returned to general files to intentionally delay a hearing in the hope that evidence would later develop to support a change of condition claim. Defendants assert this conduct by the Claimant should have no chance at success pursuant to the findings of the Court in *Tucker*. The Claimant had the opportunity to adjudicate whether he had sustained a change of condition for the worse or to seek additional causally related medical treatment but opted to pursue treatment and benefits on his own outside of the findings in the Order and outside of the confines of the South Carolina Workers' Compensation Act.

Defendants assert that they are not responsible for any of the Claimant's past medical bills or treatment incurred with Dr. O'Dell or any other unauthorized provider pursuant to the law of this case and the confines of the South Carolina Workers' Compensation Act. Defendants assert they are not liable for treatment going forward pursuant to September 18, 2018 Decision and Order in this matter.

Defendants further point to the fact that Dr. O'Dell testified at his deposition that the Claimant came to see him outside of the workers compensation system; under his own private health insurance; and that the Claimant did not come to him on referral from any of his prior authorized providers. (APA 21). Again, Defendants assert that the Claimant elected his remedy by treating on his own outside of the confines of the Workers' Compensation Act; outside of the law of this case by failing to comply with the September 18, 2018, Decision and Order from Commissioner James; and by failing to timely meet his burden of proof for a change of condition claim pursuant to the Act; therefore, Defendants assert no further benefits are owed for any alleged change of condition for the worse and/or as a result of the original work related injury.

FINDINGS OF FACT

BASED ON A PREPONDERANCE OF THE EVIDENCE, IT IS FOUND AS A FACT:

1. That Employee, Employer and Carrier are subject to and bound by the terms and provisions of the South Carolina Workers' Compensation Act. That Claimant was an employee of the named Employer on and prior to February 4, 2016.
2. Claimant sustained admitted injuries to his neck, back, and left ankle arising out of and in the course and scope of his employment on February 4, 2016.
3. Claimant underwent various evaluation and treatment for his admitted work-related injuries to his neck, back, and left ankle.
4. On September 18, 2018, in her Decision and Order subsequent to Defendants' Form 21 hearing, Commissioner Melody James found that Defendants were not responsible for the unauthorized cervical fusion surgery performed by Dr. Edwards or for any future medical care and treatment to the cervical spine related to the fusion surgery, including hardware.
5. On September 18, 2018, in her Decision and Order subsequent to Defendants' Form 21 hearing, Commissioner Melody James found that there is no evidence in the record that any additional medical treatment would tend to lessen the period of Claimant's disability in regard to the Claimant's causally related myofascial neck or back symptoms; however, Commissioner James found that the Claimant has up to one year from the date of her signed Order to return to see his authorized treating providers for any change of condition for the worse and to seek medical treatment to the neck or back as related to the February 4, 2016 accident.
6. On September 7, 2018, on a Form 16A, the parties settled the case for 5% disability to the left leg and 10% disability to the whole back (neck and back). In addition, the parties agreed the employer would provide medical care and treatment as set out in the Commission's Order of September 18, 2018, and the Claimant had one year from the date of the last payment of compensation to file a claim for a worsening of his condition.

While the Form 16A was entered into by the parties on September 7, 2018, it was stamped as received by the Commission on September 26, 2018.

7. On August 15, 2019, Claimant filed a Form 50 requesting additional medical treatment.
8. On September 30, 2019, Claimant withdrew his Form 50 alleging a change of condition and requesting a hearing, and requested that the claim be returned to general files.
9. While the Claimant did file a Form 50 within the one-year timeframe as set forth in Commissioner James' Decision and Order and on the Form 16A, he did so subsequent to having already sought treatment on his own, under his own insurance, and without any notice to Defendants with Dr. O'Dell, and he then withdrew his Form 50 requesting a hearing subsequent to the expiration of the one-year.
10. Because the Claimant withdrew his request for additional medical treatment by withdrawing his Form 50 asserting a change of condition and requesting a hearing on September 30, 2019, as well as continuing to treat with Dr. Odell, I find as a matter of Fact that the Claimant has elected his remedy.
11. It is found as fact that this case is distinguishable from *Tucker v. S.C. Dept of Transportation*, 427 S.C. 299, 831 S.E. 2d 426 (2019). In *Tucker*, the Supreme Court held that the Claimant tolled the one-year statute under Sec. 42-17-90 by filing a Form 50 "Claim Only" within one year of the last payment of compensation. Here, while Claimant's initial Form 50 filed on August 15, 2019, might have tolled the statute, the Claimant unilaterally withdrew this Form 50. Claimant neither filed a Motion for a postponement or adjournment, nor offered a proposed Consent Order. Unlike in *Tucker*, the Claimant took the affirmative action of *withdrawing* his initial Form 50 rendering his subsequent request fifteen months later untimely.
12. I find this claim to be *res judicata* and barred by the doctrine of laches

13. I find Claimant's request for benefits under the Act is hereby denied.

CONCLUSIONS OF LAW

ACCORDINGLY, IT IS THE DETERMINATION OF THIS COMMISSION THAT:

1. Under Section 42-1-130, Claimant was a covered employee at the time in question; and under Section 42-1-140, Defendant/Employer was a covered employer under the Act.
2. The Decision and Order of Commissioner Melody James dated September 18, 2018, was not appealed, is the law of this case, and nothing in this Order shall be construed so as to amend, delete from, or add to that Order. The Decision and Order of Commission Melody James dated September 18, 2018, is the law of this case and cannot be disregarded by this Commission.
3. Under *Tucker v. S.C. Dept of Transportation*, 427 S.C. 299, 831 S.E. 2d 426 (2019), the Claimant's affirmative action of *withdrawing* his initial Form 50 change of condition claim hearing request rendered his subsequent request fifteen months later untimely.
4. While the Claimant tolled the one-year statute under Sec. 42-17-90 by filing a Form 50 "Claim Only" within one year of the last payment of compensation, the Claimant's affirmative action of unilaterally withdrawing this Form 50 hearing request and asking the Commission to return the claim to general files while he continued to treat on his own for over a year rendered his subsequent request fifteen months later untimely in keeping with the September 18, 2018, Order from Commissioner James which is the law of this case.
5. Pursuant to Section 42-15-60 and Section 42-15-80, the Claimant has not established in a compelling manner that Defendants are responsible for any additional medical treatment that would tend to lessen the Claimant's period of disability for his left ankle, back, or neck injuries, as related to the original injury at work.

6. I find this claim to be *res judicata* and barred by the doctrine of laches.
7. I find the Claimant elected his remedy when he withdrew his request for additional medical treatment on September 30, 2019, seeking treatment with providers of his own choosing outside of the confines of the South Carolina Workers' Compensation Act.

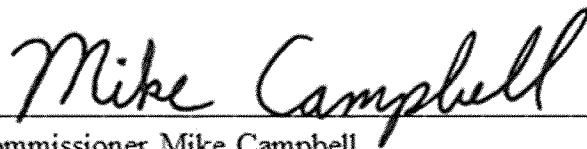
ORDER

Based on the above Findings of Fact and Conclusions of Law, it is hereby,

ORDERED, ADJUDGED AND DECREED that the Claimant's claim for change of condition seeking additional treatment and benefits is barred in that he unreasonably delayed and elected his remedy by treating on his own outside of the confines of the Workers' Compensation Act; outside of the law of this case by failing to comply with the September 18, 2018 Decision and Order from Commissioner James; and by failing to timely meet his burden of proof for a change of condition claim pursuant to the Act; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that no further benefits or treatment are owed for the Claimant's alleged change of condition claim and/or as a result of the original work-related injury.

AND IT IS SO ORDERED!



Commissioner Mike Campbell

Columbia, South Carolina

June 1, 2021

Parties served via email:

Stephen J. Wukela, Esquire: stephen@wukelalaw.com

Sarah Verstraten, Esquire: Sverstraten@hplplaw.com

CERTIFICATE OF SERVICE

This is to certify the undersigned has this date served this order in the above entitled action upon all parties to this cause by sending an electronic copy hereof by electronic mail addressed to the attorney or attorneys for said parties or by depositing a copy hereof, postage paid, in the United States certified mail addressed to any unrepresented party.

June 1, 2021

By: Barbara Cheeseboro, Administrative Assistant to Commissioner Campbell

APPELLATE PANEL
DECISION AND ORDER
OF THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
WCC FILE NO. 1602438

Randy Jordan, Employee,

Claimant/Appellant,

vs.

S.C. Department of Transportation, Employer,
and State Accident Fund, Carrier,

Defendants/Respondents.

Appellate Panel Review held via Zoom
Notices timely and properly served on
all parties of interest.

Appellate Panel Decision and Order filed
March 2, 2022

APPEARANCES:

Claimant/Appellant represented by Stephen J. Wukela
of Florence, South Carolina

Defendants/Respondents represented by Timothy B. Killen
of Charleston, South Carolina

I. STATEMENT OF THE CASE

This is an admitted accident before the Commission on the Claimant's Form 50 seeking a finding of change of condition pursuant to S.C. Code §42-17-90. This case arises out of admitted injuries the Claimant sustained to his neck, back, and left ankle on February 4, 2016, when while in the employ of South Carolina Department of Transportation, he was struck by a vehicle.

The Defendants admit that, in that accident, the Claimant suffered an injury to his back, neck and left ankle. The Defendants provided the Claimant medical treatment for his back, neck, and left ankle. On September 7, 2018, the parties entered into a Form 16A, and by Agreement the Claimant was awarded 5% loss of use to the left leg and 10% loss of use to the whole spine (neck and back).

At that time, the parties had a dispute as to whether the Employer/Carrier were responsible for certain medical treatment. In particular, the Claimant had undergone a fusion of the cervical spine on June 14, 2017 at the hands of Dr. Bill Edwards, who was not an authorized treating surgeon, and for which the Employer denied responsibility.

A hearing was held by the Commission on July 18, 2018 to determine whether the employer was responsible for the cost of the fusion. The Defendants took the position that the cost of the fusion was not the Carrier's responsibility as it was performed by a non-authorized surgeon, was non-emergent, and did not lessen the period of disability within the meaning of S.C. Code §42-15-60.

The Commissioner issued an Order on September 18, 2018; finding that, while the Claimant did sustain an injury to his neck and back and left ankle arising out of the course of employment, the Carrier was not responsible for the fusion of the cervical spine as it was not

authorized, was non-emergent, and there was no medical opinion to a reasonable degree of medical certainty that it was necessary.

Thereafter, the Claimant alleges that he suffered worsening of his condition. On June 8, 2019, the Claimant saw orthopedic, Jason O'Dell, M.D., complaining of worsening pain in his left ankle. (APA#17, p. 211). Dr. O'Dell referred the Claimant for an MRI of his left ankle and saw him again on July 9, 2019, (APA#17, p. 218), where he performed an injection in the subtalar joint of the left ankle. Claimant also alleges that as the condition of the Claimant's left ankle worsened he began developing increasing pain in his right hip and his low back as the result of altered gait.

On August 9, 2019, (within one year of the date of Form 16 dated September 7, 2018) Claimant filed a Form 50 alleging a change of condition. Claimant specifically cited in his Form 50 the worsening condition of his left ankle.

On September 18, 2019, the Commission set a hearing on the Claimant's change of condition Form 50 for October 22, 2019. On September 30, 2019, the Claimant withdrew his hearing request pending additional discovery.

Claimant continued seeing Dr. O'Dell, and on November 21, 2019 (APA#17, p. 222) Dr. O'Dell noted the pain in his right hip, SI joint, and his difficulty walking and referred him for physical therapy to improve his gait. By January 16, 2020, (APA#17, p. 225), Dr. O'Dell noted that the Claimant's pain was getting worse in his left lower extremity, and pain in his back and right hip, and referred him for an MRI of his lumbar spine, which was performed on January 29, 2020. On February 13, 2020, Claimant again saw Dr. O'Dell (APA#17, p. 234) for left lower extremity pain, lower back pain, and right hip pain. Dr. O'Dell reported that his MRI scan demonstrated broad base bulging at L4-5 and L5-S1. Dr. O'Dell continued the Claimant's

physical therapy and saw him on April 24, 2020 (APA#17, p. 236) with the same complaints; whereupon Dr. O'Dell reported that Claimant's symptoms had gotten worse. Dr. O'Dell ordered "Due to the worsening of his back pain and failure of physical therapy, the patient will be referred to Dr. Johnson for evaluation and treatment." (APA#17, p. 237).

Claimant saw Dr. Johnson at McLeod Spine Center where he underwent epidural steroid injections at L5-S1 on May 1, 2020, May 15, 2020, and May 29, 2020. Dr. Johnson noted in his first note on May 1, 2020 "Patient has ongoing lumbar radiculopathy right lower extremity. This is progressively getting worse despite physical therapy done a couple months ago." (APA#18, p. 248). After a course of epidural steroid injections did not improve Mr. Jordan's condition, Dr. Johnson referred the Claimant to orthopedic surgeon, Dr. Bill Edwards, who saw him on June 11, 2020 noting "Patient with worsening back pain radiating into both hips right greater than left." (APA#18, p. 256). Dr. Edwards did not recommend any surgery on the Claimant's lumbar spine at that point, but referred him back to Dr. Johnson for right facet joint block at L5-S1.

Dr. Edwards did see the Claimant again on June 16, 2020, this time concerned about the worsening pain he was having in his cervical spine (also an admitted body part) and the radicular symptoms he was complaining of in his right upper extremity. Dr. Edwards ordered cervical MRI and epidural steroid injections of the cervical spine. Ultimately, on July 23, 2020 Dr. Edwards referred the Claimant to Duke for further evaluation of his cervical spine.

The parties took the deposition of Dr. O'Dell on December 3, 2020. Dr. O'Dell testified:

- Q. Okay. So now, you know, we had been talking about the ankle and your treatment of the left ankle and now we're talking about the right hip. What's the clinical significance of that?
- A. So in somebody who has a lingering issue or potentially a worsening issue I do think that gait related problems can

lead to some of these secondary hip or back problems or even knee problems on the other side.

(APA#, p. 12, lines 13- 21).

* * *

Q. I see. Okay. And, you know, as I said at the outset, his back was an admitted injury in the initial accident, his ankle was an admitted injury. **At this, point both his ankle and his back are worsening, is that a fair statement?**

A. Yes.

(APA#, p. 14, lines 14-19)(Emphasis added).

* * *

Q. It's still your concern or impression is that this worsening of the back situation is a product of gait?

A. That is my opinion.

(APA#, p. 15, lines 21-24).

He went on to testify:

A. ...his chronic ankle injury is what led to the worsening of his back so to me I think the right thing for him is to continue treatment on the back....

(APA#, p. 18, lines 6-9).

* * *

Q. **...do you have an opinion as to whether his ankle condition worsened after being released by Dr. Daily?**

A. **I think it did, yes.**

(APA#, p. 19, lines 12-14) (Emphasis added).

* * *

Q. ...do you have an opinion as to whether his ankle condition aggravated the condition of his back?

A. I believe that he did.

(APA#, p. 19, lines 19-22).

In conclusion, Dr. O'Dell opined:

Q. **All right. The question I asked, though, was whether the condition of his ankle and the altered gait resulted in the aggravation and a worsening of the condition of his lumbar spine?**

A. **Yes. I think that's what happened.**

Q. **...And was the treatment, the referrals you made to Dr. Johnson and then ultimately from Dr. Johnson to Dr. Edwards, necessary to treat that worsening?**

A. **Yes, it was.**

(APA#, p. 20, line 19-p. 21, line 3) (Emphasis added).

The Claimant requested a hearing by Form 50 dated December 7, 2020.

This matter was heard by the Single Commissioner on March 2, 2021.

At hearing the Claimant sought a finding that his case should be reopened pursuant to S.C. Code §42-17-90.

By Order of June 1, 2021, the Single Commissioner denied the Claimant's claim for change of condition, finding that the claim was time barred and that the Claimant had "elected his remedy by treating on his own outside of the confines of the Workers' Compensation Act."

Specifically, the Commissioner found:

FINDINGS OF FACT

After the hearing and giving careful consideration to the documentary evidence, medical records, and the testimony of the above individuals.

- 1. That Employee, Employer and Carrier are subject to and bound by the terms and provisions of the South Carolina Workers' Compensation Act. That Claimant was an employee of the named Employer on and prior to February 4, 2016.**
- 2. Claimant sustained admitted injuries to his neck, back, and left ankle arising out of and in the course and scope of his employment on February 4, 2016.**
- 3. Claimant underwent various evaluation and treatment for his admitted work-related injuries to his neck, back, and left ankle.**
- 4. On September 18, 2018, in her Decision and Order subsequent to Defendants' Form 21 hearing, Commissioner Melody James found that Defendants were not responsible for the unauthorized cervical fusion surgery performed by Dr. Edwards or for any future medical care and treatment to the cervical spine related to the fusion surgery, including hardware.**
- 5. On September 18, 2018, in her Decision and Order subsequent to Defendants' Form 21 hearing, Commissioner**

Melody James found that there is no evidence in the record that any additional medical treatment would tend to lessen the period of Claimant's disability in regard to the Claimant's causally related myofascial neck or back symptoms; however, Commissioner James found that the Claimant has up to one year from the date of her signed Order to return to see his authorized treating providers for any change of condition for the worse and to seek medical treatment to the neck or back as related to the February 4, 2016 accident.

- 6. On September 7, 2018, on a Form 16A, the parties settled the case for 5% disability to the left leg and 10% disability to the whole back (neck and back). In addition, the parties agreed the employer would provide medical care and treatment as set out in the Commission's Order of September 18, 2018, and the Claimant had one year from the date of the last payment of compensation to file a claim for a worsening of his condition. While the Form 16A was entered into by the parties on September 7, 2018, it was stamped as received by the Commission on September 26, 2018.**
- 7. On August 15, 2019, Claimant filed a Form 50 requesting additional medical treatment.**
- 8. On September 30, 2019, Claimant withdrew his Form 50 alleging a change of condition and requesting a hearing, and requested that the claim be returned to general files.**
- 9. While the Claimant did file a Form 50 within the one-year timeframe as set forth in Commissioner James' Decision and Order and on the Form 16A, he did so subsequent to having already sought treatment on his own, under his own insurance, and without any notice to Defendants with Dr. O'Dell, and he then withdrew his Form 50 requesting a hearing subsequent to the expiration of the one-year.**
- 10. Because the Claimant withdrew his request for additional medical treatment by withdrawing his Form 50 asserting a change of condition and requesting a hearing on September 30, 2019, as well as continuing to treat with Dr. Odell, I find as a matter of Fact that the Claimant has elected his remedy.**

11. It is found as fact that this case is distinguishable from *Tucker v. S.C. Dept. of Transportation*, 427 S.C. 299, 831 S.E. 2d 426 (2019). In *Tucker*, the Supreme Court held that the Claimant tolled the one-year statute under Sec. 42-17-90 by filing a Form 50 "Claim Only" within one year of the last payment of compensation. Here, while Claimant's initial Form 50 filed on August 15, 2019, might have tolled the statute, the Claimant unilaterally withdrew this Form 50. Claimant neither filed a Motion for a postponement or adjournment, nor offered a proposed Consent Order. Unlike in *Tucker*, the Claimant took the affirmative action of withdrawing his initial Form 50 rendering his subsequent request fifteen months later untimely.
12. I find this claim to be res judicata and barred by the doctrine of laches.
13. I find Claimant's request for benefits under the Act is hereby denied.

CONCLUSIONS OF LAW

ACCORDINGLY, IT IS THE DETERMINATION OF THIS COMMISSION THAT:

1. Under Section 42-1-130, Claimant was a covered employee at the time in question; and under Section 42-1-140, Defendant/Employer was a covered employer under the Act.
2. The Decision and Order of Commissioner Melody James dated September 18, 2018, was not appealed, is the law of this case, and nothing in this Order shall be construed so as to amend, delete from, or add to that Order. The Decision and Order of Commission Melody James dated September 18, 2018, is the law of this case and cannot be disregarded by this Commission.
3. Under *Tucker v. S.C. Dept of Transportation*, 427 S.C. 299, 831 S.E. 2d 426 (2019), the Claimant's affirmative action of withdrawing his initial Form 50 change of condition claim hearing request rendered his subsequent request fifteen months later untimely.

- 4. While the Claimant tolled the one-year statute under Sec. 42-17-90 by filing a Form 50 "Claim Only" within one year of the last payment of compensation, the Claimant's affirmative action of unilaterally withdrawing this Form 50 hearing request and asking the Commission to return the claim to general files while he continued to treat on his own for over a year rendered his subsequent request fifteen months later untimely in keeping with the September 18, 2018, Order from Commissioner James which is the law of this case.**
- 5. Pursuant to Section 42-15-60 and Section 42-15-80, the Claimant has not established in a compelling manner that Defendants are responsible for any additional medical treatment that would tend to lessen the Claimant's period of disability for his left ankle, back, or neck injuries, as related to the original injury at work.**
- 6. I find this claim to be res judicata and barred by the doctrine of laches.**
- 7. I find the Claimant elected his remedy when he withdrew his request for additional medical treatment on September 30, 2019, seeking treatment with providers of his own choosing outside of the confines of the South Carolina Workers' Compensation Act.**

Claimant filed a Motion for Reconsideration on June 4, 2021 asking the Commission to reconsider its ruling, in particular, to reconsider its finding that the Claimant had withdrawn his claim by withdrawing his request for hearing. Claimant's Motion for Reconsideration also requested that the Commission address Claimant's argument that the Defendants had forfeited any statute of limitations defense by failing to raise it in their Form 51.

The Commission responded on June 22, 2021, finding "Claimant Motion for Reconsideration is hereby denied." In doing so, the Single Commissioner declined to rule on the Claimant's argument that the Defendants had forfeited their statute of limitations defense by failing to raise it in their Form 51.

This appeal followed.

II. EVIDENCE

A. STIPULATIONS

Counsel for the parties stipulated at the hearing to the following:

1. That the purpose of the hearing is to determine issues set forth in the Forms 50 and 51, and any other issues which may timely come before the Commission.
2. Notice of the hearing was timely and properly served upon all parties of interest.
3. Venue is proper.

B. APA SUBMISSIONS

Under the South Carolina Administrative Procedures Act, the following records were submitted into evidence:

Submissions of SC Department of Transportation

APA#	DOCTOR	DATES	PAGE #'s
Exhibit A	SCWCC E-Case Print Out	2/19/2021	1-5
Exhibit B	Decision and Order	9/18/2018	6-16
Exhibit C	Agreement for Permanent Disability 16(A)	9/18/2018	17
Exhibit D	Status Report Compensation Receipt (Form 19)	10/9/2018	18

Submissions of Claimant

APA#	DOCTOR	PROVIDER	DATES	PAGE #'s
1		McLeod Health	2/4/2016	1-19
2		Carolina Radiology Associates	2/4/2016	20-26
3	Dr. Christina Biester	CareSouth	2/8/2016 2/12/2016	27-36
4	Amanda Kiker, P.A. David Anderson, M.D. Ronald VanDerNoord, M.D.	OrthoCarolina	3/9/2016- 11/17/2016 6/29/2017	37-70

	Jeffery Daily, M.D.			
5		Camden Open MRI	3/21/2016	71
6		Cheraw Physical Therapy and Rehabilitation Center, LLC	5/4/2016 5/18/2016 6/8/2016 12/6/2017	72-94
7		Lancaster Imaging Center	9/9/2016 2/15/2017	95-100
8	Dr. W.S. Bill Edwards	Pee Dee Orthopedic Associates	6/9/2016- 12/7/2017	101-169
9		Palmetto Health Toumey	12/12/2016	170
10		Cora Rehabilitation Clinic (FCE)	6/13/2017	171-189
11	Willie S. Edwards, M.D.	Attending Physician's Statement		190-191
12		Photos of Claimant's Left and Right ankle		192-19813
13		Deposition of Dr. W.S. Bill Edwards	1/26/2017	
15		Form 16A	9/7/2018	199
16		Decision and Order	9/18/2018	200-210
17	Dr. Jason O'Dell	McLeod Orthopedics	6/18/2019- 4/24/2020	211-238
18	Dr. W.S. Bill Edwards Dr. Bruce Johnson	McLeod Spine Center	2/8/2018 10/22/2020	239-307
19	Dr. William James Richardson	Duke University	7/22/2020	308-313
20		Tucker v. S.C. DOT	12/23/2020	314-319
21		Deposition of Dr. Jason B. O'Dell	12/3/2020	

Claimant's APA #14 was listed on the Claimant's APA notice and in the Single Commissioner's Order. However, the deposition listed, though initially scheduled, was, in fact, never ultimately taken; and, therefore, it was never submitted to the Commission.

C. TESTIMONY

In addition to the above set-out APAs, Exhibits, and depositions, the parties agreed at the hearing before the Single Commissioner that, although the Claimant was present and prepared to testify, the case could be decided upon the record; and that testimony by the Claimant was unnecessary. (Tr. p.20, L. 9-p.21, L. 1).

D. COMMISSION FILE

Also, at the commencement of the Hearing before the Single Commissioner, the Commission's file became part of the record with the exception of self-serving declarations and unstipulated medical reports. (Tr. P.3, L. 19-22). While common practice, this fact is notable here, given that the Commissioner's record contains documents which were considered by the Single Commissioner and Appellate Panel, including the following documents, which were attached as exhibits to the Claimant's Motion for Reconsideration before the Single Commissioner:

- A. Email September 30, 2019 from Wukela Law Firm to Ms. Deborah Hutto, South Carolina Workers' Compensation Commission and reply dated September 30, 2019.
- B. Form 51, August 27, 2019 and email August 27, 2019 from Ms. Sarah Verstraten to South Carolina Workers' Compensation Commission.
- C. Form 51, January 5, 2021 and email January 5, 2021 from Ms. Sarah Verstraten to South Carolina Workers' Compensation Commission.

WE, THE APPELLATE PANEL, have reviewed the evidence of the record, the Commission's file, the single Commissioner's Order, the Motion for Reconsideration, and the briefs and oral arguments of the parties, hereby, REVERSE the Decision and Order of the Single Commissioner.

III. APPELLATE PANEL FINDINGS OF FACT

Based upon the evidence submitted by the respective parties pursuant to the Administrative Procedures Act, and the Commission's file relative to this claim, WE, THE APPELLATE PANEL, FIND THE FOLLOWING AS FACT:

1. We find the parties to the proceeding are subject to and bound by the terms and provisions of the South Carolina Workers' Compensation Act, with Randy Jordan being the Claimant, and South Carolina Department of Transportation being the Employer, and State Accident Fund being the Carrier.

This finding is based upon stipulation of the parties at the commencement of the hearing.

2. We find that, pursuant to S.C. Code §42-1-40 the Claimant's average weekly wage is Eight Hundred Nineteen and 77/100 (\$819.77) Dollars a week resulting in a compensation rate of Five Hundred Forty Six and 54/100 (\$546.54) Dollars.

This finding is pursuant to the stipulation of the parties at the commencement of the hearing. (Tr. p.3, L. 12-14).

3. We find that pursuant to S.C. Code §42-1-160, the Claimant sustained admitted compensable injuries by accident to his left leg (ankle) and whole spine (neck and back) arising out of and in the course of his employment on February 4, 2016, when the Claimant was struck by a vehicle.

This finding is based on the parties' stipulations as well as the Form 61(A) dated September 7, 2018.

4. We find that, pursuant to SC Code §42-7-90 the Claimant has suffered a compensable change of condition of those admitted, compensable, injuries.

On September 7, 2018 the parties entered into a Form 16(A) Consent Order in which the Claimant was awarded benefits for permanent loss of use of the left leg and whole spine (neck and back).

Thereafter, the record reflects that the Claimant complained of, and was treated for, worsening pain, initially in his left ankle. In particular, on June 8, 2019, the Claimant saw orthopedic surgeon, Dr. Jason O'Dell complaining of worsening pain in his left ankle. (APA#17, p. 211). Dr. O'Dell referred the Claimant for an MRI of his left ankle and saw him again on July 9, 2019, (APA#17, p. 218), where he performed an injection in the subtalar joint of the left ankle. As the condition of the Claimant's left ankle worsened, the record reflects that the Claimant began developing increasing pain in his right hip and his low back as the result of altered gait.

Claimant continued seeing Dr. O'Dell, and on November 21, 2019 (APA#17, p. 222) Dr. O'Dell noted the pain in his right hip, SI joint, and his difficulty walking and referred him for physical therapy to improve his gait. By January 16, 2020, (APA#17, p. 225), Dr. O'Dell noted that the Claimant's pain was getting worse in his left lower extremity, noted pain in his back and right hip, and referred him for an MRI of his lumbar spine, which was performed on January 29, 2020. On February 13, 2020, Claimant again saw Dr. O'Dell (APA#17, p. 234) for left lower extremity pain, lower back pain, and right hip pain. Dr. O'Dell reported that his MRI scan demonstrated broad base bulging at L4-5 and L5-S1. Dr. O'Dell continued the Claimant's physical therapy and saw him back on April 24, 2020 (APA#17, p. 236) with the same

complaints; whereupon Dr. O'Dell reported that Claimant's symptoms have gotten worse.

Dr. O'Dell ordered A Due to the worsening of his back pain and failure of physical therapy, the patient will be referred to Dr. Johnson for evaluation and treatment. (APA#17, p. 237). Claimant saw Dr. Johnson at McLeod Spine Center where he underwent epidural steroid injections at L5-S1 on May 1, 2020, May 15, 2020, and May 29, 2020. Dr. Johnson noted in his first note on May 1, 2020 A Patient has ongoing lumbar radiculopathy right lower extremity. This is progressively getting worse despite physical therapy done a couple months ago. (APA#18, p. 248).

After a course of epidural steroid injections did not improve Mr. Jordan's condition, Dr. Johnson referred the Claimant to orthopedic surgeon, Dr. Bill Edwards, who saw him on June 11, 2020 noting Patient with worsening back pain radiating into both hips right greater than left. (APA#18, p. 256). Dr. Edwards did not recommend any surgery on the Claimant's lumbar spine at that point but referred him back to Dr. Johnson for right facet joint block at L5-S1.

Dr. Edwards did see the Claimant again on June 16, 2020, this time concerned about the worsening pain he was having in his cervical spine (also an admitted body part) and the radicular symptoms he was complaining of in his right upper extremity. Dr. Edwards ordered cervical MRI and epidural steroid injections of the cervical spine. Ultimately, on July 23, 2020 Dr. Edwards referred the Claimant to Duke for further evaluation of his cervical spine.

The parties took the deposition of Dr. O'Dell on December 3, 2020. Dr. O'Dell testified:

- Q. Okay. So now, you know, we had been talking about the ankle and your treatment of the left ankle and now we're talking about the right hip. What's the clinical significance of that?
- A. So in somebody who has a lingering issue or potentially a worsening issue I do think that gait related problems can lead to some of these secondary hip or back problems or

even knee problems on the other side.
(APA#21, p. 12, lines 13- 21).

* * *

Q. I see. Okay. And, you know, as I said at the outset, his back was an admitted injury in the initial accident, his ankle was an admitted injury. **At this, point both his ankle and his back are worsening, is that a fair statement?**

A. **Yes.**

(APA#21, p. 14, lines 14-19) (Emphasis added).

* * *

Q. It's still your concern or impression is that this worsening of the back situation is a product of gait?

A. That is my opinion.

(APA#21, p. 15, lines 21-24).

He went on to testify:

A. ...his chronic ankle injury is what led to the worsening of his back so to me I think the right thing for him is to continue treatment on the back....

(APA#21, p. 18, line 6-9).

* * *

Q. **...do you have an opinion as to whether his ankle condition worsened after being released by Dr. Daily?**

A. **I think it did, yes.**

(APA#21, p. 19, lines 12-14) (Emphasis added).

* * *

Q. ...do you have an opinion as to whether his ankle condition aggravated the condition of his back?

A. I believe that he did.

(APA#21, p. 19, lines 19-22).

In conclusion, Dr. O'Dell opined:

Q. **All right. The question I asked, though, was whether the condition of his ankle and the altered gait resulted**

in the aggravation and a worsening of the condition of his lumbar spine?

A. **Yes. I think that's what happened.**

Q. **...And was the treatment, the referrals you made to Dr. Johnson and then ultimately from Dr. Johnson to Dr. Edwards, necessary to treat that worsening?**

A. **Yes, it was.**

(APA#21, p. 20, line 19-p. 21, line 3) (Emphasis added).

In sum, Claimant sustained an admitted injury to his back, neck, and, left ankle. The uncontradicted testimony of the record is that the Claimant's left ankle has worsened and, as a result, has led to a worsening of the condition of the spine.

S.C. Code §42-17-90 and "Election of Remedy"

In denying the claim for change of condition the Single Commissioner found:

"THE CLAIMANT TOOK THE AFFIRMATIVE ACTION OF WITHDRAWING HIS INITIAL FORM 50 RENDERING HIS SUBSEQUENT REQUEST 15 MONTHS LATER UNTIMELY." (ORDER P. 15, PARAGRAPH 11).

"BECAUSE THE CLAIMANT WITHDREW HIS REQUEST FOR ADDITIONAL MEDICAL TREATMENT BY WITHDRAWING HIS FORM 50 ASSERTING A CHANGE OF CONDITION AND REQUESTING A HEARING ON SEPTEMBER 30, 2019, AS WELL AS CONTINUING TO TREAT WITH DR. ODELL, I FIND AS A MATTER OF FACT THAT THE CLAIMANT HAS ELECTED HIS REMEDY." (ORDER, P. 15, PARAGRAPH 10).

"I FIND THE CLAIMANT ELECTED HIS REMEDY WHEN HE WITHDREW HIS REQUEST FOR ADDITIONAL MEDICAL TREATMENT ON SEPTEMBER 30, 2019, SEEKING TREATMENT WITH PROVIDERS OF HIS OWN CHOOSING OUTSIDE OF THE CONFINES OF THE SOUTH CAROLINA WORKERS' COMPENSATION ACT." (ORDER, P. 17, PARAGRAPH 7).

"WHILE THE CLAIMANT TOLLED THE ONE-YEAR STATUTE UNDER SEC.

42-17-90 BY FILING A FORM 50 'CLAIM ONLY' WITHIN ONE YEAR OF THE LAST PAYMENT OF COMPENSATION, THE CLAIMANT'S AFFIRMATIVE ACTION OF UNILATERALLY WITHDRAWING THIS FORM 50 HEARING REQUEST AND ASKING THE COMMISSION TO RETURN THE CLAIM TO GENERAL FILES WHILE HE CONTINUED TO TREAT ON HIS OWN FOR OVER A YEAR RENDERED HIS SUBSEQUENT REQUEST FIFTEEN MONTHS LATER UNTIMELY IN KEEPING WITH THE SEPTEMBER 18, 2008, ORDER FROM COMMISSIONER JAMES WHICH IS THE LAW OF THIS CASE." (ORDER, P. 16, PARAGRAPH 4).

First, the well-established doctrine of election of remedy is inapplicable to in this case. The doctrine of election of remedy in the Workers' Compensation context is borne of the Court of Appeals decision in Hudson v. Townsend Saw Chain Co., 296 SC 17 (Ct. App. 1988). There, the Court of Appeals found that if a Claimant files and prosecutes a third-party action against a third party tortfeasor, but fails to give the notice required by Section 42-1-560(b), the Claimant will be regarded as having elected his or her remedy and will be barred from receiving workers' compensation benefits. Hudson, at 20-21.

The instant case involves a change of condition. There was no allegation or evidence in the record that the Claimant prosecuted a third-party action without giving the proper notice under the Act. The doctrine of election of remedy, therefore, has no application in the issue before the Commission.

Secondly, we find that the claim met the time requirements of S.C Code §42-17-90. As the Commission's file reflects, the claim was timely filed on August 9, 2019, within one year of the date of the Form 16 dated September 7, 2018. The Claimant did not withdraw his claim.

By email of September 30, 2019, the Claimant's counsel wrote the Commission I am

withdrawing my hearing request pending additional discovery. Please return the case to the general files. (Emphasis added). It is based on this email that the Single Commissioner found:

8. On September 30, 2019, Claimant withdrew his Form 50 alleging a change of condition and requesting a hearing, and requested that the claim be returned to general files. (Ord., p. 15).

* * *

9. Because the Claimant withdrew his request for additional medical treatment by withdrawing his Form 50 asserting a change in condition and requesting a hearing on September 30, 2019, as well as continuing to treat with Dr. O'Dell, I find as a matter of Fact that the Claimant has elected his remedy. (Ord., p. 15).

Respectfully, we find that the Claimant did not withdraw his claim for a change of condition. He, instead, withdrew only his hearing request.

Though both “claims” and “hearing requests” are procedurally accomplished by filing a Form 50, Commission Regulations distinguish between filing a claim and requesting a hearing. R.67-206 is titled **Filing a Claim**, whereas, R.67-207 is titled **Requesting a Hearing, Claimant**.

R.67-609 titled: **Withdrawing a Request for Hearing**, provides that a claimant may withdraw a request for hearing by writing the Commission’s Judicial Department and the Commission shall file a notice removing the case from the docket.

Such is precisely what the Claimant did by email of September 30, 2019.

R. 67-609 goes on to specifically provide that, The notice is **without prejudice to the Claimant’s right to proceed with his or her claim**. (emphasis added).

Ultimately, S.C. Code §42-17-90 governs the timeliness of a claim for change of condition and would supersede Commission regulation were there a conflict between the two.

S.C. Code §42-17-90 requires that “on the application of a party in interest on the ground

of a change in condition, the Commission may review an award... the review must not be made after twelve months from the date of the last payment of compensation..." S.C. Code §42-17-90(A).

Our Supreme Court has construed this language in the case of Tucker v. S.C. DOT, 427 SC 299 (2019). There, the Court found that the Court of Appeals properly reversed a Commission decision finding that an employee's claim was untimely under §42-17-90. The Claimant on Tucker had filed a Form 50 seeking a change of condition within one year, but had not requested a hearing. More than a year after the last payment of compensation, the Claimant filed a second Form 50; requesting a hearing. The Commission found the claim untimely. The Court of Appeals reversed.

The Supreme Court affirmed the Court of Appeals and distinguished "claims" from "hearing requests." The Supreme Court held that a Form 50 claim, even without a hearing request, meets the §42-17-90 requirement of an "application for review" within one year. The Supreme Court held "the filing of a Form 50 to initiate a claim for a change of condition is the event that must occur within twelve months of the last payment of compensation to meet the timing requirement of subsection §42-17-90(A)" Tucker, at 303.

Thus, pursuant to Tucker, the Claimant's filing of a Form 50 on August 9, 2019 to initiate a claim for a change of condition was the event that must occur within twelve months of the Form 16(A) of September 18, 2018, and it, therefore, met the timing requirement of §42-17-90.

The Defendants seek to distinguish Tucker from this case on the basis that, here, the Claimant withdrew his "request for hearing." We find that the Claimant's withdrawal of his hearing request had no effect on the timely filing of his claim. Tucker distinguished "claims" from "hearing requests" and held that the Claimant need only file a "claim" within one year. See

Tucker, at 303. The Supreme Court's interpretation of S.C. Code §42-17-90 is, therefore, in accord with Commission Regulations.

Moreover, Commission Regulation R.67-609 titled "withdrawing a request for hearing" specifically provides that withdrawal of a hearing request "is without prejudice to the Claimant's right to proceed with his or her claim." R.67-609 (emphasis added).

Finally, the Defendants argue that the Claimant "withdrew the Form 50 requesting a hearing... to intentionally delay a hearing in the hope that evidence would later develop to support a change of condition claim." (Order p.13).

As the Tucker Court noted, "the fact that a Claimant does not request a hearing does not mean the claim will sit unattended... if the parties reasonably need time to prepare, or to negotiate in good faith, the assigned Commissioner-or an Appellant Panel on review-should allow it... if an employer suspects [the Claimant is intentionally delaying a hearing in hopes that evidence will later develop]... the employer may request a hearing or in some other fashion seek to protect its interest." Tucker at 303-304.

Here, the employer made no effort to request a hearing or to speed the determination of the claim for change of condition.

Moreover, we find no evidence of improper delay by the Claimant.

The 16A was signed on September 18, 2018. By June 8, 2019, the record reflects that the Claimant was treated for worsening ankle pain. (APA#17, p.211 (O'Dell, June 8, 2019 note)). Within two months thereafter, on August 9, 2019, (APA#17, P.222), the Claimant filed a Form 50 filing a claim for change of condition and requesting a hearing. However, when the Claimant began to suffer and complain of worsening spinal pain as well, he withdrew his hearing request, on September 30, 2019, to allow for additional discovery.

Indeed, by November 2019 Dr. O'Dell, who treated the Claimants ankle, noted his spinal complaints; which Dr. O'Dell ultimately related to altered gait from his worsening ankle condition (APA#21, p.12-20). Dr. O'Dell referred the Claim to a spine specialist, where he was treated regularly through 2000. (Id.; see Also APA 18).

At no point during this treatment did the employer depose the Claimant to learn about his complaints and treatment; nor did they seek a hearing to adjudicate his claim for a change of condition.

On December 3, 2020 the Claimant deposed Dr. O'Dell, who recited this treatment history and testified that the Claimant's worsening ankle caused altered gait which caused worsening pain in the Claimant's spine. (see Dep. O'Dell P.12-20). On December 7, 2020 the Claimant requested a hearing which was conducted on March 2, 2021.

As the Supreme Court described in Tucker, the Commission, by regulation, deliberately separated the procedure for filing a claim from that for requesting a hearing; precisely "to eliminate setting claims for adjudication prematurely." Tucker, at 302, FN2.

It is evident from the medical evidence that between the filing of the first Form 50 of August 9, 2019 and second Form 50 requesting a hearing on December 7, 2020, the worsening condition of the Claimant's ankle caused an altered gait, which caused a worsening of the Claimant's spine. (see Depo. O'Dell p. 12-20). This deterioration of the condition of the admitted body parts is well documented in the Claimant's treatment notes for that period. (see APA 17-18).

Given that developing condition, it would have been premature for the Commission to determine the claim when it was first set for hearing. Moreover, if the Defendants' believed that the hearing was being delayed improperly, they could have moved, themselves, that the

Commission set a hearing; they did not. We find nothing improper or dilatory in the timing of the adjudication of the claim.

Finally, even assuming that the claim was untimely filed, the statute of limitations was not raised in either of the Defendants' Forms 51 dated August 27, 2019 or January 5, 2021.

The Statute of Limitations set forth in §42-17-90 is an affirmative defense which must be raised in Defendants' Form 51 answer. See R.67-603(c). A Statute of Limitations defense under '42-17-90 not raised in a Form 51 is forfeited. See R.67-603(c).

Testimony of Unauthorized Surgeon

Our Courts have repeatedly held that the Commission may disregard medical evidence only when other competent evidence exists in the record. See Burnette v. City of Greenville, 401 S.C. 417 (Ct. App. 2012) (citing Potter v. Spartanburg School District 7 395 S.C. 17, 23 (Ct. App. 2011)).

Here, the uncontradicted testimony of the record by the Claimant's treating, albeit unauthorized, surgeon, Dr. O'Dell, was that he had suffered a change of condition.

In ruling contrary to this testimony, the Commissioner noted that the testimony came from a physician who was not authorized by the Employer/Carrier. Specifically, the Single Commissioner found that the Claimant elected his remedy by treating on his own outside of the confines of the Workers' Compensation Act. (See Order p. 17). Likewise, the Defendants argue that "the Claimant usurped Defendants' rights under the statute to control medical treatment." (Order, p.6)

The Commission cannot disregard the testimony of the Claimant's qualified treating surgeon simply because the surgeon was not authorized by the Carrier, i.e. because the Claimant treated on his own; particularly where, as here, that surgeon's testimony is uncontradicted in the

record.

It is certainly true that S.C. Code 42-15-60 provides that “during any period of disability resulting from the injury, the employer, at his own option, may continue to furnish or cause to be furnished, free of charge to the employee, and the employee shall accept, an attending physician and any medical care or treatment that is considered necessary by the attending physician, unless otherwise ordered by the Commission for good cause shown.” S.C. Code 42-15-60.

S.C. Code 42-15-60 does not, however, prohibit a Claimant from treating with physicians and surgeons that are not authorized by the Carrier. Nor does S.C. Code 42-15-60 permit the Commission to disregard the opinions such unauthorized treating providers. See Burnette, 401 S.C. 417 (Commission may disregard medical evidence only when other competent evidence exists in the record).

Res Judicata and Laches.

Finally, the Order of June 1, 2021 finds the claim barred by the doctrines of res judicata and laches.

Under the doctrine of res judicata “[a] litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit.” Plum Creek Dev. Co v. City of Conway, 334 S.C. 30, 34 (1999).

However, the matter before the Commission is a reopening proceeding; in which the Commission is asked, pursuant to §42-17-90, to review the previous award to determine the extent of improvement or worsening of the injuries upon which the original award is based.

Put differently, the issue before the Commission deciding a claim under §42-17-90 is whether there has been a change of condition since the last payment of compensation on the previous award; an issue which was not, and chronologically could not have been, before the

Commission at the first hearing. See Cromer v. Newberry Cotton Mills, 201 S.C. 349 (S.C. 1942); Wilson v. Charleston Cnty. Sch. Dist., 419 S.C. 442 (Ct. App. 2017).

Thus, where, as here, the Commission is reviewing a previous award to determine whether there has been a worsening in the condition of the injured body parts on which the original award was based, the doctrine of res judicata has no application.

Similarly, laches is an equitable doctrine that our courts have defined as neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done. Historic Charleston Holdings, LLC v. Mallon, 381 S.C. 417, 432, 673 S.E.2d 448, 456 (2009) (quoting Hallums v. Hallums, 296 S.C. 195, 198, 371 S.E.2d 525, 527 (1988)). To establish laches as a defense, a party must show that the complaining party unreasonably delayed its assertion of a right, resulting in prejudice to the party asserting the defense of laches. Id.

The Defendants argue that the Claimant delayed unreasonably his assertion of his right to adjudicate his claim for change of condition. In determining what is an unreasonable delay under the equitable doctrine of laches, the Commission must first look to the law. It is well established that equity follows the law and when an adequate remedy at law does exist an equitable remedy, such as laches, should not be fashioned. See Santee Cooper Resort v. SC Public Service Co., 298 S.C. 179 (1989).

Here, a remedy at law exists. The Workers' Compensation Act establishes, as a matter of law, the time limit within which one must file a claim for change of condition. S.C. Code 42-17-90 sets that time limit at one year from the last payment of compensation on the previous award.

We find that the claim was timely filed within one year pursuant to the statute. Given that equity follows the law, the Commission may not use an equitable doctrine such as laches to

impose a different time limit from that set at law by the statute.

Further, as set out above, we find nothing improper or dilatory in the adjudication of this claim. Moreover, if the Defendants believed that the hearing was being delayed improperly, they could have moved, themselves, that the Commission set a hearing; they did not. (see §42-17-90(A) (“on its own motion or on the application of any party in interest on the ground of a change in condition, the Commission may review an award...”)) (emphasis added)

Even if the Claimant had unreasonably delayed in requesting a hearing, the Employer can establish no prejudice. The law, §42-17-90(A), provides an adequate remedy: the Employer may request, or the Commission on its own motion may set, a hearing to determine whether there has been a change of condition.

Therefore, the equitable doctrine of laches does not apply.

5. We find that all other issues, including, but not limited to, Claimant’s entitlement to indemnity and medical benefits, maximum medical improvement and permanency, are held in abeyance pending further determination by the Commission.

CONCLUSIONS OF LAW

In view of the above set out Findings of Fact and as provided in the South Carolina Code of Laws, WE, THE APPELLATE PANEL, CONCLUDE THE FOLLOWING AS A MATTER OF LAW:

1. Pursuant to S.C. Code §42-1-130, the Claimant was a covered Employee at the time in question; and under S.C. Code §42-1-140, the Defendant-Employer was a covered Employer under the Act.

2. Pursuant to S.C. Code §42-1-40 the Claimant's average weekly wage is Eight Hundred Nineteen and 77/100 (\$819.77) Dollars a week resulting in a compensation rate of Five Hundred Forty Six and 54/100 (\$546.54) Dollars.

3. Pursuant to S.C. Code §42-1-160, the Claimant sustained admitted compensable injuries by accident to his left leg (ankle) and whole spine (neck and back) arising out of and in the course of his employment on February 4, 2016, when the Claimant was struck by a vehicle.

4. We find that, Pursuant to S.C. Code §42-17-90, the Claimant has suffered a compensable change of condition of those admitted, compensable injuries.

5. That all other issues, including, but not limited to, the Claimant's entitlement to additional indemnity and medical benefits, maximum medical improvement, and permanency, are held in abeyance pending further determination by the Commission.

ORDER

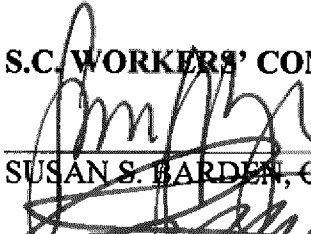
IT IS, THEREFORE, ORDERED that the Claimant has sustained a compensable change of condition and the Workers' Compensation File No. 1602438 shall be reopened. All other issues, including, but not limited to, Claimant's entitlement to additional indemnity and medical benefits, maximum medical improvement, and permanency, are held in abeyance pending future determination by the Commission.

The Single Commissioner's Order of June 1, 2021, is, therefore,

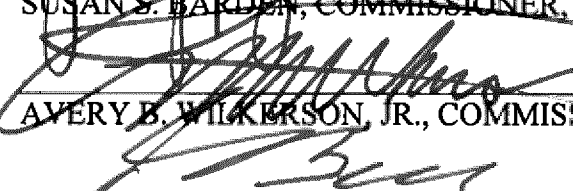
REVERSED.

AND IT IS SO ORDERED.

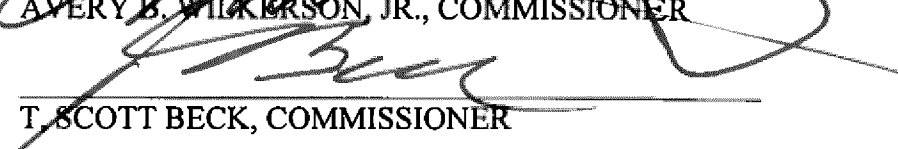
S.C. WORKERS' COMPENSATION COMMISSION



SUSAN S. BARDEN, COMMISSIONER, CHAIR



AVERY B. WILKERSON, JR., COMMISSIONER



T. SCOTT BECK, COMMISSIONER

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 March 2, 2022

DECISION AND ORDER OF THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

WCC FILE NO. 1602438

Randy Everett Jordan,	)
Employee,	)
Claimant,	)
	)
vs.	)
	)
SC Department of Transportation,	)
	)
Employer,	)
and	)
	)
State Accident Fund ,	)
	)
Carrier,	)
Defendants.	)

HEARING:	Held in Hartsville, South Carolina on July 18, 2018.
APPEARANCES:	Claimant represented by Stephen J. Wukela, Esquire of Florence, South Carolina. Defendants represented by Sarah G. J. Verstraten, Esquire of Willson Jones Carter & Baxley, P.A., Mount Pleasant, South Carolina.
PURPOSE OF HEARING:	To determine the issues as set forth on the Form 21.
DECISION AND ORDER:	By Melody James, Commissioner
FILED:	<u>September 18, 2018</u>

I. APA SUBMISSIONS

Under the Administrative Procedures Act, the following records were submitted into evidence at the time of the hearing:

- APA #1: Records of Dr. Jeff Daily, dated 2/20/2017 to 7/11/2017, consisting of pages 1-6.
- APA #2: Records of CORA Rehabilitation Clinics, dated 2/4/2016, consisting of pages 7-26.
- APA #3: Records of OrthoCarolina, dated 3/9/16 to 9/10/2017, consisting of pages 27-59.
- APA #4: Deposition of Dr. Bill Edwards, dated January 26, 2017.

II. STIPULATIONS

Counsel for the respective parties stipulated at the time of the hearing to the following issues:

1. The purpose of the hearing is to determine the issues as set forth in the Form 21 and any other issues which may timely come before the Commission;
2. That the Claimant's accident occurred on February 4, 2016;
3. The Claimant's average weekly wage was \$819.77 with a corresponding compensation rate of \$546.54;
4. Notices were timely and properly served upon all parties of interest;
5. Venue, set in , is proper as agreed by all parties;
6. That the South Carolina Workers' Compensation Commission has jurisdiction over the parties and issues involved;
7. The issues for determination are whether the Claimant has reached MMI for his work-related injuries to his left leg, back and neck, and the Claimant's entitlement to additional medical benefits and/or disfigurement, if any, for the causally related body parts and any other issues which may timely come before the Commission.

Without objection, the Commission's file was made a part of the record in this matter with the exception of any self-serving declaration or unstipulated medical reports.

III. STATEMENT OF THE CASE

This case was heard by the undersigned Commissioner in Hartsville, South Carolina, on July 18, 2018.

The Commission's file in this claim reflects that that is an admitted claim for injuries sustained to the Claimant's back, neck and left ankle on February 4, 2016, when he was standing outside of a vehicle that was hit by another vehicle pushing the Claimant into a guardrail.

It is Claimant's position in this matter that he sustained compensable injuries to his neck, back and left leg and that he is entitled to ongoing causally related medical treatment and benefits for his alleged injuries pursuant to the Act, including surgery in his spine performed by Dr. Bill Edwards on June 14, 2017. It is further the Claimant's position that he is at MMI for his work related injuries, that he has returned to work for the employer, and that this case is ripe for adjudication on the merits.

It is Defendants' position in this matter that the Claimant sustained compensable injuries to his neck, back, and left leg, and that he has reached MMI for his work related injuries. It is the Defendants' position that the Claimant was released with a zero percent impairment rating to the left leg by authorized treating physician Dr. Jeffrey Daily on June 29, 2017, and that the Commission should issue an Order finding the Claimant has reached MMI for this condition based on the opinion of Dr. Daily and the evidence as a whole. It is further the Defendants' position that the Claimant is at MMI for his neck and back (whole spine) injuries. Defendants assert that the Claimant is at MMI for the alleged injuries to his spine and that, at best, he is entitled to ongoing causally related treatment with the authorized treating orthopedics Dr. Vandernoord and/or Dr. David Anderson for myofascial symptoms to his neck or back only in order to keep him at MMI for the February 4, 2016, accident. Defendants assert that any further treatment to the neck or

back, including but not limited to surgical intervention on June 14, 2017 by Dr. Edwards and/or hardware removal and replacement, is not the Carrier's responsibility as it was performed by a non-authorized surgeon and did not lessen the period of disability within the meaning of S. C. Code § 42-15-60.

IV. EVIDENCE OF THE CASE

The medical evidence submitted reflects that with the Carrier's authorization the Claimant treated for his left ankle with Dr. Jeffrey Daily on or about February 20, 2017, who reviewed an MRI of the left ankle which did not show any specific or focal abnormalities. (APA 1). At that time, Dr. Daily noted that while there were no focal abnormalities noted, a good stretching program as well as reasonable restrictions would be in order. (APA 1). The Claimant underwent an FCE for his left ankle on June 13, 2017, at CORA Rehabilitation Clinics and it was determined that the Claimant could return to work at a medium physical demand category. (APA 7-26). Dr. Daily reviewed the results of the FCE on June 29, 2017, and opined that the Claimant was at MMI and that he would not expect any further treatment to be needed. (APA 3). Dr. Daily noted that with no objective findings on the MRI, he would have a zero percent rating but encouraged the Claimant to follow up with him with any changes related to his ankle. (APA 3). A Form 14B was completed by Dr. Daily on July 11, 2017, confirming a zero percent (0%) rating to the left ankle with permanent restrictions of no lifting greater than 50 pounds, no prolonged bending, stooping, squatting, kneeling or twisting. (APA 6), Dr. Daily did not indicate that any further medical treatment to the ankle would be needed. (APA 6). A Form 14B was also completed by authorized treating orthopaedic Dr. Vandernoord on September 10, 2017, assigning a zero percent (0%) impairment rating to the Claimant's left ankle with the same restrictions as assigned by Dr. Daily and confirming that the Claimant would not need any additional medical treatment as a result of his

work related injury. (APA 56).

Medical reports from Dr. David Anderson and Dr. Ronald Vandernoord were also submitted into evidence by Defendants. (APA 27-56). Dr. Anderson was also authorized by the Carrier and began treating the Claimant on March 9, 2016, for complaints of back, neck and left ankle pain. (APA 27). At that visit he reviewed a report of a CT scan of the Claimant's cervical spine which was performed showing OPLL with severe central canal stenosis at C3-4 and he subsequently ordered a cervical MRI. (APA 27-28). At a follow up visit on April 8, 2016, Dr. Anderson noted that the Claimant has had midline neck and periscapular pain since the date of the accident as well as some low back pain. (APA 31). Dr. Anderson went over the Claimant's imaging with him in detail and discussed treatment options. (APA 32). At that visit, he opined that the Claimant did have OPLL with stenosis but he was not myelopathic. (APA 32). In fact, Dr. Anderson noted the Claimant's symptoms were mostly myofascial in nature. (APA 32).

An updated MRI of the Claimant's cervical spine was performed on April 18, 2016, and this was reviewed by Dr. Anderson on April 21, 2016, at which time he noted that the OPLL and stenosis were long-standing and that the Claimant's symptoms were really more myofascial in nature. (APA 35-36, 38). On July 1, 2016, Dr. Anderson concluded that the Claimant's symptoms were predominantly myofascial and that he did not have any signs of myelopathy or radiculopathy despite stenosis at C3-4 and to a lesser extent C5-6 and C6-7. (APA page 42). Dr. Anderson opined that he did not feel surgical intervention would alleviate his symptoms and referred the Claimant to Dr. Vandernoord for a second opinion. (APA page 42).

Dr. Vandernoord was authorized by the Carrier and evaluated the claimant on August 18, 2016, at which time the Claimant complained of pain between the shoulder blades in the upper to mid thoracic region with no frank myelopathic symptoms. (APA 45). He noted the Claimant did

have significant OPLL with severe spinal stenosis at C3-4 which Dr. Vandernoord discussed with the Claimant pre-dated the injury. (APA 45). Dr. Vandernoord confirmed the Claimant was not having any cervical radicular myelopathic complaints and discussed with the Claimant that he was trying to work towards achieving maximum medical improvement in order to release him once he ruled out any treatable pathology. (APA 45).

On November 17, 2016, Dr. Vandernoord reviewed MRI scans of the Claimant's lumbar spine and thoracic spine and noted the Claimant's complaints of cervical range of motion but confirmed the Claimant had no radicular myelopathic complaints. (APA 50). Dr. Vandernoord ordered a bone scan to rule out further pathology and to determine the best steps towards rating and releasing the Claimant at MMI. (APA 51). On January 30, 2017, Dr. Vandernoord reviewed the bone scan which showed no concerning correlation in the spinal axis. (APA 54). Dr. Vandernoord noted that he had maximized the Claimant's care from the spine standpoint and noted the Claimant was continuing to work regular duty. (APA 54).

A questionnaire dated January 27, 2017, was completed by Dr. Vandernoord opining that surgical intervention was not required to address the Claimant's myofascial or mechanical symptoms that developed as a result of his February 4, 2016, accident. (APA 58). Further, he opined that it was more likely than not that surgical intervention would not lessen the claimant's period of disability.

The Claimant subsequently treated with Dr. Bill Edwards who was not authorized by the Carrier. Dr. Bill Edwards was deposed by the parties in this case on January 26, 2017, and his deposition transcript was submitted into evidence at the hearing. During the deposition, Dr. Edwards testified to a reasonable degree of medical certainty that the diagnosed OPLL condition as well as the stenosis present on the Claimant's diagnostic imaging were pre-existing conditions that

pre-dated the Claimant's accident. (Edwards Transcript page 21, lines 8-15). He further testified that after having performed a physical examination of the Claimant in his office on at least two occasions, the Claimant's symptoms were primarily myofascial in nature and that he would never recommend fusion surgery to address myofascial symptoms. (Edwards Transcript page 23, lines 1-10). In fact, the fusion surgery recommended for the Claimant would be to correct compressive pathology or stenosis in the Claimant's spine to prevent further neurological deterioration at some point and that the surgery was not recommended to address the Claimant's myofascial pain. (Edwards Transcript page 24, lines 2-19). Dr. Edwards concluded to a reasonable degree of medical certainty that if the Claimant had no symptoms in his neck and showed him an MRI scan and/or CAT scan of the way his neck looked, he would tell the Claimant he needed surgery regardless of whether he felt good or bad and whether he had an injury or not. (Edwards Transcript page 25, lines 6-17). Dr. Edwards ultimately performed cervical fusion on June 14, 2017.

A record such as was necessary for a decision was made of the proceeding and after careful consideration and study of all the evidence, the following findings of fact are accordingly made.

V. FINDINGS OF FACT

IT IS FOUND AS A FACT:

1. That Employee, Employer, and Carrier are subject to and bound by the terms and provisions of the South Carolina Workers' Compensation Act, as amended, with Randy Everett Jordan as Employee-Claimant and SC Department of Transportation as Employer and State Accident Fund as Carrier, Defendants.

2. That Claimant was an employee of the above-named Employer on and prior to February 4, 2016, on which date he did sustain an injury to the neck, back, and left leg arising out of and in the course of his employment, and proper notice was given to Employer. This was an accepted claim, and Claimant has received appropriate medical benefits.

3. That the average weekly wage of Employee at the time of the above-described accident was \$819.77, making a compensation rate of \$546.54 applicable in this matter.

4. That Claimant reached maximum medical improvement on June 27, 2017 for the injuries resulting from the February 4, 2016 accident.

5. That there is no evidence in the record that any additional medical treatment would tend to lessen the period of Claimant's disability in regards to his left ankle injury; however, the Claimant has up to one year from the date of this signed Order to return to see Dr. Daily as his authorized treating provider for any change of condition for the worse and to seek medical treatment to the left ankle.

6. The Claimant has not met his burden that the surgery (fusion) is more likely than not necessary to tend to lessen the period of disability within the meaning of S.C. Code §42-15-60.

7. Dr. Anderson's records indicate that he explained to the Claimant that the OPLL and stenosis is long-standing and his symptoms are really more myofascial in nature. (APA 38).

8. Dr. VanDerNoord opined to a degree of reasonable medical certainty that surgery was not recommended or required to address the myofascial or mechanical symptoms. (APA 57-59).

9. A reading of Dr. Edwards' deposition in its entirety indicates that the Claimant's myofascial condition that resulted from the accident did not require surgery. He agreed that the Claimant was negative for any signs of radiculopathy, myelopathy and entrapment. (Deposition as a whole, including pages 21-25; 26; and 28).

10. The surgery was not authorized by the worker's compensation carrier and was not emergent. See Sec. 42-15-60.

11. Defendants are not responsible for any past or future costs associated with the cervical fusion surgery performed by Dr. Edwards or for any future medical care and treatment to the cervical spine related to the fusion surgery including but not limited to removal and replacement of the hardware in the Claimant's neck. This finding is based upon the fact that the Carrier authorized the treatment of the Claimant's spine by two orthopaedics (Dr. Anderson and Dr. Vandernoord) neither of whom recorded cervical fusion as necessary to tend to lessen the period of disability within the meaning of S. C. Code § 42-15-60.

12. That there is no evidence in the record that any additional medical treatment would tend to lessen the period of Claimant's disability in regards to the Claimant's causally related myofascial neck or back symptoms; however, the Claimant has up to one year from the date of this signed Order to return to see his authorized treating providers for any change of condition for the worse and/or to seek medical treatment to the neck or back as related to the February 4, 2016 accident.

13. That Claimant has failed to prove that he is entitled to any further medical benefits, any award for serious disfigurement or any other compensable element under the law, other than the benefits as ordered herein.

VI. CONCLUSIONS OF LAW

Accordingly, as provided in § 42-17-40, SC Code Ann. (1976), as amended, it is the determination of this Commission that:

1. Under § 42-1-130, Claimant was a covered employee at the time in question; and under § 42-1-140, Defendant/Employer was a covered employer under the Act.

2. Under § 42-1-160, Claimant did sustain an injury to his neck and back by accident arising out of and in the course and scope of his employment on February 4, 2016.

3. Under § 42-15-60, Claimant was entitled to medical, surgical, hospital and other authorized treatment until June 27, 2017, the date on which Claimant reached maximum medical improvement.

4. Pursuant to § 42-15-60, the fusion surgery was not authorized and was not emergent.

5. Pursuant to § 42-15-60, there is not a medical opinion to a degree of reasonable medical certainty that future medical treatment is necessary to tend to lessen the period of disability.

6. Under § 42-15-60, there is no evidence that any additional medical treatment would tend to lessen the period of his disability for the Claimant's left ankle, neck or back injuries; however, the Claimant has up to one year from the date of this signed Order to return to see his authorized treating providers for any change of condition for the worse and to seek medical treatment to the left ankle and spine.

VII. ORDER/AWARD

IT IS HEREBY ORDERED that Claimant reached maximum medical improvement on June 27, 2017, and as such Defendants are not liable for any additional medical, surgical, hospital or other medical treatment to Claimant after said date, until and unless further ordered by this Commission.

IT IS FURTHER ORDERED that the Claimant has not met his burden that the surgery (fusion) is more likely than not necessary to tend to lessen the period of disability, as the surgery was not authorized, was not emergent, and because there is no medical opinion to a reasonable degree of medical certainty that the surgery was necessary to tend to lessen the period of disability within the meaning of S.C. Code §42-15-60.

IT IS FURTHER ORDERED that Claimant has not sustained any serious and permanent disfigurement as a result of this accident, and as such Defendants are not liable for same.

No hearing costs are assessed in this instance.

IT IS SO ORDERED.



Commissioner Melody L. James

CERTIFICATE OF SERVICE

This is to certify the undersigned has this date served this order in the above entitled action upon all parties to this cause by sending an electronic copy hereof by electronic mail addressed to the attorney or attorneys for said parties or by depositing a copy hereof, postage paid, in the United States certified mail addressed to any unrepresented party.

September 18, 2018

By: Tamara Morris, Administrative Assistant to Commissioner James

South Carolina Workers' Compensation Commission

1333 Main Street, Suite 500
P.O. BOX 1715
Columbia, SC 29202-1715
803-737-5675 www.wcc.sc.gov



WCC File #: **1602438**
Carrier File #: _____
Carrier Code #: _____
Employer FEIN #: _____

Claimant's Name: Randy Jordan SSN: 249 - 63 - 8196 Employer's Name: SC Department of Transportation
Address: 1432 Highway 268 Address: PO Box 191
City: Mt. Croghan State: SC Zip: 29727 City: Columbia State: SC Zip: 29202
Home Phone: () - Work Phone: () - Insurance Carrier: State Accident Fund
Preparer's Name: Stephen J Wukela Law Firm: Wukela Law Firm Preparer's Phone #: 843-669-5634

REQUEST FOR COMMISSION REVIEW

Request for Commission Review by ☒ Claimant ☐ Employer (check one) Date of Injury or Illness: 02/04/2016

The undersigned makes application for review of the findings of the Commissioner in the above-captioned case. The request for review is based on the following grounds: (State the grounds of your appeal in the form of questions presented. Each question presented must contain a concise statement of one proposition of law or fact. Refer to evidence by title and exhibit number. Use additional pages if necessary).

****SEE ATTACHED****

(Check one) Oral argument ☒ is ☐ is not requested. Appellant's request for oral argument is waived if not indicated on this form. I certify I have served this document pursuant to Reg. 67-211 by delivering a copy to Sarah Verstraten, Holder Padgett Littlejohn & Prickett, LLC 945 Houston Northcutt Boulevard, Mount Pleasant SC 29464 on the 11 day of June 2021.

by ☐ first class postage ☒ certified mail ☐ personal service ☐ electronic service

Preparer's Signature: Stephen J Wukela

Attorney for Claimant/Appellant
Title

stephen@wukelalaw.com
Email

6/9/2021
Date

Check this box if you are not represented by an attorney ☐

Questions about the use of this form should be directed to the Judicial Department at 803.737.5675 or appeals@wcc.sc.gov.

If the claimant appeals and is not represented by counsel, the Judicial Department will properly serve this form pursuant to Reg. 67-607 C. Pursuant to Reg. 67-205 and Reg. 701, the appeal must be postmarked no later than 14 days from the date of service of the Decision and Order of the Hearing Commissioner along with the filing fee. Attach a Form 32, if you are unable to pay the filing fee. Refer to Reg. 67-211 and Reg. 67-701 through 711.

Randy Jordan v. SCDOT
WCC File No. 1602438

1. THE SINGLE COMMISSIONER ERRED AS A MATTER OF FACT AND CONCLUSION OF LAW IN FAILING TO FIND THE CLAIMANT HAD SUFFERED A CHANGE OF CONDITION TO HIS LEFT ANKLE, BACK, AND NECK WITHIN THE MEANING OF S.C. CODE §42-17-90.
2. THE SINGLE COMMISSIONER ERRED AS A MATTER OF FACT AND CONCLUSION OF LAW IN FAILING TO FIND THE CLAIMANT WAS ENTITLED TO MEDICAL TREATMENT FOR HIS LEFT ANKLE, BACK, AND NECK.
3. THE SINGLE COMMISSIONER ERRED AS A MATTER OF FACT AND CONCLUSION OF LAW IN FAILING TO FIND THAT THE CLAIMANT WAS ENTITLED TO TEMPORARY TOTAL DISABILITY BENEFITS.
4. THE SINGLE COMMISSIONER ERRED AS A MATTER OF FACT AND CONCLUSION OF LAW FAILING TO FIND THE CLAIMANT WAS NO LONGER AT MAXIMUM MEDICAL IMPROVEMENT.
5. THE SINGLE COMMISSIONER ERRED AS A MATTER OF FACT AND CONCLUSION OF LAW FINDING THE CLAIMANT'S CLAIM BARRED BY THE DOCTRINES OF RES JUDICATA AND LACHES.
6. THE SINGLE COMMISSIONER ERRED AS A MATTER OF FACT AND CONCLUSION OF LAW IN DISREGARDING THE UNCONTRADICTED TESTIMONY OF THE CLAIMANT'S TREATING PHYSICIAN.
7. THE SINGLE COMMISSIONER ERRED AS A MATTER OF FACT AND CONCLUSION OF LAW IN FAILING TO APPLY THE CORRECT STANDARD OF PROOF; IN PARTICULAR, THE SINGLE COMMISSIONER ERRED IN FINDING THAT "THE CLAIMANT HAS NOT ESTABLISHED IN A COMPELLING MANNER THAT THE DEFENDANTS

ARE RESPONSIBLE FOR ANY ADDITIONAL MEDICAL TREATMENT..." WHEN THE CORRECT STANDARD OF PROOF IS MORE LIKELY THAN NOT.

8. THE SINGLE COMMISSIONER ERRED AS A MATTER OF FACT AND CONCLUSION OF LAW IN FINDING THAT THE CLAIMANT'S CHANGE OF CONDITION CLAIM UNDER S.C. CODE §42-17-90 WAS BARRED AS UNTIMELY.
9. THE SINGLE COMMISSIONER ERRED AS A MATTER OF FACT AND CONCLUSION OF LAW IN FINDING THE CLAIMANT WITHDREW HIS CLAIM FOR CHANGE OF CONDITION UNDER S.C. CODE §42-17-90.
10. THE SINGLE COMMISSIONER ERRED AS A MATTER OF FACT AND CONCLUSION OF LAW IN FINDING THAT, BY WITHDRAWING HIS HEARING REQUEST, THE CLAIMANT WITHDREW HIS CLAIM FOR CHANGE OF CONDITION UNDER S.C. CODE §42-17-90.
11. THE SINGLE COMMISSIONER ERRED AS A MATTER OF FACT AND CONCLUSION OF LAW IN FINDING THAT "...THE CLAIMANT TOOK THE AFFIRMATIVE ACTION OF WITHDRAWING HIS INITIAL FORM 50 RENDERING HIS SUBSEQUENT REQUEST 15 MONTHS LATER UNTIMELY." (ORDER P. 15, PARAGRAPH 11).
12. THE SINGLE COMMISSIONER ERRED AS A MATTER OF FACT AND CONCLUSION OF LAW IN FINDING THAT "BECAUSE THE CLAIMANT WITHDREW HIS REQUEST FOR ADDITIONAL MEDICAL TREATMENT BY WITHDRAWING HIS FORM 50 ASSERTING A CHANGE OF CONDITION AND REQUESTING A HEARING ON SEPTEMBER 30, 2019, AS WELL AS CONTINUING TO TREAT WITH DR. ODELL, I FIND AS A MATTER OF FACT THAT THE CLAIMANT HAS ELECTED HIS REMEDY." (ORDER, P. 15, PARAGRAPH 10).

13. THE SINGLE COMMISSIONER ERRED AS A MATTER OF FACT AND CONCLUSION OF LAW IN FINDING "I FIND THE CLAIMANT ELECTED HIS REMEDY WHEN HE WITHDREW HIS REQUEST FOR ADDITIONAL MEDICAL TREATMENT ON SEPTEMBER 30, 2019, SEEKING TREATMENT WITH PROVIDERS OF HIS OWN CHOOSING OUTSIDE OF THE CONFINES OF THE SOUTH CAROLINA WORKERS' COMPENSATION ACT." (ORDER, P. 17, PARAGRAPH 7).
14. THE SINGLE COMMISSIONER ERRED AS A MATTER OF FACT AND CONCLUSION OF LAW IN FINDING "WHILE THE CLAIMANT TOLLED THE ONE-YEAR STATUTE UNDER SEC. 42-17-90 BY FILING A FORM 50 'CLAIM ONLY' WITHIN ONE YEAR OF THE LAST PAYMENT OF COMPENSATION, THE CLAIMANT'S AFFIRMATIVE ACTION OF UNILATERALLY WITHDRAWING THIS FORM 50 HEARING REQUEST AND ASKING THE COMMISSION TO RETURN THE CLAIM TO GENERAL FILES WHILE HE CONTINUED TO TREAT ON HIS OWN FOR OVER A YEAR RENDERED HIS SUBSEQUENT REQUEST FIFTEEN MONTHS LATER UNTIMELY IN KEEPING WITH THE SEPTEMBER 18, 2008, ORDER FROM COMMISSIONER JAMES WHICH IS THE LAW OF THIS CASE." (ORDER, P. 16, PARAGRAPH 4).
15. THE SINGLE COMMISSIONER ERRED AS A MATTER OF FACT AND CONCLUSION OF LAW IN FAILING TO FIND THAT THE DEFENSE FORFEITED ANY STATUTE OF LIMITATIONS, LACHES, OR OTHER TIMELINESS DEFENSE UNDER SEC. 42-17-90 BY FAILING TO RAISE SUCH DEFENSE IN THEIR FORM 51 AS REQUIRED BY RULE 67-603(c).

**BEFORE THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
W.C.C. FILE NO. 1602438**

RANDY JORDAN,
Employee/Claimant,

v.

SC DEPARTMENT OF
TRANSPORTATION,

Employers,

and

STATE ACCIDENT FUND,

Defendants.

DECISION AND ORDER

Hearing:	Held in Florence, South Carolina on March 2, 2021.
Appearances:	Stephen Wukela, Esquire, of Wukela Law Firm on behalf of Claimant. Sarah G. J. Verstraten, Esquire, of Holder Padgett Littlejohn + Prickett, LLC on behalf of SC Department of Transportation and State Accident Fund.
Purpose of Hearing:	To determine the issues as set forth in the Form 50 submitted by the Claimant.
Commissioner:	The Honorable R. Michael Campbell, II, Commissioner.
Filed:	June 1, 2021

STIPULATIONS

It was stipulated and agreed at the time of this hearing that:

1. The purpose of the hearing is to determine the issues as set forth in the Form 50 and Form 51 filed by the parties and any other issues which may timely come before the Commission.
2. That the Claimant's accident occurred on February 4, 2016.
3. The Claimant's average weekly wage was \$819.77 with a corresponding compensation rate of \$546.54 per week.
4. Notices were timely and properly served upon all parties of interest.
5. Venue set in Florence County is proper as agreed by all parties.
6. That the South Carolina Workers' Compensation Commission has jurisdiction over the parties and issues involved.
7. The issues for determination are whether the Claimant timely filed a change of condition for the worse claim with the Commission in accordance with the law of this case and the requirements of the Act, and whether the Defendants are responsible for any medical treatment going forward for the Claimant's work-related injuries.

APA SUBMISSIONS

Prior to the taking of testimony and pursuant to notices timely filed and served, the following records were submitted into evidence pursuant to the South Carolina Administrative Procedures Act and S.C. Code. Reg. 67-612.

Submissions of SC Department of Transportation

APA#	DOCTOR	DATES	PAGE #'s
Exhibit A	SCWCC E-Case Print Out	2/19/2021	1-5

Exhibit B	Decision and Order	9/18/2018	6-16
Exhibit C	Agreement for Permanent Disability 16(A)	9/18/2018	17
Exhibit D	Status Report Compensation Receipt (Form 19)	10/9/2018	18

Submissions of Claimant

APA#	DOCTOR	PROVIDER	DATES	PAGE #'s
1		McLeod Health	2/4/2016	1-19
2		Carolina Radiology Associates	2/4/2016	20-26
3	Dr. Christina Biester	CareSouth	2/8/2016 2/12/2016	27-36
4	Amanda Kiker, P.A. David Anderson, M.D. Ronald VanDerNoord, M.D. Jeffery Daily, M.D.	OrthoCarolina	3/9/2016- 11/17/2016 6/29/2017	37-70
5		Camden Open MRI	3/21/2016	71
6		Cheraw Physical Therapy and Rehabilitation Center, LLC	5/4/2016 5/18/2016 6/8/2016 12/6/2017	72-94
7		Lancaster Imaging Center	9/9/2016 2/15/2017	95-100
8	Dr. W.S. Bill Edwards	Pee Dee Orthopaedic Associates	6/9/2016- 12/7/2017	101-169
9		Palmetto Health Toumey	12/12/2016	170
10		Cora Rehabilitation Clinic (FCE)	6/13/2017	171-189
11	Willie S. Edwards, M.D.	Attending Physician's Statement		190-191
12		Photos of Claimant's Left and Right ankle		192-19813
13		Deposition of Dr. W.S. Bill Edwards	1/26/2017	
14		Deposition of Dr. W.S. Bill Edwards	2/22/2018	
15		Form 16A	9/7/2018	199
16		Decision and Order	9/18/2018	200-210
17	Dr. Jason O'Dell	McLeod Orthopaedics	6/18/2019- 4/24/2020	211-238

18	Dr. W.S. Bill Edwards Dr. Bruce Johnson	McLeod Spine Center	2/8/2018 10/22/2020	239-307
19	Dr. William James Richardson	Duke University	7/22/2020	308-313
20		Tucker v. S.C. DOT	12/23/2020	314-319
21		Deposition of Dr. Jason B. O'Dell	12/3/2020	

STATEMENT OF THE CASE

This case was heard by the undersigned Commissioner in Florence, South Carolina, on March 2, 2021. The Commission's file in this claim reflects that this is an admitted February 4, 2016, date of accident, at which time the Claimant, a DOT employee, was struck by a vehicle sustaining injuries to his neck, back, and left ankle. The carrier provided causally related medical treatment and both parties agree that the Claimant reached maximum medical improvement and settled this case on a Form 16A on September 7, 2018.

The Form 16A approved by the Commission on September 26, 2018, shows the Claimant was paid 5% percentage of loss of use to the left leg and 10% percentage of loss of use to the whole spine (neck and back) for a total of \$21,724.97. The Form 16A cites to the Form 14B Physicians' Statement dated July 11, 2017, showing no additional medical treatment was ordered by the Claimant's authorized treating providers. On September 18, 2018, pursuant to the July 18, 2018, hearing in this matter on the issue of causally related past and future medical treatment related to the claim, Commissioner Melody James issued an Order confirming what medical treatment Defendants would be responsible for going forward and specifically laying out a deadline for filing a change of condition claim with the Commission.

It is the Claimant's position that the Form 16A sets up that the employer has an obligation to provide medical care as set out in the Order of Commissioner James dated September 18, 2018. The Claimant admits he began seeking medical treatment on his own to his left ankle without

approval from the carrier in the summer of 2019 with Dr. O'Dell, an unauthorized physician; however, he argues that because he submitted a Form 50 on August 9, 2019, alleging a change of condition for the worse and seeking additional medical treatment and benefits, he met the time requirements of S.C. Code Ann. Sec. 42-17-90 as the Form 50 was filed within one year from the Form 16A settlement. While the Claimant concedes he subsequently withdrew his Form 50 requesting a hearing on September 30, 2019 asking the Commission to return the claim to general files without adjudicating his change of condition claim or seeking an Order on additional benefits, the Claimant asserts the filing of the Form 50 on August 9, 2019, preserved the statute in this case.

After withdrawing his Form 50 requesting a hearing on September 30, 2019, the Claimant readily admits he treated on his own with various providers including Dr. O'Dell, Dr. Johnson, and Dr. Edwards without authorization from the carrier and that he did not re-file a Form 50 with the Commission until December 11, 2020. Nevertheless, it is the Claimant's position that he would be entitled to treatment with these physicians under Sec. 40-15-60. Further, because the Claimant was able to obtain deposition testimony from Dr. O'Dell on December 3, 2020, stating the Claimant developed a change of condition for the worse and that the treatment rendered to the Claimant was necessary as a result of the change of condition, the Claimant argues he is entitled to an Order from the Commission finding he sustained a change of condition for the worse; that he is entitled to treatment with Dr. O'Dell, Dr. Johnson, and Dr. Edwards going forward; and that he is entitled to indemnity benefits due to uncontradicted evidence in the record.

It is Defendants' position that the final Decision and Order from Commissioner Melody James dated September 18, 2018, is the law of this case, and that the Order specifically holds that the Claimant would have up to *one year from the date of the signed Order to return to see his authorized treating providers* for any change of condition for the worse and to seek medical treatment to the left ankle and spine. (emphasis added). Defendants argue the Claimant in this

matter did not return to see any of his authorized treating providers (i.e. Dr. Daily, Dr. VanDerNoord, and/or Dr. Anderson), as required by the terms of the September 18, 2018, Order. Instead, the Claimant elected to see his own choice of doctor in June 2019 and again in July 2019 under his own private health insurance, without any request for treatment or notice submitted to the carrier, and without filing a claim, without filing a hearing request, or seeking any additional treatment.

Defendants argue it would be improper for the Commissioner to disregard the September 18, 2018, Order in this matter as it is the law of the case. Further, Defendants assert the Claimant elected his remedy by opting to treat on his own beginning in the summer of 2019 with providers of his own choosing under his own health insurance without giving Defendants the opportunity to investigate his alleged change of condition claim and/or to determine if further treatment would be causally related to the original injury. Defendants assert that the Claimant usurped Defendants' rights under the statute to control medical treatment. In addition, Defendants argue that the doctrine of laches, an equitable doctrine, supports the notion that the Claimant slept on his rights by failing to timely seek treatment as required by the findings in the Order from Commissioner James and that his unreasonable delay in seeking benefits or treatment would preclude any obligation by Defendants to provide further benefits.

Defendants point to the fact that a Form 50 was not timely re-filed in this matter after it was withdrawn by the Claimant in August 2019 and returned to general files with no effort by the Claimant to seek treatment or benefits through the carrier. Rather, the Form 50 was not refiled until December 7, 2020, nearly fifteen months after it was withdrawn. Defendants assert that while the Claimant's Form 50 filed on August 9, 2019, was within one year of the 16A settlement arguably meeting the statute, the Claimant was out of compliance with the terms of the September 18, 2018, Order from Commissioner James which is the law of this case. Further, Defendants

argue that the evidence shows the Claimant's filing of the Form 50 in August 2019 and then subsequent withdrawal of the hearing request returning the claim to general files without making any attempt to seek medical treatment through Defendants with his authorized providers as directed in the Order, was orchestrated to intentionally delay a hearing in the hope that evidence would later develop to support a change of condition claim. Defendants assert this conduct by the Claimant should have no chance at success pursuant to the findings of the Court in *Tucker v. DOT*.

Defendants assert that the Claimant elected his remedy by treating on his own outside of the confines of the Workers' Compensation Act; outside of the law of this case by failing to comply with the September 18, 2018, Decision and Order from Commissioner James; and by failing to timely meet his burden of proof for a change of condition claim pursuant to the Act; therefore, Defendants assert no benefits are owed for any alleged change of condition for the worse and/or as a result of the original work related injury.

EVIDENCE OF THE CASE

On February 4, 2016, the Claimant, a DOT employee, was struck by a vehicle. He sustained admitted injuries to his neck, back, and left ankle. The carrier provided medical treatment with a variety of doctors and both parties agree and stipulate that the Claimant reached maximum medical improvement and settled this case on a Form 16A on September 7, 2018. (APA 199). Specifically, the Claimant was paid 5% percentage of loss of use to the left leg and 10% percentage of loss of use to the whole spine (neck and back) for a total of \$21,724.97. *Id.* The Form 16A cites to the Form 14B Physicians' Statement dated July 11, 2017, showing no additional medical treatment was ordered. *Id.* A Form 19 was approved by the Commission on or about October 9, 2018, reflecting the terms of the agreement and final release and that the sum of \$21,724.97 was indeed paid to the Claimant. (Defendants' APA page 19).

The Claimant argues that the Form 16A sets up that the employer will provide medical care

as set out in the Order of Commissioner James dated September 18, 2018. The Order confirms the carrier provided a variety of authorized medical treatment to the Claimant with orthopedic specialists, but that the Claimant also treated with an unauthorized orthopedist, Dr. Edwards, a spine surgeon in Florence, South Carolina, who performed cervical fusion. (APA pages 200-210). The Order states the carrier is not responsible for the fusion surgery performed by Dr. Edwards because there is no evidence in the record that it lessened the Claimant's period of disability, it was not authorized, and it was not emergent. (APA page 208). In regard to the Claimant's neck and back symptoms, however, Commissioner James ordered that the Claimant would have up to *one year from the date of the signed Order to return to see his authorized treating providers* for any change in condition for the worse and receive medical treatment to the neck or back as related to the February 4, 2016 accident. (APA page 208) (emphasis added).

The Claimant continued to work for the DOT and in the summer of 2019 began experiencing worsening of his left ankle symptoms. Despite the language in the Order from Commissioner James, the Claimant went on his own and under his private health insurance to Dr. O'Dell, an unauthorized physician, on June 18, 2019, to have the left ankle evaluated. (APA page 211). Dr. O'Dell sent the Claimant for an MRI of his ankle which he also sought on his own under his own health insurance. (APA 212). He went back to Dr. O'Dell July 9, 2019, and had an injection to the ankle. (APA 218-219). After undergoing this treatment on his own and without authorization from the carrier, on August 9, 2019, the Claimant filed a Form 50 hearing request with the Commission alleging a change of condition for the worse as a result of his accident at work and seeking additional medical treatment and benefits. The Claimant argues his Form 50 request for treatment was timely filed within one year from the Form 16A settlement as required by South Carolina Code Ann. Section 42-17-90.

Defendants timely filed a responsive Form 51 on August 27, 2019, denying the Claimant's

change of condition claim as no requests for treatment or other medical evidence was submitted to the carrier. The Commission scheduled the case for a hearing. On September 30, 2019, however, before any evidence was presented or a hearing could be held on the issues in controversy, the Claimant's attorney wrote the Commission and copied defense counsel stating he was withdrawing his hearing request pending additional discovery. The Claimant's attorney requested to have the case returned to general files. The request from Claimant's counsel was received by Miss Hutto in the Commissioner's office who responded confirming she removed the hearing from the docket.

After the hearing request was withdrawn on September 30, 2019, the Claimant concedes he continued to treat with Dr. O'Dell on his own, without any notice to Defendants, and under his own health insurance where he received injections to the ankle. (See APA pages 211-238). The treatment was not paid for or authorized by Defendants. During that time frame, Dr. O'Dell also noted the Claimant's complaints of worsening back symptoms. Id. Dr. O'Dell sent the Claimant to Dr. Johnson, a pain management doctor, who injected the spine on several occasions. (See APA pages 239-307). This treatment was not authorized by or paid for by Defendants. Dr. Johnson referred the Claimant over to orthopedic surgeon Dr. Edwards who treated him for worsening neck and back symptoms and took him out of work in June 2020. Id. Again, none of this treatment incurred by the Claimant was authorized by or paid for by Defendants.

The Claimant asserts the filing of the Form 50 on August 9, 2019, preserved the statute in this case. In the interest of simplicity, the Claimant asserts the request was not to have the carrier pay for the medical treatment previously incurred at the hands of Dr. O'Dell, Dr. Johnson, and Dr. Edwards, although he believes he would be entitled to that under Sec. 40-15-60. Rather, he asserts the request was filed to seek medical treatment at the hands of those doctors going forward. The Claimant argues that because he was able to later obtain deposition testimony from Dr. O'Dell

stating the Claimant did have a change of condition for the worse and that the treatment he rendered to the Claimant was necessary as a result of the change of condition, the Claimant is entitled to an Order from the Commission finding he sustained a change of condition for the worse; that he is entitled to treatment with Dr. O'Dell, Dr. Johnson, and Dr. Edwards going forward; and that he is entitled to indemnity benefits as the evidence is uncontradicted in the record. (APA 21).

The Claimant argues that the Court's decision in *Tucker v. SCDOT*, supports his position that he has not violated the statute of limitations in that "hearing requests are different than claims". (APA 20). To wit, "you file a claim within one year and you've met the statute." The Claimant further contends that this is a free country and that he is not prohibited from seeing whatever doctor he sees fit. The Claimant asserts the opinions of the unauthorized treating physician submitted into evidence are uncontradicted and that the Commission is bound to consider the opinions. Without other substantive evidence disputing their opinions, he argues the opinions of the unauthorized doctors provide substantial evidence upon which to rule.

Defendants argue that the final Decision and Order from Commissioner Melody James dated September 18, 2018, is the law of this case. (Defendants APA pages 6-16). In that Order, Commissioner James finds in "Conclusion of Law #6", that under Section 42-15-60 there is no evidence that any additional medical treatment would tend to lessen the Claimant's period of disability for his left ankle, back, or neck injuries; however, the Claimant has up to *one year from the date of the signed Order to return to see his authorized treating providers* for any change of condition for the worse and to seek medical treatment to the left ankle and spine. (Defendants APA page 15) (emphasis added). Further, in "Finding of Fact #12", Commissioner James reiterates that the Claimant has up to *one year from the date of the signed Order to return to see his authorized treating providers* for any change of condition for the worse. (Defendants APA page 14) (emphasis added). Defendants argue the Claimant in this matter did not return to see any of his authorized

treating providers (i.e. Dr. Daily, Dr. VanDerNoord, and/or Dr. Anderson), as required by the terms of the September 18, 2018, Order. Instead, the Claimant elected to see his own choice of doctor in June 2019 and again in July 2019 under his own private health insurance, without any request for treatment or notice submitted to the carrier, and without filing a claim or a hearing request before seeking the treatment on his own.

While Defendants agree with the Claimant that this is a “free country” where a person can see whatever doctor he wants to, Defendants cite to the South Carolina Workers’ Compensation Act and assert that Defendants have the right to control medical treatment including the right to choose the doctor if Defendants are to be liable for the treatment. Defendants assert that they did not deny medical treatment in June or July 2019 when the Claimant went and sought treatment on his own. Rather, Defendants were unaware of the Claimant’s treatment because the Claimant never called, never sent correspondence to the insurance carrier, never notified or called any legal office seeking treatment, never obtained a statement of causation from any medical provider that would meet the legal standard, and did not file a Form 50 asserting a change of condition claim until after he underwent the treatment on his own. He then withdrew the hearing request a month later with no explanation other than that he wanted to conduct additional “discovery” and to have the claim returned to general files.

Defendants argue it would be improper for the Commissioner to disregard the September 18, 2018, Order in this matter as it is the law of the case. Further, Defendants assert the Claimant elected his remedy by opting to treat on his own with providers of his own choosing under his own health insurance without giving Defendants any opportunity to investigate his alleged change of condition claim and/or to determine if further treatment would be causally related to the original injury. Defendants assert that the Claimant usurped the Defendants rights under the statute to control medical treatment. In addition, Defendants argue that the doctrine of laches, an equitable

doctrine, supports the notion that the Claimant slept on his rights by failing to timely seek treatment as required by the findings in the Order from Commissioner James and that his unreasonable delay in seeking benefits or treatment would preclude any obligation by Defendants to provide further benefits.

In support of their argument, Defendants point to the fact that a Form 50 was not timely re-filed in this matter after it was withdrawn by the Claimant in August 2019 and returned to general files with no effort by the Claimant to seek treatment or benefits through the carrier. Rather, the Form 50 was not refiled until December 7, 2020, nearly fifteen months after it was withdrawn. Defendants assert that while the Claimant's Form 50 filed on August 9, 2019, was within one year of the 16A settlement, the Claimant was out of compliance with the terms of the September 18, 2018, Order from Commissioner James which is the law of this case. Further, Defendants argue that the evidence shows the Claimant's filing of the Form 50 in August 2019 and then subsequent withdrawal of the hearing request returning the claim to general files without making any attempt to seek medical treatment through Defendants with his authorized providers as directed in the Order, was intentional. Defendants assert that *Tucker v. SCDOT*, 427 S.C. 299 (2019), is directly on point to address the fallacy in the Claimant's conduct in this matter. To wit, the Court in *Tucker* specifically states,

[a]t oral argument, we discussed with counsel the possibility a Claimant may file a Form 50 within twelve months, and then intentionally delay a hearing in the hope that evidence will later develop to support a change of condition claim . . . [i]n the case before us, there is no indication whatsoever Tucker or his counsel attempted to do this . . . [s]uch an improper effort, as we have explained, should have no chance of success.

Defendants argue that in contrast to the Claimant in *Tucker*, the Claimant in this matter filed a Form 50 on August 9, 2019, without making any effort to seek medical attention with his authorized providers as required by the September 18, 2018 Order and without obtaining any statements of causation regarding a change of condition for the worse within the one-year statutory

timing requirement. He then withdrew the Form 50 requesting a hearing on September 18, 2019, asking the claim to be returned to general files to intentionally delay a hearing in the hope that evidence would later develop to support a change of condition claim. Defendants assert this conduct by the Claimant should have no chance at success pursuant to the findings of the Court in *Tucker*. The Claimant had the opportunity to adjudicate whether he had sustained a change of condition for the worse or to seek additional causally related medical treatment but opted to pursue treatment and benefits on his own outside of the findings in the Order and outside of the confines of the South Carolina Workers' Compensation Act.

Defendants assert that they are not responsible for any of the Claimant's past medical bills or treatment incurred with Dr. O'Dell or any other unauthorized provider pursuant to the law of this case and the confines of the South Carolina Workers' Compensation Act. Defendants assert they are not liable for treatment going forward pursuant to September 18, 2018 Decision and Order in this matter.

Defendants further point to the fact that Dr. O'Dell testified at his deposition that the Claimant came to see him outside of the workers compensation system; under his own private health insurance; and that the Claimant did not come to him on referral from any of his prior authorized providers. (APA 21). Again, Defendants assert that the Claimant elected his remedy by treating on his own outside of the confines of the Workers' Compensation Act; outside of the law of this case by failing to comply with the September 18, 2018, Decision and Order from Commissioner James; and by failing to timely meet his burden of proof for a change of condition claim pursuant to the Act; therefore, Defendants assert no further benefits are owed for any alleged change of condition for the worse and/or as a result of the original work related injury.

FINDINGS OF FACT

BASED ON A PREPONDERANCE OF THE EVIDENCE, IT IS FOUND AS A FACT:

1. That Employee, Employer and Carrier are subject to and bound by the terms and provisions of the South Carolina Workers' Compensation Act. That Claimant was an employee of the named Employer on and prior to February 4, 2016.
2. Claimant sustained admitted injuries to his neck, back, and left ankle arising out of and in the course and scope of his employment on February 4, 2016.
3. Claimant underwent various evaluation and treatment for his admitted work-related injuries to his neck, back, and left ankle.
4. On September 18, 2018, in her Decision and Order subsequent to Defendants' Form 21 hearing, Commissioner Melody James found that Defendants were not responsible for the unauthorized cervical fusion surgery performed by Dr. Edwards or for any future medical care and treatment to the cervical spine related to the fusion surgery, including hardware.
5. On September 18, 2018, in her Decision and Order subsequent to Defendants' Form 21 hearing, Commissioner Melody James found that there is no evidence in the record that any additional medical treatment would tend to lessen the period of Claimant's disability in regard to the Claimant's causally related myofascial neck or back symptoms; however, Commissioner James found that the Claimant has up to one year from the date of her signed Order to return to see his authorized treating providers for any change of condition for the worse and to seek medical treatment to the neck or back as related to the February 4, 2016 accident.
6. On September 7, 2018, on a Form 16A, the parties settled the case for 5% disability to the left leg and 10% disability to the whole back (neck and back). In addition, the parties agreed the employer would provide medical care and treatment as set out in the Commission's Order of September 18, 2018, and the Claimant had one year from the date of the last payment of compensation to file a claim for a worsening of his condition.

While the Form 16A was entered into by the parties on September 7, 2018, it was stamped as received by the Commission on September 26, 2018.

7. On August 15, 2019, Claimant filed a Form 50 requesting additional medical treatment.
8. On September 30, 2019, Claimant withdrew his Form 50 alleging a change of condition and requesting a hearing, and requested that the claim be returned to general files.
9. While the Claimant did file a Form 50 within the one-year timeframe as set forth in Commissioner James' Decision and Order and on the Form 16A, he did so subsequent to having already sought treatment on his own, under his own insurance, and without any notice to Defendants with Dr. O'Dell, and he then withdrew his Form 50 requesting a hearing subsequent to the expiration of the one-year.
10. Because the Claimant withdrew his request for additional medical treatment by withdrawing his Form 50 asserting a change of condition and requesting a hearing on September 30, 2019, as well as continuing to treat with Dr. Odell, I find as a matter of Fact that the Claimant has elected his remedy.
11. It is found as fact that this case is distinguishable from *Tucker v. S.C. Dept of Transportation*, 427 S.C. 299, 831 S.E. 2d 426 (2019). In *Tucker*, the Supreme Court held that the Claimant tolled the one-year statute under Sec. 42-17-90 by filing a Form 50 "Claim Only" within one year of the last payment of compensation. Here, while Claimant's initial Form 50 filed on August 15, 2019, might have tolled the statute, the Claimant unilaterally withdrew this Form 50. Claimant neither filed a Motion for a postponement or adjournment, nor offered a proposed Consent Order. Unlike in *Tucker*, the Claimant took the affirmative action of *withdrawing* his initial Form 50 rendering his subsequent request fifteen months later untimely.
12. I find this claim to be *res judicata* and barred by the doctrine of laches

13. I find Claimant's request for benefits under the Act is hereby denied.

CONCLUSIONS OF LAW

ACCORDINGLY, IT IS THE DETERMINATION OF THIS COMMISSISON THAT:

1. Under Section 42-1-130, Claimant was a covered employee at the time in question; and under Section 42-1-140, Defendant/Employer was a covered employer under the Act.
2. The Decision and Order of Commissioner Melody James dated September 18, 2018, was not appealed, is the law of this case, and nothing in this Order shall be construed so as to amend, delete from, or add to that Order. The Decision and Order of Commission Melody James dated September 18, 2018, is the law of this case and cannot be disregarded by this Commission.
3. Under *Tucker v. S.C. Dept of Transportation*, 427 S.C. 299, 831 S.E. 2d 426 (2019), the Claimant's affirmative action of *withdrawing* his initial Form 50 change of condition claim hearing request rendered his subsequent request fifteen months later untimely.
4. While the Claimant tolled the one-year statute under Sec. 42-17-90 by filing a Form 50 "Claim Only" within one year of the last payment of compensation, the Claimant's affirmative action of unilaterally withdrawing this Form 50 hearing request and asking the Commission to return the claim to general files while he continued to treat on his own for over a year rendered his subsequent request fifteen months later untimely in keeping with the September 18, 2018, Order from Commissioner James which is the law of this case.
5. Pursuant to Section 42-15-60 and Section 42-15-80, the Claimant has not established in a compelling manner that Defendants are responsible for any additional medical treatment that would tend to lessen the Claimant's period of disability for his left ankle, back, or neck injuries, as related to the original injury at work.

6. I find this claim to be *res judicata* and barred by the doctrine of laches.
7. I find the Claimant elected his remedy when he withdrew his request for additional medical treatment on September 30, 2019, seeking treatment with providers of his own choosing outside of the confines of the South Carolina Workers' Compensation Act.

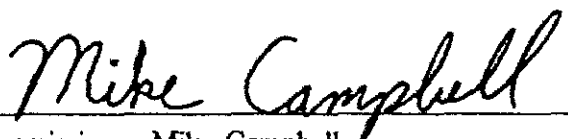
ORDER

Based on the above Findings of Fact and Conclusions of Law, it is hereby,

ORDERED, ADJUDGED AND DECREED that the Claimant's claim for change of condition seeking additional treatment and benefits is barred in that he unreasonably delayed and elected his remedy by treating on his own outside of the confines of the Workers' Compensation Act; outside of the law of this case by failing to comply with the September 18, 2018 Decision and Order from Commissioner James; and by failing to timely meet his burden of proof for a change of condition claim pursuant to the Act; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that no further benefits or treatment are owed for the Claimant's alleged change of condition claim and/or as a result of the original work-related injury.

AND IT IS SO ORDERED!



Commissioner Mike Campbell

Columbia, South Carolina

June 1, 2021

Parties served via email:

Stephen J. Wukela, Esquire: stephen@wukelalaw.com

Sarah Verstraten, Esquire: Sverstraten@hplplaw.com

CERTIFICATE OF SERVICE

This is to certify the undersigned has this date served this order in the above entitled action upon all parties to this cause by sending an electronic copy hereof by electronic mail addressed to the attorney or attorneys for said parties or by depositing a copy hereof, postage paid, in the United States certified mail addressed to any unrepresented party.

June 1, 2021

By: Barbara Cheeseboro, Administrative Assistant to Commissioner Campbell

BEFORE THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
WCC FILE NO. 1602438

Randy Jordan,	)	
	)	
Claimant,	)	
	)	
vs.	)	NOTICE OF MOTION AND MOTION
	)	FOR RECONSIDERATION
SC Department of Transportation, Employer,	)	
and SC State Accident Fund, Carrier,	)	
	)	
Defendants.	)	

TO: SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION, SARAH G. J. VERSTRATEN, AND PAGE P. HILTON, ATTORNEYS FOR DEFENDANTS:

PLEASE TAKE NOTICE that the Claimant moves this Commission for Reconsideration of the Decision and Order dated June 1, 2021. This Motion is based on the following grounds:

The Order's Finding of Fact No. 8 finds:

8. On September 30, 2019, Claimant withdrew his Form 50 alleging a change of condition and requesting a hearing, and requested that the claim be returned to general files.
(Ord., p. 15).

Similarly, Finding of Fact No. 10 finds:

10. Because the Claimant withdrew his request for additional medical treatment by withdrawing his Form 50 asserting a change in condition and requesting a hearing on September 30, 2019, as well as continuing to treat with Dr. O'Dell, I find as a matter of Fact that the Claimant has elected his remedy.
(Ord., p. 15).

Respectfully, the Claimant did not withdraw his claim for a change of condition. He, instead, withdrew only his hearing request.

As indicated in page 9 of the Order, paragraph 1, “The Claimant’s attorney wrote the Commission and copied defense counsel stating he was withdrawing his hearing request pending additional discovery.” (emphasis added).

As the Commission’s file reflects, by email of September 30, 2019 to the Commission, the Claimant’s counsel wrote “I am withdrawing my hearing request pending additional discovery please return this case to the general files.” (Exh. A, Email of 09/30/2019)(emphasis added).¹

Claimant did not withdraw his claim for a change in condition. The Claimant only withdrew his hearing request.

As the undersigned argued at trial, the case of Tucker v. SCDOT, 427 S.C. 299, makes clear that claims are distinguished from hearing requests. The filing of a claim within one (1) year meets the time limitations of §42-17-90. See Tucker, at 303.

Commission Regulations recognize that distinction as well. R.67-206 is titled “**Filing a Claim.**” Whereas, R.67-207 is titled “**Requesting a Hearing, Claimant.**”

R.67-609 titled: “**Withdrawing a Request for Hearing.**” provides that a claimant may withdraw a request for hearing by writing the Commission’s Judicial Department and the Commission shall file a notice removing the case from the docket. The Regulation provides, “The notice is **without prejudice to the Claimant’s right to proceed with his or her claim.**” (emphasis added).

¹This email chain is part of the Commission’s file and became part of the record at the hearing. (Tr. Hrg. p. 3, lines 19-22).

Further, as the undersigned argued at trial, even if the Claimant had failed to meet the Statute of Limitations under §42-1-90, the Statute of Limitations is an affirmative defense which must be raised in Defendants' Form 51 answer. See R.67-603(c). It was not so raised. (Exh. B, Form 51, 08/27/2019; Exh. C, Form 51, 01/05/2021).² A Statute of Limitations defense under §42-17-90 not raised in a Form 51 is forfeited. See R.67-603(c).

The Commission's Order does not address the argument made by Claimant's counsel at trial, (Tr. Hrg. p. 7, lines 13-14; p. 9, lines 12-18; p. 10, lines 20-25), that the Defendants forfeited the Statute of Limitations defense by failing to raise it in their Form 51. The Claimant here, requests a specific ruling on that issue.

Finally, the Order of Jun 1, 2021 finds the claim barred by res judicata and laches. The laches defense suffers from the same shortcomings as the Statute of Limitations defense. As to res judicata, it is well established that the mere fact that there is a difference between the first award and the change of condition award sought under §42-17-90 does not entitle a defendant to claim that the first award is res judicata. The whole point of §42-17-90, and the issue before the Commission deciding a claim under that provision, is whether there has been a change of condition, an issue which was not, and chronologically could not have been, before the Commission at the first hearing. If so, there would be no such thing as a change of condition. See Cromer v. Newberry Cotton Mills, 201 S.C. 349 (S.C. 1942); Wilson v. Charleston Cnty. Sch. Dist., 419 S.C. 442 (Ct. App. 2017).

²The Forms 51 are part of the Commission's file and became part of the record at the hearing. (Tr. Hrg. p. 3, lines 19-22).

On these bases, along with those argued in the Claimant's Pre-Hearing Brief and at trial, which Claimant incorporates herein by reference, Claimant requests that the Commission reconsider its decision of June 1, 2021 and make specific findings on those issues raised.

I SO MOVE.

Florence, South Carolina

June 4th, 2021

WUKELA LAW FIRM

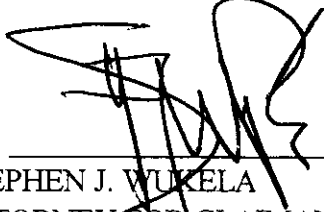
BY: 
STEPHEN J. WUKELA
ATTORNEY FOR CLAIMANT
PO BOX 13057
FLORENCE SC 29504
843-669-5634

EXHIBIT A

Jennifer Matthews

From: Hutto, Deborah <dhutto@wcc.sc.gov>
Sent: Monday, September 30, 2019 11:36 AM
To: Jennifer Matthews
Cc: sgverstraten@wjlaw.net; philton@saf.sc.gov
Subject: RE: [External] Randy Jordan v. SCDOT WCC File No. 1602438

I have removed the hearing from the docket and noted our records accordingly.

Thank you,

Deborah

From: Jennifer Matthews <jmatthews@wukelalaw.com>
Sent: Monday, September 30, 2019 10:32 AM
To: Hutto, Deborah <dhutto@wcc.sc.gov>
Cc: sgverstraten@wjlaw.net; philton@saf.sc.gov
Subject: [External] Randy Jordan v. SCDOT WCC File No. 1602438

I am withdrawing my hearing request pending additional discovery. Please return this case to the general files.

Stephen J. Wukela, Esquire
Wukela Law Firm
PO Box 13057
Florence, SC 29504
(P) 843-669-5634
(F) 843-669-5150

CONFIDENTIAL & PRIVILEGED

The preceding email message, including any attachments, may be confidential and/or protected by the attorney-client or other applicable privileges. It is intended for the sole use of the individual or entity named above. If the reader of this transmission is not the intended recipient, please notify the sender immediately and destroy any copies, electronic, paper or otherwise, that you may have of this communication. Any unauthorized review, use, disclosure or distribution is strictly prohibited and may be unlawful.

EXHIBIT B

South Carolina Workers' Compensation Commission

1333 Main Street, Suite 500 • Post Office Box 1715
Columbia, South Carolina 29202-1715
(803) 737-5675 www.wcc.sc.gov



WCC File #: 1602438
Carrier File #: 2016-316
Carrier Code #: _____
Employer FEIN #: _____

Claimant's Name: Randy Everett Jordan SSN: 249-63-8196 Employer's Name: SC Department of Transportation
Address: 1432 Hwy 268 Address: 955 Park Street, Post Office Box 191
City: Mount Croghan State: SC Zip: 29727 City: Columbia State: SC Zip: 29202
Home Phone: (843) 680-9298 Work Phone: _____ Insurance Carrier: State Accident Fund
Date of Injury: 2/4/2016
Preparer's Name: Sarah G. J. Verstraten Law Firm: Willson Jones Carter & Baxley, P.A. Preparer's Phone #: (843) 606-3295

Date of Injury or Illness: 2/4/2016

Estimated time for hearing: 45 min

Complete each information blank. Clearly specify when contentions are admitted in part and denied in part. The Employer/Carrier in answer to the claim, respectfully shows:

1. It is **Denied** the employee sustained an injury or illness on or about the date set forth in the Form 50. The reasons for denial are:
Defendants deny the claimant sustained a change of condition for the worse. Pursuant to the prior Order and signed 16A in this case, the Claimant sustained a permanent partial disability of 5% to the left leg and 10% to the whole spine (neck and back) as a result of his work related injury. Defendants deny the claimant is entitled to any further benefits under the Act and/or that the Claimant sustained any other injury.
2. It is **Admitted** both the employer and employee were subject to the Workers' Compensation Act at the time in question. The reasons for denial are: _____
3. It is **Admitted** the relationship of employer and employee existed at the time in question. The reasons for denial are: _____
4. It is **Denied** at the time in question the employee was performing services arising out of and in the course of employment. The reasons for denial are:
Pending investigation.
5. It is **Denied** notice of injury was given the employer. The reasons for denial are:
No evidence to substantiate.
6. It is **Denied** the employee **Needs / Is Entitled to Additional** medical care as a result of injury or illness. The reasons for denial are:
No evidence to substantiate.
7. It is **Denied** the employee is entitled to temporary total disability for the period(s) of :
No evidence to substantiate.
8. It is **Denied** the employee is permanently disabled. The reasons for denial are:
No evidence to substantiate.
9. It is **Denied** the employee has serious disfigurement.
10. It is contended that an average weekly wage of **\$819.77** applies, according to attached Form 20 as provided by law.
11. Further contentions, grounds of defense, or unusual aspects are:
Defendants reserve the right to amend and to assert defenses as they become aware of them.

☐ **Mediation**

- ☐ a. Mediation is requested to be ordered pursuant to Reg. 67-1801 B.
☐ b. Mediation is required pursuant to Reg. 67-1802.
☐ c. Mediation is requested by consent of the Parties pursuant to Reg. 67-1803.
☐ d. Mediation has been conducted by a duly qualified mediator and resulted in an impasse.

Questions regarding mediation may be submitted to mediation@wcc.sc.gov.

I certify I have served this document pursuant to Reg. 67-211 by delivering a copy to **Stephen J. Wukela, Esquire/Judicial Analysts**
Address Stephen@wukelajaw.com / judicialanalysts@wcc.sc.gov on the **27th** day of **August 2019**, by:

☐ first class postage ☐ certified mail ☐ personal service ☒ electronic service

I verify the contents of this form are accurate and true to the best of my knowledge.

Sarah G. J. Verstraten

Preparer's Signature

Attorney for the Employer/Insurer

Title

sgverstraten@wjlaw.net

Email

08/27/2019

Date

Refer to R.67-204 through R.67-210 and R.67-601 through R.67-615. Refer to R. 67-1801 for mediation. Questions about the use of this form may be directed to the Commission's Judicial Department at 803-737-5675 or judicial@wcc.sc.gov or mediation@wcc.sc.gov. Pursuant to R.67-606, a Form 20 must be filed with the Claims Department at least 30 days from the date of filing this form.

Stephen@wukelalaw.com

From: Sarah G.J. Verstraten <SGVerstraten@wjlaw.net>
Sent: Tuesday, August 27, 2019 1:54 PM
To: 'judicialanalysts@wcc.sc.gov'
Cc: 'Stephen@wukelalaw.com'; Vera Jackson; jmatthews@wukelalaw.com; Jaime L. Gress
Subject: Randy Jordan vs. SC Department of Transportation 2016-316:
Attachments: Form 51_Employer's Answer to Rqst for Hrg-Denied.docx

Good Afternoon!

Please see the attached Form 51, Defendants' response to the Claimant's request for hearing.

Thank you!

Sarah

WJC&B

**WILLSON JONES CARTER
& BAXLEY, P.A.**

Sarah G.J. Verstraten, Attorney
sgverstraten@wjlaw.net
421 Wando Park Boulevard, Suite 100
Mount Pleasant, South Carolina 29464
Phone: (843) 606-3295
Fax: (843) 284-1081
wjcbllaw.com

This message may be protected by the attorney/client privilege, attorney work product or other privileges. If you received this message in error, please send a reply, delete the message immediately and do not forward this message to any other person.

EXHIBIT C

Stephen@wukelalaw.com

From: Sarah Verstraten <SVerstraten@hplplaw.com>
Sent: Tuesday, January 5, 2021 9:59 AM
To: WCC - Judicial_Analysts
Cc: steve@wukelalaw.com; Sarah Fitzellen; stephen@wukelalaw.com
Subject: Form 51 - Denied: Randy Jordan vs. SC Dept. of Transportation
Attachments: Form 51 - Denied.docx

Please see the attached Form 51 – denying the above referenced claim. Please let me know if you have any questions.

Kindest Regards,

Sarah

In response to the COVID-19 virus, HPLP has implemented a plan to continue to provide service to our clients, the Courts, our employees, and the community.

At present, our offices in North Carolina and South Carolina are open and operating through a combination of remote and on site services in the best interests of our clients but also for the safety of our employees. We will continue to keep you updated.

We will work through this difficult time together and we hope everyone stays safe and healthy.

SARAH G. J. VERSTRATEN

HOLDER PADGETT LITTLEJOHN + PRICKETT, LLC

945 Houston Northcutt Blvd. | Mt. Pleasant, SC 29464

d. 843.942.0943 | f. 843.589.9000

www.hplplaw.com | sverstraten@hplplaw.com



HOLDER
PADGETT
LITTLEJOHN+
PRICKETT, LLC

CHARLESTON | COLUMBIA | GREENVILLE | RALEIGH

CONFIDENTIALITY NOTICE: This message is sent by the law firm of Holder Padgett Littlejohn + Prickett, LLC and may be confidential and privileged legal communication to the named recipient(s). If you receive this message in error or are not the named recipient(s), please notify the sender and delete this email. Thank you.

South Carolina Workers' Compensation Commission

1333 Main Street, Suite 500 • Post Office Box 1715

Columbia, South Carolina 29202-1715

(803) 737-5675 www.wcc.sc.govWCC File #: **1602438**Carrier File #: **2016-000316**

Carrier Code #:

Employer FEIN #:

Claimant's Name: Randy Jordan SSN: 249-63-8196Address: 1432 Hwy 268
Mount Croghan, SC 29727Employer's Name: SC Department of Transportation

Address:

Home Phone: (843) 680-9268 Work Phone: () -Date of Injury: 2/04/2016Insurance Carrier: State Accident FundPreparer's Name: Sarah G. J. Verstraten, Esquire Law Firm: Holder Padgett Littlejohn + Prickett, LLC Preparer's Phone #: (843) 942-0943**Date of Injury or Illness: 2/04/2016****Estimated time for hearing: One hour****Complete each information blank. Clearly specify when contentions are admitted in part and denied in part. The Employer/Carrier in answer to the claim, respectfully shows:**

1. It is **Denied** the employee sustained an injury or illness on or about the date set forth in the Form 50. The reasons for denial are:
Defendants deny the Claimant sustained a change of condition for the worse. Pursuant to the prior Order and signed Form 16A in this case, the Claimant has permanent partial disability of 5% to the leg and 10% to the whole spine (neck and back) as a result of the 2/4/2016 work related injury. Benefits and permanency have been paid. Defendants deny the claimant is entitled to any further benefits under the Act or that the Claimant sustained any new work related injury.
2. It is **Denied** both the employer and employee were subject to the Workers' Compensation Act at the time in question. The reasons for denial are:
See No. 1 above.
3. It is **Denied** the relationship of employer and employee existed at the time in question. The reasons for denial are:
See No. 1 above.
4. It is **Denied** at the time in question the employee was performing services arising out of and in the course of employment. The reasons for denial are:
See No. 1 above.
5. It is **Denied** notice of injury was given the employer. The reasons for denial are:
See No. 1 above.
6. It is **Denied** the employee **Needs / Is Entitled to Additional** medical care as a result of injury or illness. The reasons for denial are:
See No.1 above.
7. It is **Denied** the employee is entitled to temporary total disability for the period(s) of :
See No. 1 above.
8. It is **Denied** the employee is permanently disabled. The reasons for denial are:
No evidence of such.
9. It is **Denied** the employee has serious disfigurement.
10. It is contended that an average weekly wage of \$ **TBD** applies, according to attached Form 20 as provided by law.
11. Further contentions, grounds of defense, or unusual aspects are:
Defendants deny the Claimant sustained any change of condition for the worse or new injury arising out of or in the course and scope of his employment; therefore Defendant is denied benefits under the Act. Defendants object to a lump sum payment or any *Utica Mohawk/James v. Anne* language in an award from the Commission. Defendants reserve the right to assert any applicable defenses supported by evidence developed during discovery.

☐ **Mediation**

- ☐ a. Mediation is requested to be ordered pursuant to Reg. 67-1801 B.
- ☐ b. Mediation is required pursuant to Reg. 67-1802.
- ☐ c. Mediation is requested by consent of the Parties pursuant to Reg. 67-1803.
- ☐ d. Mediation has been conducted by a duly qualified mediator and resulted in an impasse.

Questions regarding mediation may be submitted to mediation@wcc.sc.gov.

I certify I have served this document pursuant to Reg. 67-211 by delivering a copy to **Stephen Wukela, Esquire, Wukela Law Firm, 403 Second Loop Road, Post Office Box 13057, Florence, SC 29504-3057 (stephen@wukelalaw.com); and Amy Bracy, Judicial Director, S.C. Workers' Compensation Commissioner, Post Office Box 1715, Columbia, SC 29202-1715 (judicialanalysts@wcc.sc.gov)** on the **5th** day of **January** 2021, by:

☐ first class postage ☐ certified mail ☐ personal service ☒ electronic service

I verify the contents of this form are accurate and true to the best of my knowledge.

Sarah G. J. Verstraten

Attorney for Defendants

sverstraten@hpiplaw.com

January 5, 2021

Preparer's Signature

Title

Email

Date

WCC Form # 51

Revised 07/15

51

Employer's Answer to Request for Hearing

South Carolina Workers' Compensation Commission

1333 Main Street, Suite 500 • Post Office Box 1715

Columbia, South Carolina 29202-1715

(803) 737-5675 www.wcc.sc.govWCC File #: **1602438**Carrier File #: **2016-000316**

Carrier Code #:

Employer FEIN #:

Claimant's Name: Randy Jordan SSN: 249-63-8196Address: 1432 Hwy 268
Mount Croghan, SC 29727Employer's Name: SC Department of Transportation

Address: _____

Home Phone: (843) 680-9268 Work Phone: () -Date of Injury: 2/04/2016Insurance Carrier: State Accident FundPreparer's Name: Sarah G. J. Verstraten, Esquire Law Firm: Holder Padgett Littlejohn + Prickett, LLC Preparer's Phone #: (843) 942-0943**Date of Injury or Illness: 2/04/2016****Estimated time for hearing: One hour****Complete each information blank. Clearly specify when contentions are admitted in part and denied in part. The Employer/Carrier in answer to the claim, respectfully shows:**

1. It is **Denied** the employee sustained an injury or illness on or about the date set forth in the Form 50. The reasons for denial are:
Defendants deny the Claimant sustained a change of condition for the worse. Pursuant to the prior Order and signed Form 16A in this case, the Claimant has permanent partial disability of 5% to the leg and 10% to the whole spine (neck and back) as a result of the 2/4/2016 work related injury. Benefits and permanency have been paid. Defendants deny the claimant is entitled to any further benefits under the Act or that the Claimant sustained any new work related injury.
2. It is **Denied** both the employer and employee were subject to the Workers' Compensation Act at the time in question. The reasons for denial are:
See No. 1 above.
3. It is **Denied** the relationship of employer and employee existed at the time in question. The reasons for denial are:
See No. 1 above.
4. It is **Denied** at the time in question the employee was performing services arising out of and in the course of employment. The reasons for denial are:
See No. 1 above.
5. It is **Denied** notice of injury was given the employer. The reasons for denial are:
See No. 1 above.
6. It is **Denied** the employee **Needs / Is Entitled to Additional** medical care as a result of injury or illness. The reasons for denial are:
See No.1 above.
7. It is **Denied** the employee is entitled to temporary total disability for the period(s) of :
See No. 1 above.
8. It is **Denied** the employee is permanently disabled. The reasons for denial are:
No evidence of such.
9. It is **Denied** the employee has serious disfigurement.
10. It is contended that an average weekly wage of \$ **TBD** applies, according to attached Form 20 as provided by law.
11. Further contentions, grounds of defense, or unusual aspects are:
Defendants deny the Claimant sustained a change of condition for the worse or new injury arising out of or in the course and scope of his employment; therefore Defendant is denied benefits under the Act. Defendants object to a lump sum payment or any *Utica Mohawk/James v. Anne* language in an award from the Commission. Defendants reserve the right to assert any applicable defenses supported by evidence developed during discovery.

☐ **Mediation**

- ☐ a. Mediation is requested to be ordered pursuant to Reg. 67-1801 B.
- ☐ b. Mediation is required pursuant to Reg. 67-1802.
- ☐ c. Mediation is requested by consent of the Parties pursuant to Reg. 67-1803.
- ☐ d. Mediation has been conducted by a duly qualified mediator and resulted in an impasse.

Questions regarding mediation may be submitted to mediation@wcc.sc.gov.

I certify I have served this document pursuant to Reg. 67-211 by delivering a copy to Stephen Wukela, Esquire, Wukela Law Firm, 403 Second Loop Road, Post Office Box 13057, Florence, SC 29504-3057 (stephen@wukelalaw.com); and Amy Bracy, Judicial Director, S.C. Workers' Compensation Commissioner, Post Office Box 1715, Columbia, SC 29202-1715 (judicialanalysts@wcc.sc.gov) on the 5th day of January 2021, by:

☐ first class postage ☐ certified mail ☐ personal service ☒ electronic service
I verify the contents of this form are accurate and true to the best of my knowledge.Sarah G. J. VerstratenAttorney for Defendantssverstraten@hplplaw.comJanuary 5, 2021

Preparer's Signature

Title

Email

Date

WCC Form # 51

Revised 07/15

51

Employer's Answer to Request for Hearing



WCC File #: 1602438
Carrier File #: _____
Carrier Code #: _____
Employer FEIN #: _____

Claimant's Name: Randy E. Jordan SSN: 249-63-8196 Employer's Name: SC Department of Transportation
Address: 1432 Highway 268 Address: PO Box 191
City: Mt. Croghan State: SC Zip: 29727 City: Columbia State: SC Zip: 29202
Home Phone: () - Work Phone: () - Insurance Carrier: State Accident Fund
Preparer's Name: Stephen J. Wukela Law Firm: Wukela Law Firm Preparer's Phone #: 843-669-5634

A claim for workers' compensation benefits is made based on the following grounds:

☒ Injury ☐ Illness ☐ Repetitive Trauma ☐ Occupational Disease ☐ Physical Brain Injury ☐ Concurrent Jurisdiction

1. The Claimant sustained an injury to Shoulders, back, left hip, and left ankle, neck on 02/04/2016 in Chesterfield County, State of South Carolina.
Body part(s) affected are: Shoulders, back, left hip, and left ankle, neck
2. Briefly describe how the accident occurred. Claimant was working on the side of the road for the SC Department of Transportation, and was struck by a vehicle.
3. Both the claimant and the employer were subject to the South Carolina Workers' Compensation Act at the time of injury.
4. The relationship of employer and employee existed at the time of injury.
5. At the time of the injury the claimant was performing services arising out of and in the course of employment.
6. Notice of the accidental injury was given to the Employer on 02/04/2016 in the following manner:
Claimant notified Tod Huggins

☒ 7. Due to injury, the claimant is in need of (check one):

☒ (a) medical examination and treatment for: Shoulders, back, left hip, and left ankle, neck

☒ (b) additional medical examination and treatment for: Shoulders, back, left hip, and left ankle, neck

☒ 8. Due to injury, the claimant requests temporary total disability benefits because of lost compensable time from work and wages for the period of:
Various dates and times

☒ 9. Due to the injury, the Claimant has permanent disability of the following nature and extent (check one):

☒ (1) General Disability: ☒ Total ☐ Partial ☒ (2) Specific Disability: ☒ Total ☐ Partial ☐ (3) Wage Loss

9a. Claimant at MMI: ☐ Yes ☒ No

☐ 10. Due to the injury, the Claimant has a serious bodily disfigurement consisting of:

10a. At the time of the injury, the Claimant was paid weekly wages of \$819.77, and demands accounting of days worked and wages earned as provided by law.

10b. Give names and addresses of all employers for whom the Claimant has worked since the date of the accident: None other than this Employer

11. Further grounds or unusual aspects of claim: Since Claimant's last payment, the Claimant has sustained a change in condition to the left ankle and is in need of additional treatment for his left ankle and additional compensation benefits.

11a. List names and addresses of all physicians or other medical specialists who have seen or treated the Claimant as a result of the accident: CareSouth; OrthoCarolina; McLeod Health Cherau; Dr. Vandernoord; Dr. W.S. Edwards; Dr. Daily; Dr. Anderson

11b. To the best of your knowledge, did you have any prior permanent disability? 5% left leg; 10% whole spine If yes, describe: per 16A Consent Order of 09/07/18

12. Appropriate benefits as provided in the Act for the above grounds and other relief as the Workers' Compensation Commission may direct as just and proper.

☐ 13. I am filing a claim. I am not requesting a hearing at this time.

Estimated time needed for hearing: 30 minutes

☒ 14. I am requesting a hearing. A \$50 fee is required.

☐ Mediation

- ☐ a. Mediation is requested to be ordered pursuant to Reg. 67-1801 B.
☐ b. Mediation is required pursuant to Reg. 67-1802.
☐ c. Mediation is requested by consent of the Parties pursuant to Reg. 67-1803.
☐ d. Mediation has been conducted by a duly qualified mediator and resulted in an impasse.

Questions regarding mediation may be submitted to mediation@wcc.sc.gov.

I certify I have served this document pursuant to Reg. 67-211 by delivering a copy to _____

on the 12 day of Dec, 2020, by ☐ first class postage ☒ certified mail ☐ personal service ☐ electronic service

I verify the contents of this form are accurate and true to the best of my knowledge.

Preparer's Signature - Stephen J. Wukela Attorney for Claimant stephen@wukelalaw.com
Title _____ Email _____ Date 12/16/20

Questions about the use of this form should be directed to the Claims Department at 803.737.5723. Refer to Regulations 67-204 through 67-211 and Regulations 67-601 through 67-615 as well as Reg. 67-1801.

South Carolina Workers' Compensation Commission

1333 Main Street, Suite 500 • Post Office Box 1715

Columbia, South Carolina 29202-1715

(803) 737-5675 www.wcc.sc.govWCC File #: **1602438**Carrier File #: **2016-316**

Carrier Code #:

Employer FEIN #:

BF 032616-000316

Claimant's Name: Randy Everett Jordan SSN: 249-63-8196 Employer's Name: SC Department of Transportation
 Address: 1432 Hwy 268 Address: 955 Park Street, Post Office Box 191
 City: Mount Croghan State: SC Zip: 29727 City: Columbia State: SC Zip: 29202
 Home Phone: (843) 680-9298 Work Phone: _____ Insurance Carrier: State Accident Fund
 Date of Injury: 2/4/2016 Insurance Carrier: _____
 Preparer's Name: Sarah G. J. Verstraten Law Firm: Willson Jones Carter & Baxley, P.A. Preparer's Phone #: (843) 606-3295

Date of Injury or Illness: 2/4/2016**Estimated time for hearing: 45 min****Complete each information blank. Clearly specify when contentions are admitted in part and denied in part. The Employer/Carrier in answer to the claim, respectfully shows:**

1. It is **Denied** the employee sustained an injury or illness on or about the date set forth in the Form 50. The reasons for denial are:
 Defendants deny the claimant sustained a change of condition for the worse. Pursuant to the prior Order and signed 16A in this case, the Claimant sustained a permanent partial disability of 5% to the left leg and 10% to the whole spine (neck and back) as a result of his work related injury. Defendants deny the claimant is entitled to any further benefits under the Act and/or that the Claimant sustained any other injury.
2. It is **Admitted** both the employer and employee were subject to the Workers' Compensation Act at the time in question. The reasons for denial are:
3. It is **Admitted** the relationship of employer and employee existed at the time in question. The reasons for denial are:
4. It is **Denied** at the time in question the employee was performing services arising out of and in the course of employment. The reasons for denial are:
 Pending investigation.
5. It is **Denied** notice of injury was given the employer. The reasons for denial are:
 No evidence to substantiate.
6. It is **Denied** the employee **Needs / Is Entitled to Additional** medical care as a result of injury or illness. The reasons for denial are:
 No evidence to substantiate.
7. It is **Denied** the employee is entitled to temporary total disability for the period(s) of :
 No evidence to substantiate.
8. It is **Denied** the employee is permanently disabled. The reasons for denial are:
 No evidence to substantiate.
9. It is **Denied** the employee has serious disfigurement.
10. It is contended that an average weekly wage of **\$819.77** applies, according to attached Form 20 as provided by law.
11. Further contentions, grounds of defense, or unusual aspects are:
 Defendants reserve the right to amend and to assert defenses as they become aware of them.

☐ Mediation

- ☐ a. Mediation is requested to be ordered pursuant to Reg. 67-1801 B.
☐ b. Mediation is required pursuant to Reg. 67-1802.
☐ c. Mediation is requested by consent of the Parties pursuant to Reg. 67-1803.
☐ d. Mediation has been conducted by a duly qualified mediator and resulted in an impasse.

Questions regarding mediation may be submitted to mediation@wcc.sc.gov.**I certify I have served this document pursuant to Reg. 67-211 by delivering a copy to Stephen J. Wukela, Esquire/Judicial Analysts****Address Stephen@wukelalaw.com/judicialanalysts@wcc.sc.gov on the 27th day of August 2019, by:**☐ first class postage ☐ certified mail ☐ personal service ☒ electronic service**I verify the contents of this form are accurate and true to the best of my knowledge.**Sarah G. J. Verstraten

Preparer's Signature

Attorney for the Employer/Insurer

Title

sgverstraten@wjlaw.net

Email

08/27/2019

Date

Refer to R.67-204 through R.67-210 and R.67-601 through R.67-615. Refer to R. 67-1801 for mediation. Questions about the use of this form may be directed to the Commission's Judicial Department at 803-737-5675 or judicial@wcc.sc.gov or mediation@wcc.sc.gov. Pursuant to R.67-606, a Form 20 must be filed with the Claims Department at least 30 days from the date of filing this form.

WCC Form # 51

Revised 07/15

51⁹⁸**Employer's Answer to Request for Hearing**



WCC File #: **1602438**
Carrier File #: _____
Carrier Code #: _____
Employer FEIN #: _____

Claimant's Name: Randy E. Jordan SSN: 249-63-8196 Employer's Name: SC Department of Transportation
Address: 1432 Highway 268 Address: PO Box 191
City: Mt. Croghan State: SC Zip: 29727 City: Columbia State: SC Zip: 29202
Home Phone: () - Work Phone: () - Insurance Carrier: State Accident Fund
Preparer's Name: Stephen J. Wukela Law Firm: Wukela Law Firm Preparer's Phone #: 843-669-5634

A claim for workers' compensation benefits is made based on the following grounds:

☒ Injury ☐ Illness ☐ Repetitive Trauma ☐ Occupational Disease ☐ Physical Brain Injury ☐ Concurrent Jurisdiction

1. The Claimant sustained an injury to Shoulders, back, left hip, and left ankle, neck on 02/04/2016 in Chesterfield County, State of South Carolina.
2. Body part(s) affected are: Shoulders, back, left hip, and left ankle, neck
Briefly describe how the accident occurred. Claimant was working on the side of the road for the SC Department of Transportation, and was struck by a vehicle.
3. Both the claimant and the employer were subject to the South Carolina Workers' Compensation Act at the time of injury.
4. The relationship of employer and employee existed at the time of injury.
5. At the time of the injury the claimant was performing services arising out of and in the course of employment.
6. Notice of the accidental injury was given to the Employer on 02/04/2016 in the following manner:
Claimant notified Tod Huggins

☒ 7. Due to injury, the claimant is in need of (check one):

☒ (a) medical examination and treatment for: Shoulders, back, left hip, and left ankle, neck

☒ (b) additional medical examination and treatment for: Shoulders, back, left hip, and left ankle, neck

☒ 8. Due to injury, the claimant requests temporary total disability benefits because of lost compensable time from work and wages for the period of:
Various dates and times

☒ 9. Due to the injury, the Claimant has permanent disability of the following nature and extent (check one):

☒ (1) General Disability: ☒ Total ☐ Partial ☒ (2) Specific Disability: ☒ Total ☐ Partial ☐ (3) Wage Loss

9a. Claimant at MMI: ☐ Yes ☒ No

☐ 10. Due to the injury, the Claimant has a serious bodily disfigurement consisting of:

10a. At the time of the injury, the Claimant was paid weekly wages of \$819.77, and demands accounting of days worked and wages earned as provided by law.

10b. Give names and addresses of all employers for whom the Claimant has worked since the date of the accident: None other than this Employer

11. Further grounds or unusual aspects of claim: Since Claimant's last payment, the Claimant has sustained a change in condition to the left ankle and is in need of additional treatment for his left ankle and additional compensation benefits.

11a. List names and addresses of all physicians or other medical specialists who have seen or treated the Claimant as a result of the accident: CareSouth; OrthoCarolina; McLeod Health Cheraw; Dr. Vandemoord; Dr. W.S. Edwards; Dr. Daily; Dr. Anderson

11b. To the best of your knowledge, did you have any prior permanent disability? 5% left leg; 10% whole spine If yes, describe: per 16A Consent Order of 09/07/18

12. Appropriate benefits as provided in the Act for the above grounds and other relief as the Workers' Compensation Commission may direct as just and proper.

☐ 13. I am filing a claim. I am not requesting a hearing at this time.

Estimated time needed for hearing: 30 minutes

☒ 14. I am requesting a hearing. A \$50 fee is required.

☐ Mediation

☐ a. Mediation is requested to be ordered pursuant to Reg. 67-1801 B.

☐ b. Mediation is required pursuant to Reg. 67-1802.

☐ c. Mediation is requested by consent of the Parties pursuant to Reg. 67-1803.

☐ d. Mediation has been conducted by a duly qualified mediator and resulted in an impasse.

Questions regarding mediation may be submitted to mediation@wcc.sc.gov.

I certify I have served this document pursuant to Reg. 67-211 by delivering a copy to SC Dept of Transp. PO Box 191, Columbia SC 29202; State Accident Fund PO Box 102100, Columbia SC 29202; Page Hilton, PO Box 102100, Columbia SC 29202; Sarah Verstraten, 421 Wando Park Blvd, Ste.

100 Mt. Pleasant St, 29164 on the 15 day of August, 2019, by ☐ first class postage ☒ certified mail ☐ personal service ☐ electronic service

I verify that the foregoing facts are accurate and true to the best of my knowledge.

Preparer's Signature: Stephen J. Wukela Attorney for Claimant: stephen@wukelalaw.com
Title: _____ Email: _____ Date: 8/9/19

Questions about the use of this form should be directed to the Claims Department at 803.737.5723. Refer to Regulations 67-204 through 67-211 and Regulations 67-601 through 67-605 as well as Reg. 67-1801.

Transcript of the Testimony of **Jordan v SCDOT and SAF**

Date: November 23, 2021



CREEL COURT REPORTING, INC.
Condensed Transcript and Word Index

1230 Richland Street
Columbia, SC 29201
Phone: (803) 252-3445 / (800) 822-0896
Email: contact@creelreporting.com
Internet: <https://creelreporting.com/>

STATE OF SOUTH CAROLINA
BEFORE THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
WCC No. 1602438

Randy Jordan,)
)
 Claimant,)
)
 v.)
)
 SC DOT,)
)
 Employer,)
)
 and)
)
 SAF,)
)
 Carrier/Defendants.)
)
 _____)

VIRTUAL FULL COMMISSION HEARING

Tuesday, November 23, 2021

9:31 a.m. - 9:56 a.m.

The Full Commission Hearing was heard virtually before Commissioners Susan S. Barden, T. Scott Beck, and Avery Wilkerson, on the 23rd day of November, 2021, before Nadine A. Garrett, Court Reporter and Notary Public in and for the State of South Carolina.

VIRTUAL APPEARANCES

Stephen J. Wukela, Esquire
Wukela Law Office
403 Second Loop Road
Florence, South Carolina 29505
Attorney for the Claimant

Timothy Blair Killen, Esquire
Holder, Padgett, Littlejohn & Prickett, LLC
945 Houston Northcutt Boulevard
Mt. Pleasant, South Carolina 29464
Attorney for the Defendants

Also Present:
Amy Bracy
Randy Jordan

INDEX

PAGE

CALL TO ORDER:	
COURT REPORTER	.3
ORAL ARGUMENTS:	
MR. WUKELA	.3
MR. KILLEN	12
MR. WUKELA	16
Certificate	24

EXHIBITS

(There were no exhibits marked during the hearing.)

STIPULATIONS

It is stipulated and agreed that this deposition is being taken pursuant to the Administrative Procedures Act and the South Carolina Rules of Civil Procedure.

1 CALL TO ORDER:

2 COURT REPORTER: Today is November 23rd, 2021. This
3 is South Carolina Workers' Compensation case
4 number 1602438. This is the case of Randy
5 Jordan, Claimant, versus SC DOT, Employer, and
6 SAF is the Carrier. The Appellant is the
7 Claimant, represented by Stephen Wukela. And
8 the Respondent is represented by Tim Killen.
9 Each side is allowed ten minutes for oral
10 argument and the Appellant three minutes in
11 reply. You are requested to argue the grounds
12 of exception and stay within the record.

13 THE COURT: Mr. Wukela.

14 ORAL ARGUMENT BY MR. WUKELA:

15 MR. WUKELA: Thank you, Madam Chairman. Please the
16 Commission. This is a change-of-condition
17 case. Randy Jordan is a DOT -- longtime DOT
18 employee, was hit by a car while working on a
19 roadside several years ago, had an admitted
20 injury to his left leg, his ankle primarily, as
21 well as his spine, his neck, and his back.

22 He -- case was litigated, we signed a 16A
23 on September the 7th, 2018, with a rating to
24 the spine, parentheses neck and back, and a
25 rating to the left lower extremity. After that

1 we litigated the Carrier's responsibility to
2 pay for some cervical spine surgery that had
3 not been authorized. And the Commissioner
4 found -- Commissioner James found in September
5 2018 that didn't change anything in the 16A,
6 that he still had a neck and back and left
7 ankle injury, but that the Carrier was not
8 responsible to pay for the cervical spine
9 surgery, given that it had not been authorized.
10 And that was the situation until he began
11 having worsening pain in his ankle.

12 And in June of 2019 he saw a Dr. O'Dell,
13 an orthopedic here in town, for his ankle. Dr.
14 O'Dell has not been -- is not and has never
15 been an authorized treating physician. Dr.
16 O'Dell saw him and noted worsening pain in the
17 ankle, recommended some treatment. And we
18 filed a Form 50 for change of condition on
19 August the 9th, 2019, within the one-year time
20 period. That is to say, we filed a claim. And
21 I say it that way, because when we talk about
22 50s, of course Form 50 to both file claims and
23 request hearings, and that seems important
24 later on in the history of this case.

25 In any event, as his treatment progressed,

1 his ankle worsened and he started developing
2 worsening hip and spine problems. So in order
3 to conduct some more discovery, on September
4 the 30th, 2019 we withdrew our hearing request
5 by letter -- actually, by email to the
6 Commissioner.

7 Subsequent to that, he continues to treat
8 with Dr. O'Dell, who notes that his gait is
9 having problems, that he's got worsening
10 problems with his back ---

11 COMMISSIONER BECK: Mr. Wukela, what does the Reg --
12 how does the Reg define -- is it withdrawing
13 the Form 50 or is it withdrawing the Hearing
14 Request in the Reg?

15 MR. WUKELA: Actually there's a Regulation that
16 speaks directly to withdrawing a hearing
17 request, Commissioner.

18 COMMISSIONER BECK: And which ---

19 MR. WUKELA: And that's 67-609. And in fact, in my
20 brief, Your Honor, if you turn to -- I think
21 page 11 in my brief sets out the language
22 there.

23 COMMISSIONER BECK: Perfect.

24 MR. WUKELA: If I'm not incorrect here. I'm sorry.
25 Perhaps -- no, I'm sorry. Page 13 in my brief,

1 Commissioner.

2 COMMISSIONER BECK: All right. I'm there.

3 MR. WUKELA: And, please the Commission, I'll
4 interrupt the history a little bit at this
5 moment to speak about that, since you've asked
6 about it.

7 The Commission Regulations recognize that
8 distinction. 67-206 is titled Filing a Claim,
9 and it talks about filing a claim, about filing
10 a Form 50. 67-207 is title Requesting a
11 Hearing, which is a separate act, but also is
12 done by filing a Form 50. Then in 67-609 has
13 the most pertinent language. It is entitled
14 Withdrawing a Request for Hearing. And it
15 reads -- and Your Honor can read without me --
16 that a Claimant may withdraw a request for
17 hearing by writing the Commission's Judicial
18 Department, which is, of course, exactly what
19 I did by email, and the Commission shall file
20 a notice removing the case from the docket.
21 The Regulation specifically provides,
22 Commissioner Beck, and I quote, the notice,
23 that is to say the notice removing the case
24 from the docket, is without prejudice to the
25 Claimant's right to proceed with his or her

1 claim, which is, of course, exactly what we
2 did.

3 By the way, Commissioner, I -- the order
4 of Commissioner Campbell somewhat conflates
5 claims and hearing requests. It doesn't make
6 that distinction. And so I actually filed a
7 motion for reconsideration citing the
8 Regulation's language and asking the Commission
9 to make specific findings about whether the
10 Commission would find that I was withdrawing my
11 hearing request, withdrawing my claim. That
12 motion was denied in a Formal Order, and so I
13 never got a direct ruling on that question.
14 But I did independently raise that.

15 If that responds to Your Honor, I'll go
16 back to ---

17 COMMISSIONER BECK: It did. Please proceed.

18 MR. WUKELA: So -- by the way, also, Commissioner,
19 that September 30th, 2019 email is, of course,
20 part of the Commission's record, because I
21 wrote the Commission, but it was also attached
22 as an exhibit to my motion for reconsideration.

23 In any event, it's -- we withdraw that
24 hearing request, he continues with treatment,
25 no question, with an unauthorized treating

1 physician, Dr. O'Dell. Dr. O'Dell notes his
2 gait abnormalities, problems with his spine, he
3 orders an MRI of his back, he refers him to
4 pain management at the hands of Dr. Johnson at
5 McLeod Orthopaedic. Dr. Johnson performs an
6 epidural steroid injection, refers him to Dr.
7 Edwards, a surgeon at McLeod Orthopedic, and
8 ultimately Dr. Edwards refers him over to Duke.
9 After that treatment progressed like that, we
10 requested a hearing by filing a Form 50 on
11 December the 7th of 2020.

12 We took Dr. O'Dell's deposition --
13 Commissioner? Yes, ma'am.

14 COMMISSIONER BARDEN: Yes, sir. I just had one
15 question. Dr. O'Dell spoke to the worsening
16 when he first saw Mr. Jordan. When you filed
17 the original 50, was there any kind of medical
18 record attached to that as far as from Dr.

19 O'Dell you spoke of earlier?

20 MR. WUKELA: There was not, Commissioner.

21 COMMISSIONER BARDEN: Okay. So that was filed in
22 December or when did you file that?

23 MR. WUKELA: I'm not sure that we ever attached any
24 -- of course we attached all the medical,
25 including Dr. O'Dell's deposition, at the

1 hearing.

2 COMMISSIONER BARDEN: Okay.

3 MR. WUKELA: At the Prehearing Brief.

4 COMMISSIONER BARDEN: Okay.

5 MR. WUKELA: Yes, Your Honor. And if it please the
6 Commission, I'll speak to Dr. O'Dell's
7 testimony in that regard. Dr. O'Dell
8 testified, and his testimony is exerted at page
9 four to six of my brief, that the Claimant's
10 back and ankle had worsened, that it had been
11 a product -- the worsening was a product that,
12 at least with regard to the spine, from his
13 altered gait, and that the referrals to Dr.
14 Johnson and Dr. Edwards and those thereafter
15 were necessary as a result.

16 COMMISSIONER BARDEN: And that was with Dr. ---

17 MR. WUKELA: That -- that ---

18 COMMISSIONER BARDEN: --- his deposition testimony;
19 is that right?

20 MR. WUKELA: It is, Your Honor. And it's exerted
21 from paged -- in pages four through six of my
22 brief. And I won't read it back all to you in
23 the interest of time. But in particular, I
24 think it's found at pages 14 and 15 and 18 and
25 19 of Dr. O'Dell's deposition transcript.

1 And by the way, Commissioner, I -- in
2 speaking to the attachment of medicals with any
3 Form 50, as we discussed, no medical was
4 attached to the Form 50s. However, it's the
5 Claimant's contention that, pursuant to the
6 Court's decision in Tucker vs. SC DOT, which I
7 know Your Honor is familiar with and the
8 Commission's familiar with, that practice,
9 which has been the practice and still is the
10 practice, is not required in order to file a
11 claim within the statute of limitation.

12 COMMISSIONER BARDEN: I was just curious as to what
13 you have attached.

14 MR. WUKELA: Yes, ma'am. And in truth,
15 Commissioner, his treatment was changing and
16 evolving during that time period. As you see
17 from the medical records, he sees O'Dell for
18 worsening ankle problems, but as his ankle
19 worsens, his gait worsens. As his gait worsens
20 his spine worsens and so -- and thus the
21 withdrawing the hearing request, taking Dr.
22 O'Dell's deposition.

23 COMMISSIONER BARDEN: And then that -- on what date
24 you filed that -- you filed the original on
25 August 9th, 2019, correct?

1 MR. WUKELA: August 9th, 2019 is correct,
2 Commissioner.

3 COMMISSIONER BARDEN: And then the second ---

4 MR. WUKELA: And the second was filed on December
5 the 7th of 2020, which was about four days
6 after Dr. O'Dell's deposition was taken on
7 December the 3rd of 2020.

8 COMMISSIONER BARDEN: Okay. Thank you, sir.

9 MR. WUKELA: Thank you, Your Honor. At any rate, as
10 the Commissioner had discussed, Dr. O'Dell
11 testified -- and, again, it's, I think, pages
12 four through six of my Brief set it out,
13 unequivocally that his back and ankle ---

14 COMMISSIONER BARDEN: Finish your thought.

15 MR. WUKELA: I'm sorry.

16 COMMISSIONER BARDEN: Finish your thought, sir.

17 MR. WUKELA: Thank you, Your Honor. That his back
18 and ankle was worsened, that it was from his
19 gait, and that the referrals were necessary.

20 Commissioner, we're going to talk a lot
21 today about the effect of withdrawing a hearing
22 request and all kinds of other theories. But
23 what you're not going to hear is there was any
24 testimony that contradicted that testimony.
25 And it's the Claimant's contention that, given

1 that uncontradicted testimony establishing
2 change of condition, that it would be contrary
3 to substantial evidence to rule otherwise.

4 COMMISSIONER BARDEN: Thank you, sir.

5 MR. WUKELA: And I will respond to the Defense
6 arguments on reply, Your Honor, if it please
7 the Commission.

8 COMMISSIONER BARDEN: Thank you. Mr. Killen.

9 ORAL ARGUMENT BY MR. KILLEN:

10 MR. KILLEN: Thank you, Your Honor. Tim Killen here
11 for the South Carolina Department of
12 Transportation and the State Accident Fund.

13 In this case the -- it's our position that
14 the filing of the Form 50 was untimely. Let's
15 see. He filed his first -- and some of the
16 dates are different. I guess the date he
17 mailed them and the date they were received.
18 But then at the first 50 was filed it was
19 requesting a hearing, was on August 19th, 2019.
20 As he didn't have the evidence to prove the
21 statute of limitations -- I mean, to prove the
22 change of condition, he withdrew it just about
23 a month later right before the hearing. Only
24 after that 50 was withdrawn he noticed the
25 deposition of Dr. O'Dell, with whom the

1 Claimant sought treatment on his own, and who
2 was not an authorized treating physician, as
3 set forth in Commissioner James' prior Order of
4 September 18th, 2018. A few days after the
5 deposition he filed a new 50.

6 This case -- and the Single Commissioner
7 in his Order distinguished this -- the facts in
8 this case from those in Tucker vs. South
9 Carolina Department of Transportation. In
10 fact, the Single Commissioner said, unlike in
11 Tucker, Claimant took the affirmative step of
12 withdrawing his Form 50 in this case. That
13 isn't what happened in Tucker. The Form 50
14 didn't establish a new claim here. It
15 requested a hearing on a change of condition.
16 The claim had already been filed many, many
17 years ago. It's a 2016 case.

18 Claimant then, after withdrawing the Form
19 50, waited over a year to gather evidence
20 before he filed a new hearing request. And the
21 Supreme Court addressed this kind of delay
22 tactic in Tucker calling it a, quote, improper
23 effort, close quote, and saying that this
24 should have no chance of success. What he did
25 here was he didn't have the evidence, he filed

1 the Form 50, he then withdrew it, and then went
2 and got the deposition of Dr. O'Dell and then
3 proceeded with the claim. And he ---

4 COMMISSIONER BECK: Mr. Killen, Tucker found the
5 claim, nonetheless, compensable.

6 MR. KILLEN: It did. It did. And ---

7 COMMISSIONER BECK: So, I mean -- so let me make
8 sure I understand. Mr. Wukela files a 50
9 requesting a hearing. And that is akin to
10 filing a claim and requesting a hearing. So
11 you have a claim filed, similar to Tucker. And
12 he withdraws the hearing request component,
13 consistent with 67-609, which leaves the claim
14 still intact. How is that dissimilar to
15 Tucker?

16 MR. KILLEN: It's our position that the claim to be
17 filed is the actual injury itself and not the
18 change of condition; that the change of
19 condition is what the hearing request was for.
20 It wasn't the type ---

21 COMMISSIONER BECK: I understand your position.

22 MR. KILLEN: Thank you, Commissioner.

23 But even if it were timely, the Claimant
24 can't prove a change a condition on this case.
25 Section 42-17-90 requires that the Claimant

1 prove that the alleged change was caused by the
2 original injury and that the onus of that the
3 onset of that change occurred after the last
4 payment of compensation. Here, Dr. O'Dell
5 noted in his deposition only that the alleged
6 changes to the Claimant's ankle arose some time
7 after the Claimant was released by Dr. Daly.

8 COMMISSIONER BECK: But that issue wasn't even
9 addressed by Commissioner Campbell.

10 MR. KILLEN: It wasn't, because he never got there.

11 COMMISSIONER BECK: That's my point.

12 MR. KILLEN: If you guys get there, this is -- I'm
13 arguing that he can't prove the change of
14 condition, because you -- you're not bound by
15 the substantial evidence, you're, as you know
16 ---

17 COMMISSIONER BECK: I understand.

18 MR. KILLEN: So the medical records actually say,
19 quote, Claimant states his ankle has been
20 progressively getting worse since the time of
21 his original injury. That's at the Claimant's
22 APA page 211. That's the first record, I
23 believe, when the Claimant went back to see Dr.
24 O'Dell in June. And it references, you know,
25 the time period all the way back. So there's

1 no evidence that the Claimant's condition had
2 its onset after the last payment of
3 compensation.

4 And my client is also arguing that the
5 Claimant abandoned his claim by failing to
6 follow the law of the case, as set forth in
7 Commissioner James' 9/18/18 Order, in which she
8 required -- she wrote that the Claimant has up
9 to one year from the date of the signed order
10 to return to see Dr. Daly as his authorized
11 treating physician for any change of condition
12 for the worse and would seek medical treatment
13 for the left ankle. That's finding of fact
14 five. This was un-appealed. No party applied
15 that -- Commissioner James' Order.

16 The Claimant failed to return to see Dr.
17 Daly and he treated on his own without
18 authorization from the Defendants and without
19 even notifying them until that first Form 50
20 was filed. And aside from that, I'll rely on
21 arguments as set forth in our Brief.

22 COMMISSIONER BARDEN: All right. Mr. Wukela, you
23 have three minutes in response, sir.

24 REPLY ORAL ARGUMENT BY MR. WUKELA:

25 MR. WUKELA: Thank you, Commissioner. I'm sorry?

1 COMMISSIONER BECK: Let me get you to address a
2 couple of issues. And I don't want to throw
3 you off your stride, but ---

4 COMMISSIONER BARDEN: I'll wait before I start, if
5 you'd like to do that.

6 COMMISSIONER BECK: Number one, Mr. Killen has made
7 reference to this finding of fact in
8 Commissioner James' Order, basically says,
9 however, the Claimant has up to one year from
10 the date of this signed Order to return to see
11 Dr. Daly as his authorized treating provider
12 for any change of condition for the worse and
13 to seek medical treatment for the left ankle.
14 His position is, is that that's an un-appealed
15 finding of Commissioner James and your client
16 went outside the scope of that Order finding
17 and therefore, based on that, was not compliant
18 with that Order and can't satisfy the burden
19 because of that. That's the first question.

20 And the second question I want to ask you
21 is where in -- point me to the specific
22 location in the APAs that satisfies the burden
23 for a change of condition for the worse for the
24 ankle.

25 MR. WUKELA: Yes, Commissioner. I'll take your

1 first question first, Commissioner. Let me say
2 first that the whole point of a change of
3 condition is to find that the condition -- ask
4 the Commission to find that the condition has
5 changed and that the Claimant's no longer bound
6 by -- the Carrier's no longer bound by the
7 previous Orders on permanency. A change of
8 condition order cannot be res judicata. That's
9 the whole point of change of condition. If the
10 original order is res judicata, there would be
11 no such thing as change of condition. And
12 there's some case law on that that I cite in my
13 brief, okay?

14 COMMISSIONER BECK: Okay.

15 MR. WUKELA: However, let me go further to say that
16 Commissioner James' order indicated that he had
17 a year to continue to see the authorized
18 treating -- I'm sorry, Commissioner Barden?

19 COMMISSIONER BARDEN: No, I didn't say anything.

20 MR. WUKELA: Oh, I'm sorry. You came up on the
21 screen. I thought you were asking and I had
22 spoken over you. I'm sorry.

23 COMMISSIONER BARDEN: I only see you. I don't even
24 see myself but barely a little thumbnail, so.
25 No, I didn't say a word. I don't even think I

1 coughed or sneezed or anything. Go ahead, sir.

2 MR. WUKELA: No, no. I'm sorry.

3 Also, Commissioner Beck, as to your
4 question about Commissioner James' Order, even
5 if that Order could be res judicata to a
6 subsequent change of condition, which I think
7 would be an absurdity, Commissioner James'
8 order found what the law was, which was, under
9 42-15-60, absent any change of condition, the
10 Claimant continued to treat with the authorized
11 treating physician for a year. That certainly
12 was the law, but -- in the Order. But nothing
13 in that Order says that he is banned from
14 seeing other physicians. And certainly nothing
15 in that Order says, nor could it, I think, in
16 the bounds of due process, say the Commission
17 will then disregard the opinion of any
18 physician that's not authorized by the Carrier.

19 Now, ultimately, Commissioner Beck, what
20 the Defense is arguing is that -- whether you
21 call it -- at points they call it election of
22 remedy, at points they call it res judicata,
23 but what they're ultimately arguing is that,
24 since Dr. O'Dell's opinion is uncontradicted
25 and is the only medical opinion in the record,

1 the Commission must disregard that opinion,
2 because the Carrier did not approve it. The
3 Carrier did not approve him to see Dr. O'Dell
4 and therefore the Commission must disregard Dr.
5 O'Dell's testimony, which, of course, they must
6 argue, because it's uncontradicted in the
7 evidence. There is no law anywhere, and
8 certainly they don't cite any, that indicates
9 that the Commission can disregard the testimony
10 of a physician, because the Carrier hasn't
11 authorized it. And that is effectively what
12 they're arguing.

13 And I have something else, Commission.
14 That's what the Carriers have convinced a lot
15 of doctors. They have convinced several
16 doctors that the Claimant can't see their own
17 doctor, and that they can only see the doctors
18 that the Carriers authorize. And, of course,
19 that's not the law.

20 Now, Commissioner Beck, I recognize that
21 my time has expired. I do want to respond to
22 the rest of your question. How shall I
23 proceed?

24 COMMISSIONER BARDEN: Go ahead.

25 COMMISSIONER BECK: I do, as well.

1 MR. WUKELA: Okay. Now, Your Honor asked me to
2 point you in the APA to the evidence I rely on
3 to establish a change of condition. And I want
4 to point you first to the deposition of Dr.
5 O'Dell, pages -- page 15, lines 21 through 24.

6 COMMISSIONER BECK: Give me the cite again. Page 15
7 ...

8 MR. WUKELA: Page 15, line 21 through 24, which is
9 found beginning on page four and going on to
10 page five of my Brief.

11 COMMISSIONER BECK: I'm there.

12 MR. WUKELA: All right. So -- and I hesitate to
13 read to you, Commissioner, because you're
14 reading it yourself. But it begins there on
15 line 21. We've been talking about the ankle
16 and your treatment of the ankle. We're talking
17 about the right hip. What's the significance
18 of that? And he says, So in somebody who has
19 a lingering issue or potentially worsening
20 issue, I do think the gait problems could lead
21 to the secondary hip or back problems, even
22 knee problems on the other side. And then he
23 goes on, beginning on line 14 of page 14. I
24 see. Okay. And as you know -- as I said at
25 the outset, his back was an admitted injury and

1 his ankle was an admitted injury. At this
2 point both his ankle and his back are worse.
3 Is that a fair statement? His answer is yes.
4 And then I go on on lines 21 of page 15. Is it
5 -- it's still your concern or impression that
6 this worsening of the back situation is a
7 product of gait? His answer is, that is my
8 opinion. And then it goes on on page 18 and
9 19, Commissioner. But I want to culminate
10 here. I'm trying to find the sentence, so I
11 don't have to read a whole bunch to you. Page
12 ---

13 COMMISSIONER BECK: Mr. Wukela, I've got what I
14 need. Mr. Wukela, I've got what I need here.

15 MR. WUKELA: Thank you, Your Honor. Again, it was
16 on page five and six of my brief.

17 COMMISSIONER BECK: Yes, sir.

18 MR. WUKELA: Without reading all that to you.

19 And, Commissioner, I would add, again,
20 that testimony is uncontradicted anywhere in
21 this record.

22 Thank you, Your Honor, for hearing me.

23 COMMISSIONER BARDEN: Thank you. That concludes
24 this proceeding.

25 (There being nothing further, the hearing concluded

1 at 9:56 a.m.)

STATE OF SOUTH CAROLINA
BEFORE THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
WCC No. 1602438

Randy Jordan,)
)
 Claimant,)
)
 v.)
)
 South Carolina Department)
 of Transportation,)
)
 Employer,)
)
 and)
)
 State Accident Fund,)
)
 Carrier/Defendants.)
 -----)

COMMISSIONER'S HEARING

Tuesday, March 2, 2021
12:12 p.m. - 12:33 p.m.

COPY

The Commissioner's Hearing was heard before Commissioner R. Michael Campbell, II, at the Florence County Complex, 180 N. Irby Street, 9th Floor, Florence, South Carolina, on the 2nd day of March, 2021 before Amber Scarborough, Court Reporter and Notary Public in and for the State of South Carolina.



CREEL COURT REPORTING, INC.
1230 Richland Street / Columbia, SC 29201
(803) 252-3445 / (800) 822-0896

APPEARANCES

Stephen J. Wukela, Esquire

Wukela Law Firm
403 Second Loop Road
Florence, South Carolina 29505
Attorney for the Claimant

Sarah Verstraten, Esquire

Holder, Padgett, Littlejohn & Prickett, LLC
945 Houston Northcutt Boulevard
Mount Pleasant, South Carolina 29464
Attorney for the Carrier

INDEX

PAGE

CALL TO ORDER:

COMMISSIONER CAMPBELL 3

CLAIMANT'S POSITION:

MR. WUKELA 4

CARRIER'S POSITION:

MS. VERSTRATEN 13

CLAIMANT'S REPLY:

MR. WUKELA 20
Certificate 22

EXHIBITS

(Claimant's Exhibit Number 1 was marked prior to the hearing.)

Claimant's Exhibit Number 1 3
(Deposition Transcript of Jason B.
O'Dell, MD)

(Claimant's Exhibit Number 1 was retained by Commissioner.)

STIPULATIONS

It is stipulated and agreed that this deposition is being taken pursuant to the Administrative Procedures Act and the South Carolina Rules of Civil Procedure.



CREEL COURT REPORTING, INC.
1230 Richland Street / Columbia, SC 29201
(803) 252-3445 / (800) 822-0896

1 (Claimant's Exhibit Number 1 was marked prior to the
2 hearing.)

3 CALL TO ORDER:

4 COMMISSIONER CAMPBELL: Today's hearing date is March
5 2nd, 2021. This is Workers' Compensation Case
6 File 1602438. The Claimant is Randy Jordan,
7 represented by Stephen J. Wukela. The Employer
8 is the South Carolina Department of
9 Transportation. The Carrier is the State
10 Accident Fund, represented by Sarah Verstraten.
11 The date of accident was February 4th, 2016.
12 There was an average weekly wage of \$819.77
13 with a corresponding compensation rate of
14 \$546.54. APAs have been submitted. Are there
15 any objections to APAs, jurisdiction, venue or
16 any other items?

17 MR. WUKELA: None from the Claimant, Commissioner.

18 MS. VERSTRATEN: None from the Defense, thank you.

19 COMMISSIONER CAMPBELL: Without objection the
20 Commission File becomes part of the record with
21 the exception of self-serving declarations and
22 unstipulated medical reports. Mr. Wukela, we
23 are here today on a Form 50 that you have filed
24 with the Commission, so if you would please put
25 your position on the record and let us know



1 what you're seeking here today, sir.

2 CLAIMANT'S POSITION:

3 MR. WUKELA: Yeah, Commissioner. Thank you, Your
4 Honor. By way of history, this is an admitted
5 accident that occurred back in February 4th,
6 2016 when the Claimant, a DOT Employee, was
7 struck by a vehicle. He has admitted injuries,
8 and Ms. Verstraten is correct, neck, back, and
9 left ankle are the admitted body parts in that
10 case. Carrier provided medical treatment with
11 a variety of our doctors and orthopaedics and
12 ultimately the party settled the case on a Form
13 16(a) on September 7th, 2018. That Form 16,
14 Commissioner, for the record is found at page
15 199. Although, of course, I know it's part of
16 the Commission's record, but it sets out that
17 the Claimant had an injury to his left leg,
18 whole spine, neck, and back and is entitled by
19 agreement of the parties to a five percent loss
20 of use to the left leg and ten percent loss of
21 use to the whole spine. That 16(a) was dated,
22 approved by the Commission 9/18/2000 and it
23 actually says '18, but it was, I mean says '19,
24 but it was '18, the signature of the parties
25 are in September 2018. The -- with regard to



1 medical treatment, the 16(a) sets up that the
2 Employer will provide medical care and set out
3 in the Commission's Order of September the
4 18th, 2018. Now, what that had to do with,
5 Commissioner, was that the Carrier provided a
6 variety of authorized medical treatment all
7 throughout his orthopaedics. The Claimant,
8 during that time, had treatment by an
9 unauthorized orthopaedist, Dr. Edwards, who's a
10 spinal surgeon here in Florence who had
11 performed the cervical fusion. And the parties
12 dispute whether the Carrier's responsible for
13 that unauthorized treatment. So, the parties
14 had a hearing before Commissioner James and
15 Commissioner James indeed issued her Order on
16 September the 18th, 2018. And the pertinent
17 part on page 208 of the APA, which is page 9 of
18 that Order, paragraphs 11 and 12 of that Order.
19 The Commissioner found in some that the
20 Carrier's not responsible for the fusion by Dr.
21 Edwards and that there's no evidence that it
22 tended to lessen the period of disability and
23 it wasn't authorized and it wasn't emergent.
24 The Commissioner went on to find that there's
25 no evidence in the record the additional



1 medical treatment will tend lessen than period
2 of the Claimant's disability. In regards the
3 Claimant's causally related neck and back
4 symptoms, however the Claimant has up to one
5 year from the date of this signed Order to
6 return to see his authorized treating providers
7 for any change in condition for the worse
8 and/or receive medical treatments to the neck
9 or back as related to the February 4th, 2016
10 accident. That's the Order of Commissioner
11 James at page 208 of the APAs, paragraph 12.
12 In the meantime, my client continued to work
13 for the DOT. And then in the summer of 2019
14 began experiencing worsening first of his left
15 ankle, he went to Dr. O'Dell, who was not
16 authorized treating physician. He used his
17 health insurance and he saw Dr. O'Dell first on
18 June the 18th of 2019, which is page 211 of the
19 APA. Dr. O'Dell sent him for an MRI of his
20 ankle and he continued to work. He went back
21 to O'Dell in July, July the 9th, 2019, where
22 Dr. O'Dell did an injection. Thereafter, on
23 August the 9th, 2019 the Claimant filed a Form
24 50 and in that Form 50 the Claimant sought
25 additional medical treatment and alleged a



1 change of condition and that was on August 9th,
2 2019, well within one year from the Form 16(a).
3 The Defendant's responded on August the 27th,
4 2019 filing a Form 51 denying that the Claimant
5 has had a change of condition, denying that he
6 was entitled to any further medical treatment,
7 although they did not raise any statute of
8 limitations. Of course this change of
9 condition was brought under South Carolina Code
10 42-17-90, which requires that a change of
11 condition be filed within one year of the
12 receipt of payment under an Order or a Form
13 16(a). But they didn't raise any statute of
14 limitations and they didn't provide any medical
15 treatment so the Claimant continued to treat
16 with Dr. O'Dell. And in pre-trial we went
17 through, I'm not going to recite again all the
18 medical treatment to Your Honor, but the
19 Claimant, suffice it to say the records show
20 that Dr. O'Dell injected him on his ankle for
21 a few times, noted worsening back symptoms, has
22 testified the back symptoms related to the
23 ankle. The back of course was an admitted body
24 part. Sent him to Dr. Johnson, the pain
25 management doctor, who injected the spine on



1 several occasions. Johnson referred him over
2 to Edwards. The Carrier didn't provide any
3 medical treatment during this time period.
4 Edwards ultimately said he's, now he has
5 worsening neck symptoms, back symptoms and took
6 him out of work in June of 2020. Now, in the
7 meantime, given that development of medical
8 treatment, in September of 2018 the
9 Commissioner sent that first Form 50 for a
10 hearing. And on September 30th, 2019 the
11 Claimant wrote and copied Mr. Verstraten
12 indicating, quote, I -- I'm withdrawing my
13 hearing request pending additional discovery.
14 Please return this case to the general file.
15 Of course that's in the Commission's file
16 received by Ms. Hutto and Ms. Hutto responded,
17 I removed the hearing from the docket and noted
18 in our records accordingly. Claimant continued
19 to treat and then on September the 7th, 2020
20 filed the 50 requesting a hearing alleging a
21 change of condition to medical treatment. Now,
22 of particular note, Commissioner, the Claimant
23 is not seeking the medical treatment or not
24 requesting that the Carrier pay for the medical
25 treatment that has occurred at the hands of Dr.



1 O'Dell and Johnson and Edwards and for the
2 record from June of '19 to date. Okay.
3 Although we would argue that under 40-15-60 we
4 think we would be entitled to that given the
5 fact that we've filed the Form 50 within a year
6 asking for medical treatment to be provided.
7 However, in the interest of simplicity we're
8 not seeking that medical treatment. What we
9 are seeking thought is medical treatment at the
10 hands of those doctors going forward.

11 **COMMISSIONER CAMPBELL:** Okay.

12 **MR. WUKELA:** The Defendant's filed a Form 51 on
13 January the 5th, 2021. In that 51 they denied
14 a change condition, they denied the Claimant
15 was entitled any medical treatment. Of course
16 they hadn't provided any whether within the
17 year or otherwise. They did not raise the
18 statute of limitations. And we took then Dr.
19 O'Dell's deposition. His testimony -- of
20 course, Your Honor, I won't recite all that,
21 it's also exempted -- inserted in my brief --
22 suffice to say, Dr. O'Dell says he had a change
23 of condition and that the treatment was
24 necessary as a result of that. Therefore, it's
25 the Claimant's position that he's had a change



1 of condition, that he's entitled to treatment
2 with these doctors going forward, he's entitled
3 to indemnity benefits, and this evidence is
4 uncontradicted in the record. The Defense
5 offers two arguments basically in response.
6 The first it has to do with the claim of the
7 -- is the statute limitations argument. They
8 argued that you have to file a claim within one
9 year under 42-17-90 and even though the
10 Claimant filed a Form 50 within one year,
11 withdrawing the hearing request they, the
12 Claimant has now missed the statute. Of
13 course, we contend that that was is directly
14 contradictory to the Court's decision in *Tucker*
15 *versus SCDOT*, which is APA 20, where precisely
16 the same question was provided, presented to
17 the Court and the Court said no, the hearing
18 request are different than claims. You file a
19 claim within one year and you've met the
20 statute. The second response we would make to
21 that argument is that argument isn't even
22 properly before the Commission because the
23 Defense had never raised the statute of
24 limitations in the pleading and therefore we
25 think the Defense argument on that point fails.



1 The next argument the Defense makes has to do
2 with this Order from Commissioner James in
3 2018. And specifically the language in which
4 Commissioner James said the Claimant has up to
5 one year to return to authorized treating
6 physicians -- for the authorized treating
7 providers for the -- and receive medical
8 treatment that they may provide. And Defense
9 argues that, and I quote from their brief, the
10 Claimant violated the Order, quote, when the
11 Claimant elected on his own to seek treatment
12 with Dr. O'Dell without any authorization from
13 Carrier. Now, first the Defense argues that
14 the Claimant never requested treatment. But of
15 course in order to make that argument they've
16 got to ignore the Form 50 of August 9th, 2019
17 when he seeks additional medical treatment.
18 Further, to make that argument, they have to
19 contend that the Claimant is prohibited by law
20 and by order from seeing doctors on his own.
21 Even if the Cl- --Car- -- Claimant's not
22 seeking, requesting the Commission order that
23 the Carrier to pay for those doctors, which
24 we're not, for the past treatment. But they
25 argue that the Commission is bound by law to



1 disregard the opinions of those doctors because
2 the Carrier didn't authorize them and then the
3 Workers' Compensation Claimant, when they get
4 hurt, are prohibited from seeing their own
5 doctors and they can only see whoever the
6 Carrier authorizes and Commissioner, that ain't
7 the law. This is a free country still and
8 people are entitled to see whatever doctor they
9 see fit. In this case, the Claimant went to
10 his own doctors because the Carrier wasn't
11 providing treatment, but that's beside the
12 point. Those doctor's opinions are
13 uncontradicted and the Commission is bound to
14 consider this opinion. And also, when
15 uncontradicted, unless there's other
16 substantive evidence disputing their opinions,
17 it's substantial evidence to rule in contrary
18 to what they said.

19 **COMMISSIONER CAMPBELL:** Okay.

20 **MR. WUKELA:** However, that's the argument that the
21 Defense makes. Again, we're not seeking any
22 payment for the previous treatment. This man
23 has admitted injuries to his neck, his back,
24 and his left ankle. All the evidence in the
25 record shows his condition has worsened. He's



1 out of work and he seeks Workers' Compensation
2 benefits and that's the point of contention.

3 COMMISSIONER CAMPBELL: Okay. All right. Thank
4 you. Ms. Verstraten?

5 CARRIER'S POSITION:

6 MS. VERSTRATEN: Good morning, Commissioner. It is
7 the Defense's position that the Claimants case
8 is built on a house of cards and that's because
9 there's more than just a Form 16(a) that was
10 agreed to and signed in this matter on
11 September 26th, 2018 when the settlement was
12 approved. We also have an Order, a final
13 decision and Order from a sitting Commissioner,
14 Commissioner Melody James, dated September
15 18th, 2018. In that Order she specifically
16 concludes as a matter of law, Conclusion of Law
17 Number 6, that under Section 42-15-60 there's
18 no evidence that any additional medical
19 treatment would tend to lessen the period of
20 his disability for the Claimant's left ankle,
21 neck, or back injuries. However, the Claimant
22 has up to one year from the date of this signed
23 order to return to see his authorized treating
24 providers for any change of condition for the
25 worse and to seek medical treatment to the left



1 ankle and spine. She really reiterates this in
2 Finding of Fact Number 12; the Claimant has up
3 to one year from the date of this signed Order
4 to return to see his authorized treating
5 providers for any change of condition for the
6 worse. Commissioner, the Claimant in this
7 matter did not return to see any of his
8 authorized treating providers as required by
9 the Order, which he and his attorney were
10 provided a copy of. It is the law of this
11 case. His authorized treating providers, as
12 detailed in the Order and as the Claimant was
13 aware, were Dr. Daly, Dr. Vandernoord, and Dr.
14 Anderson. As you have heard here today, Mr.
15 Wukela has admitted that the Claimant went to
16 see his own doctor as early as June of 2019,
17 which would have been before the Order was due.
18 He went to see his own treating provider in
19 June and July of 2019. He went to see Dr.
20 O'Dell for treatment under his own private
21 health insurance. As Mr. Wukela concedes, this
22 is a free country where you can go see whatever
23 doctor you want to. However, if you want to
24 have your coverage under the Workers'
25 Compensation Law of this State, the Employer



1 and Defendant have the right to control medical
2 treatment. The Order in this matter, dated
3 September 18th, 2018, lays out specific
4 requirements for the Claimant to return to see
5 as authorized treating provider within one year
6 of the date of the signed Order. He had health
7 insurance, even if the Carrier had denied it he
8 could have gone to see those doctors on his
9 own, but you know what, Commissioner, the
10 Claimant in this matter never did. He never
11 called, he never asked the insurance Carrier.
12 He never -- nobody ever called my office or
13 notified my office that they were seeking
14 additional medical treatment, no request was
15 made. Instead in June and July 2019 he went
16 off and treated on his own, like he had done
17 before, with Dr. Edwards and sought medical
18 treatment to his left ankle. Commissioner, at
19 this point we would argue that it would be
20 improper for the Commissioner to disregard or
21 the Commission to disregard the Order in this
22 case as it is the law of the case. We would
23 also argue that the Claimant in this matter has
24 elected his remedy. Over the last two years he
25 has treated completely on his own, under his



1 own health insurance, without giving us any
2 opportunity to investigate and determine what
3 treatment would be causally related and what
4 wouldn't. He is has essentially usurped our
5 right under the statute to control medical
6 treatment. In addition to that, we would argue
7 the doctrine of laches, which is an equitable
8 doctrine, that the Claimant has delayed
9 unreasonably in this matter and therefore is
10 not entitled to benefits. The Form 50 was not
11 refiled in this matter after it was withdrawn
12 in August of 2019 until December of 2020, 15
13 months later. The Claimant's attorney has
14 asserted today that he filed the Form 50 on
15 August 9th, 2019, which would have been within
16 one year of the 16(a). So, yes, that does toll
17 the statute and nobody's arguing that under the
18 *Tucker* case. What we are arguing is that you
19 can't just file a Form 50 to toll the statute
20 without any change of condition, without making
21 any attempt to seek medical attention or
22 treatment for change of condition for the worse
23 and just hope that eventually your case will
24 develop and that you'll be able to stake a
25 claim. The *Tucker* case addresses this



1 specifically. And I will note it's in the
2 Claimants APA Page 318 and 319. The case law
3 specifically states, we discussed with counsel
4 the possibility that a Claimant may file a Form
5 50 within 12 months and then intentionally
6 delay a hearing in the hope that evidence will
7 later develop to support a change of condition
8 claim. In the case before us there's no
9 indication whatsoever *Tucker* or his counsel,
10 which was the Claimant in that matter,
11 attempted to do this. Such an improper effort
12 as we have explained should have no chance of
13 success. Commissioner, the Claimant filed the
14 Form 50 on August 9th, 2019 without making any
15 effort to seek medical attention before that
16 matter with any of the authorized treating
17 providers in compliance with Commissioner
18 James' Order. He then withdraws the Form 50
19 without any apparent reason on September 18th,
20 2019. At that time he had the opportunity to
21 adjudicate medical treatment that was causally
22 related. He had the opportunity to seek
23 benefits under the Act. The Claimant waived
24 that by waiting 15 months to file another Form
25 50 and pursue treatment under the Act. We



1 would assert that what the Court discusses in
2 *Tucker* is exactly what is happening here.
3 There was an intentional delay so that he can
4 go out and build his case with treating
5 providers of his own outside of the Workers'
6 Compensation system and to now come back and
7 out of compliance with the Order from
8 Commissioner James and to attempt to seek
9 treatment. Also, it's important to note that
10 there are various references in the APA
11 submissions from the Claimant's attorney over
12 the last year in July of 2020 where the
13 Claimant was seen by other providers at Duke
14 University and by Dr. Johnson and those notes
15 indicate exam suspicious for shoulder
16 pathology. That's on the Claimant's APA page
17 312. On Claimant APA page 308 at Duke
18 University he tells the doctor that he had
19 turned his ankle a few weeks prior to his July
20 22nd, 2020 visit indicating there may have been
21 a new accident. We don't know what has
22 happened. We would just assert that we are not
23 responsible for (a) any of this past medical
24 bills or treatment or any treatment going
25 forward pursuant to the decision and Order in



1 this case. If the Claimant has had some sort
2 of new accident he had an opportunity to report
3 that. When we deposed Dr. O'Dell in this
4 matter he specifically testified that he had
5 not seen any of the medical records from the
6 previously assigned and authorized treating
7 providers including Dr. Daly, Dr. Vandernoord,
8 Dr. Anderson. He had not seen any of those
9 records. All of his information in his
10 deposition testimony came from what the
11 Claimant told him and from his own visits and
12 evaluation of the Claimant. None of that was
13 based on the medical records for his work
14 related accident. Dr. O'Dell specifically
15 notes that the Claimant came to him outside of
16 the Workers' Compensation system on his private
17 health insurance and was not even aware that he
18 was essentially being seen for anything work
19 related. So, it would be our position again,
20 that the Claimant has elected his remedy, he
21 has treated on his own outside of the confines
22 of the statute and outside of the law of this
23 case and therefore no further benefits are due.

24 **COMMISSIONER CAMPBELL:** Okay. All right. Thank
25 you. Mr. Wukela anything more?



CLAIMANT'S REPLY:

1
2 **MR. WUKELA:** Just to say, Commissioner, that the
3 Defense asks that this Commission disregard the
4 opinions of the treating physicians that are
5 uncontradicted and that is substantial
6 evidence.

7 **COMMISSIONER CAMPBELL:** Anything else to add?

8 **MS. VERSTRATEN:** No, Commissioner. Thank you.

9 **COMMISSIONER CAMPBELL:** And it's my understanding
10 that, as we discussed as a part of our pre-
11 hearing conference, that both parties have
12 agreed to rest on the APASS and the Commission
13 record and that no testimony will be taken
14 here?

15 **MR. WUKELA:** That's correct, Commissioner. This is
16 -- of course Claimant's here to testify if the
17 court requires it, but this is a case on the
18 medical and of the law and we don't think
19 that's necessary.

20 **MS. VERSTRATEN:** Right.

21 **COMMISSIONER CAMPBELL:** Okay. And as we discussed,
22 as long as the two parties are consenting to
23 that and don't have any objection to taking any
24 testimony, I don't think need it for my
25 purposes and therefore that concludes today's



proceedings.

(There being nothing further, the commissioner's
hearing concluded at 12:33 p.m.)



CREEL COURT REPORTING, INC.

1230 Richland Street / Columbia, SC 29201

(803) 252-3445 / (800) 822-0896

CERTIFICATE

This is to certify that the within hearing consisting of twenty one (21) pages, is a true and correct transcript of the testimony given by said witnesses after being duly sworn; said hearing was reported by the method of Stenomask with Backup.

I further certify that I am neither employed by nor related to any of the parties in this matter or their counsel; nor do I have any interest, financial or otherwise, in the outcome of same.

IN WITNESS WHEREOF I have hereunto set my hand and seal on April 6, 2021.

Amber Scarborough
Amber Scarborough

Notary Public for South Carolina
My Commission Expires: May 30, 2023



CREEL COURT REPORTING, INC.
1230 Richland Street / Columbia, SC 29201
(803) 252-3445 / (800) 822-0896

BEFORE THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
WCC FILE NO.1602438

Randy Jordan, Employee,	)	
	)	
Claimant,	)	
	)	DEPOSITION OF:
vs.	)	
	)	JASON B. O'DELL, M.D.
South Carolina Department of	)	
Transportation,	)	
	)	
Employer,	)	
	)	
Defendants.	)	
=====	)	

Deposition of JASON B. O'DELL, M.D., taken
before Laura W. Little, Verbatim Reporter and Notary
Public in and for the State of South Carolina, at
McLeod Orthopaedics-Florence, 1005 East Cheves Street,
McLeod Medical Park Five, Florence, South Carolina,
commencing at 6:11 p.m. on the 3rd day of December
2020.

Laura W. Little
Laura Little Reporting Service
345 Potato House Road
Darlington, South Carolina 29532
843-393-6466
act4court@llsouth.net

 **COPY**

APPEARANCES OF COUNSEL

For the Employee/Claimant:

Stephen J. Wukela, Esquire

Wukela Law Firm

Post Office Box 13057

Florence, South Carolina 29504

For the Carrier/Defendants: (Telephonically)

Sarah G.J. Verstraten, Esquire

Willson, Jones, Carter & Baxley, P.A.

421 Wando Park Boulevard, Suite 100

Mt. Pleasant, South Carolina 29464

1 INDEX

2		PAGE-LINE
3	Direct Examination by Mr. Wukela.	5-12
4	Cross Examination by Ms. Verstraten	21-13

7 EXHIBITS

8		
9	NUMBER DESCRIPTION PAGE-LINE	
10	(No Exhibits Proffered)	

14 COURT REPORTER'S NOTES:

15 ---Indicates Interruption;
16 -- Incomplete Sentences; Trailing Off; Incomplete
17 Phrases.
18
19
20
21
22
23
24
25

1 STIPULATIONS

2 Prior to the giving of any testimony by the
3 witness, it was expressly stipulated and agreed between
4 the parties to this action, through their respective
5 counsel, that:

6 By Notice and/or Consent, said deposition is being
7 taken in accordance with Section 42-3-160, Code of Laws
8 of South Carolina 1976, and Rule 30 of the South
9 Carolina Rules of Civil Procedure, which shall control
10 the taking of said deposition and its use thereof;

11 Said deposition shall be taken for the purpose of
12 discovery and/or for use as evidence in the above-
13 entitled action, or for both purposes;

14 That all objections would be reserved until the
15 time of the trial except as to the form of the
16 question;

17 Reading and signing of the transcript of testimony
18 by the witness was waived.

1 MR. WUKELA: Hi, Sarah, this is Stephen Wukela.
2 I've got Dr. O'Dell here now.

3 MS. VERSTRATEN: Great.

4 MR. WUKELA: I'm going to -- I've put the phone
5 over there by the Doctor, hope you can hear.

6 MS. VERSTRATEN: Okay.

7 DR. O'DELL: All right. How you doing?

8 MS. VERSTRATEN: Good. I can hear you. Thank
9 you.

10 JASON B. O'DELL, M.D.,
11 after first being duly sworn, was deposed as follows:

12 DIRECT EXAMINATION BY MR. WUKELA:

13 Q. Dr. O'Dell, I suspect that you're well known
14 to the Commission by now, but if you would for the
15 benefit of those who might not know you, give us a
16 brief rundown of your educational background starting
17 from college.

18 A. I went to Clemson, I then went to MUSC in
19 Charleston for medical school. I completed a surgical
20 internship there and I did orthopedic training at
21 Louisiana State University in Shreveport, Louisiana and
22 then I did a fellowship in foot and ankle surgery in
23 Tampa, Florida and I'm board certified in orthopedics
24 and I've been in practice here for ten years.

25 Q. It's hard to believe it's been that long.

1 A. Yeah.

2 Q. Very good. All right. So this is a Workers'
3 Compensation case. This is a little bit unusual
4 posture. It's a case that was resolved and closed and
5 we're actually trying to determine whether there's been
6 what's a so-called change of condition and whether Mr.
7 Jordan's condition has changed. This was an admitted
8 injury to his back, neck and his left ankle back in
9 2016, actually, when he was struck by a vehicle while
10 he was working for a DOT crew. None of that is
11 particularly important, I guess, to you, but just to
12 give you a posture---

13 A. Yeah.

14 Q. ---of what we're about. I understand having
15 received your records that you began to see Mr. Jordan
16 in June of 2019, is that right?

17 A. Correct.

18 Q. All right. The first record I have of you
19 seeing him was June the 18th, 2019?

20 A. Yes, sir.

21 Q. All right. And how did he present on June
22 the 18th?

23 A. He had complaints of both perceived pain and
24 instability on the ankle, the left side, and we had
25 found this, you know, guardrail, falling over a

1 guardrail type of work-related injury that was about
2 three years before the visit that we saw him. We did
3 not treat him for the previous injury that I have a
4 record of so I'm not sure he did, but at that time
5 basically he had some lateral sided foot pain, which is
6 not uncommon. We discussed, as we would normally
7 discuss, the possibility of reimaging the area given a
8 chronic condition versus considering an injection and
9 at that point we had ordered an MRI for the patient.

10 Q. All right. And, Doctor, you mentioned that
11 you had not treated him previously for the ankle with
12 that work injury?

13 A. Yes.

14 Q. Do you need to go?

15 A. No.

16 Q. Okay. I will tell you that he was treated by
17 a Dr. Daily and I'm going to show you a document, which
18 is actually Page 66 of APA 4 of the case when it was
19 heard previously. I know you've not seen this record
20 before, but I'll ask you to review it.

21 A. Okay. (Deponent complies)

22 MS. VERSTRATEN: And, Stephen, do you
23 have a date for that record?

24 MR. WUKELA: Yes, ma'am. It's June the
25 29th of 2017 by Dr. Daily. And of my previous APA,

1 Sarah, it was APA 4, Page 66.

2 MS. VERSTRATEN: Thank you.

3 A. Okay. So he talks about an MRI that was
4 done, I guess around that time and it seemed to be
5 benign, basically, so at that point he rated the
6 patient, I assume, released the patient, and placed the
7 patient at MMI.

8 Q. All right. And just for complete reference
9 I'm going to ask you to turn to page 99, the MRI to
10 which you were referring and in which Dr. Daily was
11 referring in that report is found there and it's dated
12 February the 15th, 2017 if I've got my numbers correct.

13 A. Yes. Yeah, so February of that year. Yeah,
14 it just says mild chronic change, no acute abnormality.
15 I guess the chronic change they talk about is a little
16 bit of midfoot arthritis, that's not uncommon, the MRIs
17 always say that. It doesn't describe any significant
18 pathology to the subtalar joint or the Achilles which
19 are kind of the areas we've been treating him. Okay.

20 Q. Okay. And, again, I recognize that you
21 didn't have the benefit of that note and hadn't seen
22 that note before.

23 A. Yeah.

24 Q. But with that knowledge now, how, how was Mr.
25 Jordan's presentation on June the 18th, 2019 when he

1 first saw you compared to his presentation when he last
2 saw Dr. Daily back in June of 2017?

3 A. So that was the last visit with Dr. Daily was
4 that time, is that right?

5 Q. It is. It was, yes, sir.

6 A. Let's see if he has an exam here. So at that
7 point I guess they made recommendations for medium duty
8 work and he was released. There's not really any
9 physical exam on that particular note. I guess that
10 was just a follow up to a FCE. You know, what he
11 stated to me was that he was having increasing pain
12 with prolonged activity, which is what prompted him to
13 come and see me.

14 Q. Okay. The last sentence of your history
15 indicates that he stated that his ankle had been
16 progressively getting worse since the time of his
17 initial injury?

18 A. Correct.

19 Q. Okay. And what was your plan at that point,
20 Doctor?

21 A. So at that point I didn't really know about
22 his prior imaging and it had been long enough anyway
23 that it probably wouldn't matter. If I had I would
24 have still repeated an MRI so that's what we ended up
25 doing at that time.

1 Q. All right. And it looks like he did have
2 that MRI and followed up with you on July the 9th of
3 2019, is that correct?

4 A. Yes.

5 Q. And at that point did you have the benefit of
6 that MRI?

7 A. The new one, yeah. Right.

8 Q. The new one, yes. Right. Correct.

9 A. Right. So, what we saw at that time he had a
10 little bit of fluid in the subtalar joint posteriorly.
11 No progressive arthritis. I mean it did look better
12 than I thought it might. Still had no evidence of any
13 bone edema or progressive arthritis of that joint.
14 Small amount of fluid in the joint that does seem to be
15 a newer finding compared to the older MRI that I don't
16 have the report of.

17 Q. Okay. And what was your recommendation then
18 at that point?

19 A. So based on that we said, well, there's some
20 fluid in the joint, let's see, you know, because
21 clinically we believe that joint to be hurting him so
22 as we would often do we injected it to see if that
23 would make a difference in his symptoms.

24 Q. And I think the edema that you're referring
25 to that you saw on this MRI that you didn't see on the

1 previous MRI that you've now had the opportunity to
2 review, that's the fluid that you're referring to?

3 A. The sort of fluid in the posterior part of
4 the subtalar joint.

5 Q. I see. Okay. All right. And so then the
6 next time you saw him he came in in November of 2019?
7 He had that injection?

8 A. Yeah.

9 Q. You did perform that injection?

10 A. So we would tend to do about a two month
11 follow up after an injection so it has time to start
12 working, time to wear off, and then discuss the
13 symptoms.

14 Q. Got you.

15 A. So that was his plan. And so what he said
16 was -- I mean, he seemed a little better. He states
17 that he still felt like the foot was unsteady at times,
18 but he didn't have as much pain complaints. He
19 couldn't really say if the injection had worn off or
20 whatnot, but he didn't think that it was worse, but he
21 was also having difficulty. At that time he described
22 the SI joint.

23 Q. Okay. And I suspect that most of the
24 Commissioners are familiar with the anatomy here, but
25 would you describe very briefly for the layman the

1 anatomy of the SI joint?

2 A. So that would be the junction between the
3 pelvis and the sacrum. The sacroiliac joint and the
4 ilium is the pelvic bone. So it's a form of lower
5 back pain. Sometimes it can be localized to the
6 posterior part of the hip, sometimes it could radiate.
7 That seemed to be the area he was hurting, which was on
8 the -- let's see -- it's on the right side, it was on
9 the contralateral side.

10 Q. Contralateral side of where he -- it was the
11 left ankle and right hip?

12 A. Correct. Yes.

13 Q. Okay. So now, you know, we had been talking
14 about the ankle and your treatment of the left ankle
15 and now we're talking about the right hip. What's the
16 clinical significance of that?

17 A. So in somebody who has a lingering issue or
18 potentially a worsening issue I do think that gait
19 related problems can lead to some of these secondary
20 hip or back problems or even knee problems on the other
21 side.

22 Q. Okay. Was that your concern in this case?

23 A. That's what led us to, you know, kind of work
24 on those things. You know, we knew that -- I mean,
25 obviously, imaging is not the initial treatment of a

1 hip or back issue so we try to do some therapy for him.

2 Q. Your note indicates that you guys sent him
3 over for some physical therapy to try to normalize the
4 gait?

5 A. Correct.

6 Q. Okay.

7 A. We felt his SI joint issue was gait related
8 and we felt like we've done as much as we could for his
9 foot with an injection with an MRI that wasn't too bad
10 otherwise so we decided to look at some areas.

11 Q. Got it. All right. And so then he does have
12 the physical therapy, I gather, and comes back and sees
13 you January the 16th of 2020?

14 A. That's correct.

15 Q. All right. And how are his -- what's his
16 condition at that point?

17 A. He stated his pain was 6 out of 10 and that
18 he was not really clinically getting better. At that
19 point more of his complaints related to lumbar, which
20 did prompt us to obtain an x-ray in the office that
21 day.

22 Q. Okay. So you indicate that he feels that his
23 pain is getting worse?

24 A. Correct.

25 Q. And with regard to the pain that's getting

1 worse are you referring to the ankle or the, or the SI
2 joint?

3 A. His hip and back pain.

4 Q. I see. And so it was at that point then you
5 referred him over for an x-ray first and then an MRI of
6 the lumbar spine?

7 A. We, we did. We ordered a -- yeah, we ordered
8 a CT scan. Well, that was the order that was put in.
9 We wanted an MRI. It says CT there, I think that was
10 put in error, but corrected it in time.

11 Q. Okay. I see.

12 A. Yeah. So given the worsening and failure of
13 PT to improve him clinically we said let's image it.

14 Q. I see. Okay. And, you know, as I said at the
15 outset, his back was an admitted injury in the initial
16 accident, his ankle was an admitted injury. At this
17 point both his ankle and his back are worsening, is
18 that a fair statement?

19 A. Yes.

20 Q. All right. So now you have the -- the MRI
21 was performed?

22 A. Correct.

23 Q. All right. And then he comes back and sees
24 you on February the 13th, 2020, is that correct?

25 A. Yes.

1 Q. Okay. How was he in February?

2 A. He continued to have significant pain at that
3 time. He stated that he was having some radiation of
4 the pain at that point, radicular type pain, so pain
5 radiating into the lower extremity, and so the MRI
6 showed changes both at L4-5 and 5-1.

7 Q. All right. What's your plan at that point,
8 Doctor?

9 A. So at that point we talked a little more
10 about maybe a sustained oral anti-inflammatory regimen,
11 some specific PT for the back. Our initial PT was sort
12 of just work broadly. Unfortunately, you know, work
13 comp, if I order lumbar PT directly, it would often be
14 denied, but if I order PT for gait, it sort of gives
15 them a license to do some additional treatment. For
16 the same reason I'll get a lumbar x-ray in the office
17 when I can just order it and it doesn't have to get
18 approved and then that maybe helps me treat the patient
19 later by ordering an MRI. So we formalized PT for the
20 back specifically at that time.

21 Q. It's still your concern or impression is that
22 this worsening of the back situation is a product of
23 gait?

24 A. That is my opinion.

25 Q. Okay. And so have -- there's also a mention

1 in that note too that due to the worsening of his back
2 pain and failure of physical therapy you referred him
3 over to Johnson. Or am I skipping ahead?

4 A. I think that was probably the next note.

5 Q. I see. I'm sorry. Okay.

6 A. Yeah. We gave him a little more PT, really
7 not much better. We felt like we had kind of maximized
8 his non-invasive treatment at that point.

9 Q. I see.

10 A. And, you know, certainly those two visits our
11 conversations became very much dominated by the lumbar
12 issues. So that's when we made out -- in April of
13 2020, end of April, we said let's have you see Dr.
14 Johnson and we put him on Gabapentin as a more specific
15 nerve related pain medication.

16 Q. I see. And his gait was still antalgic at
17 that point?

18 A. Correct.

19 Q. All right. Now I've got several notes where
20 it looks like he saw Johnson throughout May and then
21 ultimately over to Edwards?

22 A. I saw that he had several ESIs done, yeah.

23 Q. Okay. Have you seen, have you seen Mr.
24 Jordan back since April 24th of 2020?

25 A. No, sir.

1 Q. Okay. So he's still treating with the
2 partners in your office, Dr. Johnson and Dr. Edwards
3 and the like?

4 A. Yeah.

5 Q. Okay.

6 A. So he's -- I think he's had maybe two ESIs
7 and I don't know if he's had any back surgery, but.

8 Q. Okay. And I don't, I don't think so at this
9 point.

10 A. Okay. All right.

11 Q. But it's my understanding that Dr. Edwards is
12 still caring for him?

13 A. Yes. That's what it appeared to be.

14 Q. Okay. So do you have any plans to see him
15 back in the near term or is it your expectation that
16 he'll finish out his treatment with Johnson and Edwards
17 or what's the plan in that regard?

18 A. You know, to me, with -- I think it's helpful
19 to see the old MRI. He doesn't have progressive
20 arthritis on the MRI, which would be a sensitive way to
21 see that. So there was some fluid there and we
22 injected him and he didn't have a lot of relief from
23 the injection, you know, and then as we continued to
24 work him up and treat him, I think essentially most of
25 his leg pain was really his back. So I think he has

1 radicular pain. I think that correlates with his
2 lumbar spine findings. That was -- that doesn't
3 necessarily explain the instability that he feels, but
4 because the injection in the ankle was plus-minus---

5 Q. Right.

6 A. ---I do think that his chronic ankle injury
7 is what led to the worsening of his back so to me I
8 think the right thing for him is to continue treatment
9 on the back. Certainly glad to see him back for the
10 ankle once he recovers from his back surgery, if that's
11 where it goes, but I didn't specifically feel like I
12 needed to see him back.

13 Q. Okay. Okay. So in sum here, you've had a
14 little bit of benefit of seeing -- I know you didn't
15 see him before in the Workers' Compensation claim
16 before it was closed initially.

17 A. Yes.

18 Q. But you've had Dr. Daily's note here and
19 you've had the benefit of treating him for his ankle.
20 Just with regard to his ankle first---

21 A. Yeah.

22 Q. ---do you have an opinion as to whether his
23 ankle was worse when you saw him in June of 2019 than
24 it was when Dr. Daily released him back in June of
25 2017?

1 A. I believe that his ankle remains symptomatic
2 between these times and, you know, I would have to
3 believe that it would have been worse for the patient
4 for him to seek treatment with me under separate
5 insurance, that sort of thing.

6 Q. He indicated to you that it was -- his
7 symptoms were worse?

8 A. And he told me that and he told me he had a
9 case, which is good because not everybody does that,
10 and he did see us under his private insurance.

11 Q. All right. So I guess the question remains
12 do you have an opinion as to whether his ankle
13 condition worsened after being released by Dr. Daily?

14 A. I think it did, yes.

15 Q. All right. Now we also talked about his back
16 and as we indicated before the back was an admitted
17 injury in the initial accident. That case was closed,
18 but I think I've understood your testimony that -- or
19 let me just ask you, do you have an opinion as to
20 whether his ankle condition aggravated the condition of
21 his back?

22 A. I believe that he did. Do you know what was
23 done to his back before?

24 Q. Well, let me, I'll tell you. I'll give you
25 the records here. He had had a distant surgery on his

1 back before this accident.

2 A. Okay.

3 Q. Okay. A distant surgery. And in this
4 accident -- after this accident he was treated by Dr.
5 Vandernoord up in Charlotte and he did not have any
6 surgery.

7 A. Okay.

8 Q. And he was released with a rating and---

9 A. Related to the accident?

10 Q. Related to the accident.

11 A. Okay.

12 Q. And he went back to work. I'll show you,
13 I'll show you a record from Dr. Vandernoord of November
14 the 17th, 2016, and I think this is after he had a
15 Functional Capacity Evaluation.

16 MR. WUKELA: This is November 17th of
17 2016, Sarah.

18 A. (Deponent reviews document) Okay. All right.

19 Q. All right. The question I asked, though, was
20 whether the condition of his ankle and the altered gait
21 resulted in the aggravation and a worsening of the
22 condition of his lumbar spine?

23 A. Yes. I think that's what happened.

24 Q. All right. And was the treatment, the
25 referrals you made to Dr. Johnson and then ultimately

1 from Dr. Johnson to Dr. Edwards, necessary to treat
2 that worsening?

3 A. Yes, it was.

4 Q. I think those are all the questions. Give me
5 just a second to make sure I've not overlooked
6 anything. All right, Doctor, I think those are all the
7 questions. Have all the responses you've given me
8 today been made to a reasonable degree of medical
9 certainty?

10 A. Yes.

11 Q. Please answer any questions Ms. Verstraten
12 has for you.

13 CROSS EXAMINATION BY MS. VERSTRATEN:

14 Q. Hey, Dr. O'Dell.

15 A. Hey.

16 Q. I represent the State Accident Fund as well
17 as the Claimant's employer and I just have a few, very
18 few, quick follow up questions. Based on your
19 testimony today is it correct you have not seen the
20 medical records other than the one you saw today from
21 Dr. Daily? You did not review the medical records from
22 Dr. Daily, Dr. Vandernoord, or Dr. Alexander before you
23 first saw the claimant in June of 2019?

24 A. Right. So he -- since he saw me outside of
25 the work comp system, I, you know, didn't have any

1 referral records or anything like that.

2 Q. Okay. So none of those doctors, his
3 authorized treating providers that he saw for his comp
4 claim, none of those doctors referred him over to your
5 office and specifically requested that he see you for
6 his issues?

7 A. Yeah. I don't know if his primary care made
8 the referral or if it was a self-referral. I'm not
9 sure.

10 Q. Okay. And you said earlier he was already
11 treating you in your practice with Dr. Edwards, is that
12 correct, for his cervical spine issues?

13 A. I know that he's seen him in the past. I saw
14 some older x-rays in the system from that. At the time
15 I saw him -- I mean, we both, me and Dr. Edwards used
16 to be in the same practice. At the time I saw the
17 patient we are not -- I mean we are both employed by
18 the hospital, but in separate practices within the
19 hospital since 2016.

20 Q. Okay. Got you. Well, since you've seen him
21 is it correct that none of his treatment or care has
22 been coordinated with or approved by the Workers'
23 Compensation carrier?

24 A. You know, I don't know if towards the end it
25 became that way. I'm really not sure.

1 Q. Okay.

2 A. I know at first it wasn't. That's all.

3 Q. To your knowledge he's not currently paying
4 for his treatment at your office under Workers' Comp,
5 is that correct?

6 A. As far as I know, the notes I have, it
7 doesn't have work comp as the payer at the top of the
8 chart.

9 Q. Okay. And did, did the claimant tell you
10 anything about any new or recent accidents when you
11 first saw him in June of 2019?

12 A. I don't recall that, no.

13 Q. Okay. And to your knowledge has he reported
14 any new acute injury of any kind that he was involved
15 in, you, know, after he started treating with you in
16 June of 2019?

17 A. He related his treatment to his prior injury,
18 so no, I don't know about a different accident.

19 Q. Okay. And to your knowledge did he have any
20 complaints about the treatment he received with Dr.
21 Daily, Dr. Vandernoord, or Dr. Alexander?

22 A. He did not that I recall.

23 Q. Okay. All right. I believe that's all I've
24 got as well. I appreciate your time.

25 A. Okay. Thanks.

1 MR. WUKELA: Thanks, Sarah. That's all
2 we got. Thank you for your time, Doctor.

3 (THERE BEING NO FURTHER QUESTIONS,
4 DEPOSITION CONCLUDED AT 6:35 P.M.

5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

1 CERTIFICATE OF REPORTER

2 STATE OF SOUTH CAROLINA)

3 COUNTY OF DARLINGTON)

4 I, Laura W. Little, Verbatim Reporter and
5 Notary Public in and for the State of South Carolina,
6 certify that I did have Jason B. O'Dell, M.D., appear
7 before me at 6:11 p.m. on the 3rd day of December 2020,
8 at McLeod Orthopaedics-Florence, 1005 East Cheves
9 Street, McLeod Medical Park Five, Florence, South
10 Carolina; that the witness was duly sworn and cautioned
11 to tell the truth and nothing but the truth; that the
12 foregoing pages constitute a true and accurate
13 transcript of his testimony given at that time and
14 place.

15 I certify that I am not of counsel or kin to
16 any of the parties, nor am I interested in any manner
17 in its outcome.

18 IN WITNESS WHEREOF I have hereunto set my
19 hand and seal this the 12th day of December 2020.

20 Laura W. Little

21 Laura W. Little, Verbatim Reporter

22 Notary Public, State of South Carolina

23 My Commission Expires August 19, 2025.