THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

Commissioners Aisha G. Taylor, Susan S. Barden and Gene McCaskill

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SC Court of Appeals

Appellate Case No. 2021-001174

Trial Court Case No. 1717573

Jeffrey McCoy, Employee, ... Appellant-Respondent,

v.

Cromed, LLC, Employer, and
Guarantee Ins. Co. (in Liquidation)/S.C. Property & Casualty Ins. Guaranty
Assoc., Carrier, Respondents-Appellants, ... Respondents-Appellants.

APPELLANT'S BRIEF OF APPELLANT-RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

1. Whether the Appellate Panel erred as a matter of fact and law in ruling that McCoy was limited to 12 weeks of Temporary Total Disability Compensation (TTD) covering the "period from October 10, 2017 through January 1, 2018," when Dr. Poletti put him on "out of work status" and Dr. LaMotta put him on an indefinite 15-pound lifting restriction thus entitling him to a running award of TTD until he reaches MMI and/or returns to work at the same or similar employment?

STATEMENT OF THE CASE

This case involves cross-appeals from a Decision and Order of the Appellate Panel of the South Carolina Workers' Compensation Commission.

The employer, Jeffrey McCoy, was employed by a medical transportation service, Cromed, LLC. McCoy filed a Form 50 (Claim) on April 13, 2018, alleging he suffered an injury by accident to his back and left leg arising out of and in the course of his employment on October 9, 2017 [R.p. 44].

Prior to that filing, Cromed's insurance carrier, Guarantee Insurance Company, entered into liquidation. The South Carolina Property & Casualty Insurance Guaranty Association assumed responsibility for Guarantee's liabilities. On March 9, 2018, the Association filed a Form 19 denying the claim.

After an extended period of discovery, McCoy filed a Form 50 (Request for Hearing) on February 4, 2020. [R.p. 47].

Cromed and the Association filed a Form 51 (Employer's Answer to Request for Hearing) on March 5, 2020. [R.p.50, 53].

The case was tried before Commissioner Avery Wilkerson on July 16, 2020. On April 12, 2021, Commissioner Wilkerson issued an Order stating: "I find McCoy has proven by both lay and expert medical testimony that he suffered an injury by accident arising out of and in the course of his employment on October 9, 2017 which aggravated a preexisting condition in his lumbar spine." [R.pp. 17-18, Finding of Fact 22]. Commissioner Wilkerson ordered:

1. Defendants shall provide treatment with Dr. LaMotta designated as the authorized treating physician;
2. McCoy is entitled to 12 weeks of temporary total disability compensation covering the period from October 10, 2017 through January 1, 2018. This specific time period is based on the type of injury as shown by the greater weight of the documented medical evidence. [R.p. 19, Finding of Fact 29].

Each party timely appealed to the Full Commission. Oral argument was heard on July 19, 2021. The Appellate Panel of affirmed by Decision and Order dated September 20, 2021. [R.pp. 23-42]

This appeal followed.

STATEMENT OF THE FACTS

Jeffrey McCoy worked as a care driver for Cromed, LLC, a non-emergency medical transportation company, for approximately four months. On Thursday, September 14, 2017, McCoy started feeling a dull pain in his back. *This was not associated with an accident and is not claimed to be part of this accident.* By the following Sunday the pain had gotten worse, so he reported the pain to his supervisor, Malcolm Young.

The following Monday, September 18, 2017, McCoy went to Providence Hospital NE Emergency Department, reporting symptoms of back and abdominal pain with radiation into his left groin. The patient believed he had a kidney stone. The ER Physician diagnosed Mr. McCoy with acute left lumbar spasm and prescribed Valium and Motrin. He was written out of work through September 21st. McCoy provided the work note to his employer, who gave him a week off to rest and to come back the next Monday, September 25th. [R.pp. 713-720].

On Monday, September 25th, McCoy attempted to return to work but was unable to stay and went home after two hours.

McCoy returned to the Providence Emergency Department the next day on September 26th, for "continued lower back pain with radiation into abdomen." There was no "weakness or numbness to extremities." The ER Physician ordered a CT scan of the Abdomen/Pelvis and Lumbar Spine. The Lumbar CT revealed diffuse bulging of the disc at L4-5 with mild central canal biforaminal stenosis, and mild bulging of the L5-S1. McCoy was released to return to work on September 28th and referred to Midlands Orthopaedic. [R.pp. 722-734].

After another week of rest, McCoy went back to work on Monday, October 2, 2017. He was able to work without much difficulty through October 8, 2017. On Monday, October 9, 2017, McCoy was sent to transport two clients – one of whom was in a wheelchair. He picked up the first client and drove to pick up the wheelchair bound client.

While McCoy was enroute to his second stop – before the accident happened – Robert Cronan, the owner of Cromed, called McCoy. Cronan had been monitoring McCoy's route and was angry that he had picked up the first client before picking up the wheelchair bound client.

McCoy got the client into the car and as he was putting the wheelchair into the trunk, he felt acute shooting pain down into his left groin and leg. *This is the acute accident giving rise to this workers' compensation claim.*

After getting back into the car, McCoy called his supervisor, Malcolm Young. He testified:

> I called Malcolm just a few minutes after that and told Malcolm that I didn't understand why Robert would send‡me to pick up that wheelchair knowing that my back was already hurt.
>
> I told Malcolm that -- that when I picked [the wheelchair] up I had that sharp pain down my leg and I was in a lot of pain. He asked me did I want to take the rest of the day off. I told him at that point, no, I couldn't – I couldn't afford to take the rest of the day off and then I told him then that this may or may not be my last day; I will let you know by the end of the day. [R.p. 558, lines 1-17].

McCoy finished his shift for the day and dropped off the company car. He also called Malcolm "to ask for a Workman's Comp doctor." Young responded "is that the route you want go?" McCoy replied "Yes." [R.p. 582, lines 3-8]. Young and Cronan reported the claim to their insurance carrier that evening.

McCoy did not return to work at Cromed after his injury. Cronan testified "there was no light duty at [his] company." [R.p. 693, lines 3-7].

McCoy was seen at Midlands Orthopaedics three days later on October 12, 2017. On the intake form, he wrote that his pain started on September 14th and worsened on October 9th. [R.p.

744]. Dr. Ulrich prescribed an MRI of the lumbar spine, physical therapy and Mobic. Dr. Ulrich opined "This was a work related injury." [R.p. 747].

The MRI was performed on October 20th. The MRI showed a broad-based disc protrusion at L4-5, favoring the left side, with moderate facet arthropathy; moderate foraminal stenosis at the left L4-5 and mild on the right; annular tear along with disc protrusion at L5-S1 with abutment of the right S1 transversing nerve root.

Dr. Ivan LaMotta at Midlands referred McCoy to a pain management specialist for a selective nerve root block at left L4. He ordered additional physical therapy and prescribed ibuprofen 800 mg. He also put him on an indefinite 15-pound lifting restriction. [R.p. 754].

On February 20, 2018, Dr. LaMotta opined:

> The MRI shows worsening of the disk deformities compared to the previous CT scan consistent with an acute injury from lifting the wheelchair as reported by the patient. The lifting of the wheelchair on October 9, 2017 most probably aggravated a preexisting condition leading to the need for treatment. [R.p. 759].

McCoy then saw Dr. Steven Poletti for an evaluation on January 29, 2018. Dr. Poletti agreed with Dr. LaMotta. He wrote: "This lifting injury was potentially a straw that broke the camel's back, but nonetheless in my opinion it is most likely the lifting incident which caused the disc to herniate and ultimately has led to the recommendations by both myself and Dr. LaMotta." Dr. Poletti stated "I would place him in off-duty status." [R.p. 762-763].

Employer deposed Dr. LaMotta on September 11, 2018 and Dr. Ulrich on December 4, 2018. Dr. LaMotta restated his opinion that the work accident on October 9, 2017 caused the need for surgery, particularly noting the objective findings on the post-accident MRI compared to the pre-accident CT scan. [R.pp. 406-407]

Dr. Ulrich also stood by his opinion that this was a work-related injury. However, Dr. Ulrich also noted as he is not a spine specialist, he defers to Dr. LaMotta's opinion. [R.pp. 443-444]

On August 14, 2019, Employer deposed Dr. Poletti. Dr. Poletti was shown an opinion letter from a radiologist, Dr. Bull. Dr. Poletti testified "I will say again, just personally, every scan on every patient that I see, I look at the scan myself and interpret it myself." [R.p. 475, lines 12-14]. Dr. Poletti disagreed with Dr. Bull. In his opinion, there was an observable objective worsening on the MRI versus the pre-injury CT scan. He also testified there were differences in physical examination, signs and symptoms before and after the October 9, 2017 work accident.

The case was tried before Commissioner Avery Wilkerson on July 16, 2020. Commissioner Wilkerson issued an Order stating: "I find McCoy has proven by both lay and expert medical testimony that he suffered an injury by accident arising out of and in the course of his employment on October 9, 2017 which aggravated a preexisting condition in his lumbar spine." [R.p. 17, Finding of Fact 22]. Commissioner Wilkerson ordered:

1. Defendants shall provide treatment with Dr. LaMotta designated as the authorized treating physician;
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Each party timely appealed to the Full Commission. The Appellate Panel of the Full Commission affirmed.

This appeal followed.

STANDARD OF REVIEW

The Administrative Procedures Act ("APA") provides the standard for judicial review of decisions by the Commission. Pierre v. Seaside Farms, Inc., 386 S.C. 534, 540, 689 S.E.2d 615, 618 (2010); Lark v. Bi-Lo, Inc., 276 S.C. 130, 133-34, 276 S.E.2d 304, 306 (1981). Under the APA, the appellate court can reverse or modify the decision of the Commission if the substantial rights of the appellant have been prejudiced because the decision is affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. S.C. Code Ann. § 1-23-380(5)(d), (e) (Supp. 2011).

"[T]he guiding principle undergirding our workers' compensation system [is] that the Act is to be liberally construed in favor of the claimant. The second is the equally compelling evidentiary principle that an award may not rest upon surmise, conjecture, or speculation." Hutson v. S.C. State Ports Authority, 399 S.C. 381, 732 S.E.2d 500 (2012). The Commission's decision "must be founded on evidence of sufficient substance to afford a reasonable basis for it." Wynn v. People's Natural Gas Co. of S.C., 238 S.C. 1, 12, 118 S.E.2d 812, 818 (1961).

The Commission is permitted to disregard medical evidence only when there is other competent evidence in the record to support their conclusion. Potter v. Spartanburg Sch. Dist. 7, 395 S.C. 17, 716 S.E.2d 123 (Ct. App. 2011). Where a finding is based on "the medical opinion of the single commissioner, adopted by the Commission," rather than on the opinion of a medical provider, the finding must be reversed as unsupported by substantial evidence. Burnette v. City of Greenville, 737 S.E.2d 200, 401 S.C. 417 (Ct. App. 2012). A conclusion by the Commission "based on rank speculation . . . cannot now be used as the basis for denying [an injured worker's] claim for lost wages. Hutson at 504, 732 S.E.2d 694.

ARGUMENT

McCoy should be paid Temporary Total Disability Compensation on a running award from October 10, 2017 as the Employer neither offered nor was able to offer employment within Dr. LaMotta's 15-pound lifting restriction.

The medical evidence shows that McCoy is under work restrictions due to his injury. The Single Commissioner found as a fact that:

> Dr. Poletti put him in "out of work status." Dr. LaMotta put him on an indefinite 15-pound lifting restriction. In his deposition, Dr. LaMotta opined this "would be a temporary restriction depending on the outcome and need for future treatment." [LaMotta dep. Tr. Page 42, lines 1-14]. McCoy testified that although he feels he has improved, he still has difficulty lifting. [R.p 19., Finding of Fact 28].

The future medical treatment Dr. LaMotta referred to was physical therapy and an L4-5 epidural steroid injection. McCoy was unable to obtain any of this treatment due to the denial of his claim and inability to earn an income.

The *only* medical evidence in the record is that McCoy is in "out of work status" per Dr. Poletti or on an indefinite 15-pound lifting restriction per Dr. LaMotta. Employer admitted it has no light duty work. As such, McCoy is deemed disabled. He is entitled to ongoing temporary total disability compensation as a matter of law.

"Essentially, workers' compensation benefits accrue along a time continuum: temporary total disability benefits are available from the date of injury through the date of maximum medical improvement; post-MMI benefits may then be awarded either as a permanent total or partial disability, or as a percentage of impairment to a scheduled member." Curiel v. Env. Management Services, 655 S.E.2d 482, 376 S.C. 23 (2007). Per the Commission's regulations, "Disability is presumed to continue until the employee returns to work or compensation is otherwise suspended or terminated according to Section 42-9-260." S.C. Code Reg. 67-502 B (2) (1997). See Cranford v. Hutchinson Constr., 399 S.C. 65, 731 S.E.2d 303 (Ct. App. 2012)(temporary total disability compensation should have awarded because employee was not at MMI and had never been released

to work without restrictions).

Section 42-9-260 provides that TTD cannot be suspended or terminated unless "the employee has been released by the treating physician to limited duty work *and* the employer provides limited duty work consistent with the terms upon which the employee has been released."[1] S.C. Code Ann. § 42-9-260(B)(5) (2007)(emphasis added). In the instant case, Dr. LaMotta released McCoy to limited duty work (although Dr. Poletti kept him on "out of work status"). Cromed could have suspended TTD payments by providing limited duty work consistent with Dr. LaMotta's restrictions. The fact they have not done so requires them to pay ongoing TTD to McCoy until one of the conditions in section 42-9-260(B) are met.

McCoy never returned to work as CroMed was unable to provide work within Dr. LaMotta's restrictions (never mind that Dr. Poletti wrote him completely out of work). Because disability never ended and the Employer never satisfied any of the conditions to end the period of disability and suspend or terminate TTD, TTD must be paid from October 10, 2017 as a matter of law. The Single Commissioner's findings of fact mandate this result.

In disregard of the evidence and statutory requirements, the Single Commissioner limited the period of TTD to 12 weeks covering the period from October 10, 2017 through January 1, 2018. He reasoned: "This specific time period is based on the type of injury as shown by the greater weight of the documented medical evidence." [R.p. 19, Finding of Fact 29].

The 12 week limitation is an error on multiple grounds. First off, disability is presumed to continue until the employee returns to work or certain other conditions are met – none of which occurred here. Secondly, the documented medical evidence shows that the 15-pound limitation, whilst temporary (because McCoy is not at MMI), remains in effect until McCoy receives treatment

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[1]Section 42-9-260(B) provides five situations where temporary compensation may be suspended or terminated. Section (B)(5) is the only part potentially applicable to the facts of this case.

and Dr. LaMotta releases him without restriction or places him at MMI. In fact, Dr. LaMotta testified that the restrictions were still in effect as of his deposition on September 18, 2018 – more than nine months after the Single Commissioner ended the period of TTD. Dr. LaMotta testified:

Q Is it your opinion that additional treatment would tend to lessen Mr. McCoy's period of disability?
A Yes.
Q Is it your opinion that he should be limited to no lifting greater than 15 pounds?
A Yes.
Q That would be a temporary restriction depending on the outcome and the need for future treatment?
A Correct.
Q And he is not at maximum medical improvement?
A Correct.
Q Are these opinions to a reasonable degree of medical certainty?
A They are.

[R.p. 407, lines 1-14].

There is no evidence to refute Dr. LaMotta's testimony. As Cromed never provided the treatment, the restrictions remain in force.

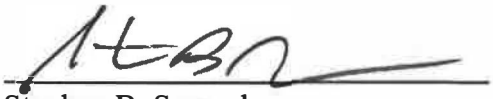
The Single Commissioner and Appellate Panel substituted their own medical opinion ("This specific time period is based on the type of injury . . . ") for the medical opinions of Drs. Poletti and LaMotta. This they cannot do. See, Burnette v. City of Greenville, 737 S.E.2d 200, 401 S.C. 417 (Ct. App. 2012)("the medical opinion of the single commissioner, adopted by the Commission," is not evidence and cannot form the basis of a finding).

As the evidence shows McCoy remained under medical restrictions which the Employer could not accommodate, McCoy is still deemed disabled under the Act. He must be paid TTD from October 10, 2017 and continuing on a running award.

CONCLUSION

For the foregoing reasons, the Decision and Order below should be affirmed in part and reversed in part. McCoy should be awarded medical treatment with Dr. LaMotta. The 12-week temporary total disability award should be reversed and modified to provide that temporary total disability compensation must be paid from October 10, 2017 and continuing on a running award.

Respectfully Submitted,



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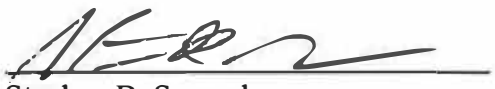
CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Appellant-Respondent complies with Rule 211(b), SCACR.

Respectfully Submitted,



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