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 REPLY BRIEF OF APPELLANT-RESPONDENT

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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 [In Reply to Respondent-Appellants' argument at pages 6-10].

Employer makes a different argument on TTD than the argument they made in their Respondents' Brief.[1] In their Respondents' Brief, they argue (1) "the Claimant failed to establish that work restrictions prevented him from performing his job with Cromed;" and (2) "failed to establish that his employer was even made aware of the purported work restrictions or any excuse." [Respondents' Brief, page 7].

As to the first point, 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." [R.p. 407, lines 1-14]., lines 1-14]. McCoy testified that although he feels he has improved, he still has difficulty lifting. [R.p. 19, Finding of Fact 28].

This finding is supported by substantial evidence. Cromed again asks this Court to reweigh the evidence.

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. "Disability is presumed to continue until the employee

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[1]In their Respondents' Brief, Cromed argued that McCoy was required to seek out alternative employment. This argument has no merit based on the Court's previous decision in Lee: "Therefore, while a claimant must prove disability, he is not required to prove he could not find employment with another employer in order to receive temporary disability benefits. Rather, the claimant satisfies his burden by proving work restrictions that prevent him from performing his regular job and the unavailability of light-duty employment through the same employer." Lee v. Bondex, Inc., 406 S.C. 97, 103, 749 S.E.2d 155, 158 (Ct. App. 2013).

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).

Respondents give short shrift to Dr. LaMotta's February 20, 2018 questionnaire putting McCoy on limited duty "as of the most recent examination" of "No lifting > 15 lbs." [R.p. 759-760]. They argue Dr. LaMotta's opinions should be "call[ed] into question" because the restrictions were not given contemporaneously with the examination and because Dr. LaMotta relied on his physician's assistant to perform the examination. Calling an expert's opinion into question plainly goes to the weight of the evidence. See, e.g., Rodney v. Michelin Tire Corp., 320 S.C. 515, 466 S.E.2d 357 (1996)(appellate court may not substitute its examination for that of an agency as to the weight of the evidence).

Respondents completely ignore Dr. Poletti's January 29, 2018 report putting McCoy in "out of work status." [R.p. 762-763]. As Dr. Poletti's physical examination and report are the most recent medical opinion – nine months after the Commission ended the 12-week award of TTD – his opinion on "out of work status" should control even over Dr. LaMotta's. Moreover, Dr. Poletti's opinion suffers from none of the defects Employer attributes to Dr. LaMotta's opinion. If one follows Cromed's argument to its logical conclusion, the Commission should be bound by Dr. Poletti's "out of work status" opinion.

Employer argues both opinions are "based on evaluations that are so remote and out-of-date as to be speculative." [Brief of Respondents, page 9]. While it would be ideal if McCoy had received treatment and evaluations closer in time to the hearing, the Commission has to make its decisions on the evidence before it. See Therrell v. Jerry's Inc., 633 S.E.2d 893, 370 S.C. 22 (2006)("Though the workers' compensation commission carries the duty to determine how an injury is compensable, the commission makes this decision based on submitted evidence, not out of thin air."). As a rule, seriously injured people do not improve without treatment. The fact Dr. Poletti

placed McCoy out of work more than a year after his injury creates a strong inference that he remained disabled. It certainly did not alter the presumption that disability continues until the employee returns to work.

Had they wished to directly challenge the opinions of McCoy's expert spine surgeons on an apples to apples basis, Cromed could have obtained their own surgical evaluation with a physical exam at any time prior to the trial. Instead, Cromed's strategy was to deny the claim and rely on an expert who did not conduct *any* physical examination. Their expert merely reviewed radiographic studies. One cannot complain to an appellate court when your own tactical decision misfires. See See Trotter v. Trane Coil Facility, 393 S.C. 637, 714 S.E.2d 289 (2011)(party bound by its own tactical decision to move doctor's deposition and subsequently learning doctor was unavailable). Cf. Erickson v. Jones Street Publishers, 368 S.C. 444, 629 S.E.2d 653 (2006)("calculated tactical decision" by litigant not to present a defense during the liability phase of bifurcated trial not reviewable on appeal). This rule extends to a party's tactical decision not to obtain or introduce evidence within the time limits set out in the rules of court. See Folkens v. Hunt, 290 S.C. 194, 348 S.E.2d 839 (Ct.App. 1986)(no abuse of discretion where trial judge refused to consider untimely affidavit); Slaughter v. Southern Talc Co., 919 F.2d 304 (5th Cir.1990)(tactical decision not to introduce affidavits at summary judgment motion did not constitute excusable neglect justifying late filing of affidavits).

McCoy proved with expert medical evidence that he was disabled. His disability is presumed to continue until he returns to work or is released without restrictions. See Cranford v. Hutchinson Constr., 399 S.C. 65, 731 S.E.2d 303 (Ct. App. 2012)(temporary total disability compensation should have been awarded because employee was not at MMI and had never been released to work without restrictions). As such, he should be paid TTD for the initial 15 weeks and then continuing on a running award until these conditions are met.

As to Cromed's second argument, the issue is not when Cromed learned of McCoy's disability; it is whether they actually offered employment suitable to his restrictions. Cromed has known TTD was an issue since the claim was filed. The Form 50 served on December 4, 2017 alleged "Due to injury, the claimant requests temporary total disability benefits because of lost compensable time from work and wages for the period of: Oct 9, 2017 (DOI) and continuing." [Form 5, 12/4/17].

Cromed gained actual knowledge of McCoy's work status when they deposed him on May 31, 2018 – if not sooner. McCoy testified he had not worked since the day of the accident because "I was ordered by [Dr. Poletti] not to." [R.pp. 158-159]. Cromed knew McCoy had been treated and evaluated by Dr. LaMotta and Dr. Poletti because their practice groups were listed on the Form 50's.

Cromed argues it "had no opportunity to even offer light duty employment . . ." [Brief of Respondents-Appellants, page 10]. To the contrary, Cromed has always had the opportunity of offering light duty employment. Even if they may not have offered it initially when they believed, mistakenly, that McCoy had resigned, they certainly had the opportunity to offer suitable employment once he filed his claim or once they received the restrictions from Dr. LaMotta. The case was not tried until July 16, 2020. Cromed had well over two years to accommodate those restrictions. That they did not confirms that McCoy "the unavailability of light-duty employment through the same employer." Lee v. Bondex, Inc., 406 S.C. 97, 103, 749 S.E.2d 155, 158 (Ct. App. 2013). See, also Johnson v. Rent–A–Ctr., Inc., 398 S.C. 595, 730 S.E.2d 857 (2012)(rejecting employer's reliance on a "voluntary resignation to argue employee constructively refused light duty work [because] it is speculative to presume Employer would offer Employee light duty work had she remained with Employer.').

The Court should affirm with the modification that TTD be paid 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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July 29, 2022
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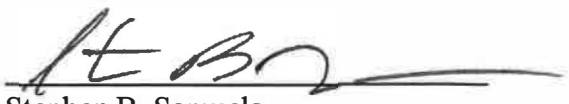
CERTIFICATE OF COUNSEL

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

Respectfully Submitted,



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