THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Hon. Susan S. Barden
Hon. Gene McCaskill
Hon. Aisha Taylor

Appellate Case No. 2021-001174
WCC File No. 1717573

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

v.

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

FINAL APPELLANT'S BRIEF OF RESPONDENTS-APPELLANTS

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STATEMENT OF THE CASE

This matter comes before the Court of Appeals from an appeal of the decision of the Appellate Panel of the South Carolina Workers' Compensation Commission which upheld the decision of the Single Commissioner.

The Claimant, Jeffrey McCoy, ("Claimant"), was employed as a medical transport driver for Defendant Cromed, LLC. Cromed provides non-emergency medical transportation services. The Claimant alleges he injured his lower back and left leg while loading a patient's wheelchair into the trunk of a vehicle on October 9, 2017.

This claim was denied. The Claimant had been experiencing non-work-related back pain for several weeks prior to the alleged injury of October 9, 2017 and had been seeking treatment for those symptoms. On September 18, 2017, the Claimant reported to the Providence Hospital Northeast emergency room with complaints of lower back pain and radiation to his groin and down his bilateral lower extremities. (R. pp. 711-712). These symptoms were not alleged to be work-related and are not part of this claim. The Claimant was diagnosed with a left lumbar spasm and was prescribed Valium and Motrin. The Claimant was given a work excuse until September 21, 2017. Cromed, LLC ("Cromed") provided Claimant with a full week off to rest and recover.

The following Monday, September 25, 2017, the Claimant attempted to return to work with Cromed but was still having significant back pain and was unable to stay at work. He returned to the Providence Hospital Northeast emergency room the next day, September 26, 2017, reporting worsening symptoms to the extent that he was now vomiting secondary to the pain. A CT scan of Claimant's lumbar spine was obtained which revealed diffusely bulging disc at L4-5 with mild central canal and bi-foraminal stenosis. There is mild bulging of the L5-S1 disc without central canal stenosis. At this visit, the impression of the evaluating physician was bulging lumbar disc,

abdominal pain, elevated blood pressure, and lumbar radiculopathy. The Claimant was given another work excuse to September 28, 2017. Cromed again accommodated the Claimant with another week off to rest.

At the September 26, 2017 Providence ER visit, the Claimant was also referred to Midlands Orthopedics for evaluation. This referral was made approximately two weeks prior to the alleged injury of 10/9/17. (R. pp. 724-734).

The Claimant finally returned to work as a medical transport driver with Cromed on October 2, 2017.

On October 9, 2017, the alleged date of injury and also the Claimant's final day of work with Cromed, the Claimant received a verbal reprimand from his supervisor and co-owner, Robert Cronan, for performing patient pickups in the wrong order. The Claimant immediately contacted the other co-owner, Malcolm Young, apparently unhappy with the discussion with Mr. Cronan, and he advised that this would probably be his last day at Cromed. Mr. Young testified he advised the Claimant at that point to bring his vehicle in, but Claimant requested that he work the rest of the day, and Mr. Young agreed. In his conversation with Claimant that morning, Mr. Young indicated Claimant said nothing about injuring or re-injuring his back and nothing about lifting a wheelchair. Mr. Cronan also testified the Claimant reported nothing to him about injuring his back lifting a wheelchair on October 9, 2017.

On October 12, 2017, the Claimant was seen by Midlands Orthopedics per the referral made at Providence Hospital back in September. The Claimant's initial visit at Midlands on October 12, 2017 was three days after his injury on his final day at work at Cromed. In his deposition, Dr. Ulrich testified that he saw the Claimant on October 12, 2017 to follow-up on Claimant's complaints of low back pain with radiating symptoms to his left leg. At that visit,

Claimant reported that he was a driver and that he "developed lower back pain with radiating pain down his left leg while driving" and that "lifting passengers" caused him significant discomfort. However, in a questionnaire completed on October 12, 2017, Claimant gave no answer when asked if this was a result of an accident. (R. pp. 740; 747). (It is important to note, however, that neither the Claimant nor any other driver with Cromed was required to "lift" patients but could only assist them in transferring in and out of a vehicle, wheelchair, etc.) The Claimant was diagnosed with lower back pain and left lumbar radiculopathy. Dr. Ulrich commented, "This is a work-related injury. He has difficulties driving." However, the Claimant reported nothing to Dr. Ulrich about injuring his back while lifting a wheelchair, and that narrative is nowhere in history taken by Dr. Ulrich. At that time, an MRI of the lumbar spine was ordered and the Claimant was referred to Dr. LaMotta at Midlands.

Interestingly, Dr. Ulrich testified in his deposition about comparing a CT scan and MRI to determine pathology; he indicated, "[T]his question probably should be answered by a radiologist...but I still think a good radiologist can use a CT scan and compare it to an MRI and access an interval change..." (R. p. 437, line 14-19; p. 438, line 24-p. 439, line 1).

The MRI was obtained on October 20, 2017 and revealed disc deformities at L4-L5 and L5-S1, worse at L4-L5 where there is a prominent broad-based disc deformity (protrusion extending centrally to the left). On October 26, 2017, the Claimant followed up at Midlands and saw Troy Blanks, Dr. LaMotta's physician assistant. Dr. LaMotta has never evaluated or even met the Claimant.

At this appointment, Claimant reported to a medical provider for the first time lifting a wheelchair at work on October 9, 2017, when he allegedly experienced a flareup of pain in lower back and left lower extremity. The Claimant was diagnosed with left lower extremity radiculitis,

L4 nerve root pattern and lumbar stenosis at L4-L5. Dr. LaMotta's PA indicated Claimant could be treated nonoperatively and he recommended a selective nerve root block at L4 and then a course of physical therapy along with anti-inflammatories.

This was the Claimant's most recent medical visit related to this claim, except for an IME with Dr. Steven Poletti, arranged by Claimant's counsel. Although Claimant was seen twice in the emergency room in the span of two weeks in September 2017, he has not been back to the emergency room even once since then.

Claimant was not given a work excuse or work restrictions at either appointment at Midlands in 2017. The Claimant only obtained limited duty restrictions from Dr. LaMotta by way of a questionnaire submitted by his attorney and signed almost four months later, February 20, 2018. (R. pp. 759-760).

At the time of the alleged injury and the following five months, Claimant made no effort to return to Cromed or request any type of employment, modified or otherwise. A hearing was held on the Forms 50 and 51 on July 16, 2020. On April 12, 2021, Commissioner Wilkerson issued his Decision and Order, finding that the Claimant sustained a compensable injury to his back on October 9, 2017 while employed with CroMed. The Commissioner also awarded causally related medical care for the Claimant's back, as well as designating Dr. LaMotta as treating physician. Finally, Commissioner Wilkerson awarded 12 weeks temporary total disability but denied Claimant's request for TTD benefits dating back to the injury. Both parties appealed Commissioner Wilkerson's Order to the Appellate Panel of the Full Commission, which affirmed the Hearing Commissioner's Order in its entirety on September 20, 2021. This appeal then followed.

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act governs judicial review of decisions by the Workers' Compensation Commission. Bass v. Isochem, 365 S.C. 454, 467, 617 S.E.2d 369, 376 (Ct. App. 2005). An appellate court's review is limited the determination of whether or not the decision of the Appellate Panel of the Workers' Compensation Commission was supported by substantial evidence or is controlled by some error of law. Grant v. Grant Textiles, 372 S.C. 196, 200, 641 S.E.2d 869, 871 (2007); S.C. Code Ann. § 1-23-380(A)(5) (Supp. 2006).

The judicial review of the appellate panel's factual findings is governed by the substantial evidence standard. Gadson v. Mikasa Corp., 368 S.C. 214, 221, 628 S.E.2d 262, 266 (Ct. App. 2006). The appellate panel's decision must be affirmed if supported by substantial evidence in the record. Shuler v. Gregory Elec., 366 S.C. 435, 440, 622 S.E.2d 569, 571 (Ct. App. 2005) (internal citations omitted). A reviewing court may not substitute its judgment for the judgment of the Commission as to the weight of the evidence on questions of fact. S.C. Code Ann. § 1-23-380(A)(5) (Supp. 2006). However, a reviewing court may reverse or modify a decision of the appellate panel if the findings of the panel are, "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." S.C. Code Ann. § 1-23-380(A)(5)(e) (Supp. 2006); (Houston v. Deloach & Deloach, 378 S.C. 543, 550; 663 S.E.2d 85, 88) (S.C. Ct. App. 2008)).

While an appellate court's review of factual findings in a workers' compensation case is governed and controlled by the substantial evidence rule, an appellate court may freely and absolutely review a trial court's decision concerning an issue of law. Where the Commission's decision is controlled by an error of law, the appellate review is plenary. Grant v. Grant Textiles, 361 S.C. 188, 191, 603 S.E.2d 858, 859 (Ct. App. 2004) (noting that a reviewing court will not

overturn a decision by the Workers' Compensation Commission unless the determination is unsupported by substantial evidence or is affected by an error of law) (*reversed* on other grounds (Grant v. Grant Textiles, 372 S.C. 196, 200, 641 S.E.2d 869, 871 (2007)). "An award in a workers compensation case cannot be based on surmise, conjecture or speculation." McLeod v. Piggly Wiggly Carolina Co., 280 S.C. 466, 313 S.E.2d 38 (1984).

ARGUMENT

I. THE APPELLANT PANEL OF THE FULL COMMISSION ERRED AS A MATTER OF LAW IN FINDING THAT CLAIMANT SUSTAINED A COMPENSABLE INJURY OR AGGRAVATION OF HIS LUMBAR SPINE ON OCTOBER 9, 2017, THE ERROR BEING SUCH FINDING WAS UNSUPPORTED BY SUBSTANTIAL EVIDENCE AND/OR CLEARLY ERRONEOUS AS A MATTER OF LAW

(a) The Appellate Panel erred as a matter of law and/or abused its discretion in finding a documented worsening of disc deformities after Claimant's alleged accident and in disregarding or assigning less weight to the opinions of a board certified radiologist relating to interpretation of various imaging studies, and instead, relying on the opinion of an orthopedist who never saw the Claimant and whose opinions lack sufficient factual foundation and probative value, the error being such findings were unsupported by the evidence and contrary to the most competent, relevant and probative medical evidence and/or clearly erroneous as a matter of law

The Appellate Panel of the Full Commission erred in assigning less weight to the opinions of a board-certified radiologist than to orthopedists, Drs. LaMotta and Poletti, where the primary issue was interpretation and comparison of a lumbar CT scan obtained prior to Claimant's accident and an MRI obtained thereafter. The Appellate Panel of the Full Commission affirmed the hearing Commissioner's finding of a "documented worsening of condition" between the lumbar CT scan obtained prior to Claimant's accident and the MRI obtained after the accident, based largely upon the opinions of Dr. LaMotta and Dr. Poletti. (Full Commission Order, finding no. 22; R. p. 38). However, this finding is vague and ambiguous in light of the conflicting medical opinions of the two orthopedists regarding exactly what the MRI showed. Finding of Fact no. 22 itself recites the conflicting opinions between the two physicians relied upon by the Claimant to establish the alleged "worsening of condition."

Dr. LaMotta testified "in my opinion, looking at the CT examination, there was a disc bulge without any evidence of stenosis, and now on the MRI examination you have a disc protrusion with evidence of nerve compression. So, to me, there is a clear change, although- Yes, I can tell you that we don't have the same level of detail as we did on the MRI examination on the CT, but there is- there is a clear difference there." (LaMotta Tr. Page 31, line 22- page 32, line 5; R. pp. 396-397).

On the other hand, "Dr. Poletti opined there is an objectively determinable disc herniation on the MRI which is substantially different than the CT scan." (Full Commission Order, Finding number 22; R. p. 38). However, Dr. LaMotta testified in his deposition that the October 20, 2017 MRI did not show a disc herniation. (LaMotta, Tr. P.33, lines 10-12; R. p. 398).

The Claimant offered no opinion of a radiologist to attempt to sort out this discrepancy. The only radiological opinion offered in evidence in this matter was that of Dr. Douglas M. Bull, a

board-certified radiologist. Dr. Bull reviewed the Claimant's lumbar CT scan in comparison with the MRI and provided the following opinion:

> " The L4 - L5 disc does show broad bulge and protrusion with some narrowing of the central canal (spinal stenosis) and some mass effect on both nerve root foramina, slightly more pronounced on the left side... The degree of disc protrusion appears to me to be the same between the two exams. My measurements of the anterior to posterior diameter of the spinal canal (distance from the back of the bulging disk to the front edge of the bony lamina) at the point of greatest disc bulge is 11.8 mm on the CT scan 9/26/17 and 12 mm on the MRI scan 10/20/17. In essence, I do not measure any anatomic difference between the two exams relative to the degree of disc protrusion, stenosis or foraminal involvement." (APA pp 62- 65; R. p. 777) (emphasis added).

Dr. Bull provided the only objective measurements to support his opinion that there was no structural difference between the Claimant's CT and MRI scans, and his opinion was unrebutted by the Claimant. Rather than adopting the conflicting/speculative opinions of the orthopedists relative to the two imaging studies, the Commission should have given greater weight to the far more qualified radiologist who provided the only opinion supported by empirical data and within his field of expertise. See Poston v. Southeastern Const. Co., 208 S.C. 35, 36 S.E.2d 858 (1946) (Opinion of expert witness is intended to aid the Commission in arriving at the correct conclusion and the weight to be given such testimony is to be determined by the Commission; however, when the Commission effectively disregards such expert testimony it must perforce find other competent evidence in the record on which to base its findings.) See also McLeod v. Piggly Wiggly Co., 280

S.C. 466, 313 S.E. 2nd 38 (Ct. App. 1984) (Appellate Panel has authority to ascertain proficiency of expert witness and decide whether a "higher degree of expertise" is needed; an award should be remanded for redetermination when alleged injury concerned a complicated area of the body requiring a higher degree of expertise than was provided to the Commission.) Accord, Potter v. Spartanburg School District 7, 395 S.C. 17, 716 S.E.2d 123(Ct. App. 2011). See also Hamilton v. Martin Color-Fi, Inc., 405 S.C. 478, 748 S.E.2d 76 (Ct. App. 2013) (Appellate Panel entitled to give more credence to opinions/ reports of more specialized physicians.) Corbin v. Kohler Co., 351 S.C. 613, 571 S.E.2d 92 (Ct. App. 2002) (Opinions of treating physician who was also specialist entitled to greater weight than that of other expert medical testimony.) See also McClendon v. Keith Hutchinson Logging, 702 So.2d 1164, (La. App.1 Cir. 1997) (Testimony of specialist is entitled to greater weight when the subject at issue involves the particular field of the specialist's expertise.)

In affirming the Hearing Commissioner's findings of fact, the Appellate Panel gave two specific reasons in support of greater weight being assigned to the opinions of Dr. LaMotta and Dr. Poletti: (1) they are spine surgeons who regularly review imaging studies, and (2) these two doctors were able to conduct a physical examination of McCoy. Neither of these amount to substantial evidence in support of the Commission's decision. First, the fact that Drs. LaMotta and Poletti are "spine surgeons" means that neither are certified specialists in radiology, as is Dr. Bull.[1] The fact that the orthopedists "regularly review imaging studies" may be accurate but again, they lack the education, training, and certification of Dr. Bull within his field of expertise. Secondly, the issue of whether a physical examination of the Claimant was conducted is completely irrelevant as radiologists typically do not examine patients. It is commonly recognized that, radiologists

[1] *The American Medical Association Encyclopedia of Medicine provides the following definition for Radiologist: "A physician.... who is specially trained and certified in the use of X rays, nuclear imaging devices, radioactive substances, ultrasound and magnetic resonance to see into the body and diagnose and treat problems." Radiologist,* AMA Encyclopedia of Medicine (1st Ed.1989).

rarely, if ever, interact with the patient directly; their findings are reported to the referring physician rather than the patient. Moreover, although Dr. Poletti did examine the Claimant on one occasion for an IME per referral from Claimant's attorney, Dr. LaMotta had never seen or examined the patient at the time of the hearing in this matter; instead, the Claimant was seen by a physician's assistant. (R. pp. 750 -755).

The specific evidence cited by the Commission in support of assigning greater weight to the opinions of Drs. LaMotta and Poletti was therefore based on findings that were irrelevant, erroneous, speculative and/or arbitrary. Such findings obviously do not constitute substantial evidence in support of the Commission's Decision and Order and therefore the Order should be reversed and the claim denied. See Herndon v. Morgan Mills Inc, 246 S.C. 201, 143 S.E.2d 376 (1965) (award of Commission may not rest on surmise, conjecture or speculation but must be founded upon substantial evidence; if findings are based on surmise, speculation or conjecture, the issue becomes one of law for the court and not of fact for the Commission); Potter v. Spartanburg School Dist. 7, 716 S.E.2d at 126 ("Substantial evidence is not a mere scintilla of evidence, nor evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole would allow reasonable minds to reach the conclusions the administrative agency reached in order to justify its actions.") See also Fontaine v. Peitz, 91 S.C. 536, 354 S. E. 2d 565 (1987) (abuse of discretion occurs when ruling is based on an error of law or when based on factual conclusions without evidentiary support.) Thus, in the present case, the Decision and Order of the Full Commission should be reversed as unsupported by substantial evidence and/or affected by an abuse of discretion.

II. THE APPELLATE PANEL OF THE FULL COMMISSION ERRED AS A MATTER OF LAW IN FINDING A CASUALLY RELATED INJURY OR AGGRAVATION TO CLAIMANT'S LUMBAR SPINE ARISING OUT OF AND IN THE COURSE OF HIS EMPLOYMENT ON OCTOBER 9, 2017, THE ERROR BEING SUCH FINDING AND/OR CONCLUSIONS WERE UNSUPPORTED BY THE EVIDENCE AND/OR CLEARLY ERRONEOUS AS A MATTER OF LAW

To find "a worsening of disc deformities," the Commission had to ignore information documented in the medical records and focus on the confusing and contradictory testimony of Claimant's experts. In fact, the medical records clearly show a patient experiencing back pain radiating to his legs since mid-September 2017, which worsened to an excruciating pain of a 10/10 level by September 26, 2017. Claimant's pain was so bad it was making him vomit. (R. pp. 711-737). This is his point of greatest pain, well before the wheelchair incident of October 9, 2017. Rather than rely on Dr. LaMotta, a "treating physician" who has never met his patient, and Dr. Poletti who, while paid for his opinion, couldn't seem to get his facts straight, the Commission should have relied on the medical records and board-certified radiologist who provided the only empirical data to answer the question whether there was a change noted in the October 20, 2017 MRI compared to the September 26, 2017 CT. (R. pp. 733; 736-737; 777).

On Monday, September 18, 2017, Claimant presented to Providence Northeast complaining of abdominal and lower back pain, that started the preceding Wednesday (9/13/17), with greater pain on the left than right and with radiation to his groin and down both legs. He denied any injury occurred as noted by Grant A. Simpson, RN. His pain is noted to be dull and aching but with associated burning-type pain in his low back that is worse when he moves or when he sits straight on his buttocks. Pain is noted to be intense with movement. No vertebral tenderness

was noted. Straight leg raise is negative. Claimant is noted to be in no acute distress. His treating physician on this visit indicated his belief Claimant was experiencing pain from a musculoskeletal process. An abdominal and pelvic CT was ordered. No stone or obstruction was noted in the urinary tract and no active process was noted in the abdomen or pelvis. This was a self-pay visit. (R. pp. 711-720.)

Claimant received a work excuse to stay out of work for three days until September 21, 2017, but Claimant was given the entire week to stay home by his employer. He returned to work on September 25, 2017 but was back at the Providence Northeast Emergency Department the following morning.

Claimant's pain continued to intensify causing him to return to the Providence Northeast emergency room on September 26, 2017 for a self-pay visit. Claimant advised Anna B. Morris, RN that he was having left flank pain radiating to the left lower quadrant. Claimant indicated he was at the ER on Sept. 18, and his pain had worsened since then. Claimant indicated he had abdominal pain with nausea/vomiting for two days. Now his pain is noted to be so bad that it causes "vomiting secondary to pain." Claimant advised his pain intensifies with movement. Claimant rated his pain as a 10/10. Lumbar vertebral tenderness is noted at this visit with decreased flexion, extension, and lateral movement. Based on Claimant's presentation and clinical finding changes, a lumbar CT was ordered, and Claimant was referred to Midlands Orthopedics for further evaluation. This referral to Midlands Orthopedics was made at the time Claimant was experiencing his greatest pain, well before the alleged lifting incident of October 9, 2017. (R. pp. 722-735).

Claimant received a release from work until September 28, 2017. His employer provided him an additional week out of work rather than making him return on the 28th.

The indication for the Lumbar CT of September 26, 2017 was low back pain with radiculopathy for one week. The specific findings include the following: Lumbar vertebral bodies show anatomic alignment; No compression fracture or spondylolisthesis; Diffuse broad-based bulging of the L4-L5 disc which extends laterally bilaterally; Facet hypertrophy contributing to some biforaminal stenosis; Mild central Canal stenosis at that level; Mild disc bulging of L5-S1 without central canal stenosis. Primary impression was a bulging lumbar disc with secondary impressions including abdominal pain and lumbar radiculopathy. (R. p 733). Dr. LaMotta testified there was no mention of "radiculopathy" in these records (LaMotta Depo., R. p. 373 line 16- p. 377 line 14; R. p. 403 line 11-24), notwithstanding the clear and multiple indications of radiculopathy. The CT scan was noted to be self-pay.

October 12, 2017 - Midlands Orthopedics: First Visit

In the general medical information form completed at the time of Claimant's first Midlands Orthopedics appointment on October 12, 2017, Claimant noted he was experiencing numbness and continued abdominal pain which began September 14, 2017. Dr. Ulrich testified in his deposition that Claimant complained of lower back pain radiating down his left leg and was adamant the pain was work-related. (Dr. Ulrich Depo., R. p. 422, lines 2-18). While Claimant noted his pain worsened on October 9th, he failed to note, however, the prior times the pain worsened to the point it caused him to vomit and present to the emergency department providing a 10/10 pain scale report to the emergency department staff. During this assessment on 10/12/17, Claimant rated his pain only at a 3/10. (R. p. 740). This visit was also self-pay.

Claimant completed the Midlands Orthopedics General Medical Information form on October 12, 2017. In response to the reason for visit, Claimant indicated "Bulging Disc." The next

question asked if this was the result of an accident. Followed by, "If yes, DATE of accident and please describe."

Next, the form asks, "Where did the injury occur?

Work__ Auto ___ Home ____ Other ____"

Of note, Claimant left these questions blank. (R. p. 740). There is no mention anywhere in this report of Claimant indicating anything about a wheelchair. Dr Ulrich testified if Claimant had indicated the kind of details about lifting a wheelchair on October 9th and having a flare-up of back pain, he would most likely have included that information in his note. (Ulrich Depo.,R. p. 432 lines 3-9).

An MRI was ordered due to left leg pain for one month which is consistent with his first report to the Providence Northeast emergency department note of bilateral radiation of pain down his legs.

October 26, 2017 - Midlands Orthopedics: Second Visit

Claimant was seen and evaluated by a physician assistant, Troy Blanks, PA-C, of Midlands Orthopedics on October 26, 2017 during this self-pay visit. While Dr. LaMotta claimed to have communicated with Claimant and examined him, these were false statements. Dr. LaMotta has never even met or examined the Claimant. Dr. LaMotta's deposition contained the following:

Q: And, in fact, he reported to you that lifting a wheelchair, not passengers - - He reported to you lifting a wheelchair had made his symptoms worse; is that right?

A: That is correct.

Q: And you were able to confirm that through the objective physical exam and MRI scan, correct?

A: Yes

(LaMotta Depo., R. p. 413, lines13-20).

However, elsewhere in the deposition:

Q: So, did you actually see the patient on 10/26 at all?

A: I did not.

Q: Have you ever met Mr. McCoy?

A: Not in person.

(LaMotta Depo., R. p. 372, lines 5-9).

The medical note of October 26, 2017 indicates the problems to be reviewed include lumbar radiculopathy, lumbar disc disorder, abdominal pain, and elevated blood pressure. Under HPI, this record notes the following:

Severity: moderate; pain level 2/10; worst pain 4/10

Timing: abrupt

Context: fall…

Work Related: no

Working: no (R. p. 752).

This note also indicates Claimant has a history of lower back problems. Claimant indicated he had pain in his left lower back radiating down through his left posterior hip and wraps around into his groin.

Dr. LaMotta claims there were several differences in Claimant's condition between September 18 to October 26, 2017. Dr. LaMotta references a difference in Claimant's characterization of his pain. While Claimant indicated his pain was a 10/10 during both visits to the Providence Northeast emergency room, the only visit when the Claimant appeared to others to

be in moderate distress was the emergency room visit on September 26, 2017. During both visits to Midlands Orthopedic, Claimant's self-reported his pain during his visits of October 12, 2017 and October 26, 2017 were 3 and 2-4 respectively. (R. pp. 740, 752).

Dr. LaMotta testified there were qualitative differences between complaints Claimant reported to the physicians of Midlands Orthopedics compared to the complaints made during his visits to the emergency department. He uses radicular pain pattern as an example. Dr. LaMotta claims that the radicular pattern was not present during his visits to the emergency department. Radiating pain to the stomach is not radicular but pain traveling down the legs without leg problems is a radicular pain pattern. (LaMotta Depo., R. p. 400 line 20 – p. 401 line 17). The problem with this analysis is that Claimant's initial complaints to emergency department personnel on his first visit on September 18, 2017 was abdominal and lower back pain, that started the preceding Wednesday (9/13/17), with greater pain on the left than right and with radiation to his groin and down both legs. Additionally, the indication for the CT of lumbar spine dated September 26, 2017 is "Pain with radiculopathy, low back pain for one week." (R. pp. 711-733).

Dr. LaMotta notes Claimant had a positive straight leg raise which is classic for radiculopathy. (LaMotta Depo., R. p. 404, lines 6-12) Claimant had negative straight leg test on September 18, 2017. No straight leg test was noted in the records from the September 26, 2017. The October 12, 2017 Midlands Orthopedic records note a positive straight leg raise for the left leg both supine and seated. Interestingly, the October 26, 2017 examination by Troy Blanks at Midlands Orthopedics notes the left leg straight leg raise returned to negative both supine and seated.

LaMotta claims there is no mention of abdominal pain on Claimant's September 26th visit. Yet there are many mentions of abdominal pain in the September 26, 2017 note. Claimant's first

interaction with medical staff resulted in his complaints of abdominal pain with nausea and vomiting for two days. The Initial Comments section on the History of Present Illness dated September 26, 2017 indicates as follows: "pt presents with c/o continued lower back pain with radiation into abdomen started 1 week ago... states pain is worse and is now vomiting secondary to the pain. abd pain to leg started 1 week ago but has worsened in the past 24 hours." Dr. LaMotta also indicated the disc bulge at L4/5 turned into a disc protrusion going to the left. (LaMotta Depo., R. p. 38, line 21 – p.382, line 18).

Contradictions of Claimant's Expert Witnesses:

Dr. Poletti's initial report dated February 12, 2018 was littered of wrong facts including the wrong injury date, among others. He indicates in this report that Claimant's date of injury was September 17, 2017 and then in the next paragraph, the date of injury becomes September 14, 2017. This report also notes Claimant attempted to return to work on October 9, 2017. Dr. Poletti also indicates Claimant describes his pain during some undated appointment as 7 out of 10. This never occurred at any point during Claimant's medical treatment, so Dr. Poletti apparently made-up facts in this report. (R. pp.____).

Thereafter, he issued another report digitally signed on March 16, 2018, and while it contained fewer factual errors, the report still contained inaccuracies as well as noticeable gaps in relevant information. (R. pp. 762-763). His History of Present Illness leaves out two of the four visits which make up the totality of Claimant's medical care. Dr. Poletti's claimed return to work date is wrong. Dr. Poletti indicated Claimant returned to work on October 9, 2017, the same day as his alleged "lifting injury." Dr. Poletti's claim that Claimant's pain rating on October 12, 2017 as a 7/10 is not correct as Claimant noted his pain rating on this visit as 3/10. This factually inaccurate report simply cannot be relied upon and lacks any probative value. (R. pp.740, 745).

Dr. LaMotta testified the October 20, 2017 MRI does not show a herniation. (LaMotta Depo., R. p. 398, lines 6-12). Whereas Dr. Poletti's report and deposition testimony indicates the same MRI shows left-sided herniation. Dr. Poletti goes so far as to say the alleged "lifting injury" caused the disc to herniate. Dr. Poletti specifically claims "this man did not have L4 radicular symptoms prior to his injury of 10/9/17..." (R. pp.762-763). Dr. Poletti apparently missed the indication for the Lumbar CT of September 26, 2017 which was "low back pain with radiculopathy for one week" or that Claimant initially sought medical care at the emergency department on September 18, 2017 complaining of back and abdominal pain radiating to the groin and down both legs since September 13, 2017. (R. pp. 711, 733).

It is obvious, which expert provided the most salient information concerning whether a worsening of Claimant's condition occurred on October 9, 2017. Dr. Ulrich testified whether pathology can be seen comparing an MRI and CT should be answered by a radiologist. He indicated a good radiologist can use a CT scan and compare it to an MRI and access an interval change. (Ulrich Depo., R. p. 437, line 5- p. 439, line 3). Interestingly, Dr. LaMotta appears to rely upon the radiographical readings rather than reviewing the films to support his opinion that the disc deformities worsened between the CT and MRI. He states, "I'm looking at the MR - - the MRI reading, Oct. 20, 2017, Providence Northeast, and the actual word used in the actual reading. In the third paragraph, it states clearly that there's a broad-based disc protrusion. So, this - - The deformity that we're talking about is a protrusion, so that is a lot worse than a disc bulge." (LaMotta Depo., R. p. 396, lines 2-9). Dr. LaMotta claims the terms "bulge, protrusion, extrusion, and herniation" are all terms that describe different things to radiologists and spine practitioners and are not used interchangeably. (LaMotta Depo., R. p.397, line. 13 – p.398, line 9).

While Dr. Poletti claims he can read and evaluate all scans (without the educational qualifications) and is more qualified than any other doctor in the state to perform this task, it appears what he is unable to do is draft a medical report that correlates factually with patient's treatment. Of note, his practice also does not release scans, whether CT or MRI, unless and until a radiologist reviews and reads each regardless of Dr. Poletti's alleged expertise. (Poletti Depo,, R. p. 475, lines 1-14). Dr. Poletti indicated radiologists and orthopedists sometime use the terms protrusion and herniation interchangeably. (Poletti Depo, R. p. 475, lines 2-8).

Dr. Bull is not trying to push a narrative. He limited his evaluation in this case to the simple question whether there is a structural difference shown on Claimant's CT compared to the MRI. This is the critical question in this matter. Dr. Bull is a more qualified expert with a greater degree of expertise in reading and evaluating CT scans as compared to MRI films. He performed a more precise evaluation and gave the most specific opinion with supporting valuations. Dr. Ulrich's recommendation should have been followed by the Commission who testified whether pathology can be seen by comparing an MRI and CT should be answered by a radiologist.

The Full Commission therefore erred in failing to give greater weight to the opinions of Dr. Bull, the only radiologist to give an opinion and the only expert qualified by education, training, and experience to compare the two scans and the only expert to make actual measurements to determine there was no anatomical difference between the CT and MRI relative to the degree of disc protrusion. There is insufficient reliable evidence to establish a worsening of disc deformities causally related to the October 9, 2017 accident. Claimant has therefore failed to meet his burden of proof to establish a causally related injury or aggravation of pre-existing condition.

III. THE APPELLATE PANEL OF THE FULL COMMISSION ERRED AS A MATTER OF LAW IN AWARDING TEMPORARY TOTAL DISABILITY BENEFITS AND IN FINDING THE EMPLOYER HAD NO SUITABLE EMPLOYMENT AVAILABLE TO CLAIMANT, THE ERROR BEING SUCH FINDINGS AND/OR CONCLUSIONS WERE UNSUPPORTED BY THE EVIDENCE AND CLEARLY ERRONEOUS IN LIGHT OF THE RELEVANT AND PROBATIVE EVIDENCE IN THE RECORD

While the Employer/Carrier denies that Claimant sustained any compensable, causally related injury on October 9, 2017, consistent with the Issues on Appeal set forth in Defendant's Form 30, in the event the Full Commission's Decision and Order is affirmed, it is the Employer/Carrier's position that Claimant failed to meet his burden of proof to establish entitlement to temporary total disability benefits at all. Alternatively, Defendants request that the Hearing Commissioner's award of twelve weeks TTD be affirmed.

For the Claimant to be entitled to temporary total disability benefits, Claimant has the burden of establishing disability. Johnson v. Rent-A-Center, Inc.,398 S.C. 595, 730 SE2d 857 (2012). S.C. Code Ann. § 42-1-120 defines "Disability" as "incapacity because of injury to earn the wages which the employee was receiving at the time of the injury in the same or any other employment." In Shealy v. Algernon Blair, Inc., 250 S.C. 106, 156 S.E.2d 646 (1967), the SC Supreme Court set forth a two-part test that Claimant must satisfy: 1) Claimant must establish that he failed to obtain employment because of an injury-produced handicap; and 2) Claimant made "reasonable efforts to obtain employment." Shealy v. Algernon Blair, Inc., 250 S.C. at 113. The Court stated further "the fact that after the injury, the employee has not worked and has therefore earned no wages is not in itself determinative of the extent of loss of his earning capacity." Id. at 112. *See also* Johnson v. Rent-A Center, Inc., 398 S.C. at 601.

In this case, the Claimant failed to establish that he was unable to obtain employment due to an injury-produced handicap or that he made reasonable efforts to obtain employment.

Claimant was never medically excused from work at either of his two visits to Midlands Orthopedics following his alleged injury of October 9, 2017. The Claimant first sought medical care for the alleged October 9, 2017 injury three days later, on October 12th. At that time, he was seen by Dr. Slif Ulrich at Midlands Orthopedics for evaluation of lower back pain. The Claimant reported to Dr. Ulrich that "he is a driver and states that he developed lower back pain with radiating pain down his left leg while driving. Lifting passengers causes him significant discomfort." Claimant reported nothing at this visit about lifting a wheelchair nor any specific injury three days earlier on October 9th. At this visit, Dr. Ulrich recommended an MRI of the lumbar spine, physical therapy, anti-inflammatories, and a prescription for Mobic; however, Dr. Ulrich did not give Claimant a work excuse nor did he recommend any specific work restrictions despite his awareness this was a Workers' Compensation claim. (R. pp. 745-749).

Claimant's second visit to Midlands Orthopedics was on October 26, 2017. This was the first time Claimant reported to any medical provider anything about attempting to lift a wheelchair at work on October 9, 2017, at which time he reportedly experienced a flare-up of lower back pain. At this visit, Claimant's MRI findings were discussed, and a selective nerve root block at L4 was recommended. It is noteworthy that again no work excuse was provided nor any specific work restrictions. (R. pp. 750-755).

The medical records indicate that no medical work excuse nor work restrictions were ever provided to the Claimant unsolicited relating to the October 9, 2017 accident. In fact, the first work limitation at all was a fifteen-pound lifting restriction issued by Dr. LaMotta by way of medical questionnaire prepared by Claimant's counsel and dated February 20, 2018, more than four months

after the alleged injury. The fifteen-pound lifting limitation was noted to be "temporary." (R. pp. 759-760).

In his deposition and in support of his medical opinions, Dr. LaMotta claimed to have communicated with the Claimant and claimed to have examined him:

> Q: And, in fact, he reported to you that lifting a wheelchair, not passengers - - he reported to you lifting a wheelchair had made his symptoms worse; is that right?
>
> A: That is correct.
>
> Q: And you were able to confirm that with the objective physical exam and MRI scan, correct?
>
> A: Yes.

(LaMotta Depo. R. p. 413).

However, this testimony was false as the Claimant was seen and evaluated by a physician assistant, Troy Blanks, PA-C on October 26, 2017. In fact, Dr. LaMotta never even examined the Claimant.

> Q: So, did you actually see the patient on 10/26 at all?
>
> A: I did not.
>
> Q: Have you ever met Mr. McCoy?
>
> A: Not in person.

(LaMotta Depo. R. p. 372).

At a minimum, this admission by Dr. LaMotta calls his opinions and the weight to be accorded to them into question. Additionally, there is no current evaluation or opinion that Claimant remains under the "temporary" restrictions or any work restrictions as he hasn't been seen at Midlands Orthopedics since October of 2017 and by Dr. Poletti in January of 2018. Their opinions are so out-of-date as to be speculative. *See* Coleman v. Quality Concrete Products, 245 S.C. 625, 142 SE2d 43 (1965). (A claimant has the burden of proving facts essential to his right to compensation and an award may not be based upon conjecture or speculation.)

Therefore, Claimant has clearly failed to establish the first prong of Shealy, that Claimant was unable to obtain employment because of an injury-produced handicap. Shealy v. Algernon Blair, 250 S.C. at 113.

The Claimant also failed to satisfy the second prong of Shealy, that he "made reasonable efforts to obtain employment and failed." Shealy v. Algernon Blair, Inc., 250 S.C. at 113. In Shealy, the Court found that the employee was not disabled under §42-1-120 in part because his efforts to obtain employment were "intermittent and lackadaisical." Id. In the present case, although Claimant testified that he had been seeking employment and that he had performed a couple of handyman jobs, including cutting yards and painting. (Transcript, R. p. 562). Claimant's efforts were anything but diligent in seeking to obtain employment during the three years for which he seeks temporary total disability benefits based upon a fifteen-pound lifting work restriction. Although Claimant visited the emergency department twice in September 2017 for pre-existing, unrelated back pain and although he was listed as "self-pay" for the ER visits as well as his first two visits to Midlands Orthopedics, Claimant hasn't visited the emergency room one time, nor has he sought medical treatment whatsoever over the past three years. Additionally, work was clearly available with no lifting requirements with Claimant's own employer, had he chosen to avail himself of this opportunity. As explained by Robert Cronan, Cromed needed drivers and would work to accommodate limitations as clearly evidenced by Cromed's granting two weeks off for the Claimant in September 2017 prior to the alleged injury to enable him to recover from his back pain. (R. pp. 151-153).

It was error for the Commissioner to find that Cromed had no suitable employment available to McCoy and could not provide work to McCoy within Dr. LaMotta's restrictions. (Finding of Fact #17 R. p. 28). Claimant contends Robert Cronan testified that Cromed had no

light duty work available and therefore could not accommodate Dr. LaMotta's restrictions. First, it must be noted that neither Dr. LaMotta nor any other physician at Midlands Orthopedics assigned work restrictions at either of Claimant's appointments in October 2017. The fifteen-pound lifting restriction from Dr. LaMotta did not come about until almost four months later via a medical questionnaire prepared by Claimant's counsel. There were no work limitations issued contemporaneously in October 2017.

Claimant asserts Robert Cronan testified that no 'light duty" was available. However, Claimant's counsel failed to define what he meant by "light duty." Mr. Cronan testified there are no lifting requirements for medical transport drivers for Cromed, and thus, Claimant's job as a medical transport driver would not violate Dr. LaMotta's fifteen-pound restriction. In fact, Claimant testified at the hearing that his job with Cromed did not require lifting. Claimant testified further:

> Q: Okay. Would you be able to do that job, given the nature of your - - your people you're transporting, without giving them some assistance?
>
> A: Yes.
>
> Q: You could?
>
> A: Yes.

(Transcript, R. p. 548).

Accordingly, Claimant has failed to satisfy his burden to establish disability pursuant to S.C. Code Ann. §42-1-120 and therefore, entitlement to temporary total benefits pursuant to Shealy *supra.*

IV. THE APPELLANT PANEL OF THE FULL COMMISSION ERRED AS A MATTER OF LAW IN DESIGNATING DR. IVAN LAMOTTA AS TREATING PHYSICIAN, THE ERROR BEING THAT THE EMPLOYER/CARRIER IS ENTITLED TO APPOINT A TREATING PHYSICIAN PURSUANT TO THE WORKERS' COMPENSATION ACT AND REGULATIONS

The Defendant's good faith denial of a claim should not warrant the Commission's appointment of a treating physician on that basis alone and where there is no evidence of a "dispute" between the parties relating to treatment, but only as to compensability. Any other outcome would be prejudicial to Defendant's statutory right to a treating physician per §42-15-60. *See* Turner v. South Carolina DHEC, 377 S.C. 540, 661S.E.2d 118 (Ct.App.2008) (Workers Compensation statute which establishes the rights of the parties in regards to payment for treatment does not give a unilateral right to Claimant to select their treatment physician and such unencumbered right undermines the authority of the Commission as prescribed by the legislature.) Moreover, Finding of Fact #25 indicates "Dr. LaMotta is the most familiar with the Claimant, he is well-known to the Commission, and he has already provided a treatment plan." (R. pp.30-31). However, as discussed above, Dr. LaMotta never examined or even met the Claimant but instead, his physician assistant saw the Claimant on October 26, 2017. Additionally, the Claimant was last seen at Midland Orthopedics in October 2017, and Dr. LaMotta is therefore, most definitely, not familiar with the Claimant or his medical condition.

CONCLUSION

For the foregoing reasons, the Respondents-Appellants respectfully request that the Decision and Order of the Full Commission be reversed and the claim for benefits be denied.

Respectfully submitted,

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Columbia, South Carolina
August 4, 2022

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Hon. Susan S. Barden
Hon. Gene McCaskill
Hon. Aisha Taylor

Appellate Case No. 2021-001174
WCC File No. 1717573

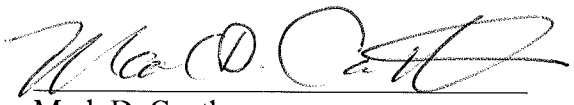
Jeffrey W. McCoy, Employee, ...Appellant-Respondent,

v.

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

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Appellant's Brief of Respondents-Appellants complies with Rule 211 (b) SCACR.



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