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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE
SOUTH CAROLINA WORKER'S COMPENSATION COMMISSION

Gene McCaskill, Commissioner
R. Michael Campbell, II, Commissioner
T. Scott Beck, Commissioner

SCWCC File No. 1508995

Appellate Case No. 2018-001964

Samuel Paulino, Claimant — Respondent,

v.

Diversified Coatings, Inc., Employer, and AmGuard Ins. Co., Carrier — Appellants.

PETITION FOR WRIT OF CERTIORARI

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II. Did the Court of Appeals err in finding that the Full Commission erred in affirming the Single Commissioner's determination that the Claimant's back is impaired greater than fifty percent because there is no medical evidence in the record that supported the Single Commissioner's findings where there is *indeed* substantial evidence in the record to support the Single Commissioner's findings and Full Commission's affirmation?

III. Did the Court of Appeals err in finding that the Claimant's spine surgery was a success where the record as a whole demonstrates anything but a successful surgical result?

IV. Did the Court of Appeals err in finding that there is no evidence in the record indicating a poor surgical result and that as a result, the Commission erred in affirming the Single Commissioner's "medical opinion" where there is indeed substantial medical evidence in the record to support a finding that the Claimant suffered a poor surgical result as evidenced by the continued and persistent symptoms, limitations, restrictions, and difficulties Claimant suffered and continues to suffer following the surgical procedure to his spine?

V. Did the Court of Appeals err in finding that Claimant failed to rebut Dr. Math's twelve-percent impairment rating to his back with medical evidence, and therefore, the findings of fact adopted from the Single Commissioner's Order are inconclusive where there is substantial evidence in the record to support the Single Commissioner's findings of fact as adopted by the Full Commission?

VI. Did the Court of Appeals err in finding that the Claimant did not present evidence as to the character of his back injury, the specific ways his back injury prevents him from leading a normal life, and the limitations the back injury places on his physical activities where the record contains countless instances in which the medical evidence specifically documents and highlights the many ways that the Claimant's back injury prevents him from leading a normal life and the many limitations that the back injury places on his physical activities?

VII. Did the Court of Appeals err in finding that the Claimant failed to present evidence of a lower back impairment rating greater than twelve percent and that substantial evidence does not support the Commission's finding as to the scheduled member where there is *indeed* substantial evidence in the record to support the Full Commission's finding as to the scheduled member?

STATEMENT OF THE CASE

This case was heard by the Single Commissioner on March 5, 2018 in Spartanburg, South Carolina and by the Full Commission on July 16, 2018 in Columbia, SC. All parties were present for the hearing: The Claimant, Samuel Paulino, the Claimant's attorney, Stephen N. Garcia; the Defendants, Diversified Coating System and AmGuard Ins. represented by their attorney, George Gallagher.

The Single Commissioner Hearing was called at the request of Defendants/Appellants. The Defendants/Appellants sought a finding of permanency and argued that Claimant/Respondent was not permanently and totally disabled.[1] Defendants/Appellants further argued Claimant/Respondent had *not* sustained a 50% or greater disability to the spine and that there was no evidence of vocational disability on the part of the Claimant/Respondent citing Claimant/Respondent's age, educational background and work history in the Dominican Republic.[2] Defendants/Appellants admitted that Claimant/Respondent's alleged psychological condition was related to the work incident, however, Defendants/Appellants denied liability for the cost of medical treatment, and as grounds, cited that the psychological treatment was not performed by a physician of the Defendants/Appellant's choosing.[3]

The Claimant/Respondent argued that Claimant *was* permanently and totally disabled under S.C. Code § 42-9-10 or, alternatively, S.C. Code §42-9-30(21), and that he was entitled to future medical care, compensability as to a denied psychological claim, continuing medical treatment, and a lump sum award.[4] The Single Commissioner found that Claimant/Respondent

[1] Appendix p. 65, lines 20-22; *See also* p. 66, lines 10-12.
[2] *Id* at p. 65, line 23 through p. 66, line 12.
[3] *Id.* at p. 72, line 25 through p. 73, line 9.
[4] *Id.* at p. 67, line 5 through p. 69, line 20.

had sustained a disability of greater than 50%, that Defendant/Appellant failed to rebut the presumption of permanent and total disability, and therefore, Claimant/Respondent was permanently and totally disabled pursuant to S.C. Code § 42-9-30(21) and entitled to future medical care to maintain his current level of function.[5] Defendants/Appellants timely filed their Form 30 Request for Review. The Full Commission hearing was held on July 16, 2018. The Full Commission affirmed the Order of the Single Commissioner with a minor modification (by Consent of the Parties) that terminated the Claimant/Respondent's treatment benefits for psychological injury.[6] Defendants/Respondents appealed the Decision and Order of the Full Commission to the Court of Appeals, and after oral arguments, the Court of Appeals reversed the Decision of the Full Commission. Claimant now seeks Certiorari of the Reversal by the Court of Appeals.

[5] Appendix p. 39, Single Commissioner Order dated April 12, 2018.
[6] Appendix. p. 4, Full Commission Order dated October 3, 2018.

ARGUMENT

1. **Although the Court of Appeals finds that the Commission erred in affirming the Single Commissioner's award of permanent total disability under the scheduled-member statute, the substantial evidence in the record supports the Commission's affirmation of the Single Commissioner's award of permanent and total disability under the scheduled-member statute.**

2. **Although the Court of Appeals finds that the Commission erred in affirming the Single Commissioner's determination that the Claimant's back is impaired greater than fifty percent because there is no medical evidence in the record that supported the Single Commissioner's findings, there is indeed substantial evidence in the record to support the Single Commissioner's findings.**

It is respectfully submitted that the Court of Appeals has misapplied or disregarded the substantial evidence standard of review in the instant matter, and specifically in the above findings. The undersigned recognizes that the Court of Appeals may have their own opinion regarding the interpretation of the evidence in the Record, however, under the substantial evidence standard of review, the Court of Appeals may not substitute its judgment for that of the Commission as to the weight of the evidence on questions of fact, but may reverse where the decision is affected by an error of law.[7] In a workers' compensation case, the Court of Appeals does not have the authority to find facts; that authority belongs to the Commission.[8] As a general rule, the Court of Appeals must affirm the findings of fact made by the Commission if they are supported by substantial evidence.[9] The Court of Appeals has cited the exception to this rule that, where no evidence indicates a medical opinion or finding of fact of a single commissioner originated from a medical provider, such an opinion or finding is not supported by substantial evidence, however, that

7 *Potter v. Spartanburg School District*, 395 S.C. 17, 22, 716 S.E.2d 123, 126 (Ct.App. 2011)(*citing Stone v. Traylor Bros.*, 360 S.C. 271, 274, 600 S.E.2d 551, 552 (Ct. App. 2004).
8 *Burnette v. City of Greenville*, 401 S.C. 417,429, 737 S.E.2d 200, 206 (Ct. App. 2012); *citing Sigmon v. Dayco Corp.*, 316 S.C. 260, 262, 449 S.E.2d 497, 498 (Ct. App. 1994).
9 *Id.* at 427, 205.

exception does not arise in this case. While the undersigned does not purport to place himself in the collective mind of the Court of Appeals, the underlying theme of the Court's opinion appears to be that the Court simply does not agree that the Claimant has suffered a greater than 50% disability to his spine. However, the possibility of drawing two inconsistent conclusions from the evidence does not prevent the Commission's finding from being supported by substantial evidence.[10]

It is also respectfully submitted that the Court of Appeals has overlooked S.C. Code Ann. § 1-23-330(4) regarding evidentiary matters in contested cases. Specifically, the Court of Appeals overlooks the Commission's experience, technical competence, and specialized knowledge in the evaluation of evidence. S.C. Code Ann. § 1-23-330(4) reads in pertinent part, "The agency's experience, technical competence and specialized knowledge may be utilized in the evaluation of evidence." The Commission, collectively, has spent countless hours, weeks, and even years evaluating medical records and evidence. The Commission scours medical records searching for bits and pieces of evidence to support their decisions, and ultimately, to make findings and conclusions that are fair and supported by substantial evidence. Throughout that process, the Commission gains experience, technical competence, and specialized knowledge of the terms and definitions used within the medical community (*including, for example, the definition of "surgical outcomes and results"*). It is respectfully submitted that the Court of Appeals has disregarded the statutory authority of the Commission to avail themselves of their experience, technical competence and specialized knowledge in the evaluation of medical records as wells as the medical evidence as a whole. Quite frankly, the Commission deserves far more deference than it was afforded by the Court of Appeals in the instant matter.

10 *Burnette v. City of Greenville*, 401 S.C. 417,427, 737 S.E.2d 200, 205 (Ct. App. 2012).

3. **Although the Court of Appeals finds that the Claimant's treating physician, Dr. McHenry, reported that the Claimant's spine surgery was a success, there is no evidence in the record to support the finding that the Claimant's spine surgery was a success, and in fact, the record as a whole demonstrates anything but a successful surgical result.**

4. **Although the Court of Appeals finds that there is no evidence in the record indicating a poor surgical result and that as a result, the Commission erred in affirming the single commissioner's "medical opinion," to the contrary, there is indeed substantial evidence in the record to support a finding by the Commission that the Claimant suffered a poor surgical result as evidenced by the continued and persistent symptoms, limitations, restrictions, and difficulties Claimant suffered and continues to suffer following the surgical procedure to his spine.**

The Court of Appeals has singled out the Single Commissioner's finding (and the Full Commission's subsequent affirmation thereof) that "Claimant's impairment ratings are very low based on the poor surgical result" as having "particular significance." The Court of Appeals further opined there is no evidence in the record that would indicate a poor surgical result to support such a finding by the Single Commissioner and affirmation by the Full Commission. In support of this opinion, the Court of Appeals has incorrectly pointed to four specific points—points for which there is no evidence in the record to support: (1) that Dr. Math gave the only medical opinion regarding Claimant's impairment rating for his back and assigned a low back impairment of twelve percent, (2) Claimant's physical therapist opined that he could perform medium work duties that involved flexing and rotating his lumbar spine, (3) Claimant's treating physician and surgeon, Dr. McHenry, reported that Claimant's spine surgery "was a success" and the disc herniation and L3-L4 extrusion were no longer present, and (4) that Dr. McHenry stated a subsequent MRI showed no impingement on the Claimant's nerve that could cause leg pain. It is respectfully submitted that the Court of Appeals has erred in its application of the medical evidence, medical opinions, layperson testimony, and standard of review.

Whether Dr. Math gave the only medical opinion regarding Claimant's impairment rating for his back and assigned a low back impairment of twelve percent.

The Court of Appeals found that Dr. Math was the only physician who gave a rating to the Claimant's spine. Simply put, Dr. Math is *not* the only physician that stated their medical opinion regarding the Claimant's impairment rating to the back (twelve percent to the lumbar spine). In fact, on April 22, 2016, Dr. McHenry rated the Claimant at thirteen percent *to the whole person* while deferring to the Functional Capacity Evaluation on the issue of the Claimant's resultant restrictions and/or limitations.[11] Dr. Math indeed assigned a rating to the Claimant of twelve percent *to the lumbar spine* on December 6, 2017.[12] However, Defendants admitted that Claimant was "entitled to PPD compensation for loss of use of the back based on the thirteen-percent whole person impairment rating assigned by the treating neurosurgeon (Dr. McHenry)."[13] Defendants also admitted that Claimant had sustained a seventeen-percent regional impairment to the lumbar spine.[14] Defendants, on yet another occasion, admitted that Claimant had sustained a seventeen-percent impairment to the lumbar spine as per Dr. McHenry and a sixteen-percent impairment to the lumbar spine as per Dr. Math.[15] Defendants also admitted that the Claimant had sustained a "thirteen-percent whole person impairment rating which clearly converts under the AMA Guides, the multiplier factor that you use, that that translates into seventeen-percent."[16] Defendants further admitted that the Claimant had sustained a "seventeen-percent lumbar regional spine impairment

11 Appendix pp. 128-129.
12 Appendix pp. 317, 325.
13 Appendix p. 20, paragraph 2.
14 Appendix pp. 21 through 22.
15 Appendix p. 26, 2nd full paragraph; *see also* p. 27 and p. 28.
16 Appendix p. 104, lines 11 through 15.

as the baseline."[17] Defendants, even further, admitted that "the rating was… seventeen percent."[18] Respectfully, the Court of Appeals erred in finding that the only medical opinion regarding the Claimant's impairment rating for his back originated from Dr. Math. Dr. McHenry's rating in conjunction with the admission(s) by the Defendants, denotes, at a minimum, competing medical opinions of twelve percent to the lumbar spine, thirteen percent to the lumbar spine, sixteen percent to the lumbar spine, and seventeen percent to the lumbar spine.

Whether Claimant's physical therapist opined that he could perform medium work duties that involved flexing and rotating his lumbar spine.

Respectfully, there is not a single medical note or opinion in the record as a whole that originates from the *Claimant's* physical therapist stating that the Claimant could perform medium work duties. In fact, the Claimant attended twelve planned visits of physical therapy from September 3, 2015 to November 19, 2015 post-surgery.[19] The Claimant was discharged by his physical therapist with the assessment that he had "not progressed as anticipated and pain has been a limiting factor… even [in-clinic] PT has not been able to gain any increase[d] range."[20] Because the Court of Appeals did not cite the Record in support of this highlighted finding of fact that Claimant's physical therapist opined that he could perform medium work duties, the undersigned operates under the assumption that in stating this finding of fact, the Court of Appeals is referring to the Functional Capacity Evaluation performed on November 20, 2017.[21]

It should be noted that the Claimant testified that the *total amount of time* that he spent

17 Appendix p. 106, lines 6 through 8.
18 Appendix p. 107, lines 20 through 21.
19 Appendix p. 175 through 234.
20 Appendix p. 229.
21 Appendix pp. 132 through 137 and pp. 358 through 360.

performing this Functional Capacity was approximately two hours and twenty minutes.[22] The Functional Capacity Evaluation, performed on November 20, 2017, was a focused evaluation aimed only at determining whether the Claimant had achieved maximum medical improvement[23] and to determine the Claimant's ability to return to work.[24] The Claimant did *not* receive treatment or recommendations from this physical therapist. The Claimant did *not* establish a long-standing relationship with this physical therapist, either. In essence, the physical therapist evaluated the Claimant over a two-hour-and-twenty-minute period and gave her opinion regarding the Claimant's physical demand capacity. It is respectfully submitted that the Court of Appeals misapprehended and/or overlooked the nature of the relationship between the Claimant and the therapist that performed the Functional Capacity Evaluation, and in turn, misapprehended and/or overlooked the weight that should be given to the results/findings of Functional Capacity Evaluation itself.

It is also respectfully submitted that the Court of Appeals erred in overlooking the full opinion of the therapist that performed the functional capacity evaluation. The Court of Appeals found, as fact, that the Claimant could perform medium work duties that involved flexing and rotating his lumbar spine. Again, because there is no specific citation of the Record to signal where the Court of Appeals derived this stated fact, and although the undersigned does not agree that the Record supports such a finding of fact by the Court of Appeals, the undersigned continues to operate under the aforementioned assumption that the Court of Appeals is relying on page three hundred fifty-nine (3) of the Appendix. However, this very page specifically states that the Claimant "was noted to have decreased range of motion with lumbar/trunk rotational and flexion movements, and when

22 Appendix p. 85, lines 10 through 12.
23 Appendix, p. 132, 313.
24 Appendix p. 317.

lifting floor to waist with decreased body mechanics to decrease weight bearing on the [right lower extremity]…" The report also states that Claimant had max lumbar flexion of 50%, max lumbar extension of 50% and max thoracic rotation of 75% left and right.[25] Even further, the Claimant's physician, Dr. Math, evaluated the results of the Functional Capacity Evaluation, disagreed as to whether the Claimant could return to work,[26] and assigned permanent physical limitations of light work duty with no lifting of greater than ten pounds.[27] The Functional Capacity Evaluation Report is replete with statements that paint a much bleaker picture than that which the Court of Appeals states as fact (i.e. the ability to perform medium work duties that involved flexing and rotating his lumbar spine). For instance, the report states:

- The Claimant "[a]mbulates with cane in his LEFT hand, decreased stances time on [right lower extremity], decreased [right] hip/knee flexion in swing phase, overall antalgic gait pattern."[28]

- Claimant "reported low back and hip pain with all MMT testing on R LE, and increased pain with MMT of Left Hip."[29]

- For the simple task of walking, "[a]erobic capacity was unable to be determined because of intense pain and antalgic gait on treadmill… patient was unable to tolerate the 5% grade and the minimum 2.0mph walking speed to complete the test. Pt was able to walk the 20min at 1.5mph with significant compensations… the following compensations were observed: decreased stance time on R LE creating asymmetrical stride length, decreased R hip/knee flexion in swing phase, labored breathing and mild sweating, forward flexed hip/trunk, B midfoot strike instead of heel strike, overall antalgic gait pattern, 8/10 low back pain reported after."[30]

- Claimant "required the use of [upper extremities] on chair to return to standing, multiple attempts made without use of furniture that results in short drop back

25 Appendix p. 135.
26 Appendix p. 317.
27 Appendix p. 325.
28 Appendix p. 134.
29 *Id.*
30 Appendix p. 136.

to ground, [Claimant] was only successful after using [upper extremities] on chair base to return to standing."[31]

This list is *not* exhaustive. The portions of the Record cited have even more detail regarding the Claimant's physical condition that directly contradicts the finding of fact by the Court of Appeals that the Claimant *could* perform medium work duties that involved flexing and rotating his lumbar spine. Respectfully, it is submitted that the Court of Appeals erred in finding as fact that the Claimant could perform medium work duties. Further, it is respectfully submitted that the Court of Appeals erred in overlooking and/or misapprehending the medical opinion of Dr. Math, who opined that the Claimant suffered permanent physical limitations of light duty with no lifting of greater than ten pounds irrespective of the findings contained within the Functional Capacity Evaluation.[32]

Whether Claimant's treating physician and surgeon, Dr. McHenry, reported that Claimant's spine surgery "was a success" and the disc herniation and L3-L4 extrusion were no longer present, and the implication of Dr. McHenry stating that a subsequent MRI showed no impingement on the Claimant's nerve that could cause leg pain.

Respectfully, the undersigned is particularly and especially concerned that the Court of Appeals entirely misconstrued the evidence in the record as a whole in determining that Dr. McHenry "reported that the Claimant's spine surgery was a success and the disc herniation and L3-4 extrusion were no longer present."[33] To the best of the undersigned's knowledge, the word "success" does not appear in the Record *at any time*, and certainly not for the purpose of

31 Appendix p. 137.
32 Appendix p. 325.
33 Appendix p. 409.

describing the Claimant's surgical result. To the contrary, the surgeon, Dr. McHenry, stated, "Patient is 8 weeks [status post] L3-4 microdiscectomy… patient has just not done as expected in the post-op period."[34] The Record as whole is not consistent with the finding made by the Court of Appeals that the Claimant's spine surgery was a success. It is also offered that the finding that "a subsequent MRI showed no impingement" has no bearing whatsoever on whether the surgical procedure can be considered a success or failure. The undersigned further offers that the Record as a whole supports the Single Commissioner's finding and the Full Commission's affirmation that the Claimant suffered a "poor surgical result." The discrepancy between the undersigned's assertion and the finding of fact by the Court of Appeals appears to turn on the definition of "success" and the understanding of success criteria for surgical procedures. I would respectfully request that this Honorable Court take notice of the plain meaning of the Single Commissioner's and the Full Commission's intended use of the word "result". Merriam-Webster defines "result" (noun) as "something that results as a consequence, issue, or conclusion." Respectfully, it is far more reasonable to conclude, that by the use of the word "result", the Single Commissioner and Full Commission were concerned with the "result" as it pertained to the alleviation of the Claimant's symptoms and not as it pertained to whether the surgical procedure successfully removed the compression from the Claimant's nerve.

In applying the aforementioned definition to the Claimant's surgical outcome (or result), it is clear that the Claimant indeed suffered a "poor surgical result" as found by the Single Commissioner and affirmed by the Full Commission. Respectfully, there is little, if anything, in the Record to support any other finding. In fact, from a logical standpoint, it simply would not be reasonable to interpret the Single Commissioner's and the Full Commission's finding that the

34 Appendix p. 153.

Claimant suffered a poor surgical result as anything but that the Claimant's *outcome* was poor based on the continued difficulties and permanent nerve damage that the Claimant suffered (and continues to suffer).

This finding by the Court of Appeals appears to infer that because Dr. McHenry, in reviewing the MRI performed on February 15, 2017, opined that the disc herniation and extrusion at L3-4 is no longer present, *that therefore*, the surgical result was successful. That is a clear misapprehension of the purpose of the MRI study altogether. The purpose of the study was to determine whether the Claimant would benefit from further surgical intervention.[35] Because the MRI did not show any further compression of the spine that would alleviate symptoms, a second surgery was not recommended. However, that is *not* evidence of a successful surgical outcome or result.

That leads us to the discussion regarding the Claimant's permanent nerve damage and the inferences made by the Court of Appeals. The finding(s) made by the Court of Appeals appears to infer that because Dr. McHenry opined that the MRI showed no impingement on the Claimant's nerve that could cause leg pain, that somehow, that opinion suggests that either the Claimant had a successful surgical result, that the Claimant no longer suffered the symptoms and/or condition (radiculopathy) that hoped to be resolved by the surgical procedure, or both. Again, that is a clear misunderstanding of the definition of "success" or "failure" of a surgical procedure, and more importantly, that is a clear misunderstanding of Dr. McHenry's stated opinion. Dr. McHenry wanted to determine whether any further surgical intervention was indicated. As we have already established, Dr. McHenry opined that the Claimant would not benefit from further surgical

35 Appendix p. 168, ("I do not think [Claimant] would benefit from further surgical intervention.")

intervention.[36] However, what appears to be overlooked is that Claimant suffered permanent nerve root damage as a result of the previously existent nerve root impingement that was corrected by the L3-4 laminectomy performed in July of 2015. The medical evidence in the Record supports the position that Claimant suffered permanent nerve root damage irrespective of whether the MRI performed on February 15, 2017 showed that the L3-4 extrusion was no longer present, to wit:

- Dr. McHenry continued to prescribe **neuropathic pain medication** to help control the symptoms associated with the Claimant's permanent nerve damage.[37]

- Dr. McHenry noted "straight leg raise positive on the right with radicular pain to the foot."[38]

- Dr. Math opined that Claimant would require chronic pain management in the form of pain medication. **Neuropathic medication**, muscle relaxants,. Interventions, like epidural steroid injection. **He may also be candidate for spinal cord stim P for his chronic right radiculopathy**.[39] (Emphasis added.)

- Dr. McHenry never once questioned the origin of the Claimant's continued radicular symptoms—and quite frankly, *not a single medical provider questioned the Claimant's honesty or credibility regarding his presentation of pain… and neither did the Commission…* ***and neither did the Defendants.***

Insomuch as the findings by the Court of Appeals infer that because Dr. McHenry opined that the MRI showed no impingement on the Claimant's nerve that could cause leg pain, therefore, the Claimant had a successful surgical result and/or that the Claimant no longer suffered the symptoms and/or condition (radiculopathy) that was expected to be resolved by the surgical procedure, it is respectfully submitted that the Court of Appeals erred in reaching said finding.

The Single Commissioner, and Full Commission by way of affirmation, relied on

36 Appendix p. 168 ("I do not think [Claimant] would benefit from further surgical intervention.")
37 Appendix p. 168.
38 Appendix p. 168.
39 Appendix p. 317.

substantial evidence in the record as a whole to support the finding that the Claimant suffered a poor surgical result. This finding was not merely an opinion based on surmise, conjecture, or speculation, but arguably, an unopposed, medical fact. **The undersigned recognizes that the Court of Appeals may have their own opinion regarding the interpretation of the evidence in the record, however, under the substantial evidence standard of review, the Court of Appeals may not substitute its judgment for that of the Commission as to the weight of the evidence on questions of fact, but may only reverse where the decision is affected by an error of law.**[40] In the instant matter, although the Claimant argues that there is no evidence in the Record to support a finding by the Court of Appeals that the Claimant's surgical outcome was successful, even if there was evidence to that effect, there is *also* substantial evidence in the record to support a finding that the Claimant suffered a poor surgical result. **Even if the Court of Appeals disagrees with the Single Commissioner and the Full Commission as to the finding that the Claimant suffered a poor surgical result, the Court of Appeals is bound by the standard of review and may not substitute its judgment for that of the Full Commission.** Even more so, it is respectfully submitted that by finding that that the Claimant's surgery was "successful", the Court of Appeals is guilty of the same error of which it now accuses the Single Commissioner and Full Commission—adopting a medical opinion that is not supported by *any* evidence in the Record. **There is not a single medical provider nor is there a scintilla of evidence in the record to support a finding that the Claimant's surgical procedure was successful—by any metric.**

40 *Potter v. Spartanburg School District*, 395 S.C. 17, 22, 716 S.E.2d 123, 126 (Ct.App. 2011)(*citing Stone v. Traylor Bros.*, 360 S.C. 271, 274, 600 S.E.2d 551, 552 (Ct. App. 2004).

5. **Although the Court of Appeals found that Claimant failed to rebut Dr. Math's twelve-percent impairment rating to his back with medical evidence, and therefore, the findings of fact adopted from the Single Commissioner's Order are inconclusive, there is substantial evidence in the record to support the Single Commissioner's findings of fact as adopted by the Full Commission.**

6. **Although the Court of Appeals found that the Claimant did not testify as to the character of his back injury, the specific ways his back injury prevents him from leading a normal life, and the limitations the back injury places on his physical activities, the Court of Appeals erred in overlooking the countless instances in which the *medical evidence* specifically documents and highlights the many ways that the Claimant's back injury prevents him from leading a normal life and the many the limitations that the back injury places on his physical activities.**

7. **Although the Court of Appeals found that the Claimant failed to present evidence of a lower back impairment rating greater than twelve-percent and that substantial evidence does not support the Commission's finding as to the scheduled member, there is indeed substantial evidence in the record to support the Single Commissioner's and Full Commission's finding as to the scheduled member.**

It is respectfully submitted that the Court of Appeals erred when it found that the "Claimant failed to rebut Dr. Math's twelve-percent rating to his back with medical evidence" and that the Single Commissioner's finding and Full Commission's affirmation is inconclusive. In reaching this finding, the Court of Appeals appears to dismiss the medical evidence within the Record, but leaves the door open for the possibility that Dr. Math's twelve-percent rating can be rebutted with layperson testimony. Although the Court of Appeals eventually goes on to find that the Claimant's lay testimony does *not* rebut Dr. Math's twelve-percent rating, the Court of Appeals *does* cite various examples of relevant types of layperson testimony that could be used to rebut the medical evidence in the Record, to wit:

- Where Claimant testified exclusively to the pain associated with his injury and the burden it placed on his daily activities;

- Compensation is based solely on the character of the injury and not upon the earnings or earning capacity of the injured employee;

- The issue under the scheduled-member statute is not impairment as to the whole body, but rather it is the loss of use of a specific body part;

- The specific ways a Claimant's back injury prevents him from leading a normal life; and

- The limitations the back injury places on the Claimant's physical activities;

The Court of Appeals found that the Claimant to failed to present evidence in the form of layperson testimony that highlighted the aforementioned points so as to rebut Dr. Math's twelve-percent rating to the back. The Court of Appeals further found that the Claimant failed to present evidence of a lower back impairment rating greater than twelve percent, and as a result, substantial evidence does not support the Commission's finding as to the scheduled member of a lower back impairment rating of greater than twelve percent.[41] It is respectfully submitted that the Court of Appeals erred in overlooking the *medical evidence* in the Record as a whole that specifically addresses the very examples that the Court of Appeals found was *not* presented as layperson testimony. In addressing the aforementioned medical evidence that the Court of Appeals has opined was *not* offered as layperson testimony, I will limit the discussion to only those subjective and objective observations and opinions within the Record regarding the Claimant's limitations that prevent him from living a normal life and that are noted *after* the date of maximum medical improvement. In doing so, the inference is that any continuing said issues, limitations, and restrictions existed at the time that the Single Commissioner and Full Commission made their findings.

On the Claimant's last visit with the surgeon, Dr. McHenry, various observations—both

41 Note that Claimant, within this Petition, has already argued that the evidence establishes that there were competing ratings of twelve percent, thirteen percent, sixteen percent, and seventeen percent.

objective and subjective—were noted in the medical notes: (1) positive for activity change and fatigue, (2) positive for shortness of breath, (3) positive for palpitations, (4) positive for difficulty urinating, (5) positive for back pain and gait problems, (6) positive for sleep disturbances and dysphoric mood, (7) sitting straight leg raise positive on the right with radicular pain to the foot, (8) leg pain, right, (9) pain of back and right lower extremity, (10) muscle weakness, (11) difficulty walking, (12) back stiffness, and (13) chronic low back pain.[42] On the Claimant's last visit in the Record with the pain management physician, Dr. Math, various observations, both objective and subjective, were noted in the medical notes: (1) patient reports that he tried his best during the FCE, but the pain aggravated after the FCE was completed for next couple of days is afraid he cannot go back to work, (2) patient reports persistent pain in the right lower extremity in L5 distribution, (3) patient reports that his pain is activity limiting, (4) patient feels his pain is not adequately controlled, (5) patient is concerned that he is not able to participate in his daily activities due to the pain, (6) considering the duration of the pain, most likely he will have chronic pain issues (tearful when discussing), (7) pain score of 6 (scale of 1-10), (8) pain limitations: general activity, (9) pain interventions: medications, (10) exhibits tenderness on musculoskeletal examination, (11) ambulates with cane, (12) has decreased stance and right lower extremity Lumbar flexion is up to 40-50º lumbar extension is 5º causes severe pain, (13) tenderness over right lower lumbar paraspinal muscles, (14) reflexes 1+ at bilateral knee symmetrically absent at ankle, (15) plantars are downgoing, (16) straight leg test causes pain at the back of the knee, (17) slightly impaired sensation on the lateral border of the right foot, (18) will require chronic pain management in the form of pain medication, neuropathic medication, muscle relaxants, epidural steroid injections, (19) candidate for spinal cord stimulator for chronic right radiculopathy, and

42 Appendix pp. 167 through 171.

(20) permanent physical limitations of no lifting greater than 10 pounds.[43] The Claimant's Functional Capacity Evaluation is even more indicative of how the Claimant's injury prevents him from leading a normal life and the limitations that the injury has placed on his daily activities (and although some of these limitations have already been highlighted in this memorandum, it deserves repeating, while keeping in mind that these are *all* observations of the evaluator and *not* subjective complaints by the Claimant): (1) ambulates with cane in LEFT hand, (2) decreased stance time on right lower extremity, (3) decreased right hip/knee flexion in swing phase, (4) overall antalgic gait pattern, (5) lumbar flexion of 50%, (6) lumbar extension of 50%, (7) thoracic rotation left and right of 75%, (8) aerobic capacity unable to be determined because of intense pain and antalgic gait on treadmill, (9) unable to tolerate 5% grade and minimum 2.0 MPH walking speed to complete test, (10) able to walk 1.5 MPH with significant compensations, (11) decreased stance time on right lower extremity creating asymmetrical stride length, (12) decreased right hip and knee flexion in swing phase, (13) labored breathing, (14) forward flexed hip and trunk, (15) bilateral midfoot strike instead of heel strike, (16) overall antalgic gait pattern, (17) 8/10 low back pain reported after walking test, (18) frequent weight shift on the left side, (19) numbness down right lower extremity to foot as standing progressed, (20) weight shifted on left side with overhead activity, (21) heavy wight shift onto left lower extremity while lifting floor to waist, (22) increased trunk and hip flexion while lifting floor to waist, (23) increased extension to low back with waist to overhead lifting, (24) decreased lumbar curve reversal with 20 repetitions of lumbar flexion, (25) hands reached only top of shit with repetitive lumbar flexion, (26) only able to rotate 75% lumbar range of motion, (27) elbows extended with double carry of 100 feet, (28) increased lumbar extension with double carry of 100 feet, (29) mild labored breathing with double carry of 100 feet, (30)

43 Appendix pp. 314 through 325.

required use of upper extremities on chair to return to standing, (31) multiple attempts to return to standing without use of furniture resulted in a short drop back to the ground, (32) patient was only successful in returning to standing after using upper extremities on chair base to return to standing, (33) 6/10 low back pain reported after transfer test, (34) high pain focus noted according to Million Visual Analog Scale, (35) decreased range of motion noted with lumbar and trunk rotational and flexion movements, (36) decreased body mechanics to decrease weight bearing on right lower extremity when lifting floor to waist, (37) aerobic capacity was unable to be determined due to inability to complete test due to safety concerns associated with antalgic gait pattern while walking at the required speed and incline.[44] With reference to just three medical notes totaling just twenty three pages—of a Record that contains nearly one hundred fifty pages of medical notes—the Claimant has identified seventy separate points of medical evidence that specifically demonstrates the character of the Claimant's back injury (painful, limited range of motion, etc.), the specific ways his back injury prevents him from leading a normal life (labored breathing, difficulty standing, shortness of breath, limited range of motion, high pain focus, etc.), and the limitations the back injury places on his physical activities (difficulties with even slow walking, no lifting of greater than 10 pounds without significant pain, antalgic gait, altered heel strike, etc.).

Following its finding that (1) the Claimant has failed to present layperson testimony rebutting the 12-percent impairment assigned by Dr. Math, and further, (2) following its finding that the Claimant has failed to testify as to the specific ways his back injury prevents him from leading a normal life and the limitations the back injury places on his physical activities, and finally, (3) following its finding that Claimant failed to rebut Dr. Math's 12-percent rating with medical evidence, it is respectfully submitted that the Court of Appeals erred in its interpretation and

44 Appendix pp. 132 through 137; *see also* Appendix pp. 359 and 360.

application of the Record as a whole.

CONCLUSION

It is respectfully submitted that the Court of Appeals erred in failing to adhere to the constraints of the relevant standard(s) of review in reaching its findings, conclusions and REVERSAL. Where the standard of review required the Court of Appeals to scour the Record to determine whether there is evidence to support the Commission's Decision, instead, the Court of Appeals improperly scoured the Record for evidence to *refute* the Commission's Decision. This was error. While the Court of Appeals may have their own opinion regarding the interpretation of the evidence in the Record, under the substantial evidence standard of review, the Court of Appeals may not substitute its judgment for that of the Commission as to the weight of the evidence on questions of fact, but may reverse only where the decision is affected by an error of law. The Court of Appeals has not identified *any* error of law. Respondent respectfully requests that the REVERSAL of the Court of Appeals be overturned and for any further relief this Court deems just and proper.

Respectfully submitted,

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August 9, 2022

Greenville, SC

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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE
SOUTH CAROLINA WORKER'S COMPENSATION COMMISSION

Gene McCaskill, Commissioner
R. Michael Campbell, II, Commissioner
T. Scott Beck, Commissioner

SCWCC File No. 1508995

Appellate Case No. 2018-001964

Samuel Paulino, Claimant Respondent,

v.

Diversified Coatings, Inc., Employer, and
AmGuard Ins. Co., Carrier Appellants.

CERTIFICATION OF COUNSEL

I certify that a petition for rehearing was made and finally ruled on by the Court of Appeals.

/s/ Stephen N. Garcia
Stephen N. Garcia, SC Bar No. 76191