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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

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Appeal No.: 2022-000864

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William D. Downes, Employee ..... Respondent,

v.

Bon Secours Mercy Health, Inc., Employer,
Safety National Casualty Corporation, Carrier, ..... Appellants.

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# INITIAL BRIEF OF APPELLANTS

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I. WHETHER THE COMMISSION ERRED BY ORDERING DEFENDANTS TO PROVIDE A BACK SURGERY THAT EVERY MEDICAL PROVIDER OPINED WAS NOT RECOMMENDED OR NECESSARY, WITH THE EXCEPTION OF CLAIMANT'S HAND-PICKED SURGEON, TO WHOM THE COMMISSION ARBITRARILY AND CAPRICIOUSLY ASSIGNED THE GREATEST WEIGHT?

II. WHETHER THIS COURT PROPERLY ALLOWED THIS APPEAL TO PROCEED TO THE MERITS?

William D. Downes ("Claimant") sustained an admitted injury to his low back on April 17, 2018, arising out of and in the course of his employment as a respiratory therapist with Bon Secours Mercy Health. He was assisting a large patient into a CT scanning area when the patient began to fall and, in the course of trying to catch her, Claimant felt a pop in his low back. During the course of his treatment, Claimant also sustained an admitted injury to his left Achilles tendon. The only issues on appeal relate to whether Claimant is entitled to lower back surgery, when the overwhelming weight of medical evidence finds such surgery is unwarranted for his condition and, consequently, whether the only doctor who recommended that surgery should have been named the authorized treating physician.

## STATEMENT OF THE CASE

This case was initiated by Claimant filing a Form 50 on February 26, 2021, alleging injury to his left leg, low back and psyche, seeking additional treatment and benefits, and requesting a hearing. (Form 50, dated Feb. 26, 2021). Appellants Bon Secours Mercy Health, Inc. and Safety National Casualty Corporation, Defendants below, filed a timely Form 51, acknowledging a compensable injury to Claimant's "left leg (Achilles tendon) and low back only," and denying that he is entitled to any additional medical care because he had reached maximum medical improvement ("MMI"). (Form 51, dated March 26, 2021). Defendants subsequently filed a Form 21, seeking to stop payment of temporary total disability benefits ("TTD") and requesting a credit. (Form 21, dated May 19, 2021).

The parties filed pre-hearing briefs and APA submissions, and were heard by Single Commissioner R. Michael Campbell, II, on August 12, 2021. The Single

Commissioner filed his Order on October 22, 2021, finding and concluding that Claimant had not reached MMI, that he was entitled to further treatment in the form of surgery to be performed by a physician of Defendants' choosing with a specialty to the back. (Single Commissioner Order, filed Oct. 22, 2021).

Claimant moved for reconsideration of the Order to the extent that it allowed Defendants to choose the physician to perform the surgery. (Claimant's Motion for Reconsideration, dated Oct 25, 2021). Defendants moved for reconsideration of the Single Commissioner Order on several grounds, including the basis for affording greater weight to Claimant's hand-picked physician than to other physicians, finding that Claimant had not reached MMI, and that he was entitled to back surgery. (Defendants' Motion for Reconsideration, dated Oct. 27, 2021). The Single Commissioner denied both motions for reconsideration. (Motion Order filed Nov. 4, 2021) (Motion Order filed Nov. 8, 2021).

On November 5, 2021, Defendants filed a Form 30, Request for Commission Review, (Form 30, dated Nov. 5, 2021), and on November 9, 2021, Claimant filed a separate Form 30. (Form 30, dated Nov. 9, 2021).

Both parties filed appellate briefs. (Claimant's Brief of A[p]pellant, dated Dec. 22, 2021) (Defendant-Appellant's Brief to the Appellate Panel, dated Dec. 23, 2021). Defendants responded to Claimant's appellate brief. (Defendant-Respondent's Brief to the Appellate Panel, dated Jan. 6, 2022). Claimant filed a Respondent's Brief, (Claimant's Brief of Respondent, dated March 7, 2022), to which Defendant replied. (Defendant-Appellant's Rely Brief, dated March 17, 2022).

The Full Commission entered its Decision and Order on June 8, 2022, affirming the Single Commissioner in part and reversing in part. In particular, the Commission gave the greatest weight to the opinions of Dr. Phillip Esce and Dr. Charles Kanos because they "had the benefit of the most recent MRI of claimant's back." Next, because Dr. Esce and "his assistant" saw Claimant "on several occasions" as opposed to only one evaluation by Dr. Kanos, the Commission gave greater weight to Dr. Esce than to Dr. Kanos. Consequently, the Commission held that Claimant was entitled to the back surgery recommended by Dr. Esce, to be performed by Dr. Esce, who was designated as the authorized treating physician.

Defendants timely appealed to this Court, which requested legal memoranda on the issue of whether this appeal is interlocutory. After reviewing submissions by both parties, on August 3, 2022 this Court ruled that the appeal should proceed forward.

## FACTUAL BACKGROUND

1. Lay Testimony.

Claimant sustained an admitted injury to his low back on April 17, 2018 arising out of and in the course of his employment as a respiratory therapist with Bon Secours Mercy Health. (Tr. p. 5, lines 15-19). Claimant testified that, as of the date of the Single Commissioner hearing, he was 56 years old. He had worked for Employer as a respiratory therapist "altogether for 27 years." (Tr. p. 14, line10 – p. 15, line 1).

On April 17, 2018, he was assisting a large patient into a CT scanning area when the patient began to fall and, in the process of trying to catch her, Claimant felt a pop in his low back. (Tr. p. 16, lines 6-20) (Cl. APA p. 1). During the course of the medical

treatment of his low back injury, Claimant also sustained an injury to his left Achilles tendon, (Tr. p. 17, lines 21-24), for which Defendants provided medical treatment.

Claimant testified that he was sent for an MRI, after which he saw Dr. Bucci. Dr. Bucci examined him and sent him to Dr. Han for pain management, which consisted of four sets of injections over a year's time. Along with physical therapy, the treatment provided Claimant with "temporary relief." (Tr. p. 18, lines 5-24; p. 26, lines 12-15; p. 26, lines 16-20). He testified that the boot that he wore after the Achilles repair "really hurt [his] back." (Tr. p. 19, lines 4-15).

Claimant testified that he wanted to see Dr. Bucci again but "was told I couldn't. I wanted to but I was told that he had released me and I couldn't go back to see him." (Tr. p. 19, lines 20-23). As a result, he testified, "I took it upon myself to go see Dr. Esce's group in Spartanburg." (Tr. p. 19, line 25 – p. 20, line 1).

Claimant acknowledged that he also obtained his own Independent Medical Examination ("IME") with Dr. William DeVault, who did not recommend further treatment. (Tr. p. 27, lines 15-20). Claimant agreed with his counsel that Dr. Esce had reasoned "that everything that could be done conservatively had been tried and you had not received the level of relief" that he was hoping for. (Tr. p. 30, lines 10-15). However, on cross-examination Claimant admitted that the treatment recommended by Dr. Kanos, which included medication and facet blocks, was not the same treatment he had received before. (Tr. p. 27, line 21 – p. 28, line 11). Claimant agreed that Dr. Esce was the only physician he had seen who recommended surgery for his back. (Tr. p. 30, lines 1-6). He also agreed that it was Dr. Kanos' opinion that "surgery was unlikely to help his back." (Tr. p. 30, line 23 – p. 31, line 8).

2. Medical Evidence.

In reviewing the medical evidence, it is important to keep in mind that all of the doctors who have treated Claimant's low back, with the sole exception of Claimant's hand-picked physician, Dr. Esce, whom he saw only twice, have opined specifically that surgery to the L5-S1 disc is not recommended or appropriate for Claimant's back injury and that he has reached MMI.

Claimant initially treated with Dr. Scott Grubbs with Workwell from April 19, 2018 to July 25, 2018. Dr. Grubbs arranged for Claimant to receive chiropractic treatment which Claimant indicated was helping. (Cl. APA pp. 2-18). On May 7, 2018, Dr. Grubbs had lumbar films performed which showed "a significantly narrowed L5-S1 disc space. It looks chronic, so may or may not be related to his present symptoms." (Cl. APA p. 7). Dr. Grubbs ordered an MRI of Claimant's lumbar spine, which was performed on July 2, 2018.

Radiologist Dr. Jeffrey Shramek's impressions were, "[m]ild L3-4 through L5-S1 disc bulges. Midline L5-S1 disc protrusion. Mild left foraminal disc protrusion. Mild Left L3 foramen narrowing." The specific findings for L5-S1 were, "Narrowed and degenerated disc. Small midline disc protrusion. Mild posterior and lateral disc bulge and with small endplate osteopytes. Mild edema of the right –sided endplates at this disc level." (Def APA pp. 11-12).

Dr. Grubbs reviewed the MRI and commented, "[l]ow back pain with disc bulging of L3-4 through L5-S1 with some midline disc protrusion at L3-4 and L5-S1. It is difficult to know whether or not these are actually causing issues, because most of his symptoms are on the right side, not on the left side, and focal changes seem to be more on

the left side." (CL APA pp. 15-16). On July 25, 2018, Dr. Grubbs felt it was appropriate for Claimant to see a back specialist, and recommended a "neurosurgical consultation or physiatry." (Cl. APA p. 18).

Claimant saw Dr. Michael Bucci of Piedmont Spine and Neurosurgical Group on August 21, 2018. After examining Claimant and reviewing the MRI, Dr. Bucci noted that the MRI "shows degenerative disc disease at L5-S1 with some minor bulging without malalignment or spinal stenosis." After a physical exam, Dr. Bucci assessed Claimant with "[a]cute bilateral low back pain without sciatica," and degenerative disc disease. He determined Claimant's condition was "Nonsurgical" and referred him to pain management, indicating it was appropriate for Claimant to continue seeing a chiropractor. (Cl. APA pp. 21-29).

Claimant began seeing Dr. Sung Han of Piedmont Comprehensive Pain Management Group for pain management. Dr. Han noted that Claimant had "seen Dr. Bucci, a neurosurgeon," that Claimant was "not a surgical candidate," and recommended lumbar epidural steroid injections. Claimant saw Dr. Han from October 17, 2018 until he was released at MMI, during which time he received lumbar interlaminar steroid injections on October 24, 2018, December 14, 2018, August 14, 2019, and December 11, 2019. After each injection, Claimant reported improvement. On April 1, 2020, Dr. Han determined Claimant was at MMI for the lumbar spine and instructed him to "[f]ollow up as needed." (Cl. APA pp. 30-46).

Meanwhile, shortly after beginning pain management with Dr. Han, Claimant sought out Dr. Timothy Monroe at Carolina Orthopaedic & Neurosurgical Associates[1] on his own, in order to obtain a second neurosurgical opinion. Dr. Monroe did not recommend surgery but, instead, assessed Claimant with "Lumbar DDD/Spondylosis L5-S1 disc bulge," and simply indicated he should follow up as needed. (Cl APA pp. 47-49).

On September 23, 2020, Claimant saw Dr. Ping Gao of AnMed Health Occupational Medicine for an impairment rating for his lower back. After examination, Dr. Gao noted that Claimant "is not a surgical candidate per Dr. Bucci." Dr. Gao indicated that Claimant had reached MMI, and assigned an impairment rating of 1% to the whole person due to chronic low back pain. (Def. APA pp. 14-19). Dr. Gao filled out a Form 14B noting that Claimant had reached MMI on April 1, 2020, providing a 1% rating to the low back, and indicating that no further medical treatment would lessen the period of disability. (Def. APA p. 21).

Dissatisfied, Claimant began seeking medical treatment outside of the workers' compensation system. First, he saw Nurse Practitioner Julie Justice with Carolina Orthopaedic and Neurosurgical Associates on January 8, 2021. NP Justice, who clearly is not a neurosurgeon, did not provide any treatment but, instead, simply ordered an updated MRI. (Cl. APA pp. 55-57).

Next, Claimant sought his own IME with Dr. DeVault on January 9, 2021. After a thorough review of Claimant's medical files and a physical exam, Dr. DeVault did not recommend surgery but, instead, concluded that Claimant had reached MMI, and

[1] This is the same practice with which Dr. Esce is associated. (Tr. p. 20, lines 2-5). Although Claimant claimed that he did not see Dr. Monroe himself, but only saw his physician's assistant, the medical records indicate that the provider was "Timothy Monroe MD," not a P.A. (Cl. APA pp. 47-50).

assigned him a 17% impairment rating for the lumbar spine. Dr. DeVault indicated Claimant would need additional conservative treatment and concluded he "is suitable only for sedentary desk type work at this time." (Def. APA pp. 3-10).

The MRI recommended by Nurse Justice was performed at Piedmont Imaging on January 20, 2021. Dr. Raul Ceballos, the reviewing radiologist, noted a comparison to the "MRI lumbar spine without contrast dated 07/02/2018." Dr. Ceballos stated that "[a]gain" the later MRI showed "minimal canal, minimal right and mild left neural forminal stenosis at the L3-L4 level," and "[a]gain, there is minimal canal and mild bilateral neural forminal stenosis at the L4-L5 level," and "[a]gain, there is minimal indentation of the ventral thecal sac and minimal bilateral neural foraminal encroachment at the L5-S1 level due to combined decreased disc height, disc bulge and shallow posterior central disc protrusion." Dr. Ceballos concluded there was "[n]o interval change," only "[m]inor multilevel acquired spinal encroachment without spinal cord or nerve root compression apparent," and "[m]ultilevel degenerative disc disease, worse at the L5-S1 level." (Cl. APA pp. 68-69).

Claimant returned to Carolina Orthopaedic on February 12, 2021 to see Dr. Esce. Although the term "moderate" does not appear on the January 20, 2021 MRI Report, (Cl. APA pp. 68-69), Dr. Esce indicated that the "MRI done at Piedmont Imaging shows L5-S1 moderate disk herniation central extending to the left side with decreased disk height." Dr. Esce stated, "[p]lan is for a left L5-S1 microdiskectomy." (Cl. APA pp. 60-62).

Claimant saw Dr. Kanos of Southeastern Neurosurgical and Spine Institute on May 17, 2021 for an IME. Dr. Kanos noted Dr. Esce's recommendation for a microdiscectomy. Dr. Kanos evaluated Claimant's two MRIs, concluding, as had Dr.

Ceballos, that "MRI on 1.10.21 was similar to 2018s MRI." Dr. Kanos noted that the MRI revealed a "relatively mild bulge at L5-S1. It's not causing significant stenosis." Dr. Kanos opined that, "[i]n terms of the L5-S1 discectomy, I am not inclined to recommend that. I think the odds of getting significant improvement in the back pain are low as his pain is strongly non mechanical." Dr. Kanos recommended sedentary activity, pain management, "medication, therapy or possible facet blocks or other injections." Dr. Kanos concluded Claimant was at MMI, assigned a 5% impairment rating to the lumbar spine. (Def. APA pp. 23-25).

Following the IME with Dr. Kanos, Claimant returned to Dr. Esce on June 30, 2021. At that point, Dr. Esce stated that Claimant "has really done everything possible for this but no relief," and again recommended "a microdiskectomy at L5-S1." (Cl. APA pp. 63-65).

## STANDARD OF REVIEW

Judicial review of a Commission decision is directed by the substantial evidence rule of the Administrative Procedures Act, S.C. Code Ann. § 1-23-380(5) (Supp. 2016). *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 276 S.E.2d 304 (1981). A reviewing court should reverse the decision of the Full Commission where it is clearly erroneous in view of the substantial evidence of the whole record. *Lark*, 276 S.C. at 136, 276 S.E.2d at 307. In addition, a reviewing court should reverse the Commission where its decision is "arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." S.C. Code Ann. § 1-23-380(5)(f).

"A reviewing court may reverse or modify a decision of an agency if the findings, inferences, conclusions, or decisions of that agency are 'clearly erroneous in view of the

reliable, probative and substantial evidence on the whole record.'" *Bass v. Isochem*, 365 S.C. 454, 467, 617 S.E.2d 369, 376 (Ct. App. 2005), *quoting from Bursey v. South Carolina Dep't of Health & Envtl. Control*, 360 S.C. 135, 600 S.E.2d 80 (Ct. App. 2004). "Substantial evidence is not a mere scintilla of evidence, nor the 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 conclusion the administrative agency reached in order to justify its action." *Frame v. Resort Services Inc.*, 357 S.C. 520, 527-528, 593 S.E.2d 491, 495 (Ct. App. 2004). In particular, Workers' Compensation awards "must not be based on surmise, conjecture or speculation." *Tiller v. Nat'l Health Care Ctr.*, 334 S.C. 333, 339, 513 S.E.2d 843, 845 (1999). Finally, a reviewing court should reverse, remand or modify a decision of the Workers' Compensation Commission if it is affected by an error of law. *Etheredge v. Monsanto Co.*, 349 S.C. 451, 562 S.E.2d 679 (Ct. App. 2002).

## ARGUMENT

**I. The Commission erred by ordering Defendants to provide a back surgery that every medical provider opined was not recommended or necessary, with the exception of Claimant's hand-picked surgeon, to whom the Commission arbitrarily and capriciously assigned the greatest weight.**

In this case, the Commission's decision to order a back surgery that every single medical provider who addressed the issue found was not recommended or likely to help Claimant's condition should be reversed because it is arbitrary and capricious, and "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." *E.g.*, *Bass*, 365 S.C. at 467, 617 S.E.2d at 376. The only way the Commission reached its conclusion to order the back surgery was by ignoring the

opinions of every other medical provider—including Dr. Monroe who is associated with the same practice as is Dr. Esce—and by affording more weight to Dr. Esce based on arbitrary and capricious grounds. *See, e.g.*, *In re Application of Blue Granite Water Co. for Approval to Adjust Rate Sched. & Increase Rates*, 434 S.C. 180, 187, 862 S.E.2d 887, 891 (2021) (explaining that a decision by an administrative agency "is arbitrary if it is without a rational basis, is based not upon any course of reasoning and exercise of judgment, is made at pleasure, without adequate determining principles, or is governed by no fixed rules or standards"); *Hatcher v. S.C. Dist. Council of Assemblies of God, Inc.*, 267 S.C. 107, 117, 226 S.E.2d 253, 258 (1976) ("'Arbitrary' means based alone upon one's will, and not upon any course of reasoning and exercise of judgment; bound by no law; done capriciously or at pleasure, without adequate determining principle, nonrational; not governed by any fixed rules or standard"). Where, as is the case here, the Commission's decision to place more weight on one doctor's recommendation is not based on any reasonable substantive rationale but, instead, is arbitrary and capricious, it must be overturned by this Court.

Here, the Commission's decision to place the greatest weight on Dr. Esce is erroneous for two reasons. First, the Commission gave the opinions of both Dr. Esce and Dr. Kanos greater weight than all of the other medical providers because those two doctors "had the benefit" of the most recent MRI of Claimant's lower back. (Finding of Fact No. 15). Claimant had an initial MRI performed on July 2, 2018, which was reviewed by Dr. Bucci, and a later one on January 20, 2021, which was reviewed by both Dr. Esce and Dr. Kanos. While, in some cases a later MRI might show progression of a

condition justifying a greater reliance on medical providers who "had the benefit" of the later test, here, the evidence shows there was no change between the two MRIs.

Dr. Kanos evaluated both MRIs and concluded that the "MRI on 1.10.21 was similar to 2018s MRI." (Def. APA p. 23). Dr. Kanos' conclusion is confirmed by the radiologists' reports of the two MRIs. In 2018, Dr. Shramek's impressions were, "[m]ild L3-4 through L5-S1 disc bulges. Midline L5-S1 disc protrusion. Mild left foraminal disc protrusion. Mild Left L3 foramen narrowing." The specific findings for L5-S1 were, "Narrowed and degenerated disc. Small midline disc protrusion. Mild posterior and lateral disc bulge and with small endplate osteopytes. Mild edema of the right –sided endplates at this disc level." (Def APA pp. 11-12). Dr. Ceballos compared the 2021 MRI to the "MRI lumbar spine without contrast dated 07/02/2018." Dr. Ceballos stated repeatedly, that "*[a]gain*" the later MRI showed "minimal canal, minimal right and mild left neural forminal stenosis at the L3-L4 level," and "*[a]gain*, there is minimal canal and mild bilateral neural forminal stenosis at the L4-L5 level," and yet "*[a]gain*, there is minimal indentation of the ventral thecal sac and minimal bilateral neural foraminal encroachment at the L5-S1 level due to combined decreased disc height, disc bulge and shallow posterior central disc protrusion." Dr. Ceballos concluded there was "[n]o interval change," only "[m]inor multilevel acquired spinal encroachment without spinal cord or nerve root compression apparent," and "[m]ultilevel degenerative disc disease, worse at the L5-S1 level." (Cl. APA pp. 68-69) (emphases added).

In contrast, Dr. Esce stated that the 2021 MRI "shows L5-S1 moderate disk herniation," (Cl. APA p. 61-62), even though the term "moderate" does not appear on the 2021 MRI report. Instead, as noted above, that MRI report found "*minimal* indentation

of the ventral thecal sac and *minimal* bilateral neural foraminal encroachment at the L5-S1 level due to combined decreased disc height, disc bulge and shallow posterior central disc protrusion," which the report attributes to "*[m]inor* multilevel acquired spinal encroachment *without spinal cord or nerve root compression apparent*," and "[m]ultilevel *degenerative disc disease*, worse at the L5-S1 level." (Cl. APA pp. 68-69) (emphases added).

In light of the evidence in the record, the Commission did not explain how or why the most recent MRI provided additional information that justified its decision to afford the doctors who "had the benefit" of seeing it greater weight. The opinions of Dr. Bucci, Dr. Monroe, Dr. Han, Dr. Gao and Dr. DeVault, the latter of which was hand-picked by Claimant for an IME but who found Claimant to be at MMI for his back and did not recommend surgery, should not be dismissed solely because they did not see a later MRI which itself indicates the findings are unchanged from the prior MRI. To place greater weight on the findings of Dr. Esce and Kanos solely because they saw the later MRI, which does not show any change of Claimant's spinal condition, is not based on substantial evidence, is arbitrary and capricious and should be reversed. *Blue Granite*, 434 S.C. at 187, 862 S.E.2d at 891; *Hatcher*, 267 S.C. at 117, 226 S.E.2d at 258. While the Commission's resolution of factual disputes usually is conclusive, "an award may not rest on surmise, conjecture or speculation; it must be founded on evidence of sufficient substance to afford a reasonable basis for it." *Wynn v. Peoples Nat. Gas Co.*, 238 S.C. 1, 12, 118 S.E.2d 812, 818 (1961).

Next, the Commission erred in placing more weight on Dr. Esce's recommendation for surgery than on Dr. Kanos' recommendation for conservative

treatment, based solely on the fact that Dr. Esce saw Claimant twice to Dr. Kanos' single visit. This is patently arbitrary. The capriciousness and absurdity of placing more weight on a doctor's opinion based on the difference between one visit and two is readily apparent: if the two-visits-versus-one rationale were a valid basis for assigning more weight to one physician than another, then an on-going treating physician's opinion would always prevail. That clearly is not the case in South Carolina worker's compensation law. Furthermore, the result reached by the Commission—based solely on one visit versus two—encourages parties to simply schedule the most visits in order to have their medical expert deemed more persuasive.

The Commission cannot transform the fact that Dr. Esce saw Claimant only twice, as compared to Dr. Kanos' one visit, into something more substantively meaningful by adding in the initial intake visit with Nurse Practitioner Justice and characterizing the visits to Dr. Esce's office as "several" visits. Nurse Practitioner Justice did not provide any care to Claimant but, instead, merely ordered a repeat MRI. (Cl. APA pp. 55-57). In fact, because Nurse Practitioner Justice saw Claimant before the 2021 MRI and did not have "the benefit" of seeing it, that visit is inconsequential, according to the Commission's own flawed reasoning that opinions or care provided prior to the second MRI are of lesser probative value.

The record demonstrates that Dr. Esce's continued recommendation for surgery after Claimant saw Dr. Kanos, *i.e.*, that he felt that, "given the fact he has really done everything possible for this but no relief, a microdiskectomy at L5-S1 would be the next best available option," (Cl. APA p. 65), is based on incorrect information. This is because Dr. Kanos recommended additional and new treatment including "PM,

medication, therapy or possible facet blocks or other injections." (Def. APA p. 25). In fact, at the hearing, Claimant agreed that the treatment recommended by Dr. Kanos was different from the conservative treatment he had already received. (Tr. p. 27, line 21 – p. 28, line 11).

Dr. Han, as the authorized treating physician could have ordered a subsequent evaluation by a neurosurgeon if he had felt that was necessary. Instead, he noted improvement following conservative treatment, and that, per "Dr. Bucci, a neurosurgeon, not a surgical candidate." (Cl. APA pp. 30, 33, 35-39, 41-43, 45). On April 1, 2020, Dr. Han determined Claimant was at MMI for the lumbar spine and instructed him to "[f]ollow up as needed." (Cl. APA p. 46). There is no evidence or testimony whatsoever that Claimant asked Dr. Han for further treatment, evaluation or a second opinion.[2]

At the end of the day, the Commission must have a reasonable basis for its decision, which must be supported by substantial evidence and cannot be arbitrary and capricious, or based on surmise, speculation or conjecture. *Blue Granite*, 434 S.C. at 187, 862 S.E.2d at 891; *Hatcher*, 267 S.C. at 117, 226 S.E.2d at 258; *Wynn*, 238 S.C. at 12, 118 S.E.2d at 818. Determining that a doctor's recommendation should carry more weight simply because he saw a claimant one more time than did another doctor is arbitrary and capricious. It is based on nothing more than surmise, speculation and conjecture. Here, the overwhelming preponderance of the evidence supports the conclusion that Claimant is at MMI for his lower back, and that surgery is

[2] Claimant's testimony that he wanted to see Dr. Bucci again but "was told I couldn't. I wanted to but I was told that he had released me and I couldn't go back to see him," (Tr. p. 19, lines 20-23), is not supported by any objective evidence in the record.

overwhelmingly not recommended for his on-going pain. (Cl. APA pp. 21-26, 30-31, 33, 35-39, 41-43, 45-46, 47-50, 65-66; Def. APA pp. 3-10, 11-12, 14-21, 23-25).

Consequently and in any event, there is no basis for naming Dr. Esce as the authorized treating physician. Defendants are empowered under the Act to control the medical care and treatment they provide. *See* S.C. Code Ann. § 42-15-60(A) ("the employer, at his own option may continue to furnish … and the employee shall accept an attending physician and any medical care or treatment that is considered necessary"); *see also* S.C. Code Reg. § 67-509(A) ("The employer's representative chooses an authorized health care provider and pays for authorized treatment"). And, while the Commission may order treatment by a physician other than one named by the Employer under certain circumstances, those circumstances have not been shown to be present here and, in addition, there has not been any showing of "good cause," as is required by the statute. S.C. Code Ann. § 42-15-60(A).

**II. This Court properly allowed this appeal to proceed to the merits.**

As pertains to this appeal, S.C. Code Ann. § 1-23-380 provides, in pertinent part, that "[a] preliminary, procedural, or intermediate agency action or ruling *is immediately reviewable if review of the final agency decision would not provide an adequate remedy*." S.C. Code Ann. § 1-23-380 (emphasis added); *see also Rose v. JJS Trucking, LLC*, 411 S.C. 366, 369, 768 S.E.2d 412, 413 (Ct. App. 2015). This language provides a limited exception to the final judgment requirement for an appeal prior to determination of all the rights in a workers' compensation case.

In *Rose*, this Court held that the above-stated exception did not apply specifically because the defendants had an adequate remedy in that they could seek payment from the

Uninsured Employers' Fund after a final determination of benefits due the claimant. Indeed, the Uninsured Employers' Fund acknowledged that "it would be required to reimburse Appellants if the commission later orders a transfer." 411 S.C. at 369, 768 S.E.2d at 413-414. Here, in stark contrast, once the unnecessary surgery is performed, there is no "remedy" available to Defendants who will be responsible not only for the cost of the surgery and recovery, but for any complications that arise as a direct result of the surgery. *See, e.g., Mullinax v. Winn-Dixie Stores*, 318 S.C. 431, 436, 458 S.E.2d 76, 79 (Ct. App. 1995) (noting "the great weight of authority holds the aggravation of the primary injury by medical or surgical treatment is compensable"). As noted above, in this case, Claimant's Achilles tendon injury arose from medical treatment for his low back and, accordingly, Defendants have provided medical treatment for that injury.

Surgery always carries a certain amount of risk, with back surgery certainly no exception, particularly where it is not medically necessary. Performing any surgery that has little likelihood of relieving a patient's symptoms is not only foolhardy but incredibly risky. Under the Commission Decision on appeal here, Defendants will be on the hook for the negative consequences that may arise from the unnecessary back surgery performed by Dr. Esce, with no adequate remedy after a final determination of benefits. Once the back surgery is performed, there is no "undoing" it. As a result, the Commission Decision is immediately appealable under the last sentence of S.C. Code Ann. § 1-23-380, providing that "[a] preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy."

## CONCLUSION

For the reasons stated herein, this Court should reverse the Commission Decision.

Respectfully submitted,

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December 5, 2022

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

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Appeal No.: 2022-000864

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William D. Downes, Employee ..... Respondent,

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Bon Secours Health System, Inc., Employer,
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**PROOF OF SERVICE**

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I certify that I have served the **Initial Brief of Appellants** and Appellants' **Designation of Matter** on William D. Downes, by emailing it to his attorneys of record as follows:

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*Attorneys for Respondent William D. Downes*

December 5, 2022

McAngus Goudelock & Courie, LLC

By: *s/Helen F. Hiser*
Helen F. Hiser
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*Attorneys for Appellants Bon Secours Health System, Inc. and Safety National Casualty Corporation*

**Reply To**
HELEN F. HISER
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RECEIVED
Dec 05 2022
SC Court of Appeals

December 5, 2022

**Via S.C. Courts E-filing**
The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, South Carolina 29211

RE: William Downes v. Bon Secours Mercy Health and Bon Secours Health System, Inc. c/o Cannon Cochran Management Services, Inc.
Date of Accident: April 17, 2018
WCC File No.: 1809996
Our File No.: 2024.22054
Claim No.: 18J28K142496
Appeal No.: 2022-000864

Dear Ms. Kitchings:

Enclosed for filing please find the following documents:

1. the original of the Initial Brief of Appellants;
2. the original of the Designation of Matter to be Included in the Record on Appeal; and,
3. Appellants' Proof of Service concerning items one and two.

Please let us know if you have any questions concerning the attached or need anything further from us.

Sincerely,
McAngus Goudelock & Courie, LLC

Helen F. Hiser

Enclosures

cc: Donald E. Kamb, Jr., Esq. (via email only)
Joe Mooneyham, Esq. (via email only)