THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Appellate Case No.: 2022-000282

Michael K. Crowley, Employee, ...Appellant,

vs.

Darlington County, Employer, and
South Carolina Association of Counties SIF, Carrier.....Respondents.

RESPONDENTS' INITIAL BRIEF

J. Gabriel Coggiola, Esquire
Willson, Jones, Carter & Baxley
3600 Forest Dr., Suite 204
Columbia, SC 29204
(803) 227-2884
jgcoggiola@wjcblaw.com
Attorney for Respondents

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II. **Whether the substantial evidence in the record supports the Commission's finding that Appellant is not permanently and totally disabled pursuant to S.C. Code Ann. § 42-9-10 for loss of earning capacity?**

III. **Whether the Commission properly admitted and considered the December 17, 2020 medical report of Dr. James Bethea as part of the evidence in the record?**

IV. **Whether the Commission erred by making certain findings of fact alleged by Appellant to contain legal arguments, positions, opinions, and citations not presented to the Commission by the parties and therefore making a decision based on an improper legal analysis?**

STATEMENT OF THE CASE

This matter involves workers' compensation claims stemming from two (2) admitted work accidents sustained by Claimant Michael Crowley (hereinafter "Appellant") arising out of and in the course and scope of his employment with Defendant Darlington County (hereinafter "Respondents"). Appellant was involved in his first accident on May 5, 2017, when he was attempting to restrain a combative juvenile and injured his right knee. Respondents provided Appellant with appropriate and causally related medical treatment with Dr. Nigel Watt, who released Appellant at maximum medical improvement (hereinafter "MMI") on October 5, 2017. (Def. APA #4, p.23). At that time, Dr. Watt assigned Appellant a permanent physical impairment of 5% to the right lower extremity due to knee injury. (Id.) Dr. Watt recommended Appellant be allowed to return to his normal work duties without restrictions. (Id.). On December 4, 2017, Dr. Watt completed a Form 14B[1], wherein he reiterated his opinion of 5% impairment to the right

[1] The Form 14B "Physician's Statement" is the South Carolina Workers' Compensation Commission's form that is used by a person's treating physician to provide the physician's opinion concerning whether the patient has reached MMI, whether the patient has any permanent physical impairment, the body part(s) affected, work restrictions and future medical needs.

lower extremity, assigned no permanent work restrictions, and stated to a reasonable degree of medical certainty that Appellant did not require any additional medical, surgical, hospital, or other treatment that Appellant needed as a result of his injury for an additional time that would tend to lessen his period of disability or maintain his current level of function. (Def. APA #4, p.25).

Shortly after his release at MMI for the May 2017 injury, Appellant was involved in a second admitted accident on January 3, 2018, wherein he was assisting in the removal of a car from an icy road, and he reinjured his right knee. Additionally, he sustained a new injury to his lumbar spine. Respondents again provided Appellant with appropriate and causally related medical treatment to Appellant's right knee with Dr. Watt. On January 31, 2019, Dr. Watt opined that Appellant would not require further orthopedic care for his right knee as he was already established with a pain management physician for his right lower extremity. (Claimant APA#6, p.105). Dr. Watt did not assign any additional impairment as a result of Appellant's second work accident. Respondents obtained a second opinion for Appellant's right knee injury with Dr. Richard Friedman, who, on October 1, 2020, stated Appellant was at MMI and opined Appellant suffered no permanent impairment, had no permanent limitations, and would not require any future medical treatment. (Def. APA #19, pp.739–740).

With respect to his back, Respondents initially authorized an evaluation of Appellant's lumbar spine with Dr. Joseph Cheatle on August 15, 2018. (Def. APA#10, pp.246–248). Dr. Cheatle causally related Appellant's symptoms to his January 3, 2018, work accident and referred Appellant for an MRI of his lumbar spine. (Def. APA #10, p.248). Following his MRI, Appellant returned to Dr. Cheatle on November 14, 2018, and Dr. Cheatle stated Appellant's MRI was negative for stenosis and referred Appellant for an evaluation as to the medical necessity and feasibility of a spinal cord stimulator (hereinafter "SCS"). (Def. APA #10, p.250). Appellant underwent a SCS trial at the direction of Dr. Barbara Sarb on February 18, 2019. (Def. APA #11,

pp.253–255). On February 25, 2019, Dr. Sarb removed the leads from Appellant's SCS trial. (Def. APA #11, p.260). Appellant underwent a second trial SCS, and on September 20, 2019, Dr. Sarb removed the leads from his second trial and noted Appellant's failure to see appreciable relief with the SCS. (Claimant's APA #5, p.71). Dr. Sarb indicated Appellant could follow up with neurosurgery as already scheduled. (Claimant APA#5, pp.72). Appellant received authorized neurosurgical treatment with Dr. William Naso, who released Appellant at MMI on November 21, 2019, and stated, "[h]e completed his FCE which placed him at a sedentary job description. I think he can continue to work at his current capacity which he says he is tolerating." (Claimant APA #5, pp.64–65). On December 1, 2019, Dr. Naso completed a Form 14B, wherein he assigned an 8% whole person impairment rating, or 10.7% to the lumbar spine, assigned permanent work restriciotns per Appellant's FCE, and recommended future medical treatment to consist of a TENS unit and physical therapy. (Def. APA #11, p.309). On February 13, 2020, Dr. Naso provided a letter to Appellant's employer, stating,

> From a neurosurgical standpoint, [Claimant] can continue to work in his current capacity, which includes being able to carry a weapon and taser. He can also accompany a judge, providing the judge security inside and outside a court room, including at lunch. Otherwise, his restrictions as outlined in his functional capacity evaluation remain.
>
> (Def. APA #11, p.310).

Following his release at MMI for the lumbar spine, Appellant requested a second opinion for his lumbar spine, which Respondents agreed to provide. On December 17, 2020, Appellant presented to Dr. Bethea, who diagnosed Appellant with chronic lumbar syndrome and stated that Appellant's subjective complaints were out of line with his objective findings. (Def. APA #20, pp.741–743). Dr. Bethea released Appellant at MMI and assigned a 3% whole person impairment, assigned no permanent work restrictions, and opined Appellant would not require future medical treatment. (Def. APA #20, p.742–743).

In addition to the medical providers described above, Appellant was also sent by his

attorney for one time independent medical evaluation with Dr. Leonard Forest on January 30, 2020. In a letter from Dr. Forest to Appellant's attorney, Dr. Forest stated,

> With regard to impairment rating for Deputy Crowley's back, his condition is best fit into DRE category 3 as defined by the Fifth Edition of the AMA Guides. For this, I would assign a 13% whole person impairment rating. Using the conversion as defined in the Fifth Edition of the AMA Guides. This would equate to a 17% regional impairment rating.
>
> (Claimant's APA #2, p.29)

In addition to the medical treatment described above, Respondents obtained a vocational evaluation and labor market survey with James Myers, MA, QRP, CCM, CRP at Corvel. On April 10, 2020, Mr. Myers prepared a vocational assessment report wherein he opined that based on the recommendations of Appellant's physicians and the Functional Capacity Evaluation (hereinafter "FCE"), Appellant should be able to return to work in a sedentary to light physical demand level. (Def. APA #18, p.736). Mr. Myers prepared a "Labor Market Survey" wherein he identified a list of jobs Appellant could perform based on his transferrable skills and physical limitations, including: desk officer; fraud investigator; management aid; dispatcher; surveillance system monitor; customer service representative; collection manager; code inspector; service advisor; information clerk; telephone solicitor; and file/office clerk. (Def. APA#18, p.725). Mr. Myers conducted a labor market survey of twelve (12) employers within a 50-mile radius of Bennettsville, South Carolina, and of the twelve (12) employers contacted, 100% reported they were either hiring or would be hiring in the near future. (Def. APA#18, pp.725–730).

It is worth noting that throughout the course of both of his claims, Appellant continued working for Respondents, who accommodated his work restrictions, until his resignation on January 5, 2021. At the hearing, Appellant testified that his resignation was voluntary and was, in part, due to issues he was having with the Sheriff's Department. (Hr. Tr., p.86, lines 10–19).

On January 4, 2021, Respondents filed a Form 21, request for hearing, seeking an

adjudication of Appellant's entitlement to permanent partial disability (hereinafter "PPD") and a determination of what, if any, future medical treatment Appellant was entitled to in order to maintain his level of disability at MMI. (Form 21, dated 1/4/21).

On January 13, 2021, counsel for Appellant noticed the *de bene esse* deposition of Dr. Bethea, set for January 27, 2021. (Claimant's APA #14, pp.171–176). However, Appellant's counsel cancelled the deposition after learning the fees associated with taking Dr. Bethea's deposition and asserted Respondents were responsible for the cost of the deposition. (Hr. Tr., p.10, lines 21-25). In the alternative, Counsel for Appellant requested that either Respondents pay for the deposition, or the South Carolina Workers' Compensation Commission issue a subpoena to Dr. Bethea for live testimony at the hearing. (Hr. Tr., p.11, lines 1–14). Respondents argued that Appellant had ample time to conduct Dr. Bethea's deposition and asserted there was no existing statutory, regulatory, or case law supporting Appellant's position that Respondents should bear the cost of the deposition sought by Appellant's counsel. (Hr. Tr., p.13, lines 1–13).

The case was heard by a Single Commissioner on March 4, 2021. At the hearing, in addition to his objections concerning the introduction of Dr. Bethea's medical report pursuant to S.C. Code Ann. § 42-15-95 and the violation of his rights to due process resulting from him having to pay for the deposition of Dr. Bethea and the Commission's failure to subpoena Dr. Bethea as witness, Appellant objected to the introduction of any medical records pre-dating Claimant's initial date of accident on the grounds that there was no medical expert opinion causally relating the prior medical records to his current complaints, and Appellant's prior medical records were irrelevant, immaterial, and call for speculation as to the pertinence of the records. (Hr. Tr., pp.14–17). Respondents argued there was no statutory, regulatory, or case law support for this position. Defendants argued the records were germane to Claimant's credibility and the history of his pain complaints. (Hr. Tr., p.17, lines 13–21).

On July 6, 2021, the Single Commissioner issued a Decision and Order, wherein he found that Appellant reached MMI effective November 21, 2019. (Decision and Order, p.31). The Single Commissioner awarded Appellant 10% permanent partial disability (hereinafter "PPD") to his right lower extremity as a result of both the May 5, 2017, and January 3, 2018, accidents. (Decision and Order, pp. 31–32). The Single Commissioner awarded Claimant 25% PPD to his back as a result of his January 3, 2018, work accident. (Decision and order, p.32). The Single Commissioner further found that Claimant was entitled to future medical treatment to the back to include physical therapy and a TENS Unit in order to maintain his level of disability as MMI as set forth by his authorized treating physician, Dr. Naso. (Decision and Order, p.32). The Single Commissioner denied Appellant's objection to the admissibility of Appellant's pre-accident medical records and found that Appellant's rights to due process were not denied. (Decision and Order, pp.29–31).

On August 6, 2021, Appellant filed a Form 30 request for Full Commission review. (Form 30, dated 8/6/21). Following briefing of by the parties, oral arguments were held before the Full Commission Appellate Panel (hereinafter "Full Commission") on December 20, 2021. On February 1, 2022, the Full Commission issued an Appellate Panel Decision and Order, wherein they affirmed the decision of the Single Commissioner in Full. (Full Commission Order, p.26).

On March 7, 2022, Appellant filed a Notice of Appeal with this Court. This appeal follows.

STANDARD OF REVIEW

"The Administrative Procedures Act (APA) provides the standard for judicial review of decisions by the [Appellate Panel]." Pierre v. Seaside Farms, Inc., 386 S.C. 534, 540, 689 S.E.2d 615, 618 (2010). "[An appellate] court can reverse or modify the [Appellate Panel]'s decision if it is affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence in the whole record." Id. "Substantial evidence is not a mere scintilla of

evidence, but evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the agency reached." Id. (internal quotation marks omitted). The possibility of drawing two different conclusions from the evidence does not prevent a finding from being supported by substantial evidence. Hall v. Desert Aire, Inc., 376 S.C. 338, 348, 656 S.E.2d 753, 758 (Ct.App.2007).

"Where there are conflicts in the evidence over a factual issue, the findings of the [Appellate Panel] are conclusive." Hall v. United Rentals, Inc., 371 S.C. 69, 80, 636 S.E.2d 876, 882 (Ct.App. 2006). "The [Appellate Panel] is the ultimate fact finder in [w]orkers' [c]ompensation cases...." Hargrove v. Titan Textile Co., 360 S.C. 276, 289, 599 S.E.2d 604, 611 (Ct.App. 2004). The final determination of witness credibility and the weight of the evidence is for the Appellate Panel. Id. "Where the medical evidence conflicts, the findings of fact of the [Appellate Panel] are conclusive." Mullinax v. Winn–Dixie Stores, Inc., 318 S.C. 431, 435, 458 S.E.2d 76, 78 (Ct.App. 1995).

ARGUMENTS/DISCUSSION

I. The substantial evidence in the record supports the Commission's finding that Appellant sustained 25% permanent partial disability to his back pursuant to S.C. Code Ann. § 42-9-30(21) as result of his January 3, 2018, work accident.

Appellant argues the Commission failed to find him permanently and totally disabled for having sustained greater than 50% loss of use to the back pursuant to S.C. Code Ann. § 42-9-30(21), often referred to as the "scheduled member statue." The scheduled member statute states, in relevant part, that:

> In cases included in the following schedule, the disability in each case is considered to continue for the period specified and the compensation paid for the injury is as specified...for the *loss of use* of the back in cases where the loss of use is forty-nine percent or less, sixty-six and two-thirds of the average weekly wages during three hundred weeks. In cases where there is fifty percent or more loss of use to the back, sixty-six and two-thirds percent the average weekly wage during five hundred weeks...in cases where there is fifty percent or more loss of use of the back the injured employee shall be presumed to have suffered total and permanent disability

and compensated under Section 42-9-10(B). *The presumption set forth in this item is rebuttable.*

S.C. Code Ann. § 42-9-30(21) (emphasis added).

Appellant goes on to provide an extensive history of our appellate courts' treatment of cases involving permanent partial disability to the back leading up to the 2007 amendment of S.C. Code Ann. § 42-9-30(21), which, significantly, added the statement that the presumption of total and permanent disability is rebuttable. Appellant states that since the 2007 amendment, neither the South Carolina Court of Appeals nor Supreme Court has addressed whether wage loss is to be considered in a scheduled member award. Appellant then goes on to reference the Supreme Court's holding in Clemmons v. Lowes Home Centers, Inc.,[2] erroneously stating that the Court held that the legislature did not intend to infuse wage loss into a scheduled member award and that whether a claimant was working was insufficient to defeat the presumption created by S.C. Code Ann. § 42-9-30(21).[3]

Respondents respectfully submit that Appellant's colloquium on the history of the Commission's treatment of § 42-9-30 and its treatment of disability to the back up to the present version of S.C. Code Ann. 42-9-30(21) is irrelevant to pertinent issue in case at hand. Unlike the case in Clemmons, there is ample evidence in the record of this case to support the Commission's finding of less than 50% loss of use to the back, or in this case, 25% percent permanent partial disability to the back.

As a brief matter of context, the injured worker in Clemmons was originally found by the

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[2] 420 S.C. 282, 803 S.E.2d 268 (2017)

[3] In Clemmons, the Supreme Court reversed the Court of Appeals, concluding the Commission's findings were not supported by the substantial evidence and remanded to the Commission for a new hearing to determine the claimant's percentage of impairment and whether the presumption of permanent and total disability under § 42-9-30(21) had been rebutted. 420 S.C. 282, 289–290 (2017). The Court went on to hold that based on their resolution of the issue of whether the substantial evidence supported the Court of Appeals' affirmation of the Commission's findings, it was not necessary for them to reach the merits of the second issue of whether the Court of Appeals improperly infused wage loss into and as a consideration for an award made under the scheduled member statute. 420 S.C. 282, 286, fn.2 (2017)

Commission to have sustained 48% permanent partial disability to the back based on the complete evidence in the record, and the Court of Appeals affirmed that finding. Clemmons v. Lowes Homes Centers, Inc., 412, S.C. 366, 383, 772 S.E.2d 517 (Ct.App. 2015). The Supreme Court subsequently reversed the Court of Appeals, finding there was *no* evidence in the record that Clemmons suffered anything less than 50% impairment to his back. Clemmons v. Lowes Homes Centers, Inc. 420 S.C. 282, 288, 803 S.E.2d 268 (2017). Specifically, the Supreme Court stated that every doctor and medical professional who assigned an AMA Guides impairment rating indicated Clemmons lost more than 70% use of his back. Id., at 288.

Unlike the case in Clemmons, every medical provider that submitted an impairment rating to Appellant's back in this case assigned ratings far below 50%. Appellant's authorized treating neurologist, Dr. Naso, assigned an impairment rating of 8% to the whole person, or a regional rating of 10.7% to the lumbar spine. (Def. APA #11, p.309). Dr. Bethea, who performed a second opinion of Appellant's back, assigned an impairment rating of 3% impairment using the Sixth Edition of the AMA Guides. (Def. APA#20, p.742–743). Even Dr. Leonard Forest, an expert retained by Appellant, assigned an impairment rating of 13% to the whole person, which he equated to a 17% regional impairment rating. (Claimant's APA #2, p.29).

"The [Appellate Panel]'s finding as to the degree of impairment is a question of fact." Clark v. Aiken Cnty. Gov't, 366 S.C. 102, 115, 620 S.E.2d 99, 105 (Ct. App. 2005). "[T]he determination of an injured employee's impairment rating is more art than science, involving the consideration of evidence the [Appellate Panel] may gather from the injured employee, medical and vocational experts, and lay witnesses[.]" Burnette v. City of Greenville, 401 S.C. 417, 429, 737 S.E.2d 200, 206–207 (Ct.App. 2012). "While an impairment rating may not rest on surmise, speculation or conjecture ... it is not necessary that the percentage of disability or loss of use be shown with mathematical exactness." Fishburne v. ATI Sys. Int'l, 384 S.C. 76, 86, 681 S.E.2d 595, 600

(Ct.App. 2009)(alteration in original) (internal quotation marks omitted). "The Appellate Panel is not bound by the opinion of medical experts and may find a degree of disability different from that suggested by expert testimony." Id.

In this case, substantial evidence supports the Commission's finding that Appellant only sustained 25% permanent partial disability to the back, and therefore was not entitled to permanent and total disability under S.C. Code Ann. § 42-9-30(21) due to 50% or more loss of use of the back.

Despite his contention that evidence of loss of earning capacity should not be considered under in an award under S.C. Code Ann. § 42-9-30, Appellant goes on to erroneously argue that "the only reliable, probative, and substantial evidence in the record" regarding Appellant's loss of use to the back supports an award of permanent and total disability pursuant to S.C. Code Ann. § 42-30(21), citing Appellant's FCE, Dr. Forest's statement unsupported statement that Appellant "lost more than 50% function of his back," the opinion Appellant's vocational expert, Harriet Fowler; and the lay testimony of Appellant. Although the Single Commissioner is entitled to accept lay testimony in addition to medical evidence, our Supreme Court has stated "[i]t [is] for the Commission to give the testimony of the injured workman…such probative value as it deems proper under the circumstances." Dykes v. Daniel Const. Co., 262 S.C. 98, 2020 S.E.2d 646 (1974).

Appellant blatantly ignores *any and all* evidence which contradicts the self-serving evidence he relies upon. For example, Appellant seemingly ignores Dr. Naso's February 13, 2020, statement that, "[F]rom a neurological perspective [Appellant] can continue to work in his current capacity which includes being able to carry a taser and a weapon. He can also accompany a judge providing the judge security within and outside a court room including at lunch. Otherwise, his restrictions are as outlined in his functional capacity evaluation remain." (Defendants APA #11,

p.310). Further, Appellant ignores Dr. Bethea's opinion that there should be "no absolute work restrictions." (Def. APA #20, p.310). Finally, Appellant ignores the vocational evidence provided by Mr. Myers, who concluded that based on the recommendations of Appellant's physician's and the FCE, Appellant should be able to return to work in a sedentary to light physical demand level. (Def. APA #18, p.736). Mr. Myers identified a list of jobs Appellant could perform based on his transferrable skills and physical limitations, including: desk officer; fraud investigator; management aid; dispatcher; surveillance system monitor; customer service representative; collection manager; code inspector; service advisor; information clerk; telephone solicitor; and file/office clerk. (Def. APA#18, p.725). Mr. Myers conducted a "labor market survey" of twelve (12) employers within a 50-mile radius of Bennettsville, South Carolina, and of the twelve (12) employers contacted, 100% reported they were either hiring or would be hiring in the near future. (Def. APA#18, pp.725–730).

In this case, other than essentially arguing a dissatisfaction with the Commission's findings regarding the extent of loss of use suffered by Appellant, Appellant has failed to specifically articulate any actual error on behalf of the Commission. Respondents surmise that counsel for Appellant is essentially trying to take another stab at arguing against the infusion of wage loss into an award of disability under § 42-9-30(21) after the Supreme Court refused to address that issue in Clemmons. However, unlike the case in Clemmons, Respondents assert that the Commission's findings with regard to the extent of disability Appellant sustained to the back pursuant to S.C. Code Ann. § 42-9-30 are completely in line with the ratings assigned by the various doctors and wholly supported by the substantial evidence in the record. As such, Respondents respectfully request this Court affirm the Commission's well supported conclusion that Appellant sustained 25% permanent partial disability to his back.

II. The substantial evidence in the record supports the Commission's finding that Claimant is not permanently and totally disabled pursuant to S.C. Code Ann. § 42-9-10 for loss of earning capacity.

Appellant erroneously argues that the Single Commissioner failed to award Appellant permanent and total disability under S.C. Code Ann. § 42-9-10. "The general test of total disability is inability to perform services other than those that are 'so limited in quality, dependability, or quantity that a reasonable market for them does not exist.'" Wynn v. People's Natural Gas Co., 238 S.C. 1, 118 S.E.2d 812 (1961).

As set forth in the argument above, the substantial evidence in this case demonstrated that Appellant is not permanently and totally disabled. Appellant's authorized treating physician, Dr. Naso, stated that Appellant could continue to work in his current capacity. (Def. APA #11, p.310). Respondents' vocational expert, James Myers, identified a number of jobs Appellant could perform within his work restrictions and identified twelve (12) positions currently available in Appellant's area. Throughout the course of both claims, Appellant even continued to work for Respondent until his voluntary resignation on

Based on the evidence in the record, the Commission properly found that Claimant was not permanently and totally disabled pursuant to S.C. Code Ann. § 42-9-10, and their ruling should be affirmed.

III. The Commission properly admitted into evidence and considered the December 17, 2020, medical report of Dr. James Bethea as part of the evidence in the record.

Appellant erroneously asserts that the Commission erred in allowing the December 17, 2020, medical report of Dr. James Bethea into evidence on the grounds that it was obtained in violation of S.C. Code Ann. § 42-15-95(B), which states,

> A Health care provider who *provides* examination of treatment for any injury, disease, or condition for compensation is sought under the provisions of this title may discuss or communicate an employee's medical history, diagnosis, causation,

course of treatment, prognosis, work restrictions, and impairments with the insurance carrier, employer, their respective attorneys, or certified rehabilitation professionals, or the commission without the employee's consent. The employee must be:

1) notified by the employer, carrier, or its representative requesting the discussion or communication with the healthcare provider in a timely fashion, in writing or orally, of the discussion or communication and may attend and participate. This notification must occur prior to the actual discussion or communication if the healthcare provider knows the discussion or communication will occur in the near future;
2) advised by the employer, carrier, or his representative requesting the discussion or communication with the healthcare provider of the nature of discussion or communication prior to the discussion or communication; and
3) provided with a copy of the written questions at the same time the questions are submitted to the healthcare provider. The employee must also be provided with a copy of the response by the healthcare provider.

S.C. Code Ann. § 42-15-95(B) (*emphasis added).*

In his brief, Appellant references "multiple communications by Respondents with Dr. Bethea and specifically including a detailed letter attaching hundreds of pages of medical records sent to Dr. Bethea on October 27, 2020; all of which conversations and communications occurred between October 2020 and January 2021 and were not copied to nor was the Appellant made aware of any of these…"(Appellant's Brief, p.41). Other than the October 27, 2020, letter from Respondents to Dr. Bethea, Appellant fails to cite or identify any other specific improper communications by Respondents. As such, Respondents will address the October 27, 2020, letter referenced by Appellant in his brief.

Respondents' October 27, 2020, letter to Dr. Bethea was sent *prior to* Dr. Bethea ever having any contact with or performing any examination or treatment of Appellant in this case. Respondents agreed to provide Appellant with a second opinion pursuant to a consent order. (Consent Order, dated 10/29/20). Respondents' October 27, 2020, letter to Dr. Bethea requested that he perform a second opinion evaluation of Appellant. (Claimant's APA #13, p.169–170). A review of the letter shows that the correspondence included an enclosed copy of Appellant's

complete medical records for review, a brief synopsis of Appellant's treatment to date, and the identification of specific medical opinions to be addressed if Dr. Bethea agreed to perform the requested evaluation. (Id.) The issues referenced in the letter included (1) whether Dr. Bethea felt Appellant had reached MMI, (2) if Dr. Bethea did feel Appellant had reached MMI, what impairment he felt Appellant sustained, (3) what permanent work restrictions he would assign as a result of Appellant's injuries, and (4) what future medical treatment Appellant would require as a result of his injuries. Finally, the letter goes on to ask what treatment Dr. Bethea would recommend at this time if he did not feel Appellant had reached MMI. (Id.)

Nothing in Respondents' October 27, 2020, letter to Dr. Bethea could be construed as a "discussion or communication that would conflict with or interfere with the employee's examination or treatment," as set forth in S.C. Code Ann. § 42-15-95(B), which is the purpose of the statute's limitation on unilateral communication with health care providers.

Respondents acknowledge that once Dr. Bethea provided examination or treatment of Appellant, a statutory duty to notify Appellant and his attorney of the communication in advance and give them the opportunity to participate in any ongoing discussions or communications is triggered; however, that requirement does take effect until the doctor "provides" examination of treatment of Appellant, as stated in the clear and unambiguous language of § 42-15-95(B). Unless and until Dr. Bethea "provides" examination or treatment, the statute is not applicable. As such, Respondents' October 27, 2020, letter to Dr. Bethea requesting a second opinion was not a violation of § 42-15-95(B), and the Commission properly allowed into evidence for consideration the subsequent December 17, 2020, medical report of Dr. Bethea.

IV. The Commission did not err in making certain findings of fact alleged by Appellant to contain legal arguments, positions, opinions, and citations not presented to the Commission and therefore constituting an improper legal analysis.

A. The Commission did not err in making finding of fact #22 involving the introduction of Appellant's pre-accident medical records for consideration as part of the evidence in the record.

Appellant's argument involving finding of fact #22 is essentially Appellant's effort to reverse the Commission's finding that Respondents had the right to submit medical records that pre-dated Appellant's work accident. Appellant argues that for medical records to be admitted, to be relevant and material, and for the Commission's decision based on those records not to be arbitrary and capricious, there is a requirement for medical testimony linking those past medical records to the injured worker's current condition. Again, Respondents contend this argument is unsupported by law and without merit.

Simply put, there is no legal basis for Appellant's argument that a Commissioner should not be allowed to review prior medical evidence and assign whatever weight he or she deems appropriate as it relates to an injured workers' current condition and request for benefits. Evidence of a claimant's pre-accident medical history goes to the issue credibility of his complaints and to a determination of what existing problems that claimant has, and whether they are related to his accident produced injuries and resulting disability.

Further, there is no statute or case law supporting Appellant's argument that pre-accident medical records must contain an expert medical opinion causally relating the records to the current issues before they can be admitted into evidence by a Commissioner.[4] A Commissioner is free to accept the pre-accident medical records as evidence and assign them whatever weight he or she deems appropriate in conjunction with their well-established statutory authority.

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[4] Appellant cites the 1960 case of Cross v. Concrete Materials in support of his position. 236 S.C. 440, 114 S.E.2d 828 (1960). The holding in Cross deals with an injured worker's burden of proving an aggravation of a pre-existing condition as a compensable work accident. This is not same as the issue of whether a Commissioner is entitled to review prior medical records for the purpose of determining credibility or deciding what, if any, impact the previous record of injuries might have on an injured workers' resulting disability. As such, Respondents contend the holding in Cross is irrelevant to the issue before this Court.

B. The Commission did not err in making finding of fact #23 containing precent not cited to the Commissioner by the parties at the hearing.

Appellant seemingly argues that the Single Commissioner considered ex parte communications, or sought legal advice or opinions in connection with the reference to cases cited in finding of fact #23 involving Appellant's due process rights to cross examine Dr. Bethea; however, Appellant fails to identify what ex parte communications or outside legal advice or opinions were sought by the Commissioner. As such, Respondents assert there was no error committed by the Commissioner.

Although the cases referenced by Appellant were not cited by either party at the hearing, the issue of whether Appellant's due process rights to cross-examine Dr. Bethea were argued extensively by both parties. Counsel for Respondents specifically argued there is no authority to support Appellant's contention that Respondents should have been responsible for payment for the deposition of Dr. Bethea. (03/04/21 Hr. Tr., p.12, lines 6–25, p.13, lines 1–17).

Even if the Commissioner is barred from seeking outside legal advice or opinions, Respondents are unaware of statute or case law limiting their decision making to holdings from cases specifically cited by the parties at the hearing.

Regardless of whether the cases cited in finding of fact #23 are improper, Respondents contend that any potential error is not dispositive. The argument concerning whether Appellant's due process rights to cross-examine Dr. Bethea was still made by the parties at the hearing before the Single Commissioner, Appellant had to opportunity to make the argument again to the Full Commission, and the issue is still before this Court now.

C. The Commission did not err in making findings of fact #23, 24, 25, and #27 regarding Appellant's contention this his due process rights were violated in relation to his ability to cross examine Dr. Bethea.

Appellant's argument that the Commission's findings of fact #23, 24, 25, and 27 involving

his due process rights to cross examination of Dr. Bethea are without merit. Appellant even acknowledges that a Commissioner's ability to subpoena a witness to testify is discretionary, but he then goes on to state that the statutory discretion is removed if requested by Appellant for the purpose of cross examination. He then takes the position that his admitted right to cross examine Dr. Bethea through deposition was violated because he was required to pay for the deposition. Again, this argument is without merit.

Dr. Bethea's medical report was timely and properly admitted into evidence as an APA submission in accordance with S.C. Reg. 67-612. Despite Respondents' proper submission of Dr. Bethea's medical report as evidence pursuant to the regulation, Appellant still argues he was denied his right to due process based on the Commissioner's refusal to subpoena Dr. Bethea as a witness to the hearing and Respondents' refusal to pay for Appellant's deposition of Dr. Bethea.

In this case, Appellant had ample time to depose Dr. Bethea, and Appellant even scheduled the deposition of Dr. Bethea, only to cancel it on his own after learning that he would have to pay for the deposition. The South Carolina Rules of Civil Procedure governing the use of depositions of treating physicians and other specified treating health care providers clearly states, "the cost of the deposition, including materials and fees, shall be borne by the party noticing the deposition." Rule 30(i), SCRCP.

Under S.C. Reg. 67-1302, the South Carolina Workers' Compensation Commission establishes a maximum allowable payment for the provision of medical services based upon a relative value scale and a conversion factor set by the Commission. "The maximum allowable payments and any policies governing the billing and payment of services provided by medical practitioners shall be published in a medical services provider manual." S.C. Reg. 67-1302 (A)(1)—commonly referred to as the "Fee Schedule." Under the Medical Services Provider Manual, reimbursement for medical testimony by deposition or testimony by appearance for physicians is

governed by Code SC004, which outlines that depositions are capped at $400 for the first hour and $100 to report each additional quarter hour.

To that end, Dr. Bethea's request for payment for his deposition was in line with the Fee Schedule. There is no statutory authority supporting Appellant's argument that Respondents should be required to pay for the deposition of the doctor simply because Appellant wants to cross examine him. It is regular and customary practice in workers' compensation that either party take the deposition of both authorized treating providers and medical providers retained by either side if they want to investigate or challenge their medical opinions.

Further, Appellant fails to cite any authority in support of his argument that the Commission is *required* to issue a subpoena to a medical provider to testify live at a hearing. Defendants argue it would be improper for a Commissioner to step into either party's role in discovery or litigation and subpoena a witness on behalf of a party to testify a hearing, as opposed to remaining a neutral party tasked with adjudicating the claim.

CONCLUSION

Based on the arguments set forth above, this Court should affirm the Commission's decision in full, including, but not limited to, the Commission's finding that Claimant is not permanently and totally disabled pursuant to either S.C. Code Ann. § 42-9-30(21) or § 42-9-10.

Respectfully submitted,

WILLSON JONES CARTER & BAXLEY, P.A.

John Gabriel Coggiola, Esquire
Willson, Jones, Carter & Baxley, P.A.
3600 Forest Drive, Suite 204
Columbia, SC 29204
Attorney for Respondents

Date: January 11, 2023

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Appellate Case No.: 2022-000282

Michael K. Crowley, Employee, ...Appellant,

vs.

Darlington County, Employer, and
South Carolina Association of Counties SIF, Carrier.....Respondents.

PROOF OF SERVICE

I certify that I have served **Respondents' Initial Brief** and **Designation of Matter to be Included in the Record on Appeal**, by electronic mail, on the Honorable Jenny Abbott Kitchings, Clerk of Court of the South Carolina Court of Appeals at:

ctappfilings@sccourts.org.

In addition, I certify that I have served the same on the all counsel of record for Appellant in the above-captioned claim at the following addresses, by electronic mail:

Preston F. McDaniel, Esquire (preston@pfmcdlaw.com)
Gerald Malloy, Esquire (gmalloy@bellsouth.net)
Attorneys for Appellant Michael K. Crowley

J. Gabriel Coggiola, Esquire
Willson, Jones, Carter & Baxley, P.A.
3600 Forest Dr., Suite 204
Columbia, SC 29204
(803) 227-2884
jgcoggiola@wjcblaw.com
Attorney for Respondents

January 11, 2023
Columbia, South Carolina

wjcb willson jones carter & baxley

attorneys at law
greenville | charleston | columbia
charlotte | myrtle beach | raleigh | atlanta

John Gabriel Coggiola
Direct (803) 227-2884
Fax (803) 782-2527
jgcoggiola@wjlaw.net

3600 Forest Drive, Suite 204
Columbia, SC 29204
www.wjcblaw.com

January 11, 2023

Sent Via Email (ctappfilings@sccourts.org)
The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
1220 Senate Street, Columbia, SC 29201
Columbia, SC 29211

Re: Michael K. Crowley v. Darlington County
Appellate Case No. 2022-000282

Dear the Honorable Ms. Kitchings:

Pursuant to Rules 208, 209, and 262, SCACR, enclosed for filing with the Court, please find **Respondents' Initial Brief** and **Designation of Matter to be Included in the Record on Appeal**, along with proof of service for the same. By copy of this letter, I am hereby serving Appellant's counsel of record with a copy of these documents.

If you have any questions or concerns, please do not hesitate to contact me. Thank you for your attention to this matter.

With kindest regards,

WILLSON JONES CARTER & BAXLEY, P.A.

John Gabriel Coggiola

JGC/jgc

Enclosures:

cc: Mr. Preston F. McDaniel, Esquire (via email)
Mr. Gerald Malloy, Esquire (via email)