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**Jan 17 2023**

**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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WCC File No. 1908703  
Appellate Case No. 2022-000067

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Kyle R. Bagley, Employee . . . . . Appellant,

v.

JN Fibers, Inc., d/b/a Sun Fiber, LLC, Employer, and  
Great American Insurance Company, Carrier . . . . . Respondents.

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REPLY BRIEF OF APPELLANT

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## ARGUMENT

This case involves errors of law by the Appellate Panel (“the panel”) of the Workers Compensation Commission and/or their decision is not supported by the evidence demonstrated on the whole record; unlike the Hearing Commissioner’s Order which takes into account the record as a whole. The order of the panel wholly disregarded evidence (direct and circumstantial) and gave legal authority to medical opinions, thereby supplanting the causation standard and disregarding the opinions of the Claimant’s treating Neurologist. Regardless of the decision arrived upon by the panel, the decision cannot be upheld if the panel refused to acknowledge and weigh items that meet the legal definition of evidence in viewing the record as a whole. This error is compounded when other evidence is misrepresented/misstated. That is what the panel did in this case and these are errors of law nor are they supported by the evidence/record viewed as a whole.

**i. The panel did not treat some competent evidence as legal evidence.**

“In order to prove Claimant’s left arm and left leg symptoms were the result of the accident, Dr. Gunter opined that there would have to be distinct lesions on these separate portions of the brain.” (R. p. 44). “**In order to prove...**” this is an incorrect statement of law that demonstrates the panel’s misapplication of the law. (*Id.*, emphasis added). Throughout the order of the panel and in the brief of Respondents, medical causation is conflated with legal causation or entirely supplants legal causation. The law of causation does not require direct evidence. For example,

“Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact. The law makes absolutely no distinction between the weight or value to be given to either direct or circumstantial evidence. This Court has not distinguished between the two types of evidence in numerous cases. Proof that workers' compensation claimant sustained an injury may be established by circumstantial or direct evidence.”

*Moriarty v. Garden Sanctuary Church of God*, 341 S.C. 320, 337, 534 S.E.2d 672 (2000) citing: *State v. Needs*, 333 S.C. 134, 156 n. 13, 508 S.E.2d 857, 868 n. 13 (1998), and *Tiller v. Nat'l Health Care Center of Sumter*, 334 S.C. 333, 341, 513 S.E.2d 843, 846 (1999).

The testimony of three lay witnesses were taken in this matter and are part of the record, that being: 1) the Claimant, 2) the Claimant's wife, and 3) the Claimant's mother. All three testified that Claimant did not have the left arm contractures and left drop foot when he went to work on June 13, 2019. (R. p. 129, lines 3-21 – R. p. 142, lines 22-25 – R. p. 143, lines 1-12 – R. p. 164, lines 18-23). The deposition testimony of four doctors was also taken. (R. pp. 747-982). Dr. Rao, his treating Neurologist, also opined, to a reasonable degree of medical certainty, that these contractures in question were the result of this injury in question (R. p. 17; Findings of Fact 38, 40). Every person who testified in this matter testified that the Claimant did, in fact, have left arm contractures and left drop foot and the single commissioner, who looked at the evidence in the record as a whole, found in his Order “the contractures that the Claimant now presents with were not present until after this work-related injury.” (R. p. 18; Finding of Fact 41). This circumstantial evidence was unchallenged by the Respondents. This *evidence* is not speculative.

Yet, in spite of the uncontradicted testimony and unchallenged findings, the panel repeatedly referred to Claimant's “alleged symptoms.” (R. pp. 41, 48). The panel also found that “Dr. Rao bases his opinion primarily upon Claimant's subjective statements concerning the timeline of symptoms.” (R. p. 47). While it is true that Claimant's recitation of events is subjective, it is corroborated by the record, when viewed as a whole and it is uncontradicted in the record and unchallenged by the Respondents. Claimant did not have the left arm contracture nor the left drop foot before the accident, but he developed them shortly thereafter. This *evidence* is not speculative.

Contrary to the assertions of the Respondents in their brief that “Appellant essentially argues that the Commission should have afforded more weight to Dr. DuPuy and Dr. Rao,”

Claimant argues that the panel cannot require objective evidence while failing to weigh legally competent evidence. (Brief of Respondents p.15). Respondents argue further that “the Appellant has implicitly acknowledged that there is conflicting evidence over a factual issue in dispute.” (*Id.*). That’s simplistic and incorrect. There is no conflict regarding Claimant’s ‘pre and post-injury’ condition. The only issue is whether Claimant’s post-injury condition is causally related to the admitted workplace accident and supported by evidence in the record as a whole. To resolve that dispute, the panel must weigh all of the competent evidence before it/in the record. It did not do so here. In South Carolina, the Appeals Court may “reverse or modify the Commission’s decision if substantial rights of the Appellant has been prejudiced because the Commission’s findings, inferences, conclusions or decisions are affected by other errors of law or are clearly erroneous in view of the reliable, probative and substantial evidence on the whole record.” *Frampton v. South Carolina Dep’t of Nat’l Resources*, 432 S.C. 247, 256, 851 S.E.2d 714, 719 (2020).

There is however a conflict in the testimony of the two doctors whom the panel relied upon and whose “opinions on the objective diagnostic imaging and the medical science of closed head injuries...were substantially consistent...” (R. p. 49; Finding of Fact 56). Dr. Brown opined that “my concern about that being – saying that there is a partial left foot drop associated with an inversion, which will track you to...the medial margin of your right – right motor strip is separate in – in location and unlikely to be affected by a small lesion as – the same as his arm.” (R. p. 769, lines 14-22). But also, “potentially within the deep basal ganglia certainly can happen, but those would typically be presenting with other findings, which he did not have on exam.” (R. p. 770, lines 6-9). Whereas Dr. Gunter opined “[a]nd so you would expect a closed head injury that produced contracture of an upper and lower extremity would do that by damaging the upper motor

neuron that goes to those areas of your body. And so the leg cortex is actually interhemispheric, it's actually in-between the two halves of the brain, which is uncommonly injured because it's fairly well protected in the interhemispheric sulcus. And then the arm, which is out more on the surface of that cortex – excuse me of that brain, in the motor strip, could be affected. But it's right next to the face, and to get the hand and the arm but not the face would be unusual, because they're geographically, immediately adjacent. Now, literally, anywhere along the corticospinal tract you would produce something that might produce a delayed contracture, like in the brainstem or in the pons. But if you had those injuries, you'd expect a decline in level of consciousness for sure.” (R. p. 916, lines 22-25 – R. p. 917, lines 1-19). Contrary to the finding of the panel, these anatomical descriptions share no similarities on their face. The only thing Dr. Brown and Dr. Gunter agree upon is that to have Claimant's left arm contracture and left drop foot, you would *typically expect* “*other findings.*” Their contrarian opinions are speculative and do not support the decision of the panel.

Respondents would like the Court to believe that Claimant's argument regarding the weight to be given the opinion of Dr. Brown stands on nothing more than Claimant's naked assertion, but that is not the case. (Brief of Respondents p.15). Here is a timeline of events to shed additional light on this issue:

June 14, 2019 – Claimant is struck in the head while at work. (R. p. 35)

June 15-16, 2019 – Claimant has significant headache and malaise and could not get out of bed all weekend. (R. p. 670, lines 2-4 – R. p. 673, lines 11-14 – R. p. 674 lines 13-15).

June 17, 2019 – Claimant attempts a return-to-work but leaves early to go to the hospital complaining of a headache and a sharp pain down his back. (R. p. 670, lines 12-17).

June 20, 2019 – Claimant presents to Chester Chiropractor where James Stauffer, DC, notes headaches, neck pain, with an arm in a fixed position up at his

chest/sternum area bent the elbow (left arm), left leg pain, an antalgic lean forward or anterior when standing and lower back pain. (R. p. 274).

June 25, 2019 – Claimant presents to MUSC Lowry Family Medicine where the Objective Physical Exam notes:

Left shoulder: **He exhibits decreased range of motion, tenderness, bony tenderness, pain and decreased strength.**

Cervical back: He exhibits decreased range of motion, tenderness, bony tenderness, pain and spasm.

Thoracic back: He exhibits decreased range of motion, tenderness, bony tenderness, pain and spasm.

Lumbar back: He exhibits decreased range of motion, tenderness, bony tenderness, pain and spasm.

**Positive left straight leg raise at 45 degrees.**

**And, a trigger point corticosteroid injection in the posterior thoracic region subscapularis left was administered.** (R. p. 276; emphasis added).

July 5, 2019 – Claimant presents to Dr. Brown and the Physical Exam notes:

The patient is notably sitting in a hunched forward posture with his neck tilted towards the left. His left shoulder, elbow joint, wrist joint, and all digits on the left hand are flexed and clenched at baseline, however, he is capable of normal range of motion when asked and as well as observed delayed later throughout the exam. **The patient has 5/5 bilateral upper and bilateral lower extremity strength...The patient has negative straight leg raise bilaterally.**

And, under the Assessment/Plan:

**I have reviewed the patient's historical narrative with him here in clinic today and I do feel that his symptoms do fit the time course with his stated injury,** however, he does not have significant neurologic structure abnormality on imaging or on physical exam for his spine. (R. pp. 296-297; emphasis added).

July 22, 2019 – Claimant presents to Your Life Wellness & Physical Therapy on Dr. Brown's referral. **Strength testing of the left upper extremity was poor for shoulder elevation, shoulder abduction, wrist extension, triceps, 1<sup>st</sup> extension, and hand intrinsics. Strength testing in the left lower extremity was good in the quadriceps and gastroc and fair in the illopoas, anterior tibialis, EHL, and hamstrings.** (R. p. 323; emphasis added).

As you can see, Claimant was presenting with a left arm contracture and left drop foot no later than June 20, 2019; just six days after his work-related accident. Eleven days post-accident, June 25, 2019, Claimant's left upper extremity range of motion and strength was so limited that a

cortisone injection was administered into his left shoulder. Then, eleven days post-injection, July 5, 2019, his range of motion and strength are “normal.” Seventeen days, and two occipital nerve block injections, from that encounter, July 22, 2019, his left upper extremity strength was poor in all but one muscle group tested. Two conclusions can be reached from this: 1) the steroid injection in his shoulder served its purpose, if only for a limited time; or 2) the July 5, 2019, medical record is inaccurate. Under either, the record from that date cannot be relied upon to form an opinion.

The notion put forth by Dr. Gunter, the panel, and Respondents that the “objective diagnostic imaging proves the appellant did not sustain a brain injury,” would require us to live in a vacuum void of common experience and current events because lay knowledge of two common diseases quickly dispels their position. As we get older and our parents do the same, we hope that their faculties remain intact and that they do not develop dementia. One common form of dementia, Lewy body dementia, is diagnosed based on a patient’s symptoms because its neurological cause remains undetectable through imaging. For football fans, chronic traumatic encephalopathy, CTE, is diagnosed based on a patient’s history of playing contact sports and the symptoms they present with because it is also undetectable through imaging. In spite of the fact that neither of these conditions can be seen through imaging, millions of people are nonetheless afflicted with them. Would Dr. Gunter, the panel, and Respondents deny these conditions exist on the absence of imaging?

Combined, Dr. DuPuy and Dr. Rao have over seventy years of clinical experience, and both opined that Claimant’s presentation was organic, not exaggerated and opined that these issues/conditions of Claimant were related to this incident at hand. Their opinions, based on their experience, are not speculative, not to mention based on their extensive time with Claimant in various appointments they had with him. These opinions along with the unchallenged

circumstantial evidence support the findings and conclusions of the single commissioner. “It is a well-settled rule that circumstantial evidence may be relied upon to support a finding of fact or an award in workmen's compensation cases, and such finding or award may be based on inferences drawn from such circumstantial evidence.” *Fowler v. Abbott Motor Co.*, 236 S.C. 226, 229-31, 113 S.E.2d 737, 739 (1960). Here, the circumstantial evidence is buttressed by two experts with vast clinical experience opining that Claimant’s left arm contracture and left drop foot are the result of his work-related accident.

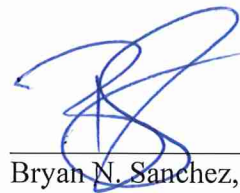
When all of the evidence is weighed, in looking at the record as a whole, the findings and conclusions of the single commissioner are supported in the record. In disregarding all of the direct and circumstantial evidence in this case, the panel has failed to weigh all of the evidence before it. This is an error of law. A decision controlled by an error of law, cannot stand and to find otherwise would certainly prejudice the Claimant’s substantial rights.

### CONCLUSION

The Claimant/Appellant respectfully request this Court reverse the panel’s order and reinstate the order of the single commissioner.

Respectfully Submitted,

January 12, 2023.



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AND

GREAT AMERICAN INSURANCE COMPANY, Defendant-Carrier, Respondent(s).

**PROOF OF SERVICE**

I certify that I have served the "Final Reply Brief" by emailing a copy of same, on the below date, to:

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