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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM
THE WORKERS' COMPENSATION COMMISSION

SCWCC Case No. 1809996
Court of Appeals Case No. 2022-000864

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

vs.

Bon Secours Mercy Health, Inc., Employer, and
Safety Nat'l Cas. Corp., Carrier, ... Appellants.

INITIAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

Table of Authorities ii

Statement of Issues on Appeal 1

Statement of the Case 2

Statement of Facts 4

Arguments 9

I. SUBSTANTIAL EVIDENCE SUPPORTS THE COMMISSION'S DETERMINATION THAT DOWNES IS ENTITLED TO THE RECOMMENDED BACK SURGERY 10

II. THE COMMISSION PROPERLY DESIGNATED DR. ESCE AS THE SURGEON TO PROVIDE THE ORDERED TREATMENT AND SURGERY 17

III. THE COMMISSION'S ORDER FINDING DOWNES HAS NOT REACHED MAXIMUM MEDICAL IMPROVEMENT AND IS ENTITLED TO ADDITIONAL SURGICAL TREATMENT IS INTERLOCUTORY, IS NOT IMMEDIATELY APPEALABLE, AND IS NOT PROPERLY BEFORE THIS COURT 19

Conclusion 22

TABLE OF AUTHORITIES

Cases

Bone v. U.S. Food Serv., 404 S.C. 67, 744 S.E.2d 552 (2013) 20

Burnette v. City of Greenville, 401 S.C. 417, 737 S.E.2d 200 (Ct. App. 2012) 16

Charlotte–Mecklenburg Hosp. Auth. v. S.C. Dep't of Health & Envt'l Control, 387 S.C. 265, 692 S.E.2d 894 (2010) 19-20

Good v. Hartford Accident & Indem. Co., 201 S.C. 32, 21 S.E.2d 209 (1942) 20

Hall v. United Rentals, Inc., 371 S.C. 69, 636 S.E.2d 876 (Ct. App. 2006) 18-19

Hartzell v. Palmetto Collision, LLC, 419 S.C. 87, 796 S.E.2d 145 (Ct. App. 2016) 15

Hoxit v. Michelin Tire Corp., 304 S.C. 461, 405 S.E.2d 407 (1991) 9, 17

Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981) 9

Long v. Sealed Air Corp., 391 S.C. 483, 706 S.E.2d 34 (Ct. App. 2011) 20

Martin v. Rapid Plumbing, 369 S.C. 278, 631 S.E.2d 547 (Ct. App. 2006) 19

McGuffin v. Schlumberger-Sangamo, 307 S.C. 184, 414 S.E.2d 162 (1992) 9

Michau v. Georgetown Cty., 396 S.C. 589, 723 S.E.2d 805 (2012)..... 15

Mullinax v. Winn-Dixie Stores, Inc., 318 S.C. 431, 458 S.E.2d 76 (Ct. App. 1996) 9, 10

Rodney v. Michelin Tire Corp., 320 S.C. 515, 466 S.E.2d 357 (1996) 9

Roper v. Kimbrell's of Greenville, Inc., 231 S.C. 453, 99 S.E.2d 52 (1957) 9

Smith v. Southern Builders, 202 S.C. 88, 24 S.E.2d 109, 114 (1943)..... 9-10, 21

Stephen v. Avins Constr. Co., 324 S.C. 334, 478 S.E.2d 74 (Ct. App. 1996) 10

Statutes

S.C. Code Ann. § 1-23-380 (2018) 9, 10, 19

S.C. Code Ann. § 42-15-60 (2018)..... 18

Other Sources

Black's Law Dictionary 919 (9th ed. 2009)..... 20

STATEMENT OF ISSUES ON APPEAL

I. Does substantial evidence support the Workers' Compensation Commission's determination that William Downes is entitled to the recommended back surgery?

II. Does substantial evidence support the Workers' Compensation Commission's designation of Dr. Esce as the surgeon to provide the ordered treatment and surgery?

III. Is the Commission's Order finding William Downes has not reached MMI and is entitled to additional surgical treatment interlocutory, not immediately appealable, and not properly before this Court?

STATEMENT OF THE CASE

This case arises from the Workers' Compensation Commission. The claim initially came before a single Commissioner on William Downes' Form 50 hearing request seeking additional benefits for an admitted injury by accident that occurred on April 17, 2018 while he was working for Bon Secours Mercy Health, Inc. Downes had received some authorized treatment for his low back and his left leg, and he is continuing to receive weekly temporary total disability compensation benefits. At the hearing, Downes contended he has not reached maximum medical improvement ("MMI") because he needs and is entitled to additional medical treatment for his back, specifically low back surgery recommended by neurosurgeon Dr. Esce. Appellants responded contending that such surgery is not warranted based on the opinions of the other physicians who have seen Downes, including neurosurgeons Dr. Bucci and Dr. Kanos. By stipulation, the only issue for determination at the hearing was entitlement to this low back surgery. All other issues—including permanency—were held in abeyance.

By Order dated October 22, 2021, the single Commissioner determined that Downes has not reached MMI and is entitled to the treatment and surgery recommended by Dr. Esce. However, the Commissioner did not designate Dr. Esce as the treating physician, finding that Appellants were entitled to provide the "the back surgery recommended by Dr. Esce by a physician of the defendants' choosing with a specialty to the back." (ROA, pp. x-x)

Both parties appealed to the Full Commission Panel. A hearing was held before an Appellate Panel on March 21, 2022. By Order dated June 8, 2022, the Appellate Panel affirmed the single Commissioner's determination that Downes has not reached MMI and is entitled to the treatment and surgery recommended by Dr. Esce. The Panel however amended

the single Commissioner's Order to designate Dr. Esce as the authorized treating physician. (ROA, pp. x-x)

Defendants Bon Secours Mercy Health, Inc. and Safety National Casualty Corporation now appeal to this Court.

Of note, this Court previously asked the parties for memorandums on appealability of the Full Commission's Order, which were filed. However, by Order filed on August 3, 3022, the Court determined that the appeal would continue but that the parties could address the issue further in the briefs.

STATEMENT OF FACTS

At the time of the initial hearing before the Commission in this matter, William Downes was 56 years old, held an associates degree in respiratory therapy, and had worked for Bon Secours Mercy Health (and its predecessors) for about 27 years. (ROA pp. x-x) Downes testified that his work involves treating patients with lung diseases or who are on ventilators. The job requires lifting and transporting patients. (ROA pp. x-x) He stated that prior to April 17, 2018, he had no significant low back problems or treatment. He has had some chiropractic adjustments. (ROA pp. x-x)

On April 17, 2018, Downes was assisting with a large patient in the CT scanning area. When the patient began to fall, he caught her and immediately felt a painful pop in his low back. The pain radiated down both legs. (ROA pp. x-x) Downes stated he was sent to Workwell Occupational Medicine for evaluation and treatment, but he testified that the treatment provided did not help him. (ROA pp. x-x) An MRI scan was obtained, and Downes stated that he was sent to Dr. Bucci and then to Dr. Han. Downes testified that he was treated with four rounds of injections and some 18 months of physical therapy. He stated that this provided only temporary relief and that his low back and leg pain never entirely went away. (ROA pp. x-x)

Of note, Downes sustained an injury to his left Achilles during authorized evaluation and treatment at Workwell. He later underwent surgery for that injury and spent some time in a walking boot. Downes stated that the boot affected his gait and increased his back pain. (ROA pp. x-x)

Concerning his back, Downes testified that he inquired about returning to see Dr. Bucci again but explained that he was not allowed to do so. He therefore sought out further evaluation on his own at Carolina Orthopaedic & Neurosurgery, where he eventually saw Dr. Esce. (Hrg. tr. p. 19, line 20-p. 21, line 13) Downes stated that Dr. Esce recommended surgery to repair a disc in his low back. (Hrg. tr. p. 21, line 14-p. 22, line 6) He was instead sent by the insurance carrier to Dr. Kanos for another opinion, and Dr. Kanos recommended continued conservative treatment rather than surgery. (Hrg. tr. p. 22, lines 7-15) However, Downes testified that he has already undergone such conservative medical treatment since his accident on April 2018, and it has not made him any better. (ROA pp. x-x) He stated that he needs and wants the surgery recommended by Dr. Esce so that his low back problem can be addressed, and he can become more functional. (Hrg. tr. p. 22, line 16-p. 24, line 3)

A review of the medical evidence submitted into the record shows that following his injury, Downes was initially evaluated and treated at Workwell Occupational Health. He was seen on multiple occasions, was first diagnosed with "low back pain/strain," and treated with medication and work restrictions. He was allowed to attend chiropractic treatment for a period of time and was eventually referred for MRI scanning and neurosurgical evaluation when symptoms were determined to potentially include radiculopathy. (cl's APA #2, p. 18)

Neurosurgeon Dr. Michael Bucci saw Downes on August 20, 2018 and, after examination, opined in his office note as follows: "Nonsurgical. Pain management referral. He has been seeing a chiropractor weekly and was encouraged to continue on with this for the time being. No follow-up indicated here currently." (cl's APA #3, pp. 22-25) From the submitted evidence, this appears to be Downes's only visit with Dr. Bucci.

Pain management physician Dr. Sung Han began treating Downes on October 17, 2018 with epidural steroid injections, physical therapy, and continued work restrictions. These conservative treatment measures continued until April 1, 2020, when Dr. Han placed Downes at MMI and noted again that he is "[n]ot a surgical candidate for lumbar spine, has seen Dr. Bucci." (cl's APA #4, pp. 30-46)

At some point during this treatment with Dr. Han, Downes saw Dr. Monroe at Carolina Orthopaedic & Neurosurgery Associates on his own. Downes testified that he did this simply to obtain assurance about the pain management treatment Dr. Bucci recommended. Dr. Monroe made no treatment recommendations, but Downes continued with the pain management treatment Dr. Han was providing. (cl's APA #5, pp. 47-50; Hearing transx p. 20, line 2-p. 21, line 10)

At the end of Dr. Han's treatment, defendants sent Downes to occupational medicine physician Dr. Ping Gao for an impairment assessment and Form 14B. On September 23, 2020, Dr. Gao noted that he had not seen or reviewed any of the radiology studies or reports, but he opined that Downes was at MMI as of that date, had a 1% medical impairment to the low back, had no permanent physical limitations, and was not in need of additional medical treatment. (defs' APA #5, pp. 14-22) This appears to be Downes's only visit with Dr. Gao.

On January 6, 2021, Downes saw Julie Justice, a nurse practitioner at Carolina Orthopaedic & Neurosurgical Associates. Nurse Justice noted that "[a]pparently, the patient has a history of a lumbar disc herniation that occurred following a work-related injury. I do not have any recent imaging. We will go ahead and get a lumbar MRI to further evaluate and I would like for him to follow up with Dr. Esce after he has this for further direction." (cl'sAPA #6, pp. 55-57)

Dr. William DeVault performed another impairment rating evaluation of Downes on January 9, 2021. He opined that

> [w]ithin a reasonable degree of medical certainty, William Downes has reached maximum medical improvement for these injuries. Based on the American Medical Association Guides to the Evaluation of Permanent Impairment, Fifth Edition, William Downes has 17% lumbar spine permanent and partial impairment under DRE lumbar category three, table 153-3, page 384... In order to maintain his current level of function, William Downes will need six physician visits per year and 15 physical therapy visits per year for treatment of acute exacerbations of his lumbar spine and left lower extremity conditions. Additional lumbar spine evaluation and treatment may be necessary. William Downes is suitable only for sedentary desk type work at this time.

(defs' APA #2, pp. 3-10) There is no evidence that Downes saw Dr. DeVault again.

On February 4, 2021, Downes returned to Carolina Orthopaedic & Neurosurgical Associates and was evaluated by neurosurgeon Dr. Philip Esce. Dr. Esce reviewed the updated MRI scan and ultimately opined that "MRI reviewed done at Piedmont Imaging shows L5-S1 moderate disc herniation central extending to the left side with decreased disc height... Plan is for a left L5-S1 micro- discectomy. Risk, benefits, and details of the procedure have been explained to the patient." (cl's APA #6, pp. 60-62)

On a questionnaire dated March 1, 2021, Dr. Esce opined to a reasonable degree of medical certainty that "[i]t is more likely than not that Danny Downes low back injury, including but not limited to lumbar disc protrusion at L5-S1 with radiculopathy, was either caused or was aggravated by his work accident on or about April 17, 2018 when a patient fell on him." He also opined that "[t]he medical treatment provided to or recommended for Danny Downes, including but not limited to L5- S1 micro discectomy, was either provided or

recommended in an effort to affect a cure, give relief, and reduce the period of disability stemming from his work-related low back injury." (cl's APA #6, pp. 66-67)

Defendants responded by sending Downes for an IME with neurosurgeon Dr. Charles Kanos of Prisma Health Southeastern Neurosurgical & Spine. Dr. Kanos stated in his note that

> I reviewed his MRI and there is relatively mild bulge at L5-S1. Is not causing significant stenosis. He does not have classic radicular pain but he will have tingling with occasional pain. He's got calf atrophy and the EHL weakness as a result of his Achilles injury and was told that some of the symptoms in the feet are related to that. In terms of the L5- S1 discectomy, I am not inclined to recommend that. I think the odds of getting significant improvement in the back are low as his pain is strongly non-mechanical. Also, radiculopathy is not his main complaint. His symptoms are approximate 80% back/20% leg. I feel he is at MMI with a 5% impairment rating to his lumbar spine based on the AMA Sixth Edition. He had an FCE that showed sedentary activity and I have no reason to dispute this. I think further medical treatment should include PM, medication, therapy or possible facet blocks or other injections.

(defs' APA #6, pp. 23-25) This was Downes's only visit with Dr. Kanos.

Downes returned to Dr. Esce on June 28, 2021. Dr. Esce stated stated that

> Workers' Comp then sent him over to Prisma, where he was Dr. Kanas who did not recommend surgery, but recommended further conservative care. Repeating the injections and physical therapy again. The patient then returned to my office with continued persistent complaints of severe back pain and lumbar radiculopathy, worse on the left side than right side, weakness with movement of his foot... Overall, I feel that given the fact he has really done everything possible for this but with no relief, a microdiscectomy at L5- S1 would be the next best available option. We are going ahead and try to get him set up for surgery.

(cl's APA #6, pp. 63-65)

ARGUMENTS

The standard of review in workers' compensation cases is clear, in that a court may not overturn a conclusion of the Workers' Compensation Commission unless that conclusion is "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." Lark v. Bi-Lo, Inc., 276 S.C. 130, ___, 276 S.E.2d 304, 306 (1981). See also Rodney v. Michelin Tire Corp., 320 S.C. 515, 466 S.E.2d 357 (1996); S.C. Code Ann. § 1-23-380 (2018).

> The test is whether the decision of the Commission is supported by substantial evidence. 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 that the administrative agency reached in order to justify its action.

Mullinax v. Winn-Dixie Stores, Inc., 318 S.C. 431, 458 S.E.2d 76 (Ct. App. 1995). "Where there is a conflict in the evidence, either of different witnesses or of the same witnesses, the findings of fact of the Commission as triers of fact are conclusive." Hoxit v. Michelin Tire Corp., 304 S.C. 461, ___, 405 S.E.2d 407, 409 (1991). "The final determination of witness credibility and the weight to be accorded evidence is left to the Full Commission." McGuffin v. Schlumberger-Sangamo, 307 S.C. 184, 186, 414 S.E.2d 162, 163 (1992). See also Roper v. Kimbrell's of Greenville, Inc., 231 S.C. 453, 461, 99 S.E.2d 52, 57 (1957)("...it is not for this court to balance objective against subjective findings of medical witnesses, or to weigh the testimony of one witness against that of another. That is the function of the Commission alone."); Smith v. Southern Builders, 202 S.C. 88, 24 S.E.2d 109, 114 (1943)("It was for the

Industrial Commission to determine which diagnosis advanced by these physicians it would accept.")

However, "where the evidence is susceptible of but one reasonable inference, the question is one of law for the court rather than one of fact for the Commission," Mullinax, 458 S.E.2d at 80, and a court "may reverse where the decision is affected by an error of law." Stephen v. Avins Constr. Co., 324 S.C. 334, 478 S.E.2d 74 (Ct. App. 1996); S.C. Code Ann. § 1-23-380 (2018).

I. **Substantial evidence supports the Commission's determination that Downes is entitled to the recommended back surgery**.

A review of all the evidence on the record in this claim shows that the Commission correctly determined that Downes is entitled to the additional medical treatment and surgery that has been recommended for him.

The issue at the hearing was whether Downes is entitled to additional medical treatment in the form of surgery recommended by Dr. Esce, or whether Downes had reached MMI and further such surgery was not necessary as opined by Dr. Kanos. The Commission concluded that Downes has not reached MMI and is entitled to surgery as recommended by Dr. Esce.

The admitted injury occurred on April 17, 2018 while Downes was assisting with a large patient in the CT scanning area. When the patient began to fall, he caught her and immediately felt a painful pop in his low back. The pain radiated down both legs. (ROA pp. x-x) Downes stated he was sent to Workwell Occupational Medicine for evaluation and treatment, but he testified that the treatment provided did not help him. (ROA pp. x-x) An MRI scan was obtained, and Downes stated that he was sent to neurosurgeon Dr. Bucci and

then to Dr. Han, a pain management specialist. Downes testified that he was treated with four rounds of injections and some 18 months of physical therapy. He stated that this treatment provided only temporary relief and that his low back and leg pain never entirely went away. (ROA pp. x-x)

Of note, Downes sustained another injury to his left Achilles during evaluation and treatment at Workwell. He later underwent surgery for that injury and spent some time in a walking boot. Downes stated that the boot affected his gait and increased his back pain. (ROA pp. x-x)

Concerning his back, Downes testified that he inquired about returning to see Dr. Bucci again when pain management treatment was reaching an end but explained that he was not allowed to do so. He therefore sought out further evaluation on his own at Carolina Orthopaedic & Neurosurgery, where he eventually saw Dr. Esce. (Hrg. tr. p. 19, line 20-p. 21, line 13) Downes stated that Dr. Esce recommended surgery to repair a disc in his low back. (Hrg. tr. p. 21, line 14-p. 22, line 6) He was instead sent by the insurance carrier to Dr. Kanos for another opinion, and Dr. Kanos recommended continued conservative treatment rather than surgery. (Hrg. tr. p. 22, lines 7-15) However, Downes testified that he has already undergone such conservative medical treatment since his accident on April 2018, and it has not made him any better. He stated that he needs and wants the surgery recommended by Dr. Esce so that his low back problem can be addressed, and he can become more functional. (Hrg. tr. p. 22, line 16-p. 24, line 3)

The medical evidence submitted into the record shows that following his injury, Downes was initially evaluated and treated at Workwell Occupational Health. He was seen on multiple occasions, was first diagnosed with "low back pain/strain," and treated with

medication and work restrictions. He was allowed to attend chiropractic treatment for a period of time and was eventually referred for MRI scanning and neurosurgical evaluation when symptoms were determined to potentially include radiculopathy. (cl's APA #2, p. 18)

Neurosurgeon Dr. Michael Bucci saw Downes on August 20, 2018 and, after examination, simply opined in his office note as follows: "Nonsurgical. Pain management referral. He has been seeing a chiropractor weekly and was encouraged to continue on with this for the time being. No follow-up indicated here currently." (cl's APA #3, pp. 22-25) From the submitted evidence, this appears to be Downes's only visit with Dr. Bucci.

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Defendants then sent Downes to occupational medicine physician Dr. Ping Gao on September 23, 2020 for an impairment rating and Form 14B completion, as neither Dr. Bucci nor Dr. Han will do an impairment rating. Of note, Dr. Gao stated that he had not seen or reviewed any of the radiology studies or related reports. However, he opined that Downes was at MMI as of that date, had a 1% medical impairment to the low back, had no permanent physical limitations, and was not in need of additional medical treatment. This appears to be Downes's only visit with Dr. Gao. (defs' APA #5, pp. 14-22)

On January 6, 2021, Downes saw Julie Justice N.P. of Carolina Orthopaedic & Neurosurgical Associates. Ms. Justice noted Downes's history of work injury and treatment with conservative pain management procedures, including injections. Since it had been some

time since his last MRI, she ordered an updated scan and scheduled an appointment for review with neurosurgeon Dr. Philip Esce. (cl'sAPA #6, pp. 55-57)

Evaluating orthopaedist Dr. William DeVault provided another impairment rating on January 9, 2021. In addition to that calculation, he opined that Downes will need continued medical treatment and stated that "[a]dditional lumbar spine evaluation and treatment may be necessary." He stated that Downes is "suitable only for sedentary desk type work at this time." There is no evidence that Downes saw Dr. DeVault again. (defs' APA #2, pp. 3-10)

On February 4, 2021, Downes returned to Carolina Orthopaedic & Neurosurgical Associates and was evaluated by neurosurgeon Dr. Philip Esce. Dr. Esce reviewed the updated MRI scan and ultimately opined that "MRI reviewed done at Piedmont Imaging shows L5-S1 moderate disc herniation central extending to the left side with decreased disc height... Plan is for a left L5-S1 micro- discectomy. Risk, benefits, and details of the procedure have been explained to the patient." (cl's APA #6, pp. 60-62)

On a questionnaire dated March 1, 2021, Dr. Esce opined to a reasonable degree of medical certainty that "[i]t is more likely than not that Danny Downes low back injury, including but not limited to lumbar disc protrusion at L5-S1 with radiculopathy, was either caused or was aggravated by his work accident on or about April 17, 2018 when a patient fell on him." He also opined that "[t]he medical treatment provided to or recommended for Danny Downes, including but not limited to L5- S1 micro discectomy, was either provided or recommended in an effort to affect a cure, give relief, and reduce the period of disability stemming from his work-related low back injury." (cl's APA #6, pp. 66-67)

Defendants responded by sending Downes for an independent medical exam ("IME") with neurosurgeon Dr. Charles Kanos of Prisma Health Southeastern Neurosurgical & Spine.

Dr. Kanos opined, as follows:

> I reviewed his MRI and there is relatively mild bulge at L5-S1. Is not causing significant stenosis. He does not have classic radicular pain but he will have tingling with occasional pain. He's got calf atrophy and the EHL weakness as a result of his Achilles injury and was told that some of the symptoms in the feet are related to that. In terms of the L5-S1 discectomy, I am not inclined to recommend that. I think the odds of getting significant improvement in the back are low as his pain is strongly non-mechanical. Also, radiculopathy is not his main complaint. His symptoms are approximate 80% back/20% leg. I feel he is at MMI with a 5% impairment rating to his lumbar spine based on the AMA Sixth Edition. He had an FCE that showed sedentary activity and I have no reason to dispute this. I think further medical treatment should include PM, medication, therapy or possible facet blocks or other injections.

This was Downes's only visit with Dr. Kanos. (defs' APA #6, pp. 23-25)

Downes returned to Dr. Esce on June 28, 2021. Dr. Esce opined:

> Workers' Comp then sent him over to Prisma, where he was Dr. Kanas who did not recommend surgery, but recommended further conservative care. Repeating the injections and physical therapy again. The patient then returned to my office with continued persistent complaints of severe back pain and lumbar radiculopathy, worse on the left side than right side, weakness with movement of his foot... Overall, I feel that given the fact he has really done everything possible for this but with no relief, a microdiscectomy at L5- S1 would be the next best available option. We are going ahead and try to get him set up for surgery.

(cl's APA #6, pp. 63-65)

Based on this evidence, the Commission chose to focus on the most recent evaluations and opinions provided by Dr. Esce and Dr. Kanos. This is certainly reasonable given that they had the benefit of the most recent MRI and both saw Downes following the conclusion of pain

management treatment. So, unlike Dr. Bucci, who was the only other neurosurgeon to evaluate Downes, Dr. Esce and Dr. Kanos had knowledge as to the benefit, or lack of benefit, that the conservative pain management treatment provided. Between the two, the Commission chose to rely on the diagnosis and opinions of Dr. Esce given that he and his office saw Downes on multiple occasions and Dr. Kanos only saw Downes once. Again, this is certainly a reasonable decision that is supported by the record.

However, there is another compelling reason supporting the decision in addition to what the Commission identified. Under the Act, the provision of medical treatment beyond the initial 10-week period must be supported by medical evidence stated to a reasonable degree of medical certainty. See S.C. Code Ann. § 42-15-60(A). See also Hartzell v. Palmetto Collision, LLC, 419 S.C. 87, 796 S.E.2d 145 (Ct. App. 2016). This requirement applies as much to independent medical examinations obtained by a defendant as it does to those obtained by an injured worker. See Michau v. Georgetown Cty., 396 S.C. 589, 596, 723 S.E.2d 805, 808 (2012).

Here, while Dr. Esce clearly stated that his opinion to a reasonable degree of medical certainty in the questionnaire that he signed, there is no such statement in Dr. Kanos's report. (compare cl's APA #6, pp. 66-67 with defs' APA #6, pp. 23-27) Therefore, Dr. Kanos's opinion cannot be afforded the same weight as Dr. Esce's opinion.

As to defendants' arguments, they first assume that the Commission must have erroneously come to its own medical conclusion that the later MRI showed something different than the first since he gave greater weight to the physicians who had seen that later MRI. However, this in and of itself is surmise and conjecture, as there are no findings that indicate that the Commission itself made any reading or comparison of the MRIs in the record.

To have done so would of course have been improper. See Burnette v. City of Greenville, 401 S.C. 417, 737 S.E.2d 200 (Ct. App. 2012)(finding concerning an analysis of an MRI not supported by substantial evidence where there is no evidence that the opinion originated from a medical provider but is apparently the medical opinion of the single commissioner).

To the contrary, the Commission quite clearly looked to the readings and information from the physicians who had the benefit of that additional MRI. It is erroneous to state that Dr. Esce's reading of the MRI is arbitrary because it is different than Dr. Kanos's reading or the reading of the radiologists, as neurosurgeons of course make their own readings of the MRI films and do not rely on radiologists' readings. Dr. Esce and Dr. Kanos had different readings and reached different conclusions from their readings, but that is simply the conflict in the evidence that underlies this issue and the reason for the hearing before the Commission. A plain reading of the Commission's order is that greater weight was given to the most recent and contemporaneous information. Dr. Esce and Dr. Kanos simply had more information available to them than did Dr. Bucci, who evaluated Downes long before, and Dr. Esce had more information than Dr. Kanos by virtue of the fact that he evaluated claimant on more than one occasion.

While it is true that Dr. Bucci, Dr. Han, Dr. Monroe, Dr. Gao, and Dr. DeVault did not recommend surgery, their expertise, their purpose, and the timing of the evaluations must be considered. And it is apparent from the Commission's Order that the Commission did just that.

Dr. Bucci saw Downes almost three years before Dr. Esce and Dr. Kanos evaluated him, and the import of his decision is that he wanted to see the effect pain management treatment would have for Downes's symptoms and condition. (cl's APA #3, pp. 22-25) Dr.

Han is a pain management specialist and not a back surgeon. His role was simply to provide the pain management treatment that Dr. Bucci recommended. (cl's APA #4) Dr. Monroe made no treatment recommendations, and according to Downes was simply providing him assurance about the pain management treatment Dr. Bucci recommended. (cl's APA #5, pp. 47-50; Hearing transx p. 20, line 2-p. 21, line 10) Dr. Gao is an occupational medicine specialist who saw Downes for an "independent rating examination" and made clear that he was simply evaluating impairment. (defs APA #5, pp. 14-22) The same can be said for Dr. DeVault, though he is trained in orthopaedics. Though, of note, Dr. DeVault did state that Downes would likely need further evaluation of his lumbar spine. (defs' APA #2, p. 10)

Obviously, the Commission made a well reasoned and rational choice between conflicting evidence. The most relevant opinions on the issue of back surgery at this point are those of Dr. Esce and Dr. Kanos. While the opinions of Dr. Esce and Dr. Kanos conflict, there are clear reasons outlined by the Commission and found in the Act for giving the most weight to Dr. Esce's diagnosis and opinion. As has been stated previously, "[w]here there is a conflict in the evidence, either of different witnesses or of the same witnesses, the findings of fact of the Commission as triers of fact are conclusive." Hoxit v. Michelin Tire Corp., 304 S.C. 461, ___, 405 S.E.2d 407, 409 (1991). As such, the Commission's findings and order on this issue must be affirmed.

II. The Commission properly designated Dr. Esce as the surgeon to provide the ordered treatment and surgery.

A review of all the evidence on the record in this claim clearly shows that the Commission correctly designated Dr. Esce as the treating physician to render the treatment ordered, as there is as much good cause here to order a change in physician as there is to

order a change in treatment.

The issue at the hearing before the single Commissioner was whether Downes is entitled to additional medical treatment in the form of surgery recommended by Dr. Esce or whether he had reached MMI and further such surgery was not necessary as opined by Dr. Kanos. The single Commissioner found good cause in the evidence on the record to order that Downes has not reached MMI and is entitled to the recommended surgery; however, he then inexplicably did not take the logical next step in also finding that there is good cause to order a change in the treating physician in order to accomplish this purpose. The single Commissioner rather ordered that defendants are entitled to choose the physician to perform the surgery recommended by Dr. Esce and did not specify that surgeon should be Dr. Esce. This is internally inconsistent and creates the untenable situation in which defendants could designate Dr. Kanos or some third surgeon as the authorized physician to provide the surgery recommended by Dr. Esce and thereby frustrate the Commissioner's intent – whether intentionally or unintentionally.

While the Workers' Compensation Act does give defendants the right to choose a treating physician, that right is not absolute. Section 42-15-60 of the Act makes clear that the Commission has the authority to settle disputes concerning treatment issues and also to designate a different treating physician for good cause shown, such as under the circumstances of this claim and order. See S.C. Code Ann. § 42-15-60 (2018)("...unless otherwise ordered by the Commission for good cause shown"). See also Hall v. United Rentals, Inc., 371 S.C. 69, 636 S.E.2d 876 (Ct. App. 2006)("The Appellate Panel, when necessary, may override the employer's choice of providers and order a change in the medical or hospital service provided. …Ultimately the Panel is authorized and empowered

to order further medical care and payment for that medical care when controversies arise between a claimant and the employer."); Martin v. Rapid Plumbing, 369 S.C. 278, 631 S.E.2d 547 (Ct. App. 2006)("The appellate panel is afforded discretion to order medical treatment under section 42-15-60 when a controversy …arises.")

Downes appealed this issue to the Full Commission, and the Appellate Panel reversed the single Commissioner and designated Dr. Esce as the treating physician. The Panel specifically found good cause in "[d]efendants' denial of the recommended medical procedure and the differing opinions of the neurosurgeons." Based on the foregoing, that decision is supported by substantial evidence and workers' compensation law. The Commission's determination on this issue should be affirmed.

III. The Commission's Order finding Downes has not reached maximum medical improvement and is entitled to additional surgical treatment is interlocutory, is not immediately appealable, and is not properly before this Court.

A review of the circumstances surrounding this case shows that appellants' appeal to this Court is interlocutory, as there are issues remaining before the Commission and this case has not reached a final judgement.

In Charlotte–Mecklenburg Hosp. Auth. v. S.C. Dep't of Health & Envt'l Control, the Supreme Court looked to the Administrative Procedures Act and held that "judicial review may only be sought from a **final** decision" of an administrative agency. Charlotte–Mecklenburg Hosp. Auth. v. S.C. Dep't of Health & Envt'l Control, 387 S.C. 265, 692 S.E.2d 894 (2010)(emphasis in original). In so holding, the Court stated that "[i]f there is some further act which must be done by the court prior to a determination of the rights of the parties, the order is interlocutory" and that "[a] final judgment disposes of the whole

subject matter of the action or terminates the particular proceeding or action, leaving nothing to be done but to enforce by execution what has been determined." Id. See also Long v. Sealed Air Corp., 391 S.C. 483, 706 S.E.2d 34 (Ct. App. 2011).

The Supreme Court further addressed appealability in Bone v. U.S. Food Serv., 404 S.C. 67, 744 S.E.2d 552 (2013). The Court looked to § 1–23–380(A) of the Administrative Procedures Act and noted that

> On its face, the statute refers to a "final judgment," which is a well-established term of art in the law to which great significance is attached. See Good v. Hartford Accident & Indem. Co., 201 S.C. 32, 21 S.E.2d 209 (1942) (holding if a judgment determines the applicable law while leaving open questions of fact, it is not a final judgment); see also Charlotte–Mecklenburg Hosp. Auth. v. S.C. Dep't of Health & Envt'l Control, 387 S.C. 265, 267, 692 S.E.2d 894, 895 (2010)("A final judgment disposes of the whole subject matter of the action or terminates the particular proceeding or action, leaving nothing to be done but to enforce by execution what has been determined." (citing Good)).

Bone, 744 S.E.2d at 557. Concerning the definition of "final judgment," the Court later also noted that

> This Court's jurisprudence is in accord with the definition of a final judgment found in Black's Law Dictionary. It defines a final judgment as "[a] court's last action that settles the rights of the parties and disposes of all issues in controversy, except for the award of costs ... and enforcement of the judgment." Black's Law Dictionary 919 (9th ed. 2009).

Bone, 744 S.E.2d at 558-559. The Court observed that no award had been made in the case and that the Commission's order did not address the severity of the injury, whether Bone had reached MMI, or if she was entitled to medical treatment; therefore, the Court held that the

order then before the Court was not final and interlocutory.

Here, as in Bone, there has not been a final judgment disposing of all the issues in the case. In fact, the Commission has determined that MMI has not been reached and additional medical treatment is necessary before the final determination of permanency can be reached. There is much left to be done before all issues in controversy in the claim are resolved. Appellants' remedy is to provide the treatment as ordered by the Commission and appeal this issue after Downes has been determined to have reached MMI post-surgery and a final award of permanent compensation has been made. As such, the current order is interlocutory and is not immediately appealable.

While this does place the risk of such treatment on defendants, the same was true in Bone and that did not require a different result in that case. Furthermore, our courts have long held that the purpose of the Workers' Compensation Act is to place upon the employer, and not the injured worker, the burden of the casualties – or the risks – of doing business. See Smith v. Southern Builders, 202 S.C. 88, 24 S.E.2d 109 (1943).

This case should not be heard by this Court and should be remanded to the Commission until all issues are resolved and a final order has been issued.

CONCLUSION

It is, therefore, respectfully submitted that under the facts and law relevant to the question, substantial evidence well supports the Commission's determination that Downes is entitled to the back surgery recommended by Dr. Esce. Given the conflict in the evidence, the Commission's choice between the medical opinions in its findings of fact must be held conclusive. The Commission's decision should be affirmed.

Furthermore, the Commission committed no error in designating Dr. Esce as the treating physician to provide the surgery, as there is good cause to do so in order to properly effectuate the Commission's decision concerning treatment. That decision is also supported by substantial evidence. Therefore, the Commission's Order should be affirmed in full.

Finally, it is respectfully submitted that this Court should not reach the merits of this appeal at this time, as the Commission's order is interlocutory, is not immediately appealable, and is not properly before this Court on appeal.

Respectfully submitted,

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