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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Appeal No.: 2022-000864

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

v.

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

REPLY BRIEF OF APPELLANTS

McAngus Goudelock & Courie, LLC
Helen F. Hiser
735 Johnnie Dodds Blvd., Suite 200
P.O. Box 650007
Mount Pleasant, South Carolina 29465
(843) 576-2900

Attorneys for Appellants Bon Secours Health System, Inc. and Safety National Casualty Corporation

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Appellants Bon Secours Mercy Health, Inc. and Safety National Casualty Corporation, reply to the Brief of Respondent William D. Downes ("Claimant"). Claimant's Brief contains several inaccuracies and/or misstatements, and fails to provide this Court with any reasons or basis for sustaining the Commission Decision. Claimant's arguments as to finality fail to take into account the third sentence in first paragraph of S.C. Code Ann. § 1-23-380 and, therefore, completely miss the mark.

I. Nothing in Claimant's Brief alters the fact that the Commission erred by ordering Defendants to provide the back surgery recommended only by Dr. Esce in this case.

Despite Claimant's arguments to the contrary, the Commission erred in ordering Defendants to provide a back surgery that every medical provider who saw or treated Claimant was not recommended or necessary, with the exception of Claimant's hand-picked surgeon, to whom the Commission arbitrarily and capriciously assigned the greatest weight. While it is true that the Commission is entitled to assign weight to medical evidence, it cannot order medical treatment, or make any other award, based on reasons that are arbitrary and capricious. S.C. Code Ann. § 1-23-380(5)(f); *Crisp v. SouthCo., Inc.*, 401 S.C. 627, 639, 738 S.E.2d 835, 841 (2013).

Contrary to Claimant's suggestion to this Court, the Commission's *only* rationale for giving more weight to the opinions of Dr. Esce and Dr. Kanos was because they "are the only physicians in the record that had the benefit of the most recent MRI of claimant's back … as opposed to the physicians who saw claimant prior to the most recent MRI." (Comm'n Dec., R. p. 18). Because there was no change between the 2018 and 2022 MRIs, (R. pp. 209-210), this is not a rational basis on which to place greater weight on Dr. Esce and Dr. Kanos over all the other physicians who saw and treated

Claimant. *See, e.g., In re Application of Blue Granite Water Co. for Approval to Adjust Rate Sched. & Increase Rates*, 434 S.C. 180, 187, 862 S.E.2d 887, 891 (2021) (explaining that a decision by an administrative agency "is arbitrary if it is without a rational basis, is based not upon any course of reasoning and exercise of judgment, is made at pleasure, without adequate determining principles, or is governed by no fixed rules or standards"); *Hatcher v. S.C. Dist. Council of Assemblies of God, Inc.*, 267 S.C. 107, 117, 226 S.E.2d 253, 258 (1976) ("'Arbitrary' means based alone upon one's will, and not upon any course of reasoning and exercise of judgment; bound by no law; done capriciously or at pleasure, without adequate determining principle, nonrational; not governed by any fixed rules or standard"). Not even Dr. Esce's medical notes indicate any change or difference between the two MRIs. (R. pp. 201-206).

Even if this Court were to accept Claimant's argument that it made sense to place more weight on the opinions of Dr. Kanos and Dr. Esce over those of all the other physicians who found Claimant had reached MMI,[1] which it should not, the Commission's rationale for placing greatest weight on Dr. Esce is irrational. On appeal, Claimant continues to perpetuate the incorrect impression that Dr. Esce had an on-going treatment relationship with Claimant suggesting, as the Commission did, that his opinion should carry more weight because he saw Claimant "multiple" times. What is plainly evident from the record is that Dr. Esce only saw Claimant twice, while Dr. Kanos saw him once. Merely counting the number of visits, and affording greater weight to the physician with one additional visit, is neither rational nor reasonable. Placing greater

[1] In addition to Dr. Kanos, multiple medical providers, including Dr. DeVault, Claimant's hand-picked IME doctor, found that Claimant had reached MMI for the low back. (R. p. 187 (Dr. Han); pp. 235-240, 242 (Dr. Gao); p. 228 (Dr. DeVault)).

weight on one physician over another based on an irrational basis is arbitrary and capricious, *see, e.g.*, *Blue Granite*, 434 S.C. at 187, 862 S.E.2d at 891; *Hatcher*, 267 S.C. at 117, 226 S.E.2d at 258, and cannot support the Commission decision in this case.

Claimant next suggests that Appellants believe the Commission came to its own medical conclusion as to what the second MRI showed. Instead, Appellants' argument is that Dr. Esce's description of the second MRI is at odds with every other physician who reviewed the MRI. Dr. Ceballos compared the 2021 MRI to the 2018 MRI, finding no change. (R. pp. 209-210 (finding "*[a]gain*" the later MRI showed "minimal canal, minimal right and mild left neural forminal stenosis at the L3-L4 level," and "*[a]gain*, there is minimal canal and mild bilateral neural forminal stenosis at the L4-L5 level," and yet "*[a]gain*, there is minimal indentation of the ventral thecal sac and minimal bilateral neural foraminal encroachment at the L5-S1 level due to combined decreased disc height, disc bulge and shallow posterior central disc protrusion," and concluding there was "[n]o interval change," only "[m]inor multilevel acquired spinal encroachment without spinal cord or nerve root compression apparent," and "[m]ultilevel degenerative disc disease, worse at the L5-S1 level")) (emphases added). Dr. Kanos reviewed the MRI and saw only a "relative mild bulge at L5-S1."

Equally, if not more important, Dr. Kanos explained that the surgery proposed by Dr. Esce had very low odds of giving Claimant significant improvement for the precise reason that "his pain is strongly non mechanical" and "radiculopathy is not his main complaint." (R. p. 247). In other words, Dr. Kanos, along with every other physician who saw or treated Claimant (with the exception of Dr. Esce), even those hand-picked by Claimant, did not find the MRI or Claimant's reported symptoms warranted low back

surgery which, as Appellants have pointed out before, carries a great deal of risk in and of itself. An unnecessary back surgery with little chance of providing Claimant real relief is a risk that an employer is not and should not be required to bear under the Act.

Claimant repeats and bases much of his argument on Dr. Esce's mistaken understanding of Dr. Kanos' recommended course of action, suggesting that it would merely involve more of the same conservative treatment. Instead, what is evident from the record, (R. p. 247), and what Claimant himself acknowledged, is that the treatment recommended by Dr. Kanos was not what he had undergone previously:

> Q: … Are you aware that [Dr. Kanos] recommended some medication and some facet blocks as a possibility that weren't done before?
>
> A: Seem like I recall he did say something about facet block from what I recall.
>
> Q: So it's not necessarily the exact same thing that you were doing before, correct?
>
> A: Correct.

(R. p. 112, line 21- p. 113, line 11). Thus, Dr. Esce's conclusion that surgery was warranted because Claimant had failed all conservative care, (R. p. 204), is not supported by the record. While the injections and physical therapy had not provided the level of relief Claimant was seeking, there is no evidence as to whether the facet blocks would provide relief—precisely because the Commission ordered surgery before allowing that course of treatment a chance to succeed.

Next, Claimant argues that the Commission properly discounted Dr. Kanos' treatment recommendations because they were not stated "to a reasonable degree of medical certainty." That formulaic phrase is required in a number of instances in the South Carolina Workers Compensation Act ("Act"), but the recommendation for a course

of treatment is not one of them. *See* S.C. Code Ann. § 42-1-160(B) (proof of mental/mental injury requires "expert opinion or testimony stated to a reasonable degree of medical certainty"); S.C. Code Ann. § 42-1-160(E) (proof of causation in medically complex cases requires "expert opinion or testimony stated to a reasonable degree of medical certainty"); S.C. Code Ann. § 42-1-172 (proof of repetitive trauma injury requires "expert opinion or testimony stated to a reasonable degree of medical certainty")[2]; S.C. Code Ann. § 42-9-35 (claims based on pre-existing condition must be based on "expert opinion or testimony stated to a reasonable degree of medical certainty"); S.C. Code Ann. § 42-11-10 (proof of occupational disease requires expert opinion or testimony stated to a reasonable degree of medical certainty"). And, while the phrase "expert medical evidence stated to a reasonable degree of medical certainty" appears in the first sentence of S.C. Code Ann. § 42-15-60, this Court has interpreted that provision to mean that, in order "[t]o hold an employer liable for medical expenses beyond" the initial 10-week period, *a claimant* must present expert medical evidence "based upon a heightened standard of medical evidence, [that] additional treatment would tend to lessen the claimant's period of disability." *Hartzell v. Palmetto Collision, LLC*, 419 S.C. 87, 96, 796 S.E.2d 145, 150 (Ct. App. 2016). In other words, the statutory assumption is that, after 10 weeks, a claimant is not entitled to additional medical treatment unless he or she presents medical evidence stated to a reasonable degree of medical certainty that the treatment will lessen the period of disability.

[2] *Michau v. Georgetown County*, 396 S.C. 589, 723 S.E.2d 805 (2012), cited by Claimant, is inapposite as it addresses the medical evidence required to establish a repetitive trauma claim under Section 42-1-172, which this claim clearly is not.

Here, Dr. Kanos' treatment recommendation was not offered in support of a mental/mental injury, or to show causation in a medical complex case, or to prove a repetitive trauma injury, or a pre-existing condition, or an occupational disease. Instead, the key part of Dr. Kanos' medical record relied on by Appellants is his recommendation for treatment: Dr. Kanos reviewed Claimant's medical records, performed a thorough examination of Claimant, after which he explained that surgery had a low probability of providing Claimant relief "as his pain is strongly non mechanical" and "radiculopathy is not his main complaint." He recommended further medical treatment including pain management, "medication, therapy or possible facet blocks or other injections." (R. p. 247). Again, there simply is no requirement under the Act for a treatment recommendation to be stated to a reasonable degree of medical certainty. To the extent Claimant argues that Dr. Kanos' conclusion that he had reached MMI was not stated to a reasonable degree of medical certainty, as noted above, that conclusion was reached by multiple other providers, even physicians hand-picked by Claimant. (R. p. 187 (Dr. Han); R. pp. 235-240, 242 (Dr. Gao); R. p. 228 (Dr. DeVault)).

This Court should hold that the Commission erred in ordering Appellants to provide the back surgery that was recommended only by Dr. Esce, and directing that Dr. Esce become the authorized treating physician.

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

Claimant's challenges to this Court's ability to hear this appeal miss the mark. First, *Charlotte-Mecklenburg Hosp. Auth. V. S.C. Dep't of Health & Envt'l Control*, 387 S.C. 265, 692 S.E.2d 894 (2010), is not controlling because it dealt with an appeal from the Administrative Law Court ("ALC"), which is governed by S.C. Code Ann. § 1-23-

610(A)(1). This case is on appeal from the Worker's Compensation Commission, not the ALC, and is governed by a different statutory provision, S.C. Code Ann. § 1-23-380. The third sentence in first paragraph of Section 1-23-380 contains language, absent from Section 1-23-610, which provides that "[a] preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy." This case is immediately appealable because review of a final agency decision, after the unnecessary low back surgery has been performed, along with any ensuing negative complications, will not provide an adequate remedy.

Unlike the instant case, both *Long v. Sealed Air Corp.*, 391 S.C. 483, 706 S.E.2d 34 (Ct. App. 2011) and *Bone v. U.S. Food Serv.*, 404 S.C. 67, 744 S.E.2d 552 (2013), dealt with reversals of Commission decisions, that were remanded for further substantive proceedings. Clearly, this appeal does not involve a remand but, instead, the exception to the finality rule set out in the first paragraph of S.C. Code Ann. § 1-23-380, which was specifically recognized in *Bone*. *See* 404 S.C. at 74, 744 S.E.2d at 556 (explaining that the remand order before it "is not a final order. *However*, a preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy") (emphasis added).

Finally, while Claimant is correct that the Act places the burden of compensating workers who suffer injuries arising out of and in the course of employment on the employer, *Smith v. S. Builders*, 202 S.C. 88, 101, 24 S.E.2d 109, 115 (1943), that risk does not include unnecessary surgeries that carry a great degree of risk with little expectation of long-term improvement, and that likely will result in further harm to the

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

CONCLUSION

For the reasons stated in their Brief and herein, this Court should reverse the Commission Decision.

Respectfully submitted,

MCANGUS GOUDELOCK & COURIE, LLC

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s/Helen F. Hiser

Helen F. Hiser
S.C. Bar No.: 76124
735 Johnnie Dodds Blvd., Suite 200
P.O. Box 650007
Mount Pleasant, South Carolina 29465
(843) 576-2900

Attorneys for Appellants Bon Secours Health System, Inc. and Safety National Casualty Corporation