

RECEIVED
OCT 27 2023
S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Appeal From The
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
Appellate Panel

Appellate Case Number 2019-001944

Court of Appeals Opinion No. 2023-UP-223
Submitted November 1, 2022 – Filed June 7, 2023
Rehearing Denied August 25, 2023

Mary Hickman, Employee, Respondent,

v.

Ruiz Foods, Employer, and
Safety National Casualty Corporation
c/o York Risk Services Group, Carrier, Petitioners.

**RESPONDENT'S RETURN TO
PETITION FOR WRIT OF CERTIORARI**

Other Counsel of Record:

MCANGUS GOUDELOCK & COURIER
Helen F. Hiser
735 Johnnie Dodds Blvd., Suite 200
P. O. Box 650007
Mount Pleasant, South Carolina 29465
Telephone (843) 576-2900
helen.hiser@mgclaw.com
Attorney for Petitioners

Dwight C. Moore, SC Bar No. 63008
Moore Law Firm, L.L.C.
26 North Main Street (29150)
Post Office Box 1229
Sumter, South Carolina 29151-1229
Telephone (803) 778-6520
Fax (803) 775-6365
Email: moorelawfirm@ftc-i.net
Attorney for Respondent

TABLE OF CONTENTS

Table Of Authorities	i
Questions Presented	1
Statement of the Case.....	1
Standard of Review	10
Argument	10
I. Did the Court of Appeals Apply an Incorrect Standard of Review?	10
II. Did the Court of Appeals Err by Misapplying This Court’s Ruling in <i>Crane v. Raber’s Disc. Tire Rack</i> , 429 S.C. 636, 842 S.E.2d 349 (2020) to the Facts of this Case?	11
III. Did the Court of Appeals Err by Failing to Find that Substantial Evidence Supports the Commission’s Finding that Claimant reached Maximum Medical Improvement with Respect to Her Low Back by September 28, 2017?	14
IV. Did the Court of Appeals Err by Requiring Petitioners to Disprove that Claimant is entitled to Additional Medical Treatment?	15
V. Did the Court of Appeals Err in Failing to Find That Substantial Evidence Supports the Commission’s Finding that the Only Compensable Injury at the Time of the Hearing was Claimant’s Low Back?	16
VI. Did the Court of Appeals Err in Ordering the Commission to Reinstate Temporary Total Disability Payments?	16
Conclusion	16

TABLE OF AUTHORITIES

CASES

<u>Crane v. Raber’s Discount Tire Rack, et al</u> , 429 S.C. 636, 842 S.E.2d 349 Filed March 11, 2020, Refiled April 29, 2020 (2020)	1,11,14
<u>Dodge v. Brucolli, Clark, Layman, Inc.</u> , 334 S.C. 574, 514 S.E.2d 593 (Ct. App. 1999), <u>Reh’g Denied June 5, 1999</u>).	11
<u>Hall v. United Rentals, Inc.</u> , 371 S.C. 69, 80, 636 S.E.2d 876, 882 (Ct. App. 2006)	10
<u>Hargrove v. Titan Textile Co.</u> 360 S.C. 276, 295, 599 S.E.2d 604, 613 (Ct. Appeal 2004).	13,14
<u>Tims v. J.D. Kitts Const.</u> , 393 S.C. 496, 504, 713 S.E.2d 340, 344 (Ct. App. 2011)	18

STATUTES

S.C. Code Ann. § 1-23-310, et seq., (2005)	10
S.C. Code Ann. § 1-23-380(A)(e)(f) (2005)	11,12
S.C. Code Ann. § 42-9-260 (2005)	16
S.C. Code Ann. § 42-15-60 (2015)	10,16

COURT RULES

Rule 242, SCACR	1
-----------------------	---

QUESTIONS PRESENTED

- I. Did the Court of Appeals Apply an Incorrect Standard of Review?
- II. Did the Court of Appeals Err by Misapplying This Court's Ruling in Crane v. Raber's Disc. Tire Rack, 429 S.C. 636, 842 S.E.2d 349 (2020) to the Facts of this Case?
- III. Did the Court of Appeals Err by Failing to Find that Substantial Evidence Supports the Commission's Finding that Claimant reached Maximum Medical Improvement with Respect to Her Low Back by September 28, 2017?
- IV. Did the Court of Appeals Err by Requiring Petitioners to Disprove that Claimant is entitled to Additional Medical Treatment?
- V. Did the Court of Appeals Err in Failing to Find That Substantial Evidence Supports the Commission's Finding that the Only Compensable Injury at the Time of the Hearing was Claimant's Low Back?
- VI. Did the Court of Appeals Err in Ordering the Commission to Reinstate Temporary Total Disability Payments?

Pursuant to Rule 242, SCACR, Ruiz Foods and Safety National Casualty Corporation c/o York Risk Services Group petition this Court to grant a Writ of Certiorari, reverse the Court of Appeals, and affirm the Decision of the Commission in its entirety in the case of Mary Hickman, Employee, Appellant, v. Ruiz Foods, Employer, and Safety National Casualty Corporation c/o York Risk Services Group, Carrier, Respondents, Unpublished Opinion No. 2023-UP-223, Submitted November 1, 2022, Filed June 7, 2023, Rehearing Denied August 25, 2023 (Ct. App. 2023). The Petitioners contend that this case presents novel issues of law, and the Court of Appeals' Decision is in conflict with prior decisions of this Court. Rule 242(b)(1),(3), SCACR.

Respondent hereby submits her Return to the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

The Respondent suffered on-the-job injuries during the evening hours of August 22, 2016, when she slipped and fell in an accumulation of water and oil on the floor of her worksite. The incident was admitted by the Petitioners. The Respondent states that she fell onto her right side,

striking some metal trays with her right arm and head as she fell to the floor. She complained of pain and bruising to the right upper arm, right lateral knee, midline thoracolumbar region and right scalp. She was treated at the KershawHealth Medical Center on August 23, 2016. She was seen on August 23, 2016, by Keith Farrell, APRN, at McLeod Occupational Health for injuries diagnosed as follows:

1. Contusion of right upper arm
2. Abrasion of right upper arm
3. Contusion of scalp
4. Contusion of right knee
5. Strain of muscle and tendon of back wall of thorax

Her activity restrictions "General: Seated duty only, Rotate stand/walk/sit as needed for comfort PRN."

(R. p. 148; *App. APA 1, p. 1*; R. pp. 175-176; *App. APA 2, pp. 28-29*).

On March 23, 2017, the Respondent was seen by Dr. Scott B. Boyd at Lexington Brain and Spine Institute for a "workman's comp evaluation regarding a fall that occurred at work (Ruiz Foods) 08/22/2016. Since that time she has had a considerable amount of pain in the right side of her low back that extends into the buttock with tingling and numbness down the side of the right leg to the foot. The pain in her back is constant. Her leg symptoms are intermittent. Activity tends to aggravate her symptoms overall. She denies any left leg symptoms. She tried to work but was unable to do so. She was unable to tolerate light duty as well. They sent her to physical therapy but that seemed to aggravate her symptoms. An MRI scan was then ordered which showed some abnormalities prompting visit today. She has not been to pain management." Dr. Boyd's Assessment follows. "Low back and right leg pain in her Low radicular pattern. She states this has occurred since her described work injury. She exhibits quite a bit of pain and Waddell signs. Her MRI scan does show a facet effusion on the right at L5-S1. I don't believe any of this surgical and she was not able to tolerate physical therapy. Therefore I have recommended referral to pain

management to consider further treatment is likely to include facet blocks or epidural sterile injections. Once again I do not believe that there is a surgical alternatives here so I will release her to pain management and keep her out of work until they're evaluation." Dr. Boyd wrote the Respondent out of work from March 23, 2017, until she could be evaluated by pain management. (R. pp. 235-236, 238; *App. APA 5, pp. 118-121*)

Respondent was referred to Dr. Steven B. Storick of Midlands Orthopaedics and Neurosurgery on May 2, 2017, for evaluation of her right knee, right arm/elbow, back and head. His Discussion Notes Follow:

Ms. Hickmon presents with multiple complaints from her work-related injury that seemed to be improving except for her persistent right low back pain. She only occasionally has pain down the right leg and numbness in the foot. The patient had no neurological deficits and did not appear myelopathic. Her physical exam due to mostly localized tenderness. The lumbar MRI findings were most degenerative of uncertain age. Patient has significant elevated Oswestry and verbal pain scores. Her old medical records were also reviewed indicating issues with chronic back pain and headaches. Conservative treatments would be the most appropriate. The patient reports minimal physical therapy for her back and the previous treatments most focused on over-the-counter medication if needed. I would expect she should be at maximum medical improvement when she completes physical therapy. Ms. Hickmon described working at a food processing plant where she is a "stacker" moving tortillas from one line to another for 9 hours a day. Once she is at MMI, I believe she should be capable of returning to that type of work. She will follow-up when she completes physical therapy. The patient may return to work in sedentary duty for now. Treatment plan was reviewed with Ms. Hickmon. All of my opinions are based upon a reasonable degree of medical certainty.

On June 20, 2017, Dr. Storick recorded the following Discussion Notes:

Overall the patient has improved with conservative treatments. She will need to continue with her daily home exercises for her back. The patient is capable of returning back to work without restrictions. She will not need long-term medications and should utilize OTC as needed. The patient may need to see an orthopedist regarding the popping and pain in the right knee. Using the AMA Guides to the evaluation of Permanent Impairment, Fifth Edition, the patient has a 2% whole body impairment lumbar spine based on the low back pain and lumbar spondylosis. She is to follow up as needed. Treatment plan was reviewed with the patient. All my opinions are based upon a reasonable degree of medical certainty. (R. pp. 239, 242, 249-250; *App. APA 6, pp. 122, 125, 132-133*)

The Respondent was seen by Dr. W. S. (Bill) Edwards, Jr., Spine Surgeon, of Pee Dee Orthopaedic Associates, P.A., on September 28, 2017, on referral for a Lumbar Independent Medical Evaluation; the chief complaint being low back pain and right leg pain. In pertinent part, Dr. Bill Edwards' History of Present Illness is as follows:

The 50 year old black female sustained a work related injury in August of 2016 on her job as a food process worker at Ruiz Foods. She noted the immediate onset of pain in her back without any dermatomal pattern of pain in legs but states that she injured her right knee at the same time. Symptoms have improved from that standpoint though her back continues to bother her significantly. She was seen at Occupational Medicine Clinic at McLeod initially and physical therapy was started and subsequently was referred to Dr. Scott Boyd in Columbia who did not feel she was a surgical candidate and referred her to Pain Management under the direction of Dr. Storick. Conservative treatment has consisted of physical therapy and medication and initially she was out of work for awhile but has been on a light duty environment since that time. She was felt to be at maximum medical improvement by Dr. Storick on June 20, 2017 and was felt by him to have no specific need for restrictions for her back. He opined that she had 2% whole person impairment of her body related to her low back injury. She denies any previous problems related to her spine. Her continued pain has been localized in the low back area radiating to the right leg though she admits that her knee has improved. She describes some paresthesias in the right foot and ankle since this injury that have not improved. She drives approximately one hour each way to work which she feels aggravates her symptoms at times....

DISCUSSION:

Patient does not appear to be at maximum medical improvement. A new MRI should probably be obtained to determine if any localized treatment at L4-5 on the right side could be offered such as an epidural steroid injection. I made no reappointment to see her but I will be happy to assume her care if the involved parties desire and I will be happy to help facilitate obtaining a new MRI scan and therapeutic injection before final statements are made.

(R. pp. 260-261; *App. APA 8, pp. 143-144*)

On February 15, 2018, the Respondent was seen by Dr. Willie S. Edwards of McLeod Spine Center. Dr. Edwards recorded the following under his Spine Notes: "Patient presents with back pain radiating down bilateral Low extremities she states she has been experiencing these symptoms since August 2016 when she had a fall at work. She describes her symptoms as a

numbness sensation radiating down both of her Low extremities to her toes with the right side being much worse than her left. She states her symptoms are aggravated with extended walking, standing and better with heat. She did previously undergo physical therapy which offered her no relief. She does continue her work as a food process worker at Ruiz foods. She rates the severity of her condition as an 8 out of 10.” Dr. Black provided the Respondent with a brace to assist with her discomfort and recommended epidural injections to assist with her discomfort in the Low extremities.

Dr. Edward’s notes from Respondent’s follow-up visit with him on March 15, 2018, states: “Patient presents in follow-up with continued complaints of back pain radiating down both of her extremities. Upon her last visit she was provided with a brace which she does wear she states provides her some relief when walking for any extended period of time. We did also refer her for an injection which unfortunately has not been completed at this time. She states her symptoms are constant and worsening in nature.”

Pursuant to referral by Dr. Edwards, the Respondent was administered an epidural steroid injection on April 18, 2018, by Dr. Anthony W. Alexander of McLeod Physician Associates. Dr. Alexander’s notes reflect the following: “The patient presents today to undergo her first transforaminal epidural steroid injection. The patient rates her low back pain as a 10/10 and right leg to the toe pain 10/10. ...” (R. pp. 251, 253, 256, 258; *App. APA 7, pp. 134, 136, 139, 141*)

On July 10, 2018, the Respondent was seen by Dr. Leonard Forrest of the Southeastern Spine Institute on referral for an Independent Medical Evaluation. The pertinent part of his notes follow:

Today I had an opportunity evaluate Ms. Mary Hickman. ... She presents at this time with pain that is in her low back and right buttock.

Ms. Hickman relates the onset of her symptoms to a work injury that occurred 08/22/16. She states she was working for Ruiz Foods and walking around a corner when she slipped and fell hard. She relates there was water and oil on the ground. She recalls falling onto her low back and buttock area onto a brick and concrete surface. Ms. Hickman relates that, in addition to falling onto her back, her arm somehow got caught. She relates having an injury to her right shoulder and she also reports that her head hit the ground. She also had pain in the right knee following this incident.

Ms. Hickman relates initially being treated in the safety office at work with ice, and she recalls being sent home from work. Ms. Hickman reports that the following day her symptoms were more prominent. She was directed to go to McLeod occupational health. She subsequently had treatment for the shoulder and knee as well as her back. Her treatment included primarily physical therapy. She relates having one recent injection procedure done. Prior to that injection, she was having leg pains in addition to the pains in her back and buttock. She reports that the injection procedure resolved the leg pains. However, she remains with prominent pain in her low back and right buttock. Ms. Hickman relates she has been offered surgery by a doctor and she would like to understand her other options.

Currently, Ms. Hickman reports pain in the low back and buttocks. The pain includes aching, burning, and pins and needles. Her level of pain currently varies from 6 to 10 on a scale of 0 to 10. Walking, standing, and lifting make her symptoms feel worse. Sitting with a pillow behind her back, and also lying down with a pillow under her legs are helpful. Medication is also helpful.

Prior to the injury 08/22/16, Ms. Hickman recalls having a couple of episodes of low back pain. By her recollection, the symptoms she had in the past before this accident were primarily in the middle part of the low back and not the right side or right buttock. She recalls having an injection procedure done in approximately 2013. She does not recall any other treatment that was needed. She relates that, prior to the incident 08/22/16, she was asymptomatic and working 8 to 10 hours a day.

...

Ms. Hickman relates that, following her injury in August 2016, she was off work for approximately one month. She then went back to light duty work. She reports that, over the interval following that, she has worked light duty, but needed to be off work at times. She relates that, since this past March, she has been off work entirely.

...

... She has tenderness over the low back and right buttock including over the right S1 joint. Stress of the right S1 joint reproduces some of her symptoms. No tenderness over the mid-back, upper back, or neck. ...

Ms. Hickman has had 2 lumbar MRI scans done. The first was done in January 2017 and the second one was done in October 2017. I reviewed both studies and

also have the official reports from the radiologist for both. The January 2017 study shows facet arthropathy with effusion at L5-S1 on the right. There is facet arthropathy present L-5, right greater than left, also. At that time there was marrow edema in the L4 and L5 pedicles on the right. The study from October 2017 continues to show significant facet arthropathy. The radiologist reports a disc bulge at L3-4 and a listhesis at L4-5 on this October study. I don't see anything significant in this regard or significantly different comparing the two studies.

Impression:

Ms. Hickman has pain in her low back, particularly on the right side, and also her right buttock. She also had pain down the right leg, but she had good improvement with these leg symptoms following a lumbar transforaminal injection that was recently done. To a reasonable degree of medical certainty, Ms. Hickman's low back and buttock pains were caused by the 08/22/16 incident.

With regard to the scan findings, the likelihood is that the facet arthropathy predated the 08/22/16 work incident, but the incident aggravated this condition causing the facet effusion as well as the edema that was seen on the initial MRI in January 2017. Her most recent MRI done in October shows less of the acute findings, but the significant facet arthropathy in the low lumbar spine, particularly on the right, persists. To a reasonable degree of medical certainty, the incident caused an injury to the low lumbar spine including an aggravation of the underlying spondylosis changes.

I also suspect that there may have been an injury to the S1 joint as a result of the 8/22/16 incident.

In my opinion, Ms. Hickman is not at maximal medical improvement.

Recommendation:

Ms. Hickman states she has been discussing surgery with Dr. Edwards. Dr. Edwards' notes, that are available to me, don't discuss surgery, but my opinion is that surgery may prove to be needed, including potentially a two level fusion. However, I don't believe that we know this will be necessary, or will be the best treatment, yet. Ms. Hickman has only had a single injection procedure done to date, and, according to my review, this was a transforaminal injection. This type of injection is best for treating the associated leg symptoms as opposed to treatment for the back and buttock pain. Indeed, Ms. Hickman relates she did have good improvement of her leg symptoms from this injection.

At this time, my specific recommendation for Ms. Hickman is to initiate treatment for the back with an intralaminar epidural injection. If she does not respond adequately to one or two such injections, I would recommend proceeding with treatment of the lumbar facet joints, possibly bilaterally, but particularly the right

L45(sic) and L5S1 facets. Also, to my exam, there is a likelihood that the S1 joint was injured, and is a contributing factor to Ms. Hickman's symptoms at the present time, as well. As such, an S1 injection should be a consideration for treating that component of her symptoms. Of note, spine surgery won't address the S1 joint at all.

Ms. Hickman has been off work recently. She reports her activities have been very limited by her pain. She notes she cannot even go to church now. I recommend Ms. Hickman continue to be off work. With treatment, ideally she will improve functionally as well as symptomatically.

...
(R. pp. 262-264; *App. APA 9, pp. 145-147*)

Dr. Forrest also completed Form 14B, Physician's Statement, dated August 5, 2018, in which he diagnosed Respondent's injury as significant aggravation of facet joints based upon facet effusion and edema and disc bulging; injury to the low back at right SI joint, right buttock, leg and back; and determined that she sustained a permanent physical impairment of 14% medical impairment to the low back and SI joint; and that as a result of the injury, the Respondent was disabled from meaningful gainful employment. He recommended additional treatment in the form of injections and possible surgery that would tend to lessen the period of disability or maintain the current level of function.

(R. p. 265; *App. APA, Exhibit A*)

Respondent filed Form 50, Request For Hearing, dated June 20, 2018, claiming injury to her right knee, back, right forearm, elbow and head, seeking additional medical treatment, and temporary total disability benefits. (R. p. 118)

Respondent's Form 51, Employer's Answer To Request for Hearing, was filed July 20, 2018, asserting *inter alia* that the Respondent's current condition is not related to her work accident, denied that she is entitled to additional medical treatment and denied that she is totally disabled as a result of her compensable injury. (R. p. 119)

The case was heard on September 24, 2018, in Florence, South Carolina, before Single Commissioner Avery B. Wilkerson, Jr., who filed his Decision and Order on January 4, 2019, ordering:

That Respondent suffered a compensable injury to only her back for which she received all appropriate medical treatment;

That Respondent reached maximum medical improvement on September 28, 2017;

That Respondent's current condition to her back is unrelated to her compensable accident sustained on August 22, 2016, as Respondent failed to meet her burden of proof; and

That the Respondent is not entitled to any additional medical treatment.
(R. pp. 8-16)

On January 23, 2019, Respondent filed Form 30, Request for Commission Review. (R. p. 120) The Appellate Panel Review was held in Columbia, South Carolina, on April 29, 2019, before Commissioners Melody James, Aisha Taylor and Susan Barden. The Appellate Panel's Decision and Order filed October 28, 2019, Ordered as follows:

That the Respondent suffered a compensable injury to only her back for which she received all appropriate medical treatment;

That the Respondent reached maximum medical improvement on September 28, 2017;

That Respondent's current condition of her back is unrelated to her compensable accident sustained on August 22, 2016, as Respondent failed to meet her burden of proof; and

That Respondent is not entitled to any additional medical treatment.
(R. pp. 1-6)

Respondent filed Notice of Appeal to the South Carolina Court of Appeals on November 22, 2019. The Court of Appeals filed Unpublished Opinion No. 2023-UP-0223 on June 7, 2023, in which it reversed the Commission and remanded the case for an award of temporary total

disability benefits. The Petitioners sought rehearing, and the Petition for Rehearing was denied by Order filed August 23, 2023. On September 27, 2023, the Petitioners filed a Petition for Writ of Certiorari.

STANDARD OF REVIEW

The Standard of Review in this case is set by The South Carolina Administrative Procedures Act (APA), S.C. Code Ann. 1-23-310, et seq. (2005). “A reviewing court may reverse or modify a decision of an agency if the findings, inferences, conclusions, or decisions of that agency are “clearly erroneous in view of the reliable, probative and substantial evidence on the whole record.” *Hall v. United Rentals, Inc.*, 371 S.C. 69, 79, 636 S.E.2d 876, 881, (Ct. App. 2006). (*Internal cites omitted*) “Substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the administrative agency reached in order to justify its action. *Hall*, at 371 S.C. 80, 636 S.E. 882.

ARGUMENT

I. Did the Court of Appeals Apply an Incorrect Standard of Review?

The Court of Appeals applied the correct Standard of Review in this case. “The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions of decisions are

...

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;

- (c) made upon unlawful procedure;
- (d) affected by other error of law;
- (e) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
- (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.”

S.C. Code Ann. §1-23-380(A)(e)(f)

The Court of Appeals found that the Commission erred as a matter of law in concluding that Hickman is not entitled to continued medical treatment for her back injury with radiating leg pain. The Court of Appeals cites *Dodge v. Brucolli, Clark, Layman, Inc.*, 334 S.C. 574, 514 S.E.2d 593 (Ct. App. 1999), *Reh’g Denied June 5, 1999*, and § 42-15-60 to support its holding that, to the extent the Commission found the Respondent was not entitled to continued medical treatment because she reached maximum medical improvement, such finding was affected by an error of law. (Ct. App. Op. No. 2023-UP-223, p. 7)

II. Did the Court of Appeals Err by Misapplying This Court’s Ruling in *Crane v. Raber’s Disc. Tire Rack*, 429 S.C. 636, 842 S.E.2d 349 (2020) to the Facts of this Case?

The Court of Appeals did not misapply to the facts in the case of *Hickman, supra*, the ruling of the South Carolina Supreme Court in *Crane v. Raber’s Discount Tire Rack*, 429 S.C. 636, 842 S.E.2d 349 (2020). The Supreme Court reasoned that “[i]n cases where credibility is not a substantial issue, however, even a valid credibility finding is not a proper basis for deciding a question of fact. This case illustrates that point. Even if Crane was untruthful in his testimony at the hearing, his claims for future medical care, temporary total disability and permanent impairment caused by hearing loss are based on objective medical evidence.” *Crane* at 429 S.C. 646, 842 S.E.2d 354.

The primary factual determination for the Commission in the *Hickman* case was whether or not the “reliable, probative and substantial evidence on the whole record”¹ supported an award of continued medical treatment for the Respondent. Conversely, the Commission concurred with the capriciousness of the Single Commissioner’s focus in denying continued medical treatment. The Commission based its decision on the conclusion of the Single Commissioner that the Respondent was not credible and her IME physician was not believable.

The Appellate Panel affirmed in part and reversed in part the Single Commissioner’s Decision and Order. A careful review of the differences between the Findings of Fact in the Decision and Order of the Single Commissioner dated January 4, 2019, and the Decision and Order of the Appellate Panel filed six (6) months later on October 28, 2019 are as follows:

Findings 1 – 4 in both Decisions and Orders are the same.

Finding 5 in the Single Commissioner’s Decision

Based on the greater weight of the evidence by all doctors including her IME doctor, **there is no mention of injuries** to the Claimant’s head, right forearm or should(*sic*), right knee, or right leg.

Finding 5 in the Appellate Panel’s Decision:

Based on the greater weight of the evidence by all doctors including Claimant’s IME doctor, **any injury** to the head, right forearm or shoulder, right knee, or right leg **resolved**

Finding 6 in the Single Commissioner’s Decision

Claimant provided two different testimonies depending on who was asking her the questions. Claimant was clear in her answers when asked by her attorney, and **unclear and prone to rambling** when asked by the Defense. Until recently everything had cleared up except her back pain. (R. p. 44, ln. 4-8, p. 47, ln. 2-10, p. 51, ln.15-20, p. 73, ln. 14 – p. 74, ln. 2, p. 74, ln. 19-25, p. 75, ln. 18 p. 76, ln. 2, p. 86, ln. 18 – p. 87, ln. 3; *Hearing Tr. p. 26 Ln. 4-8; p.29 Ln. 2-10; p. 33 Ln. 15-20; p. 55 Ln. 14 – p. 56 Ln. 2; p. 56 Ln. 19-25; p. 57 Ln. 18 – p. 58 Ln. 2; p. 68 Ln. 18 – p.69 Ln. 3*)

Finding 6 in the Appellate Panel’s Decision

Claimant provided two different testimonies depending on who was asking her the questions. Claimant was clear in her answers when asked by her attorney, and **unclear** when asked by the Defense. Until recently everything had cleared up except her back pain. (R. p. 44, ln. 4-8, p. 47, ln. 2-10, p. 51, ln.15-20, p. 73, ln. 14 – p. 74, ln. 2, p. 74, ln. 19-

¹ S.C. Code Ann. § 1-23-380(A)(e) (f)

25, p. 75, ln. 18 p. 76, ln. 2, p. 86, ln. 18 – p. 87, ln. 3; *Hearing Tr. p. 26 Ln. 4-8; p. 29 Ln. 2-10; p. 33 Ln. 15-20; p. 55 Ln. 14 – p. 56 Ln. 2; p. 56 Ln. 19-25; p. 57 Ln. 18 – p. 58 Ln. 2; p. 68 Ln. 18 – p. 69 Ln. 3*)

Findings 7 and 8 in both Decisions and Orders are the same.

Finding 9 in the Single Commissioner's Decision

I do not find the testimony by the Claimant consistent with the medical evidence presented at the hearing. (R. p. 73, ln. 4- p. 74, ln. 2; *Hearing Tr. p. 55, Ln. 4 - p. 56 Ln. 2*) **Based on the request of Defense**, I do not find the Claimant to be credible or truthful with her testimony.

Finding 9 in the Appellate Panel's Decision

I do not find the testimony by the Claimant consistent with the medical evidence presented at the hearing. (R. p. 73, ln. 4- p. 74, ln. 2; *Hearing Tr. p. 55, Ln. 4 - p. 56 Ln. 2*) We do not find the Claimant to be credible or truthful with her testimony.

Findings 10, 11, 12, and 13 in both Decisions and Orders are the same.

Finding 14 in the Single Commissioner's Decision

All issues currently suffered by the Claimant are not related to the workers compensation case of August 22, 2016. This is based on the greater weight of the evidence.

Finding 14 is omitted from the Appellate Panel's Decision.

Respondent respectfully suggests that the purported reversal of the Single Commissioner's Decision and Order by the Appellate Panel reflects an absence of a substantive review of the case and that the review, on appeal to the Full Commission, resulted in a mere "cleaning up" of his Findings of Fact by the Appellate Panel.

Dr. Boyd noted in his report that "[s]he exhibits quite a bit of pain and Waddell signs." (R. pp. 235-237; *App. APA 5, pp. 118-121*) Dr. Storick reported that the [p]atient has significant elevated Oswestry and verbal pain scores." (R. pp. 239, 242, 249-250; *App. APA 6, pp. 122, 125, 132-133*) Despite substantial evidence on the whole record that the Respondent continued to experience pain and sought medical treatment long after September 28, 2017, the Commission based its decision and award upon findings of a lack of credibility and dishonesty on the part of

the Respondent, that she reached MMI on September 28, 2017, and Ordered that she was not entitled to continued medical treatment to lessen her period of disability.

Furthermore, to the extent the based its findings and conclusions upon the reported “elevated Oswestry and verbal pain scores” and the fact that “[s]he exhibits quite a bit of pain and Waddell signs” opined by its physicians, such reliance is in error. Suspected malingering or exacerbated pain in a worker’s compensation claimant is addressed in our case law. Likewise, the same applies to prior events that might have led to the existence of pre-existing conditions. “A work-related accident which aggravates or accelerates a pre-existing condition, infirmity, or disease is compensable. A condition is compensable unless it is due solely to the natural progression of a pre-existing condition. It is no defense that the accident, standing alone, would not have caused the claimant’s condition, because the employer takes the employee as it finds him or her.” Hargrove v. Titan Textile Co. 360 S.C. 276, 295, 599 S.E.2d 604, 613 (Ct. Appeal 2004).

The Opinion of the Court of Appeals reversing and remanding the Hickman case falls within the ruling of our Supreme Court in Crane, supra, due to the fact that the substantial rights of the Respondent have been prejudiced because the administrative findings, inferences, conclusions or decisions are affected by an error of law and are clearly erroneous in view of the reliable, probative and substantial evidence on the whole record.”

III. Did the Court of Appeals Err by Failing to Find that Substantial Evidence Supports the Commission’s Finding that Claimant reached Maximum Medical Improvement with Respect to Her Low Back by September 28, 2017?

Due to the errors of law on the part of the Commission as set forth in Items I and II above, the Court of Appeals did not err in failing to find that substantial evidence supports the Commission’s finding that the Claimant reached Maximum Medical Improvement with respect to her low back by September 28, 2017.

There is substantial evidence in the record which defeats such a finding.

IV. Did the Court of Appeals Err by Requiring Petitioners to Disprove that Claimant is entitled to Additional Medical Treatment?

“There is no dispute Hickman injured her back on August 22, 2016, and there is no dispute Hickman’s back condition was preventing her from working as a tortilla stacker at the time of her hearing. Furthermore, there is no evidence in the record indicating an interruption in the causal chain from the August 22, 2016, injury to the disability experienced in 2018. *Tims v. J.D. Kitts Const.*, 393 S.C. 496, 504, 713 S.E.2d 340, 344 (Ct. App. 2011) (Every natural consequence that flows from a work-related compensable injury is also compensable unless the consequence is the result of an independent intervening cause sufficient to break the chain of causation.” Accordingly, Hickman was entitled to compensation in 2018 for the back injury with radiating leg pain sustained in August 2016. *Hickman*, Op. No. 2023-UP-223 (Ct. App. 2023), Reh’g Denied August 25, 2023, p. 8.

“Finally, there is no evidence in the record to support the conclusion that Hickman’s period of disability would not be shortened by continued medical treatment. Rather, all evidence indicates Hickman was told by her doctors that, as of March 15, 2018, Hickman was unable to work as a tortilla stacker until her back and radiating leg pain were treated, either by surgery or epidural injections. *Hickman*, Op. No. 2023-UP-223 (Ct. App. 2023), Reh’g Denied August 25, 2023, p. 9.

Question IV is misleading and raises a false inference. Rather than being required by the Court of Appeals to disprove that the Claimant was entitled to additional medical treatment, the Petitioners chose to undertake the task of attempting to refute and discredit the reliable, probative

and substantial evidence and supporting statutory and case law in the record proving the Claimant's entitlement to continuing medical treatment.

V. Did the Court of Appeals Err in Failing to Find That Substantial Evidence Supports the Commission's Finding that the Only Compensable Injury at the Time of the Hearing was Claimant's Low Back?

The Court of Appeals did not commit error in so finding because to do so would be in contravention of the reliable, probative and substantial evidence in the record, statutes and case law. The Court of Appeals found, as a matter of law, that the Claimant is entitled to continuing medical treatment for her back injury with radiating leg pain in reliance upon § 42-15-60 and *Dodge, supra*.


VI. Did the Court of Appeals Err in Ordering the Commission to Reinstate Temporary Total Disability Payments?

No. The Court of Appeals remanded the case for an award of temporary total disability benefits in accordance with the provisions of § 42-9-260.

CONCLUSION

For the foregoing reasons, the Respondent respectfully urges this Court to deny the Petition for Writ of Certiorari, affirm the Opinion of the Court of Appeals, and Order the Petitioner to forthwith comply with the directions set forth in Opinion No. 2023-UP-223.

MOORE LAW FIRM, L.L.C.


Dwight C. Moore, SC Bar No. 63008
26 North Main Street
Post Office Box 1229
Sumter, South Carolina 29151-1229
Telephone (803) 778-6520
Fax (803) 775-6365
moorelawfirm@ftc-i.net

Attorney for Respondent

October 27, 2023

RECEIVED

OCT 27 2023

S.C. SUPREME COURT