THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM COMMISSION PANEL OF THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

WCC NO. 0914812

Oscar Hickman .....Appellant

vs.

City of Myrtle Beach and Companion Property & Casualty Group .....Respondents

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FINAL BRIEF OF APPELLANT

Gene M. Connell, Jr. (S.C. Bar No. 1358)
KELAHER, CONNELL & CONNOR, P.S.
The Courtyard, Suite 209
1500 U. S. Highway 17 North
Post Office Drawer 14547
Surfside Beach, South Carolina 29587-4547
(843) 238-5648 (phone)
(843) 238-5050 (facsimile)
gconnell@classactlaw.net
Attorney for Appellant

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gconnell@classactlaw.net
Attorney for Appellant

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STATEMENT OF ISSUES ON APPEAL

This matter is before the Court on appeal based on the South Carolina Workers' Compensation Commissions' denial of the employee's request for surgery to his back after being injured in an admitted worker's compensation claim on September 9, 2009. The issues in this case include the following:

I. Did the Commission err in failing to find that the Claimant did not have a change of condition once he was able to have the surgery to his back after his colon cancer went into remission?

II. Did the Commission err in failing to find that additional medical care was governed pursuant to S.C. Code § 42-15-60?

III. Did the Commission err in failing to find that a change of condition occurred because Claimant's back condition had progressively worsened?

IV. Did the Commission err in failing to order the surgery when the Workers' Compensation Act requires the Commission to construe the Act in favor of coverage?

V. Did the Commission err in failing to find that the employee was entitled to additional medical treatment under *Dodge* and S.C. Code Ann. § 42-15-60?

VI. Did the Commission err in failing to find that the cancer remission was not a physical change of condition which allowed for spinal surgery?

VII. Did the Commission err in failing to find that the spinal surgery was a physical impossibility under the cancer treatment was completed?

STATEMENT OF THE CASE

This matter is before the Court based on a series of Orders of the Workers' Compensation Commission issued in this case. The Claimant, Oscar Hickman, was a twenty year employee with the City of Myrtle Beach who worked for the Street Department. On September 9, 2009 he was lowering the gate of a trailer when a co-worker dropped his side of the gate causing the entire weight of the gate to be briefly shifted onto Hickman. As

a result, Hickman injured his arm and back. He went to Doctors Care on September 14, 2009 and eventually on September 29, 2009 was referred to Dr. Bauerle at Strand Orthopaedic Consultants by the City and its insurer.

Dr. Bauerle diagnosed Hickman with lumbar spondylosis and an MRI showed changes in Hickman's lumbar spine at L4-5 and L5-1. Hickman underwent steroidal injections with Dr. Kang along with a course of physical therapy.

In January, 2010, Dr. Bauerle informed the Claimant that he should have back surgery. Hickman advised Dr. Bauerle at that time that he had just been diagnosed with colon cancer the previous month. Thus, Dr. Bauerle indicated that spinal surgery was not an option until the colon cancer was treated. As a result, Dr. Bauerle reviewed the Functional Capacities Evaluation of June 30, 2010 and rated the Claimant at 5% to the whole person. Dr. Bauerle prepared and submitted a Form 14-B finding Hickman had a 5% rating to the whole person. Almost immediately thereafter the employer filed a Form 21 which eventually was heard by Commissioner Wilkerson. Commissioner Wilkerson awarded client a 7.5% disability rating to the back and awarded medical pursuant to S.C. Code § 42-15-60.[1]

When the case came up for hearing (prior to the hearing with Commissioner Wilkerson), Hickman was living with his wife in California undergoing lifesaving cancer treatment. Dr. Shah wrote a letter dated December 1, 2010 (ROA p. 37) which stated:

> Oscar Hickman is a patient of ours who we are currently treating and following for colon cancer. He has completed chemotherapy, but continues to suffer from the side effects from the treatment, such as neuropathy and a low immune system. Due to these side effects it is medically unsafe for him

[1] A finding of maximum medical improvement by the Commission under S.C. Code Ann. § 42-15-60 does not preclude additional medical care. *Dodge v. Bruccoli, Clark, Layman, Inc.*, 334 S.C. 574, 514 S.E.2d 593 (Ct.App. 1999)

> to travel outside of California. Please feel free to contact us if you have any further questions or concerns....[2]

Eventually, on May 9, 2011 Dr. Shah wrote another letter regarding Hickman's treatment and stated as follows:

> This letter is written in support of my patient Mr. Oscar Lee Hickman regarding continuous treatment in therapy or surgery regarding severe back issues. Upon Mr. Hickman's recent visit and assessment in my office, Mr. Hickman is cleared for further treatment and care for his ongoing back therapy. If I can be of further assistance, please contact me.... (ROA p. 79).

Thereafter, Claimant filed a request for change of condition and attached a letter from Dr. Wayne Bauerle dated November 28, 2011:

> It is my opinion that Mr. Hickman's medical condition has changed for the worse as a result of his not being able to undergo the recommended surgery because of being diagnosed with cancer. It is further my opinion after reviewing the MRI done in Los Angeles, California, on August 17, 2011 that there is objective evidence that his condition has progressively worsened. He has evidence of significant degenerative at L5-S1 and also has a Grade I degenerative spondylolisthesis at L4-L5. (ROA p. 87).

At the change of condition hearing, Dr. Bauerle's deposition was offered along with all his medical records. Dr. Bauerle stated that Hickman's condition was progressively worse (ROA p. 95, APA 37, lines 19-22); that his functional level was worse (ROA p. 96, APA 38, lines 7-9); that his pain was worse, which I classify as an objective complaint (ROA p. 96, APA 38, lines 7-9); that it was hard to compare different MRI studies with different technicians and different magnets (ROA p. 97, APA 39, lines 10-14); that there may have been a change in the MRI, it's tough to say without using the same machine (ROA p. 97, APA 39, lines 17-21); that Hickman had an increase in symptomatology (ROA p. 98, APA 40, lines 14-23); that his colon cancer must be resolved prior to the back surgery (ROA p. 100, APA 42, lines 1-4); that he definitely needed the cancer treatment first (ROA

[2] As a result, the employer's request for a hearing was cancelled several times.

p. 100, APA 42, lines 14-18); that he treats the symptoms and that Hickman's symptoms were worse from the last time he had seen him (ROA p. 98, APA 40, lines 15-25; ROA p. 99, APA 41, lines 1-25); that the cancer trumped his ability to have surgery on his back (ROA p. 100, APA 42, lines 2-9); that there had been a change of condition, that the cancer had been treated and that no one would have performed the back surgery until the cancer was resolved (ROA p. 103, APA 45, lines 11-19); that he has been rated and released because there should be no surgery until the cancer is resolved (ROA p. 105, APA 47, lines 15-22).

Despite this testimony from Dr. Bauerle that the Claimant could not have safely had the back surgery until after his cancer treatment and that his condition was worse, the single Commissioner and the Full Commission found that a change of condition had not occurred, and as a result the surgery was denied.

The single Commissioner, Melody L. James, wrote in her opinion dated October 23, 2012:

> There has been no showing of a physical change of condition since that date.[3] S.C. Code Ann. Section 42-17-90 specifically requires that there be a "change of condition caused by the original injury, after the payment of compensation." Claimant's argument that the improvement in the cancer should be the basis of change in condition is misplaced. Although it is regretful as the spine surgery was originally recommended at the time of his diagnosis of cancer, the change of condition in his cancer treatment is not related to the original injury. The cancer was not part of the original injury and no change of condition has been shown to the original injury. (ROA p. 20).[4]

[3] The single Commissioner and the Commission did not have "substantial evidence" to deny Hickman's claim.

[4] Unfortunately, the single Commissioner did not address the testimony of Dr. Bauerle that Hickman's back condition had worsened after the initial ruling by Commissioner Wilkerson.

The single Commissioner's Order was appealed to the Full Commission of the South Carolina Worker's Compensation Commission. The Full Commission held:

> Our Courts have interpreted "change of condition" to mean a physical change of condition as a result of the injury. *Causby v. Rock Hill Printing & Finishing Co.* 249 S.C. 225, 153 S.E. 2d 697 (1967).... (ROA p. 8).

Further the Full Commission went on to hold:

> Claimant's argument that the improvement in the cancer should be the basis of change in condition is misplaced. The cancer was not part of the original injury and no change of condition has been shown to the original injury. (ROA p. 9). [5]

Here, Claimant had two separate changes of condition. First, Dr. Bauerle testified Claimant's back had progressively gotten worse since the hearing before Commissioner Wilkerson.[6] Second, Claimant had completed his life threatening cancer treatment and was now physically able to have the back surgery.

ARGUMENT

I. The Full Commission erred in failing to construe the Workers' Compensation Act liberally.

The Full Commission in its opinion in this case found when the Act is clear and unambiguous in its terms it must be strictly applied. *Transportation Ins. Co. and Flagstar Corp. v. S.C. Second Injury Fund*, 389 S.C. 422, 699 S.E.2d 687 (2010). This was error.

S.C. Code Ann. § 42-17-90 (known as the change of condition statute) allows the Commission to increase, reduce or terminate the award when the facts disclose a change in the claimant's condition *See Causby v. Rock Hill Printing & Finishing Co.* 249 S.C. 225, 153 S.E. 2d 697 (1967). Here the treating physician (Dr. Bauerle) clearly testified

[5] The Commission did not address the testimony of Dr. Bauerle in denying the claim that his back had gotten progressively worse.

[6] This issue was raised but not addressed by the Full Commission.

Claimant's back was worse (which had nothing to do with the cancer). (See Full Commission Transcript, ROA p. 184, lines 1-23).

It is also well settled under the law of this state that the Workers' Compensation Act is remedial social legislation and should always be construed in favor of the employee. In *Davis v. S.C. Dept. of Corrections*, 289 S.C. 123, 125, 345 S.E.2d 245, 246 (1986) the Supreme Court noted in a strikingly similar case:

> The Workers' Compensation Act should be liberally construed in furtherance of the purposes for which it was designed. Any reasonable doubts as to construction should be resolved in favor of the claimant by including him within the coverage of the Act rather than excluding him. It would require a strained construction of the Act to allow a former inmate compensation for permanent disability, yet deny him the medical treatment which may prevent his injury from resulting in permanent disability. (345 S.E.2d at 246.)

In this case, employee respectfully suggests that a liberal construction of the Act is required so that he can have back surgery. Once the cancer was resolved, Hickman returned to his doctor immediately to have the back surgery which has been denied by the Full Commission. Further, Claimant's treating doctor had found that his back was worse than the last time he saw him. (ROA p. 98, lines 15-25; ROA p. 99, lines 1-25). The Claimant asserts if there was any doubt as to whether the change of condition should apply, it is in this case when Hickman's medical condition changed and his back condition worsened so much that he could now have the surgery. It is disingenuous to argue that he can't have the surgery after the employer filed a Form 21 hoping for just such a result and trying to stop the Claimant from having the needed surgery because of another medical condition. (Further, Claimant's back condition got worse regardless of the cancer).[7]

[7] This testimony of Dr. Bauerle is undisputed.

The carrier's doctor testified extensively during his deposition that no one would have performed the surgery on the Claimant until the colon cancer was resolved. (ROA p. 103, APA 45, lines 11-19). Further, that same doctor testified there was objective evidence the Claimant's condition had worsened and that the surgery was necessary. (ROA p. 87; ROA p. 98, lines 15-25; ROA p. 99, lines 1-22; ROA p. 102, lines 14-24; ROA p. 103, lines 3-14). For these reasons and because of the substantial evidence rule, the Full Commission erred in failing to liberally construe the Act and allow Claimant to have the necessary surgery.

II. The Full Commission erred in failing to hold that Hickman had a change of condition.

It is well settled in South Carolina that a review for a change of condition is concerned with conditions that have arisen thereafter. See *Causby v. Rock Hill Printing & Finishing Co.*, 249 S.C. 225, 228, 153 S.E.2d 697, 698-99 (1967). Here, Hickman's condition changed because his medical condition changed (and there was substantial evidence to support it). On top of that the carrier's own physician indicated there was objective evidence that Hickman's condition was worse. (ROA p. 102, lines 14-25; ROA p. 103, lines 5-19). His back condition had gotten progressively worse and his cancer treatment had been completed, thus allowing him to have the needed back surgery. This is exactly what the change of condition statute contemplated happening in cases such as the Claimant's.

The Commission further erred in failing to hold that the substantial evidence standard for change of condition had been satisfied. Dr. Bauerle, in his deposition, indicated that Claimant's symptomatology had gotten worse. (ROA p. 98, APA 40, lines 14-23); that his pain had gotten worse (ROA p. 96, APA 38, lines 7-9); that he had gotten progressively

worse (ROA p. 95, APA 37, lines 19-22). With these factors in the record, the Commission erred in failing to find that the claimant was entitled to additional treatment. The substantial evidence presented by Dr. Bauerle includes the fact that Claimant's condition had gotten worse and that the cancer treatment had been completed thus allowing Dr. Bauerle to perform the surgery. (ROA p. 98, APA 40, lines 14-23; ROA p. 96, APA 38, lines 3-9; ROA p. 95, APA 37, lines 19-22).

The Commission cites *Robbins v. Walgreens and Broadspire Services*, 375 S.C. 259, 652 S.E.2d 90 (2007) for the proposition that pain alone is not enough to obtain a change of condition. In *Robbins* this Court noted that neither of the claimant's treating doctors had offered an opinion that the claimant's condition had gotten worse. Thus, in *Robbins* this Court affirmed the Full Commission. This is not the case here since Dr. Bauerle testified that Claimant's condition was progressively worse (ROA p. 95, APA 37, lines 19-22); that his functional level was worse (ROA p. 96, APA 38, lines 7-9); that his pain was worse and that the doctor classified this as an objective complaint (ROA p. 96, APA 38, lines 10-19); that he had an increase in symptomatology (ROA p. 98, APA 40, lines 14-23); that we treat symptoms and that the symptoms here were worse (ROA p. 102, APA 44, lines 14-25).

The Supreme Court has repeatedly held a liberal construction of this section is required. *Allen v. Benton Outdoor Advertising*, 236 S.C. 22, 112 S.E.2d 722 (1960). *See also, Cromer v. Newberry Cotton Mills*, 201 S.C. 349, 23 S.E.2d 19 (1960). (The purpose of this section is to enable the Commission to end compensation in cases where the change in condition amounts to a complete recovery; to enable it to diminish compensation where the change in condition is for the better; and to increase compensation where the facts developed upon a review show the change of condition is for the worse).

This Court has also had an opportunity to review a change of condition award based on pain. In *Gattis v. Murrells Inlet VFW No. 10420*, 353 S.C. 100, 516 S.E.2d 191 (S.C.App. 2003) evidence closely resembling the evidence in this case was offered including the need for surgery, the fact surgery would improve the level of pain and her ability to function. Here, the Claimant's doctor testified his pain and symptomology changed, that his function level was worse and that his complaints were objective (See deposition of Dr. Bauerle, (ROA pp. 95-103, APA 37-45).)

Claimant further notes the unpublished opinion of this Court in the case of *Walmart Stores v. Waxenfelter*, 2008-UP-075, (February 4, 2008, S.C. Court of Appeals). In that case the employee settled his claim on a Form 16 in 2003. In 2004 he filed a change of condition. Waxenfelter claimed severe back pain in 2004. Dr. Bauerle (the same doctor in this case) treated him in 2003. Dr. Bauerle referred Waxenfelter to a pain management doctor (Dr. Wilkins). Dr. Wilkins treated him and thought he had a large herniation. In June 2004 Waxenfelter underwent emergency surgery for a large infection to the L1-L2 disc. Dr. Poletti stated without question that his spine condition had worsened.

On appeal Walmart claimed the spinal infection was not a "change of condition." This Court found that Dr. Poletti's testimony that his condition worsened was sufficient to justify a change of condition. (Here, Dr. Bauerle's opinion is exactly like Dr. Poletti's in that the Claimant's condition worsened after the award.) See also, *Gattis v. Murrells Inlet VFW No. 10420*, 353 S.C. 100, 516 S.E.2d 191 (S.C.App. 2003). In *Gattis* the Commission found claimant had a 25% impairment to the back which was not appealed. The claimant then filed a change of condition claim which was approved by this Court. This Court sustained the trial court and found a change of condition existed based on continual

evaluations by the treating doctor. The same type of substantial evidence is present in this matter as was in *Gattis*.

Further, the Commission did not have substantial evidence to justify its decision that there had been no change of condition. This Court has held substantial evidence means the Commission must consider the record as a whole to allow reasonable minds to reach the conclusion that the administrative agency reached in order to justify its actions. The substantial evidence from the treating physician was not supportive of the Commission's decision. (See testimony of Dr. Bauerle offered earlier in this Brief, ROA pp. 95-103, APA 37-45).

Further, Dr. Bauerle noted "no one would have performed the surgery until the cancer issue was resolved." (ROA p. 103, APA 45, lines 11-19; ROA p. 106, lines 2-5).

Thus, Claimant's claim for change of condition under § 42-17-90 was two-fold. First, Claimant's back condition was worse as per the testimony of Dr. Bauerle; and, second, Claimant had a physical change of condition in that he could not have the back surgery until the cancer treatment had occurred. Further, counsel points out to the Court that this same issue occurs all the time in workers' compensation claims. Counsel cannot count the number of times that an employee needed surgery for an accident and it was tabled until an underlying high blood pressure could be resolved. In those types of cases, the Commission never denied the claim, but simply treated the underlying medical condition first and then had the surgery later. Finally, Commissioner James seems to understand the dilemma of the Claimant when she noted it was regrettable that the Claimant couldn't have the spine surgery because of his cancer treatment. (ROA p. 20). Accordingly, the change of condition request should have been granted since all evidence supported the Claimant's condition.

III. The Full Commission erred in failing to hold that the request to have back surgery by the Appellant would lessen the period of disability.

Claimant respectfully requests to this Court that this case is controlled by Commissioner Wilkerson's unappealed Order which states in pertinent part: "Medical treatment is governed by S.C. Code Ann. § 42-15-60." (See Decision and Order of Commissioner Avery Wilkerson dated July 21, 2011) (ROA, P. 26).

In this case, Claimant needed back surgery, but was unable to have it due to Claimant's current cancer treatment. Now that the cancer treatment has been resolved, Claimant wishes to have additional back surgery to "lessen the period of disability" under S.C. Code § 42-15-60.

South Carolina's Supreme Court has long recognized additional medical treatment is required under state law if it tends to lessen the period of disability. See *Williams v. Boyle Construction Co.*, 252 S.C. 387, 166 S.E.2d 550 (1969). See also *Lee v. Harborside Café*, 350 S.C. 74, 564 S.E.2d 354 (Ct.App. 2002) which holds that even though a claimant has reached maximum medical improvement if additional medical care treatment would tend to lessen the period of disability, then such treatment may be warranted to at least maintain the claimant's degree of physical impairment. See also *Dodge v. Bruccoli, Clark, Layman, Inc.*, 334 S.C. 574, 514 S.E.2d 593 (Ct.App. 1999). (Commission may order additional medical treatment after the claimant is at maximum medical improvement.)[8]

In *Dodge*, the Supreme Court explained that S.C. Code Ann. § 42-15-60 was not subsumed by a claimant reaching maximum medical improvement. Further, the question becomes does additional medical care lessen the period of disability. In this case, the

[8] Contrary to the Full Commission's comments "*Dodge* medical" is encompassed by the Order of Commissioner Wilkerson.

question is answered emphatically "yes." Hickman needs this surgery to continue to work and to get better. Indeed this case is similar to the case of *Dykes v. Daniel Const. Co.*, 262 S.C. 98, 202 S.E.2d 646 (1974) cited by the *Dodge* Court. In *Dykes*, the Supreme Court ordered additional medical care to the claimant's eye because the "pain" would becoming incapacitating. *Dykes* 262 S.C. at 110, 202 S.E.2d at 652. This is exactly what Commissioner Wilkerson envisioned when he said in his Order "medical treatment is governed by S.C. Code Ann. § 42-15-60." (ROA, p. 26).

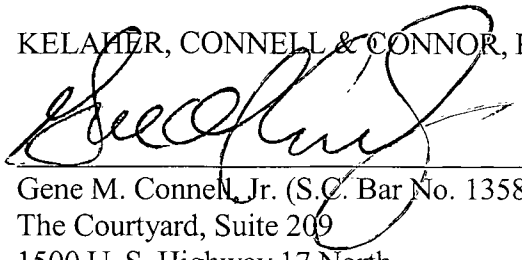
This issue was front and center before the Commission and was ignored. Clearly, Dr. Bauerle knew when he rated the Claimant that surgery was not an option at that time due to his cancer. The Commissioner had a specific medical record on this point as did the Full Commission. It is unfair and does violence to the Act to turn the Claimant away under these circumstances. Everyone from the doctor to the Full Commission knew that the surgery on his back was impossible until the cancer was resolved. The unique circumstances of this case require reversal so that Hickman can have his back surgery. Accordingly, Claimant requests based on the substantial evidence that the Court reverse the Commission and order the surgery.

CONCLUSION

For the reasons stated above, Hickman requests this Court reverse the Full Commission and order the back surgery be performed or in the alternative remand this matter to the Commission for treatment under S.C. Code Ann. § 42-15-60.

Respectfully submitted,

KELAHER, CONNELL & CONNOR, P.C.



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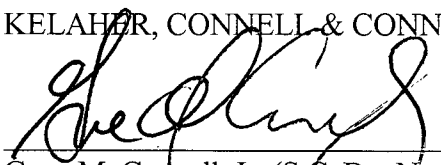
CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Brief complies with Rule 211(b), SCACR.

KELAHER, CONNELL & CONNOR, P.C.



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PROOF OF SERVICE

PERSONALLY appeared before me, Shelia Y. McCumbee, who being duly sworn, deposes and says that she is an employee of KELAHER, CONNELL & CONNOR, P.C., Attorneys at Law, and that she has served the **Final Brief of Appellant** on the Respondents, through their attorney of record, by depositing a copy of same in the United States Mail, postage prepaid, to:

Stanford E. Lacy, Esquire
Collins & Lacy, PC
P. O. Box 12487
Columbia, SC 29211

DATE OF MAILING: August 1, 2013

Shelia Y. McCumbee
Shelia Y. McCumbee

SWORN AND SUBSCRIBED before me,
this 1st day of August, 2013

Donna M. Budner
Notary Public for South Carolina
My Commission Expires: 2/14/17