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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Melody James, Commissioner; Avery B. Wilkerson, Jr., Commissioner, and Cynthia C. Dooley,
Commissioner (Chair)

Appellate Case No. 2024-000701

Karen Martin, Claimant

Respondent,

v.

AMB Transportation, LLC,
Employer, and State National
Insurance Company, Inc. c/o CCMSI,
Carrier,

Appellants.

**INITIAL BRIEF OF APPELLANTS AMB TRANSPORTATION, LLC AND STATE
NATIONAL INSURANCE COMPANY, INC.**

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STATEMENT OF ISSUE ON APPEAL

1. WHETHER THE WORKERS COMPENSATION COMMISSION APPELLATE PANEL ERRED IN ORDERING RESPONDENT WAS ENTITLED TO BACK SURGERY AND ALL COSTS OF CAUSALLY RELATED TREATMENT, AS RECOMMENDED BY THE AUTHORIZED TREATING PHYSICIAN?

STATEMENT OF THE CASE

The Claimant sustained an admitted injury to her lower back and left shoulder on April 13, 2021, in the course of her employment with AMB Transportation, LLC. Employer's insurance company State National Insurance Company, Inc. c/o CCMSI, provided coverage for the Employer at the time of said accident. AMB Transportation, LLC and State National Insurance Company, Inc. c/o CCMSI (hereinafter referred to as "Appellants") respectfully contend that the evidence and applicable law, in conjunction with the Findings of Fact and Conclusions of Law rendered by the South Carolina Worker's Compensation Appellate Panel (hereinafter referred to as "Appellate Panel") supports that the Claimant is only entitled to back surgery and any additional causally related medical treatment for her back injury recommended by the authorized treating physician Dr. David Mithcell.

This matter came before the South Carolina Workers' Compensation Commission pursuant to the Claimant's (hereinafter referred to as "Respondent") Form 50 and the Form 51 filed by Appellants. Respondent asserted that she was entitled to additional medical treatment related to her April 13, 2021, injury, specifically treatment encompassing her left shoulder, cervical spine, lower back, and psyche. Respondent contended that she had not yet reached maximum medical improvement, requesting back surgery as recommended by her authorized treating physician, Dr.

David Mitchell, asserting she had an aggravation of a pre-existing back injury. Appellants admitted Respondent sustained an injury arising out of and in the course and scope of her employment on or about April 13, 2021, to her left shoulder but denied the extent of the injury to her left shoulder. Additionally, Appellants denied all other body parts alleged by the Respondent, including, but not limited to, her cervical spine, lower back, left leg, and psyche. Appellants did authorize and provide the Respondent with injections and physical therapy to her lower back. However, Appellants denied surgery for the Respondent's low back based on S.C. Code Ann. § 42-9-35 and the medical opinions from Dr. Hodge and Dr. Peelle. Appellants authorized surgical intervention related to the Respondent's admitted left shoulder, providing an arthroscopic procedure to repair the lateral and rotator cuff tear in her left shoulder on August 19, 2021. Respondent was subsequently released at MMI for her left shoulder by Dr. Hoenig on April 21, 2022.

At the hearing on February 8, 2023, before Single Commissioner R. Michael Campbell, II, Appellants asserted that although they agreed for Dr. Mitchell to be the authorized treating physician, they did not authorize or endorse his recommendation for additional surgery for the lower back due to Respondent's pre-existing back condition. This determination was further supported after Appellants obtained two surgical opinions from other physicians, Dr. Hodge and Dr. Peelle. Appellants objected to the introduction of an Affidavit prepared by Dr. Mitchell (R APA pages 176-179) contending the Affidavit was not in compliance with S.C. Code Ann. § 42-9-35, because it didn't contain an indication it was "stated to a reasonable degree of medical certainty," as required by the statute. Appellants bolstered their argument asserting it should be withheld pursuant to *Michau v. Georgetown County*, 396 S.C. 589, 723 S.E.2d 805, in which the Supreme Court of South Carolina held that the admissibility of evidence in a Workers'

Compensation claim specifically under the statute, must fall in line with the plain language of that statute.

The Single Commissioner issued a Decision and Order on April 7, 2023, concluding, *inter alia*, that while Dr. Mitchell's Affidavit regarding Respondent's aggravation of her pre-existing back condition and need for surgery didn't include the terminology "stated to a reasonable degree of medical certainty," that Dr. Mitchell's opinion was supported by an Affidavit prepared by Dr. Carol Kooistra, who did in fact conclude her opinion "stated to a reasonable degree of medical certainty." Thus, in conjunction with Dr. Mitchell's history of treating Respondent's back, his opinion was given the greatest weight amongst the two deferring opinions provided by Appellants. Moreover, the Commissioner found Respondent met her burden of proof asserting she sustained an aggravation of a pre-existing back condition; Respondent wasn't at maximum medical improvement; and that Respondent was entitled to back surgery and all costs of causally related treatment, as recommended by her authorized treating physician, Dr. David Mitchell.

Following the Single Commissioners Decision and Order, Appellants timely requested review before the Appellate Panel by way of a Form 30 and Grounds for Review dated April 20, 2023. Oral arguments commenced on July 17, 2023. In appealing the Single Commissioner's decision, Appellants asserted the Single Commissioner erred in his application and analysis of *Michau v. Georgetown County*, 396 S.C. 589, 723 S.E.2d 805 and S.C. Code Ann. § 42-9-35, by failing to exclude Dr. Mitchell's Affidavit from evidence; that the Single Commissioner erred in finding Respondent met her burden of proof under S.C. Code Ann. § 42-9-35 in finding she sustained an aggravation to her pre-existing back condition; that the Single Commissioner erred in finding Respondent was entitled to lower back surgery causally related to her work related injury;

and that the Single Commissioner erred in not finding Respondent to be at maximum medical improvement. The Appellate Panel affirmed the Single Commissioner's findings in a Decision and Order dated March 25, 2024. Critically, the Appellate Panel found Respondent was entitled to back surgery and all costs of causally related treatment recommended by the authorized treating physician Dr. David Mitchell. Thereafter, the Appellants served the Notice of Appeal to the Court of Appeals on April 24, 2024.

STANDARD OF REVIEW

In workers' compensation cases, the South Carolina Workers' Compensation Commission is the trier of fact. Hunter v. Patrick Construction Co., 289 S.C. 46, 344 S.E.2d 613 (1986). The Administrative Procedures Act governs review of the Full Commission Appellate Panel's decisions. *See* Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981). Although the Appellate Panel is the ultimate finder of fact in a workers' compensation case, an Appellate Court may reserve or modify a decision of the Appellate Panel if the findings and conclusions are "affected by error of law, clearly erroneous in view of the reliable and substantial evidence on the whole record, or arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." Gray v. Club Grp., Ltd., 339 S.C. 173, 182, 528 S.E.2d 435, 440 (Ct. App. 2000). *See* S.C. Code Ann. §1-23-380(A)(6)(d),(e)(1997).

STATEMENT OF THE FACTS

Respondent was treated by Dr. Mitchell on May 14, 2021, where he recommended left sided L3-L4 and L4-L5 transforaminal epidural steroid injections (R APA page 15) following complaints of continued pain in her left lower extremity centralized more in her groin and thoracic spine areas. (R APA page 13). Thereafter an MRI of her lumbar spine was performed on May 5,

2021, revealing “notable L2-3 through L4-5 disc degeneration with concentric disc bulges, endplate osteophytes, disc height loss, as well as facet and ligamentous changes. Mild L2-3 through L4-5 central canal stenoses.” (R APA page 150). Respondent was then evaluated by Michelle Whitesides at Carolina Orthopaedic & Neurosurgical Associates (R APA page 25) who indicated that her thoracic spine changes on the MRI were arthritic in nature and her changes in the lumbar spine indicated stenosis of the neural foramina noting there was an exacerbation due to her fall in the lumbar spine causing her to have left lower extremity radicular symptoms and pain. (R APA page 28).

Dr. Carol Kooistra of Carolina Neurology of Spartanburg at Respondent’s request conducted an independent medical evaluation of Respondent on November 5, 2021, noting Respondent had tripped and fell and was experiencing difficulties with her left shoulder and lumbar spine region. (R APA page 159). She opined Respondent had “post traumatic low back pain atop previous L45 spine disease/pain with left leg L5 radiculopathy.” (R APA page 161). Thereafter, Dr. Kooistra recommended Respondent receive additional care including pain management and medication and assigned a 10% impairment to Respondent’s spine due to her work injury. (R APA page 161).

Respondent then returned to Dr. Mitchell on November 16, 2021, who noted she had nerve root impingement of the left L5 nerve root, recommending she obtain a block. (R APA page 117). Thereafter on January 26, 2022, Dr. Mitchell recommended an outpatient laminectomy at L4-5 with decompression of the LS nerve root on the left. (R APA page 129). Notably, the medical narrative recommending surgery lacked an opinion to a reasonable degree of medical certainty that the proposed surgery was causally related to her work accident due to an aggravation of a

preexisting condition. (R APA pages 127-130).

Appellants referred Respondent to Dr. Phillip Hodge at Southeastern Neurosurgical and Spine Institute on March 15, 2022, for a second opinion regarding her low back pain, causation, and surgery. (A APA page 182). Respondent reported she was having pain in the lumbar region with radiation down the left lower extremity with associated tingling and numbness in her left foot. (A APA page 182). Dr. Hodge concluded Respondent would not benefit from the surgical procedure as there was not enough nerve compression warranting surgical intervention and abstained from recommending treatment after noting Respondent had exhausted all nonoperative treatment.¹

Thereafter, Appellants referred Respondent to Dr. Michael Peelle of Prisma Health Orthopedics – Lexington on September 15, 2022, for a third opinion. (A APA page 311). Dr. Peelle's determination entailed findings of "chronic thoracic kyphosis, stenosis without myelopathy, pre-existing and unrelated to the fall in 2021, mild lumbar spondylosis at L4-5, with degenerative structural change and mild nerve compression, and atypical neurologic complaints left lower extremity." (A APA page 311). He opined her issue was a chronic degenerative condition and he saw "no structural abnormalities such as fracture, instability, or disc herniation that would be concordant with an acute structural injury following the fall. (A APA pages 311-312). Further, he stated Respondent "has several atypical posturing and pain that seems unusual for a typical radicular pattern" and didn't recommend any surgical intervention. (A APA page 312).

Dr. Carol Kooistra of Carolina Neurology of Spartanburg, completed an affidavit at

¹ Dr. Hodge's recommendation refers to the proposed outpatient laminectomy at L4-5 with decompression of the LS nerve root on the left recommended by Dr. Mitchell (R APA page 129).

Respondent's request on September 6, 2022, indicating it appeared Respondent's prior complaints of lower back pain in 2019 were related to her right side, while complaints following her work-related injury on April 13, 2021, were located on her left side. (R APA page 176). Dr. Kooistra further opined Respondent's MRI revealed certain pre-existing conditions in the lumbar spine. (R APA page 176). However, it was Dr. Kooistra's opinion to a reasonable degree of medical certainty that Respondent's injury on April 13, 2021, aggravated any pre-existing conditions in her lumbar spine and as thus necessitated the need for surgery. (R APA page 176).

Subsequently, Dr. David Mitchell completed an affidavit at Respondent's request on September 13, 2022, where he opined Respondent needed the outpatient laminectomy at L4-5 with decompression of the LS nerve root on the left he recommended on January 26, 2022. (R APA page 178). Moreover, Dr. Mitchell stated Respondent's injury on April 13, 2021, aggravated, accelerated, and exacerbated any pre-existing conditions of the lumbar spine. (R APA page 178).

ARGUMENT

I. THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION APPELLATE PANEL ERRED IN RENDERING ITS FINDING OF FACT NUMBER SEVEN AND SUBSEQUENT ORDER, BY SUBJECTING APPELLANTS TO ADDITIONAL SCHEDULED BODY PARTS OTHER THAN THE LOW BACK

The Appellants respectfully assert that the Appellate Panel erred in its findings, not through reaching the determination that Respondent is entitled to low back surgery, as recommended by the authorized treating physician, but rather by reaching a determination as to Respondent's entitlement to "all causally related treatment, as recommended by ATP Dr. Mitchell." (Appellate Panel Decision and Order, page 4, Finding of Fact No. 7). Appellants' assert that the plain language and construction of the Appellate Panel's finding creates ambiguity and leaves Respondent with

the inference that the Appellate Panel authorized additional treatment for all body parts, other than her low back, as long as recommended by Dr. Mitchell when all other body parts had not yet been adjudicated on the merits. Thus, under its current construction, subjecting Appellants to provide any and all costs of causally related treatment recommended by Dr. Mitchell, for body parts other than her low back is contrary to the central aim of the lower court proceedings and substantial evidence presented. The Appellate Panel's Finding of Fact subjects Appellants to an unrestrained variety of additional body parts other than the admitted left shoulder injury and lower back which were the only body parts adjudicated on the merits before the Single Commissioner and Appellate Panel.

Appellants concede that the Commission has the authority to find and award compensation benefits to an employee who has a permanent physical impairment or pre-existing injury and who aggravates the pre-existing permanent physical impairment or pre-existing injury as a result of a work injury. S.C. Code Ann. §42-9-35. Appellants do not dispute their responsibility under the code or their obligation to provide surgical intervention and related low back treatment to Respondent as a result of the work accident and in fact Appellants have already provided the low back surgery which Respondent had on February 5, 2024. Rather, Appellants contend the extent of their obligation solely resides with Respondent's low back injury and any medical care for the low back causally related to the work injury.

The intent of the Appellate Panel to constrain Appellant's responsibilities solely to Respondent's low back injury can be derived from the reasoning set forth in the Panel's Findings of Fact proceeding and following the Finding of Fact and Order currently in contention. The Appellate Panel's determination in the prior action contemplates the recommendations of both Dr.

Mitchell and Dr. Kooistra, which solely relate to the appropriate treatment necessary to address Respondent's low back injury, specifically whether Respondent is at MMI or needs surgery due to the aggravation of her preexisting injury. (Appellate Panel Decision and Order, page 4, Findings of Fact Nos. 3 and 4). Additionally, the Appellate Panel signaled its intention to only rule on issues related to Respondent's low back and need for low back surgery by holding all other issues related to the claim in abeyance. (Appellate Panel Decision and Order, page 4, Finding of Fact No. 8).

Appellants concede additional issues in controversy remain unaddressed at the current stage of litigation; however, we respectfully assert these issues should be addressed during subsequent litigation amongst the parties before an administrative body where they can be fully adjudicated on the merits, rather than be addressed incidentally due to error in the construction of the Appellate Panel's findings. If Respondent intends to introduce additional scheduled body parts not previously litigated nor adjudicated before the lower courts that require treatment causally related to Respondent's work accident on April 13, 2021, then Respondent has to progress through the proper procedural channels established by the South Carolina Workers' Compensation Act to request a hearing on the merits of these body parts, rather than circumventing statutorily established procedural channels through interpretation of the Appellate Panel's erroneous finding.

CONCLUSION

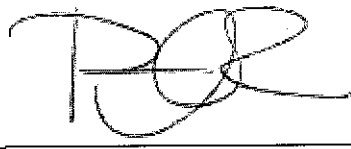
Based on the foregoing, the Appellants respectfully request the Court of Appeals affirm in part and modify in part the Decision and Order of the Appellate Panel dated March 25, 2024. Appellants respectfully request the Court affirm Appellate Panel Findings of Fact numbered one through six (Appellate Panel Decision and Order, pages 3-4,) and Findings of Fact number eight (Appellate Panel Decision and Order, page 4), and modify Appellate Panel Findings of Fact

number seven and subsequent Order (Appellate Panel Decision and Order, page 4, and page 5, lines 2-4). The Appellants further request this Court find that Respondent is entitled only to causally related treatment for her lower back as recommended by Dr. Mitchell. Alternatively, the Appellants would request the Court remand this matter to the South Carolina Workers' Compensation Commission Appellate Panel for clarification regarding Respondent's entitlement to causally related treatment and costs recommended by Dr. Mitchell are only for the lower back (Appellate Panel Decision and Order, page 4, Finding of Fact No. 7 and page 5, lines 2-4) for the reasons set forth hereinabove.

Charleston, South Carolina
June 14, 2024

Respectfully submitted,

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Richard, please find attached for service upon you the Appellants' Initial Brief and Designation of Matter to be included in the Record on Appeal in the above matter. I will be printing this email and enclosing it with the packet that I provide to the Court of Appeals to which I will copy you on that correspondence. Please let me know if you have any questions. Have a good weekend, Regan

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