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**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM SOUTH CAROLINA  
WORKERS' COMPENSATION COMMISSION

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

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Appellate Case No. 2024-000701

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Karen Martin, Claimant

Respondent,

v.

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

Appellants.

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**INITIAL BRIEF OF RESPONDENT KAREN MARTIN**

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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")

This matter came before the South Carolina Workers' Compensation Commission pursuant to the Claimant's (hereinafter referred to as "Respondent") Form 50 and the Fonn 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.

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).

### **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. (RAPA 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." (RAPA 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 LS nerve root, recommending she obtain a block. (RAPA 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).

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.<sup>1</sup>

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

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<sup>1</sup> 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 (RAPA page 129).

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 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. (RAPA 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. (RAPA 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. (RAPA page 178).

### **ARGUMENT**

#### **I. THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION APPELLATE PANEL DID NOT ERR IN RENDERING ITS FINDING OF FACT NUMBER SEVEN AND SUBSEQUENT ORDER.**

The Appellant correctly states the standard of review as set forth in 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).

The Commissioner and the Full Commission found as a matter of fact that the authorized treating surgeon, Dr. Mitchell and the Respondent's IME, neurologist Dr. Koostra's opinion regarding the Plaintiff's need for back surgery to be more persuasive than the Appellant's IME's. Not only was that finding not "clearly erroneous" but typically the Commission gives the authorized treating doctor's opinion more weight than IME's. Dr. Mitchell is the authorized treating doctor because the Appellant chose to make him the authorized treating doctor. The Commissioner and the Full Commission typically give the treating doctor's opinion greater weight because he/she is in a better position to evaluate the patient as opposed to a one-time IME.

The Appellate misapplies the Supreme Court's holding in Michau. Dr. Mitchell's statement of causation was definitive. He stated that, "This stands to reason that aggravation caused by the injury has created the need for this lady to have a decompressive laminectomy on the left side". (Dr. Mitchell's affidavit p.2). The standard of a reasonable degree of medical certainty is only a "more likely than not" standard which is a lesser standard than Dr. Mitchell's definitive statement of causation. Even if the Court were to conclude that the qualifying causation language is required based on the Michau case, that standard was reached by Dr. Koostra's affidavit that contains the, "to a reasonable degree of medical certainty" language. There is no holding in Michau that says the Respondent cannot obtain an IME to supply the necessary language. Such a holding would deprive the Respondent and all future plaintiffs from obtaining second opinions on causation issues which is contrary to the stated purpose of the Act.

Additionally, While the Appellant preserved the issue of whether the Worker's

Compensation Panel erred in ordering that the Respondent was entitled to back surgery and all costs of causally related treatment as recommended by the authorized treating physician for appeal, in Appellant's brief they concede the issue and have paid for the requested back surgery rendering this issue moot. Quoting page 7 of Appellant's brief, "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"** (emphasis added). Again, on page 8 of Appellant's brief, "**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"** (emphasis added).

Clearly the Appellant has abandoned their argument based on Michau that the back surgery was not causally related to the compensable on the job accident and their only remaining issue is the claim that the language of the Appellate Panels Order in Finding of Fact no. 7 creates ambiguity and leaves the Respondent with the inference that the Appellate Panel authorized additional treatment for all body parts, other than her low back. Finding of Fact no. 7 is not ambiguous. Finding of Fact no. 7 is as follows; "Claimant is entitled to the back surgery and all causally related treatment, as recommended by ATP Dr. Mitchell". Dr. Mitchell must determine that the recommended treatment is causally related to the back surgery. This does not open Pandora's box to all sorts of body parts as argued by the Appellant. It must be causally related. There are only so many body parts that can be affected by low back injury and related back surgery. The

Appellate Panel has ordered that the back injury and subsequent back surgery is compensable, and the Full Commission is the final finder of fact as stated above. While it is true under the Appellate Panel's finding of fact no. 8 that all other issues are to be held in abeyance, it does not mean that complications or other medical conditions causally related to the back injury or surgery require a second hearing. To do so would further delay causally related reasonable and necessary treatment to the possible detriment of the Respondent. There was a two-year delay in the Respondent receiving the low back surgery recommended by the authorized treating doctor because the Appellant chose to litigate the compensability and medical necessity of the surgery. Dr. Mitchell in his affidavit indicated, "that if the nerve compression continues to go untreated that the Respondent will suffer increased detriment and impairment to her overall condition". (Dr. Mitchell's affidavit p.2). It is reasonable to assume that any complications from the surgery are likely caused by the two-year delay and now the Appellant wishes to seek further delay of reasonable and necessary treatment based on a slippery slope argument. Under section 42-15-60 (A) the employer shall provide medical, surgical, hospital, and other treatment to effect a cure or give relief in the judgment of the commission that will tend to lessen the period of disability as evidenced by expert medical evidence stated to a reasonable degree of medical certainty. The statute also requires the employee to accept medical treatment considered necessary by the attending physician. The Respondent has fully complied with the recommendations of the treating authorized physician and the Appellate Panel has ordered the Appellant to comply with causally related medical treatment ordered by the treating authorized physician. The Appeal is without merit and should be dismissed.

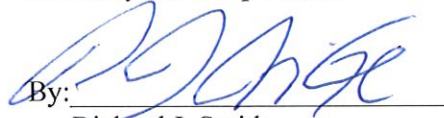
### CONCLUSION

Based on the foregoing, the Respondent respectfully request the Court of Appeals fully affirm the Decision and Order of the Appellate Panel dated March 25, 2024.

Greenville, South Carolina  
July 12, 2024

Respectfully submitted,

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