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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
Appellate Panel

Appellate Case No. 2024-000294

Hector Lopez-Vasquez,.....Claimant/Appellant,

vs.

Ox Paper Tube & Core Carolina, LLC, Employer,
and Berkshire Hathaway Homestate Insurance Company, Carrier, ...Respondents.

INITIAL BRIEF OF RESPONDENTS

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STATEMENT OF THE CASE

Appellant Hector Lopez-Vasquez ("Claimant") filed this workers' compensation case following an admitted work accident on February 18, 2022, that resulted in multiple serious injuries. On April 26, 2022, he filed his Request for Hearing seeking an award of "additional medical examination and treatment," consisting of 24-hour attendant care recommended by his authorized treating physician, Dr. Sima Desai. (Form 50, p. 1). The parties stipulated Claimant was entitled to the attendant care. (Commissioner Beck's Order dated May 23, 2023, p. 4, ¶3). The parties also agree Respondents Ox Paper Tube & Core Carolina, LLC ("Employer") and Berkshire Hathaway Homestate Insurance Company ("Carrier") consistently offered to pay for that care through a professional, licensed medical provider. (Transcript of Hearing before Commissioner Beck dated October 19, 2022, p. 24, ll. 3-7, p. 45, ll. 4-9; Appellate Panel's Order dated February 5, 2024, p. 2). However, Claimant "declined outside 3rd party care [offered by Respondents]" because he and his "Wife/fiancé," Ms. Juliana Roldan-Dimas[1], "agreed it would be best for her to care for his

[1] Claimant also refers to her as his "longtime partner." (App. In. Br., p. 1). The Hearing Commissioner and Appellate Panel called her "Claimant's significant other." (Beck Order p. 20, ¶ 21; Appellate Panel Order p. 8, ¶21). Claimant and Ms. Roldan-Dimas have been together for approximately 13 years, but they are not legally married, and she divorced her husband in 2016. (Hearing Tr. 16:8-13, 27:2-6). She is not related by blood or marriage to Claimant.

needs." As such, Claimant asserted "Ms. Roldan-Dimas is entitled to payment for the care she is providing." (Form 50, p. 1).

Respondents timely filed their Answer to Request for Hearing, denying Claimant was entitled to any additional medical treatment as Respondents had authorized all causally related medical treatment to which he was entitled. (Form 51, p. 1). Prior to the hearing, the parties resolved Claimant's entitlement to attendant care through the hearing date pursuant to a consent order. (Beck Order, p. 22, ¶33).

During the prehearing conference, Claimant limited his request to state he was seeking attendant care for fifteen hours per day. (Beck Order, p. 5). At the hearing on October 19, 2022, Claimant argued attendant care provided by Ms. Roldan-Dimas should be ordered based on the recommendation of Dr. Desai, Ms. Roldan-Dimas' close relationship with Claimant, a potential language barrier, and extenuating circumstances relating to Claimant living with her and her family. (*Id*. at 5-6). Respondents countered they retained the statutory right to control medical care, and the attendant care should be provided by a licensed professional as opposed to Ms. Roldan-Dimas who attended school through only the ninth grade, speaks limited English, cannot read English, and has no medical education, training or background. (*Id*. at 6). The issue thus narrowed to whether the South Carolina Workers' Compensation Commission would allow Respondents to exercise their statutory right to direct medical care pursuant to S.C. Code Ann. § 42-15-60(A) for any attendant care needs to which Claimant was admittedly entitled, or whether the Commission would order Respondents to compensate Ms. Roldan-Dimas for providing the attendant care. (Appellate Panel Order, p. 4).

Based on the evidence presented at the hearing, the Hearing Commissioner issued his Decision and Order on May 23, 2023, finding Claimant was entitled to an award of attendant care pursuant to section 42-15-60(A), but that such care must be provided by a licensed medical professional of Respondents' choosing based upon the plain language of the statute. (Beck Order, p. 23, ¶8). Because the parties agreed Claimant was not at maximum medical improvement, the Hearing Commissioner held S.C. Code Ann. § 42-15-60(C) was not applicable and an award of medical benefits must be pursuant to subsection (A), which does not contemplate non-professional unskilled services. (Beck Order, p. 24, ¶13). Although subsection (C) includes more expansive language regarding medical and other non-medical benefits that can be awarded after a finding of permanent and total disability, the Hearing Commissioner found that if the South Carolina Legislature intended for unskilled attendant care or unskilled nursing services to be awarded prior to a finding of permanent and total disability, it would have expressly included such a benefit in subsection (A) either in 1980 when it added subsection (C), or in 2007 when it amended subsection (A). (*Id*. at 23-24, ¶¶ 9-13). Furthermore, the Hearing Commissioner reasoned that a ruling that permits a claimant's unlicensed and untrained significant other to render "treatment" pursuant to subsection (A), prior to a finding of permanent and total disability, would create a "liability conundrum" for Respondents should Claimant suffer a subsequent injury due to the fault of the unskilled attendant care, as Respondents would have no legal remedy or subrogation rights. (*Id*. at 26, ¶¶ 19-20). Thus, the Hearing Commissioner ruled the Commission lacked authority to order Respondents to pay Ms. Roldan-Dimas to provide medical services. Ultimately, the Hearing Commissioner held Claimant was entitled to 15 hours daily of licensed, professional in-home attendant care with a medical

provider of Respondents' choosing, pursuant to section 42-15-60(A). (*Id*. at 26-27, ¶ 21, and at 28).

Thereafter, Claimant filed his Request for Commission Review challenging the Hearing Commissioner's finding that the Commission was without authority to order Respondents to provide unskilled attendant care pursuant to section 42-15-60(A), and in failing to order Respondents to compensate Ms. Roldan-Dimas. (Form 30). After the parties submitted their appellate briefs to the Full Commission, a hearing on Claimant's appeal proceeded on August 28, 2023. The Appellate Panel of the South Carolina Workers' Compensation Commission filed its Appellate Panel Decision and Order on February 5, 2024, affirming the Hearing Commissioner's Decision and Order nearly verbatim as to the factual findings and legal conclusions. (Appellate Panel Order, pp. 15-24). Claimant then timely filed his Notice of Appeal on March 1, 2024. (Notice of Appeal).

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act (APA) establishes the standard for judicial review of decisions by the Appellate Panel. *Fredrick v. Wellman, Inc.*, 385 S.C. 8, 15–16, 682 S.E.2d 516, 519 (Ct. App. 2009); *see Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 134–35, 276 S.E.2d 304, 306 (1981). Under this APA scope of review, "[t]he final determination of witness credibility and the weight assigned to the evidence is reserved to the [A]ppellate [P]anel." *Houston v. Deloach & Deloach*, 378 S.C. 543, 551, 663 S.E.2d 85, 89 (Ct. App. 2008); *see also Shealy v. Aiken County*, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000) (recognizing the Appellate Panel finds facts, evaluates the credibility of witnesses, and assigns weight to the evidence). The Court may not substitute its judgment

for that of the Appellate Panel as to the weight of the evidence on questions of fact but may reverse or modify the Appellate Panel's decision if an appellant's substantial rights have been prejudiced because the decision is affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. *Carolinas Recycling Group v. South Carolina Second Injury Fund*, 398 S.C. 480, 483, 730 S.E.2d 324, 326 (Ct. App. 2012); *see* S.C. Code Ann. § 1-23-380(5). Substantial evidence is defined as evidence that, in viewing the record as a whole, would allow reasonable minds to reach the same conclusion as the Appellate Panel. *Carolinas Recycling Group*, 398 S.C. at 483, 730 S.E.2d at 326 (citing *Lark*, 276 S.C. at 135, 276 S.E.2d at 306).

STATEMENT OF THE FACTS

Following his initial hospitalization, Claimant was discharged on March 2, 2022. That same day, Respondents authorized and provided Claimant with a Home Health Assessment through Rock Hill Kindred at Home, wherein his home health needs were evaluated. (Claimant's APA, pp. 39-94). Claimant attended his first evaluation with Dr. Desai, the authorized treating physical medical specialist, on March 17, 2022. Dr. Desai evaluated his various injuries and recommended multiple referrals to other specialists to treat and evaluate his injuries. However, Dr. Desai did not initially recommend home health attendant care. (*Id*. at 156-160). Respondents approved and provided for the additional treatment Dr. Desai initially recommended. (Beck Order, pp. 8-10).

Subsequently, Claimant obtained a medical questionnaire from Dr. Desai on April 6, 2022, indicating he required attendant care although she had not examined Claimant since the initial visit. Specifically, Dr. Desai checked "yes" to questions asking whether Claimant required 24-hour attendant care, 7 days per week, and whether Claimant's

"significant other, Ms. Julianna Roldan-Dimas, is capable of providing the required 24-hour attendant care" to Claimant. (*Id*. at 161). Upon receipt, Respondents offered to provide 24/7 attendant care with a professional home health nurse. (Hearing Tr. 24:3-7, 45:4-9; Appellate Panel Order, p. 2). However, Claimant declined to accept this treatment because he wanted Respondents to pay Ms. Roldan-Dimas an hourly rate to provide the recommended 24/7 attendant care. (Form 50, p. 1; Brief of Claimant/Appellant to Full Commission, p. 2 ("Defendants offered to provide the attendant care through a licensed nurse, nursing aid, or licensed professional caregiver; however, Claimant was unable to accept this offer and thus declined . . .")).

Despite Dr. Desai's opinion about the capabilities of Ms. Roldan-Dimas, Dr. Desai admitted she had no knowledge of the specific care being provided to Claimant and was not aware Claimant had previously declined professional attendant care services offered by Respondents. (Desai Dep. 32:24-33:3). Dr. Desai also testified she had no direct knowledge of Ms. Roldan-Dimas' education, training or experience related to providing attendant care, her ability to assist with ambulation or transfers, or her ability to manage Claimant's diabetic condition. (*Id*. at 26:6-22, 27:10-28:4). In fact, Ms. Roldan-Dimas is ninth grade educated, only understands a little English, is not capable of reading English, and has no medical or first aid training. (Roldan-Dimas Dep. 19:8-11). Based on these facts and a review of Claimant's medical records, Respondents' expert, Maria Lopes-Virella, M.D., Ph.D., opined Ms. Roldan-Dimas was not a licensed health care provider and was not qualified to provide attendant care to Claimant. (Lopes-Virella Aff., ¶¶ 20-21).

Prior to the accident, Ms. Roldan-Dimas earned approximately $640.00 per week working on an assembly line at Black & Decker, for a total of approximately $33,000.00 annually. (Hearing Tr. 29:4-10). Following Claimant's accident, she decided to quit her gainful full-time employment despite Respondents consistently offering to provide professional home health care services. She instead asked the Commission to start paying her to care for Claimant as a home health attendant. (*Id*. at 37:17-38:1). However, when asked at the hearing about the duties of a home health attendant, she testified she had never been trained in those specific duties, but she felt she was doing a good job. (*Id*. at 30:18-31:25). She and Claimant admitted they were asking the Commission to require Respondents to pay her approximately $78,000.00 per year, based on $14.41 per hour for 15 hours per day, 7 days per week. (*Id*. at 34:21-35:5). This equates to almost 2.5 times what she was earning prior to deciding to quit her job at Black & Decker to provide services for Claimant that she is not qualified or trained to provide. She confirmed she has no training in medical billing, no professional liability insurance, no training in fall prevention, and no training in handling patients with vestibular deficits. (*Id*. at 31:3-32:5).

Claimant also argues he refused to accept the medical care offered by Respondents because of a language barrier and because he and Ms. Roldan-Dimas live with her daughter, Ms. Andrea Angeles-Roldan, who was uncomfortable with having strangers in her home to provide medical care Claimant needed to maximize his recovery. However, Ms. Roldan-Dimas confirmed the nurse care manager provided by Respondents speaks Spanish and coordinates Claimant's medical appointments. (*Id*. at 30:1-7). Respondents also have offered to provide a professional attendant who speaks Spanish. (Transcript of Full Commission Hearing dated August 28, 2023, p. 14, ll. 17-25). And although the daughter

testified that she and her husband did not want strangers in their home around her children, she acknowledged she and multiple other family members were always present when her children were home. (Hearing Tr. 45:4-19, 48:1-9).

ARGUMENT

I. The South Carolina Workers' Compensation Commission correctly held that the plain language of the only applicable statute (S.C. Code Ann. § 42-15-60(A)) requires Respondents to provide attendant medical care through a trained and licensed medical professional rather than through a non-professional who lacks any training, education, license or insurance coverage to provide medical treatment.

The issue on appeal is very narrow because the relevant and important facts are not in dispute. The parties agree that Claimant has not been declared totally and permanently disabled; thus, the parties agree that only section 42-15-60(A), and not (C), applies to this appeal. The parties agree that Respondents are required to provide the attendant care recommended by Dr. Desai. The parties agree that Respondents did offer, through the services of a medical professional, to provide that recommended attendant care, but Claimant declined the offer. (Appellate Panel Order, p. 2 ("There was no disputing [Respondents] consistently offered, and [Claimant] consistently declined, professional home health care as recommended by Dr. Desai.")). Claimant's stated reason is that he instead wants Ms. Roldan-Dimas to provide the services. However, the record establishes that she has only a ninth-grade education, cannot read English and requires a translator to testify, has no medical background, training, license or insurance, and has never worked in the medical field. Thus, she is simply not qualified to provide medical care or treatment.

Despite these undisputed facts, Claimant nevertheless filed his appeal asking this Court to reverse the Hearing Commissioner and the Appellate Panel on the narrow issue of whether Respondents are statutorily required to pay a non-professional to provide the

attendant care that Respondents have repeatedly offered to provide through a licensed medical professional. Because the relevant statutory language prohibits Claimant's request, this Court should affirm.

A. The plain language of S.C. Code Ann. § 42-15-60(A) requires the Commission's conclusion.

There is no dispute Claimant has not reached maximum medical improvement and, likewise, has not been deemed permanently and totally disabled. Therefore, any award of medical treatment is governed by section 42-15-60(A). While Claimant argues there is no distinction between benefits allowed under subsection (A) and subsection (C), a review of the plain language of the statute and the legislative amendments clearly shows otherwise.

The Hearing Commissioner and the Appellate Panel concluded that pursuant to subsection (A), Claimant is entitled to attendant care, but such care must be provided by a licensed professional, based upon the plain language of the statute. Claimant argues the Commission erred in failing to order non-professional attendant care because section 42-15-60 does not distinguish between professional and non-professional care. However, Claimant mistakenly couches the issue as that of whether the Act distinguishes between professional and non-professional care. Respondents agree the Act does not distinguish between those two phrases. The Act does, however, delineate what medical treatment and "other care" the Commission is allowed to award at various stages of a case.

As the Hearing Commissioner and the Appellate Panel both concluded, if the South Carolina General Assembly had not intended to create a distinction between the types of medical benefits that could be awarded, there would be no reason to draft an entire subsection that relates solely to cases where a claimant has been deemed permanently and totally disabled. The Commission correctly noted that when the legislature amended

section 42-15-60 in 2007, the various versions of the bill illustrate a clear intention to keep distinct the benefits provided in cases of lifetime medical benefits once a claimant is deemed permanently and totally disabled versus those provided for in all other cases. During the 2007 amendment process, the legislature had the opportunity to use the more inclusive language of subsection (C) in subsection (A) but failed to do so.

Section 42-15-60(A) addresses the carrier's specific obligation for providing treatment **prior to** a claimant being found totally and permanently disabled. It states in relevant part:

> The employer/carrier shall provide medical, surgical, hospital, and other treatment, including medical and surgical supplies as reasonably may be required, for a period not exceeding ten weeks from the date of an injury, to effect a cure or give relief and for an additional time as in the judgment of the commission will tend to lessen the period of disability as evidenced by expert medical evidence stated to a reasonable degree of medical certainty. . . . During any period of disability resulting from the injury, the employer, at his own option, may continue to furnish or cause to be furnished, free of charge to the employee, and the employee shall accept, an attending physician and any medical care or treatment that is considered necessary by the attending physician, unless otherwise ordered by the commission for good cause shown. S.C. Code Ann. § 42-15-60(A).

On its face, the language of subsection (A) limits the Commission's authority to order only "medical . . . and other treatment," and, as aptly pointed out by the Hearing Commissioner and Appellate Panel, "[w]hat a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, courts are bound to give effect to the expressed intent of the legislature." *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) (internal citations omitted). "[T]he cardinal rule of statutory construction is that the court must ascertain and effectuate the intent of the legislature and in interpreting a statute, the court must give the words their plain and ordinary meaning without resorting to a tortured construction which limits or expands the statute's operation." *Gattis v.*

Murrells Inlet VFW # 10420, 353 S.C. 100, 113, 576 S.E.2d 191, 198 (Ct. App. 2006) (quoting *State v. Dickinson*, 339 S.C. 194, 199, 528 S.E.2d 675, 677 (Ct. App. 2000)). The South Carolina Supreme Court has held, "[w]henever possible, legislative intent should be found in the plain language of the statute itself." *State v. Pitman*, 373 S.C. 527, 561, 647 S.E.2d 144, 161 (2007) (citing *Whitner v. State*, 328 S.C. 1, 6, 492 S.E.2d 777, 779 (1997). "Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." *Hodges*, 341 S.C. at 85, 533 S.E.2d at 581.

In this appeal, the language of subsection (A) is clear and unambiguous concerning what treatment can be ordered, as the statute only uses the terms "medical" and "treatment," both of which on their face would be defined as services provided by a healthcare professional. To suggest the legislature intended the word "treatment" in section 42-15-60 to encompass care provided by an unlicensed and untrained individual requires a giant leap from the plain language of the statute. Such an argument should be supported by clear evidence showing an intent on the part of the legislature to broaden the scope of the statute beyond the plain language; however, Claimant has failed to provide any such evidence.

When seeking to determine the meaning of a statute, "the Court should not concentrate on isolated phrases within the statute, but rather, read the statute as a whole and in a manner consonant and in harmony with its purpose." *Duke Energy Corp. v. South Carolina Dept. of Revenue*, 415 S.C. 351, 355 (2016). If there is any question as to whether subsection (A) limits the Commission's authority to medical professionals and medical treatment, the title of section 42-15-60 is: "Time period medical treatment and supplies furnished; refusal to accept medical treatment; settled claims; total and permanent

disability." The title itself evidences this statute was intended to address an injured worker's entitlement to medical treatment. The unlicensed, unskilled, and untrained services provided by Ms. Roldan-Dimas do not qualify as medical treatment from a commonsense standpoint.

Importantly, when reading section 42-15-60 as a whole, it is clear the legislature intended to delineate different benefits available to individuals deemed permanently and totally disabled compared to other injured workers. Specifically, subsection (C) outlines a carrier's obligations for providing medical treatment and care in cases where a claimant has been found permanently and totally disabled. In those cases, the carrier's obligation is much broader as it relates to the types of medical treatment and "other treatment or care" that may be necessary as a result of a work accident over the claimant's lifetime. Subsection (C) states a carrier must provide "reasonable and necessary nursing services, medicines, prosthetic devices, medical, hospital, and other treatment or care . . . during the life of the injured employee . . . ." S.C. Code Ann. § 42-15-60(C). The legislature added subsection (C) in 1980.

Unlike in subsection (A), subsection (C) specifically provides authority for the Commission to award "other treatment or care." The legislature chose to add an entirely different term in subsection (C), when they included other "care," which is not by definition something that can only be provided by a healthcare professional. Importantly, both subsections (A) and (C) were drafted to use the word "and" between the phrases "medical" and "other treatment," which inextricably connects the two words; however, subsection (C) added the term "or care" after "medical" and "other treatment" in the list of benefits that could be ordered after a finding of permanent and total disability. As a matter of

statutory interpretation, the legislature's use of "and" connects the separate clauses of "medical" and "other treatment" together, while the use of "or" in subsection (C) evidences the legislature's intent that other "care" could encompass non-professional services, not provided for in subsection (A). Any other interpretation would render the "or care" language in subsection (C) unnecessary.[2]

While there have been South Carolina cases which have awarded non-professional attendant care to be paid by an employer/carrier, the cases that have provided for non-professional attendant care or other non-medical treatment concern situations where a claimant has either been found permanently and totally disabled or the parties concede the claimant is permanently and totally disabled. Respondents are not aware of, and Claimant

[2] The Hearing Commissioner and Appellate Panel noted that the statute does not specifically define "medical, surgical, hospital, and other treatment." (Beck Order, p. 26, ¶ 19; Appellate Panel Order, p. 23 ¶ 19). But they examined the language of the statute and its legislative history to arrive at their conclusion. Claimant recognizes that "[t]he mere fact that the terms are undefined does not mean one must expand beyond the statutory text to understand and apply them." (App. In. Br., p. 11). However, Claimant then proceeds to do just that with citations to appellate opinions from outside South Carolina, most of which do not concern the workers' compensation context. (*Id*. at 11-13). And the workers' compensation opinions outside South Carolina are distinguishable. For example, the Arizona statute at issue in *Carbajal v. Industrial Commission of Arizona*, 219 P.3d 211, 213 (Ariz. 2009), covers "medical, surgical and hospital benefits or other treatment, nursing, medicine, surgical supplies, crutches and other apparatus, including artificial members, reasonably required at the time of injury, and during the period of disability." That language is hardly "similar" to section 42-15-60(A) and does not distinguish between the treatment and care available depending on whether a claimant is totally and permanently disabled. (App. In. Br., pp. 12-13). Similarly, the North Carolina workers' compensation statutes at issue in *Mehaffey v. Burger King*, 749 S.E.2d 252 (N.C. 2013), include definitions. The North Carolina Act at that time defined "medical compensation" to include "medical, surgical, hospital, nursing, and rehabilitative services, and medicines, sick travel, and other treatment, including medical and surgical supplies . . .." *Id*. at 255. That definition was also amended in 2011, while *Mehaffey* was on appeal, specifically to include "attendant care services." *Id*. In short, there is no reason to look beyond the language of section 42-15-60(A) because there is no ambiguity, and Claimant cites no binding South Carolina authority for his position.

does not cite, any case law interpreting section 42-15-60(A) to allow non-family members, or family members,[3] of an injured worker or non-professionals to be compensated for attendant care before a claimant has been deemed permanently and totally disabled. For instance, in *Pressley v. REA Const. Co., Inc.,* 374 S.C. 283, 648 S.E.2d 301 (Ct. App. 2007), the issue was whether the claimant's mother was entitled to compensation for providing non-professional attendant care. However, the carrier admitted the claimant was permanently and totally disabled, and conceded he was entitled to lifetime medical benefits. Thus, this Court held that an injured employee is entitled to receive "reasonable and necessary nursing services," which permitted the Commission to award non-professional attendant care in that case. S.C. Code Ann. § 42-15-60(C). Notably, the "reasonable and necessary nursing services" provision is only mentioned in subsection (C) which, again, only pertains to cases where a claimant has been deemed permanently and totally disabled.[4]

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[3] Claimant mistakenly argues the Hearing Commissioner and Appellate Panel based their holdings on whether Ms. Roldan-Dimas was a family member. (App. In. Br., pp. 15-16). Instead, their conclusions were based on the different language used in subsections (A) and (C), whether Claimant had been declared totally and permanently disabled, and Ms. Roldan-Dimas' lack of qualifications to provide medical treatment. They did not decline "to award an injured employee attendant care simply because the caregiver is a spouse . . . ." (*Id*. at 16). Thus, Claimant's citation to *Edward Kraemer & Sons, Inc. v. Downey*, 852 P.2d 1286 (Colo. App. 1992) is inapposite. Ms. Roldan-Dimas is not Claimant's spouse. Furthermore, the Colorado statute at issue in *Downey* requires an employer to "furnish medical, surgical, dental, nursing, and hospital treatment; medical, hospital, and surgical supplies; crutches; apparatus; and guardian ad litem or conservator services as may be reasonably be needed at the time of the injury." *Id*. at 1288; Colo. Ann. § 8-42-101(1)(a)(I).

[4] Claimant interestingly cited *Pressley* to the Hearing Commissioner as support for his request to order Respondents to pay for "family-provided attendant care." (Claimant's Legal Brief, p. 5). However, Claimant did not rely on *Pressley* before the Appellate Panel, and Claimant only cited *Pressley* to this Court related to the standard of review. (App. In. Br., p. 9). Thus, Claimant implicitly acknowledges that *Pressley* is easily distinguishable as both the Hearing Commissioner and Appellate Panel concluded.

Thompson v. S.C. Steel Erectors, 369 S.C. 606, 632 S.E.2d 874 (Ct. App. 2006), is the only other South Carolina appellate court case cited by Claimant regarding the substantive interpretation of section 42-15-60. *Thompson* was decided before the statutory amendments in 2007 and concerned whether the previous version of the statute covered costs to make a claimant's residence handicapped-accessible. *Id*. 619, 632 S.E.2d at 881-882. As concluded by the Hearing Commissioner and the Appellate Panel, *Thompson* is inapposite to whether subsection (A) permits an award of attendant care by an unqualified individual before a finding of total and permanent disability.[5]

Accordingly, Respondents contend the Hearing Commissioner and the Appellate Panel correctly held that while Claimant is entitled to attendant care, such services must be provided by a licensed medical professional, as this conclusion is consistent with the plain language of section 42-15-60(A).

B. The Commission correctly found Ms. Roldan-Dimas is not qualified to provide medical treatment pursuant to S.C. Code Ann. § 42-15-60(A).

The Commission is without legal authority to require Respondents to pay Ms. Roldan-Dimas for attendant care under section 42-15-60 because she is not qualified to provide medical care or treatment. Claimant cannot dispute that Ms. Roldan-Dimas has no medical training and is not a licensed healthcare provider. She testified she has not been trained in the duties of a home health care aide, she has no training in medical billing, she has no professional liability insurance, she has not been trained in fall prevention, she has no training in handling patients with vestibular deficits, and she has no first aid training. (Hearing Tr. 31:2-32:5). Ms. Roldan-Dimas admitted that she completed the ninth grade

[5] For this same reason, *Timmons v. North Carolina Department of Transportation*, 473 S.E.2d 356 (N.C. App. 1996), cited by Claimant (App. In. Br., p. 15), is inapposite.

in Mexico but is unable to read English. (Roldan-Dimas Dep. p. 9:7-9,12:13-19; Hearing Tr. 28:9-18). She also confirmed that if she were needed to complete medical logs in English of Claimant's daily progress and details of the attendant care she was providing, she would be unable to do so. (Hearing Tr. 28:9-18). Under the Act, medical providers are required to provide medical documentation to carriers and employers and failure to do so results in liability for fines and penalties against the providers.[6] Considering Ms. Roldan-Dimas is incapable of communicating in English, there is simply no way she could comply with any documentation requirements.

Ms. Roldan-Dimas' work experience is limited to factory work, with no training in even basic first aid. (Roldan-Dimas Dep. 16:5-19:21). She has no other job or work experience, she has never worked in a medical or rehabilitation setting, and she has no certifications or on-the-job training. (Hearing Tr. 29:15-25). She has never been trained in first aid, fall management, or handling wound care. (Roldan-Dimas Dep. p. 19:12-21:1). Accordingly, by her own admissions, she is neither qualified nor capable of providing "medical, surgical, hospital and other treatment" for Claimant. S.C. Code Ann. § 42-15-60(A).

The Hearing Commissioner and Appellate Panel's conclusions on this point are further supported by the opinions of Dr. Maria Lopez-Virella, a board-certified physician in pathology and lipidology and a Professor at the Medical University of South Carolina. She opines what seems to be obvious – that any necessary attendant care should be

[6] S.C. Code Ann. § 42-15-95 requires that all information compiled by "a health care provider licensed pursuant to Title 40 pertaining directly to a workers' compensation claim must be provided to the insurance carrier . . . within fourteen days after receipt of written request." Failure to comply within thirty days would subject the health care provider to a penalty payable to the commission, not to exceed two hundred dollars.

provided by a licensed and trained skilled home health care aide or nurse to ensure Claimant's best possible recovery. (Lopes-Virella Aff., ¶ 20).[7] Dr. Lopez-Virella further concludes that Ms. Roldan-Dimas is neither a licensed health care provider nor qualified to provide "medical, surgical, hospital and other treatment" to Claimant. (*Id*. at ¶ 21).

C. Respondents maintain the right to direct medical care under the statute, the Commission correctly identified liability concerns with Claimant's positions, there are significant policy concerns with Claimant's position, and those liability and policy concerns outweigh Claimant's preference to have Respondents pay Ms. Roldan-Dimas to provide medical treatment.

Under the Act, Respondents maintain the right to direct medical care, and Claimant has outright refused to accept the professional attendant care services they offered. Claimant admitted in his pleadings filed April 26, 2022, less than three months after his accident, that he declined the outside third-party care offered by Respondents because he and Ms. Roldan-Dimas "agreed it would be best for [Ms. Roldan-Dimas] to care for [Claimant's] needs." (Form 50, p. 1). Likewise, Ms. Roldan-Dimas testified that Claimant was offered home health services by Respondents upon his release from the hospital, but those services were declined by her and Claimant because he told her he felt more comfortable having her assist him at home. (Hearing Tr. 30:8-11).[8]

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[7] Claimant interestingly argues that subsection (A) "imposes no credentialing requirements." (App. In. Br., pp. 15-16). However, qualifications to provide medical treatment are absolutely implicit in the statutory language. To conclude otherwise would permit lay persons to provide "surgical" care. S.C. Code. Ann. § 42-15-60(A).

[8] Claimant's decision to decline Respondents' offer to provide the attendant care that Dr. Desai recommends distinguishes his case from *Hall v. United Rentals, Inc*., 371 S.C. 69, 636 S.E.2d 876 (Ct. App. 2006), and *Clark v. Aiken County Government*, 366 S.C. 102, 620 S.E.2d 99 (Ct. App. 2005). (App. In. Br. pp. 22-23). *Hall* and *Clark* involved disputes between the claimant and the employer/carrier about whether the employer/carrier was required to pay for spine surgeries not prescribed by the authorized physician. Claimant's situation is not one where Respondents are unable to offer the attendant care recommended by Dr. Desai. Respondents offered that care through medical professionals, but Claimant rejected the offer because he wants an unqualified person to provide the treatment.

While the Commission has the authority to order treatment other than that provided by the employer, this statutory authority is limited to situations where "in an emergency, on account of the employer's failure to provide the medical care as specified in this section, a **physician** other than provided by the employer is called to treat the employee, the reasonable cost of the service must be paid by the employer, if ordered by the Commission." S.C. Code Ann. § 42-15-60(A) (emphasis added). Thus, in the extreme instance of an emergency, the Act requires the involvement of a physician, further evidencing the medical nature of the "treatment" involved in subsection (A). In this instance, not only is there no emergency giving rise to the Commission usurping Respondents' statutory right to direct medical care by ordering Respondents to provide treatment with a different provider than that offered, but Ms. Roldan-Dimas also does not qualify as a "physician" or a medical provider.

Furthermore, Claimant's comfort level with his significant other is not a sufficient reason to deny Respondents their statutory right to direct medical care. Dr. Desai does not provide the requisite good cause for Claimant's rejection of the offered attendant care by a medical professional. Although she opined Ms. Roldan-Dimas was competently providing attendant care, Dr. Desai did not testify that it would be detrimental to Claimant or his recovery if he received attendant care by a professional. (Desai Dep. 48:16-19). In fact, when asked directly whether a professional would be better suited to provide the necessary attendant care than a non-professional, Dr. Desai testified, "they're equal." (*Id*. at 42:10-25).

This testimony certainly does not rise to the level of establishing facts sufficient to strip Respondents of their right to direct medical care, particularly when Claimant

repeatedly refused to accept the attendant care Respondents offered, arguably for financial gain. Allowing a claimant to refuse the offered attendant care under these circumstances would create troubling situations where injured workers could demand compensation for family members and friends for any reason, so long as a doctor says it could benefit them.

Moreover, our courts have confirmed that section 42-15-60 "does not give a unilateral right to claimants to select their treating physician, and such an unencumbered right undermines the authority of the commission, as prescribed by the legislature." *Turner v. South Carolina Dept. of Health and Environmental Control*, 377 S.C. 540, 546, 661 S.E.2d 118, 121 (Ct. App. 2008). Importantly, Respondents are not aware of any case law that has found it proper for the Commission to usurp the employer's right to direct medical care where treatment was offered with a licensed healthcare provider in favor of an untrained non-professional as requested by a claimant. Doing so in this case would not only undermine the statutory mandate that medical treatment be directed by Respondents, but it also would be the equivalent of giving Claimant the unilateral right to select the medical provider, which was rejected in *Turner*.[9]

[9] Claimant quotes *Risinger v. Knight Textiles*, 353 S.C. 69, 73, 577 S.E.2d 222, 224-25 (Ct. App. 2002) for the proposition that section 42-15-60's language "does not allow an employer to dictate the medical treatment of injured employees." (App. In. Br., p. 22). However, citing *Risinger* for that proposition in this appeal is absolutely misplaced. In *McKinney v. Kimberly Clark Corporation*, 376 S.C. 636, 658 S.E.2d 112 (Ct. App. 2008), this Court evaluated a claimant's argument, based on *Risinger*, that he had the unilateral right to select a treating provider, and the employer should pay for it. This Court distinguished *Risinger* on this exact legal point because in *Risinger* the Appellate Panel had designated a treating physician who recommended additional treatment that the employer/carrier refused to pay for. *Id*. at 638-39, 658 S.E.2d at 113. Importantly, *McKinney* held section 42-15-60 "does not give a unilateral right to claimants to select their treating physician, and such an unencumbered right undermines the authority of the appellate panel, as prescribed by the legislature." *Id*. at 639, 658 S.E.2d at 114.

Claimant additionally questions how the Hearing Commissioner and Appellate Panel could recognize the obvious "liability conundrum" with ordering non-professional attendant care before a claimant is declared totally and permanently disabled. (App. In. Br., p. 19). As detailed above, the statute itself differentiates between the benefits available before and after a finding of permanent and total disability. More importantly, once a claimant is found to be permanently and totally disabled, the employer's indemnity liability is capped, since the claimant has already been found entitled to the statutory maximum of 500 weeks of benefits. S.C. Code Ann. § 42-15-10. There is no increased liability to an employer for indemnity benefits at that point, even if additional injury occurs due to the fault of an unskilled individual providing attendant care.

Furthermore, prior to a claimant reaching maximum medical improvement, the goal of medical treatment is to lessen a claimant's overall period of disability and achieve the best possible recovery. Accordingly, both the Commission and employer/carriers have a significant interest to ensure that the medical care provided to a claimant achieves those goals, and achieving the best possible medical outcome requires care with trained and qualified medical providers. On the other hand, once a claimant reaches maximum medical improvement but is found permanently and totally disabled, he unfortunately has reached a point where he is not expected to make significant improvements. That is not the situation with Claimant, which is precisely why Respondents insist on providing medical treatment with trained professionals, but Claimant continues to refuse to accept. In fact, the hope is that Claimant continues to recover and is never declared permanently and totally disabled.

Moreover, the liability concerns with ordering Respondents to pay Ms. Roldan-Dimas other to provide attendant care are obvious. As Claimant himself aptly noted in his

Brief to the Full Commission, "any subsequent injury the Claimant incurs while receiving treatment for work injuries is considered compensable and the employer's responsibility." (Claimant's Full Commission Brief, p. 12). Claimant acknowledges this fact yet argues there is no increased liability if the treatment being provided is offered by an untrained non-professional provider, particularly one who is uninsured like Ms. Roldan-Dimas. It goes without saying that someone who is not trained to provide specific medical services but does so anyway runs a much higher risk of causing additional injury to an injured worker. Claimant's concession that such injury would be Respondents' responsibility is precisely why the Hearing Commissioner and Appellate Panel correctly found that ordering Respondents to pay Ms. Roldan-Dimas for services she is not qualified to provide creates a liability conundrum.

Claimant next nebulously argues that even if he were injured due to Ms. Roldan-Dimas' lack of training or negligence, "the Workers' Compensation Law is equipped with a process for addressing the claims and properly assigning liability" with citations to S.C. Code Ann. §§ 42-1-560(c) and 42-15-70. (App. In. Br., p. 19). These sections respectively concern the assignment of an employee's claims against a third-party to the employer/carrier and the responsibility of an employer for malpractice[10] committed by a provider furnished by the employer. Considering Ms. Roldan-Dimas admitted she does not own a home and is uninsured, Respondents have no meaningful way to seek indemnification from Ms. Roldan-Dimas for her negligence. (Hearing Tr. 31:19-21).

[10] Section 42-15-70's language about "malpractice by a physician or surgeon furnished by" an employer clearly contemplates that the "service or other treatment" is being provided by a professional with malpractice insurance to respond to any such claim. That is not possible here given Ms. Roldan-Dimas has no professional insurance (because she is not a professional).

Additionally, Claimant's acknowledgement of Respondents' subrogation rights, while also conceding Ms. Roldan-Dimas is untrained and unlicensed, highlights the significant liability concern. That concern vanishes if Claimant had accepted the professional attendant care Respondents offered. If he subsequently suffered an injury because of that provider's negligence, he has the right to bring an action against the provider and Respondents would also be able to seek indemnification from the licensed and insured provider. Under this latter scenario, Respondents would have chosen the provider and, therefore, would arguably share some responsibility; whereas, under Claimant's position, Respondents would be forced to pay an unqualified individual and bear the entire risk of any negligence on her part. This is fundamentally and inherently unfair.

Claimant also disputes that ordering Respondents to pay Ms. Roldan-Dimas for non-professional attendant care creates concerns about an employer-employee relationship between Employer and Ms. Roldan-Dimas. Claimant analogizes the situation is no different than a hospital providing medical services to a claimant, and no one would conclude the hospital thus became the employee of that claimant's employer. (App. In. Br., p. 20). Initially, Respondents note that Ms. Roldan-Dimas simply cannot provide medical treatment because she is not a healthcare provider. Beyond that, licensed treatment providers are employees of the medical facility for whom they work, making it impossible for them to be deemed employees of the carrier/employer. Likewise, legitimate healthcare professionals employed by a healthcare facility are not only covered under their employer's insurance policies, but also the employers accept the risk associated with their employee's actions. This is not the case with Ms. Roldan-Dimas as she is unemployed and would not be under the supervision or control of a healthcare facility. In fact, she would not be under

the supervision or control of anyone, which is yet another concern with ordering Respondents to pay her for services she is not qualified to provide.

Finally, although Respondents are not accusing Ms. Roldan-Dimas of any improper motives, the Court cannot ignore the potential secondary gain ramifications of a holding that requires an employer/carrier to pay a significant other to provide non-professional attendant care during this stage of a claimant's recovery. Ms. Roldan-Dimas testified she wanted the Commission to order Respondents to pay her more than $1,500.00 per week, which equates to more than $78,000.00 per year, for providing care to Claimant. That amount is more than double what she earned prior to Claimant's accident while working for Black & Decker. (Hearing Tr. 29:4-10; 37:4-16). Ms. Roldan-Dimas confirmed that despite Respondents' offering to provide professional in-home attendant care, consistent with Dr. Desai's recommendation, Ms. Roldan-Dimas and Claimant declined to accept such treatment because they preferred her to quit working and stay home with him. (Hearing Tr. 37:17-38:19). At a minimum, the result Claimant seeks would inject improper secondary gain incentives into the system, which is particularly concerning when he is still very much in the recovery stage of his treatment.

CONCLUSION

For all the foregoing reasons, the Hearing Commissioner and Appellate Panel reached the correct conclusion under the plain language of section 42-15-60(A). Respondents therefore respectfully ask this Court to affirm the Commission.

(Signature on Following Page)

Respectfully submitted,

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