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SC Court of Appeals

**State of South Carolina
Workers' Compensation Commission**

APPELLATE PANEL DECISION AND ORDER

COMMISSION PANEL: The Honorable Cynthia C. Dooley; The Honorable Gene McCaskill
and The Honorable R. Michael Campbell.

SCWCC File No.: 1921668

Evaristo Verdugo Morales,

Claimant,

v.

Insulation by Cohen, LLC,

Employer,

and

Builders Premier Insurance Co.,

Carrier,

Defendants.

AFFIRMED

Hearing held in Richland County, South Carolina,
on October 14, 2024

Per notice timely and properly served upon all Parties of Interest.

Appearances: Preston McDaniel, of McDaniel Law Firm, appeared on behalf
of Claimant/2nd Appellant.

E. Courtney Gruber, of Clement Rivers, LLP, appeared on behalf
of Defendants/1st Appellants.

Court Reporter: Amber Scarborough, 1230 Richland St, Columbia, SC 29201,
803-252-3445, contact@creelreporting.com.

Filed:

December 3, 2024

I. STATEMENT OF THE CASE

Single Commissioner

On February 29, 2024, a hearing was held before a Single Commissioner to determine issues set forth on the parties' Forms 50, 51 and 21. Claimant sustained a compensable injury limited to his thoracic spine at T-12 on October 10, 2019, pursuant to the unappealed Single Commissioner's Decision and Order filed on January 11, 2021. Claimant maintained he was not at maximum medical improvement (MMI) for his injury and sought ongoing medical care for the same. In the alternative, Claimant sought a permanent total disability determination and future medical care. Claimant further sought a finding that Defendants were not entitled to a credit for the overpayment of temporary compensation, but if awarded, the credit should date back to Defendants' Form 21, Request for Hearing, on August 8, 2023.

Defendants maintained that Claimant reached MMI on January 8, 2020, but continued to receive temporary compensation. Defendants based this contention on the Form 14B, Physician's Statement, dated January 12, 2021. Defendants sought to stop payment of Claimant's temporary compensation. Defendants further sought a permanent partial disability determination and a credit for the overpayment of Claimant's temporary compensation from his date of MMI.

The Single Commissioner determined, *inter alia*:

[D]efendants may stop payments of temporary disability. [D]efendants will pay Claimant permanent partial disability in accordance with his 45% disability rating to the back at a compensation rate of \$845.74, minus credit for weekly benefits paid since 7/19/23. [C]laimant is entitled to any ongoing treatment for his injury to his T12 vertebra as recommended by the authorized treating physician, Dr. Douglass Stofko. [C]laimant is entitled to lifetime maintenance, repair, and replacement for any hardware he retains as a result of treatment of his compensable T12 vertebra injury.

(Single Commissioner's Decision and Order filed on June 21, 2024, p. 12.)

Full Commission

This matter is now before the South Carolina Workers' Compensation Commission's Appellate

Panel pursuant to issues raised on appeal by the parties. Within the statutory period, Claimant and Defendants each filed a Form 30, Request for Commission Review. Accordingly, the parties presented for oral arguments before the Appellate Panel on October 14, 2024.

II. SINGLE COMMISSIONER FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDINGS OF FACT

Based upon the above stipulations and evidence of the case, the [Single Commissioner] finds the following facts based upon the preponderance of the evidence:

1. All parties are subject to and bound by the terms and provisions of the South Carolina Workers' Compensation Act.
2. Jurisdiction and venue are proper.
3. That Claimant's average weekly wage is \$1,302.27 with a resulting compensation rate of \$845.74.
4. Claimant sustained a compensable injury to the thoracic spine (T12 fracture) on 10/10/2019.
5. The only compensable injury in this case is the fracture at T12.
6. The issue of whether or not Claimant sustained compensable injuries to the cervical spine, lumbar spine, and both shoulders was already litigated at an evidentiary hearing held on 8/13/2020. The resulting Order, filed on 1/11/2021, denied compensability of those other claimed body parts, and that Order was not appealed.
7. With regard to the functional capacity evaluation (FCE) dated 10/23/2020 (Claimant APA 1), it is found as a fact that the evaluator stated at page 1: "The results of this evaluation cannot be considered valid."
8. The findings in the functional capacity evaluation carry no evidentiary weight because (1) the evaluator stated that the results cannot be considered valid and (2) the deficits noted on page 3

of the FCE, which are the basis for the evaluation's findings, concern body parts that are not compensable and, therefore, not relevant to this case.

9. Dr. Stofko stated in his deposition that paragraphs 1-4 on page 3 of the FCE were not causally related to the T-12 fracture. (Second Deposition of Dr. Stofko, Defendants APA p. 482, lines 18-25; p. 483, lines 1-23; p 484, lines 6-14).
10. Claimant's vocational evaluation (Claimant APA 4) is not given any weight due to its reliance (sic) the findings of the functional capacity evaluation, which has been found to carry no evidentiary weight, as the stated limitations were based upon body parts that are not causally related to the compensable injury.
11. Furthermore, Claimant's vocational evaluation is also excluded due to due process concerns. Defendants requested that Claimant undergo a neuropsychological evaluation and a second evaluation with a vocational expert; however, Claimant declined. Defendants filed a motion to compel, which was denied by the Commission, pursuant to S.C. Code Ann. § 42-15-80, because neither of the requested evaluators was a physician or surgeon. Because of Defendants' inability to obtain expert vocational and neuropsychological evaluations in this claim, to protect Defendants' due process rights, Claimant's vocational evaluation is given no weight.
12. No weight is given to Dr. Poletti's opinion because of his inability to objectively assess Claimants' impairments. In multiple different cases, Dr. Poletti has described himself on the record as an, "unashamed patient advocate"; these statements preclude him from being able to give a truly independent medical evaluation. (See the Order from SC Workers' Compensation Commission case number 2205977, issued on March 15, 2024, pages 10-13.)
13. The opinions stated by Dr. Leonard Forrest (Claimant APA 2) are outweighed by the greater weight of the relevant medical evidence in the case and are based largely on injuries that go

beyond the T12 fracture and are not compensable in this case. Furthermore, Dr. Forrest's opinions were heavily based on findings from the FCE which were not relevant to the only compensable injury in this case, the T12 fracture. Therefore, Dr. Forrest's opinions in this case are afforded no evidentiary weight.

14. Dr. Jeffrey Buncher's opinions are largely based upon body parts that are found not to be compensable; therefore, Dr. Buncher's opinions in this case are also given no weight.
15. Claimant was treated in the emergency room by Dr. Douglas Stofko, a board-certified neurosurgeon who was on call the date of the accident.
16. Dr. Stofko performed a two-level fusion from T11 to L1 for the T12 fracture, which was the compensable injury resulting from this accident.
17. Dr. Stofko testified in his deposition that Physician's Assistant Alana Cole was an "extender of me. So all her orders, anything that she's doing is acting under me." (Second Deposition of Dr. Stofko, Defendants' APA p. 457, lines 1-11). However, the record does not appear to contain an instance of Dr. Stofko specifically endorsing PA Alana Cole's opinions contained in her 14B.
18. Dr. Stofko testified that the opinions he had rendered in a questionnaire he had completed at the request of Claimant's Attorney Don Gibson on 11/18/2020 were still his opinions. (Second Deposition of Dr. Stofko, Defendants APA p. 478, lines 1-25, p. 479, lines 1-7).
19. Claimant's radicular pain noted in the left upper and left lower extremities is not causally related to the T12: fracture. (Second Deposition of Dr. Stofko, Defendants APA p. 479, lines 2-7).
20. The cervical complaints and medical treatment noted in Claimant's medical records were not causally related to the T12 fracture. (Second Deposition of Dr. Stofko, Defendants APA p. 482, lines 2-12).
21. Complaints expressed by Claimant to PA Alana Cole, specifically that he was having pain at the

- screw sites from his previous surgery, are not supported by the greater weight of medical evidence in the record; PA Cole testified in her deposition that the area he was referencing as being painful was above the screw sites. (PA Cole Deposition p. 6, 1-24).
22. Dr. Stofko further testified that he did not believe Claimant's complaints noted in the 1/10/2024 visit were due to his original accident that Dr. Stofko treated him for in October, 2019. (Second Deposition of Dr. Stofko, Defendants APA p. 482, lines 1-12).
23. Claimant reached maximum medical improvement on 1/8/2020. (Defendants APA 1, p. 24).
24. The MRI of the lumbar spine ordered in the 14B is no longer necessary in light of the lumbar MRI that was done 8/8/2020. (PA Cole Deposition, p. 38, lines 9-24).
25. Claimant testified in his deposition that he was gainfully employed at Integrated Site Management (ISM) from around the last days of May 2022 until August 2022, earning \$15.00 an hour working 5-6 hours a day, Monday through Friday. (Morales Deposition, p. 14, lines 9-24, p. 20 lines 10-14, p.18, lines 9-20).
26. Claimant testified in his deposition that from August 2022 to November 2022, he worked at Flores Construction making \$16.00 an hour working 30, 32, 35, and sometimes 40 hours a week. (Morales Deposition p.18, lines 20-25, p. 19, lines 1-16, p. 20 lines 2-9).
27. Payroll records from Flores Contracting LLC indicate Claimant received checks beginning on 11/22/2022 and continuing through 1/12/2023. (Defendants APA Exhibit C).
28. Claimant was on non-weight-bearing status for his left leg and on crutches for approximately four months as a result of a car wreck which occurred 12/31/2022, resulting in fractures to seven ribs (right at 5 & 6, left at 3-6), a sternum fracture, and a severely comminuted fracture to the tibial plateau necessitating surgery and permanent installation of orthopedic hardware. (Defendants APA 4, p. 122,123,142,143). (Claimant Deposition, p. 12, lines 3-19).

29. The parties attempted to resolve the issues at mediation on 7/19/2023, but mediation was unsuccessful.

30. The greater weight of medical evidence indicates that Claimant sustained 5% impairment to his back as a result of the T12 fracture. (Defendants APA 1, p. 24).

31. Defendants are entitled to credit for overpayment of temporary total compensation since 7/19/2023 for the following reasons:

(a) Even though MMI was reached on 1/8/2020, Defendants' authorized provider did not submit a Form 14B stating Claimant was at MMI until 1/12/2021.

(b) Following Defendants' filing of their Form 21 on 2/5/2023 (sic), a hearing was held on 4/26/2022 (sic), Order instructions were not received until 2/23/2022, and the subsequent Order was filed on 3/22/2022.¹

(c) Following the Single Commissioner's Order, the case underwent an appeal process by which the Single Commissioner's Order was vacated for being premature, as the case needed to go to mandatory mediation before an Order could be issued.

(d) The delays in getting a Final Order for this matter are not attributable to Claimant; therefore, it would be fundamentally unfair to give Defendants credit dating back to the date of MMI.

CONCLUSIONS OF LAW

Based upon the above stipulations, statement of the case, APA submissions, evidence of the case, findings of fact, and South Carolina law, the following conclusions of law are made:

1. S.C. Code Ann. § 42-1-160 defines injury by accident and further defines medical evidence as "an

¹ The Single Commissioner's Decision and Order contained scrivener's errors under Finding of Fact No. 31(b). Specifically, the dates of the hearing and Defendants' Form 21 filing are incorrect. Those dates have been amended in accord with the record under the Appellate Panel's Findings of Fact, *infra*.

expert opinion or testimony stated to a reasonable degree of medical certainty, documents, records, or other material that is offered by a licensed healthcare provider."

2. Pursuant to *Ashe v. Swenson*, 397 U.S. 436, 443, 90 S.Ct. 1189, 1194, 25 L.Ed.2d 469 (1970), "[w]hen an issue of ultimate fact has once been determined by a valid and final judgement, that issue cannot again be litigated between the same parties in any future lawsuit."
3. Claimant is entitled to lifetime maintenance, repair, and replacement for any hardware he retains as a result of treatment of his compensable T12 vertebra injury.
4. Claimant is entitled to any ongoing treatment for his injury to his T12 vertebra as recommended by the authorized treating physician, Dr. Douglas Stofko.
5. Claimant is entitled to an award of 45% permanent partial disability to the back, which, pursuant to S.C. Code Ann. § 42-9-30 (21), equates to 135 weeks of permanent partial disability. At a compensation rate of \$845.74, 135 weeks equals \$114,174.90.
6. S.C. Code Ann. § 42-9-210 provides for deduction from compensation of payments made by an employer when not due and payable.
7. Pursuant to the Commission's authority under § 42-9-210, I find that Defendant (sic) is only entitled to credit dating back to 7/19/2023, the date of the failed mediation.

III. ISSUES ON APPEAL

Defendants/ 1st Appellants

1. The Single Commissioner erred in finding as a fact (paragraph 31) that Defendants are entitled to credit for overpayment of temporary total compensation only since 7/19/2023 in that the finding is not supported by the greater weight of evidence and statutory and case law.
2. The Single Commissioner erred in finding as a fact and concluding as a matter of law that Defendants are entitled to a credit for overpayment of temporary total compensation since 7/19/2023 in that Finding of Fact No. 31 (b) contains incorrect factual information and cannot be a legitimate basis for Finding of Fact No. 31. Contrary to Finding of Fact No. 31(b), Defendants filed their Form 21 on 2/5/2021, not 2/5/2023, and the hearing was held on 4/26/2021, not 4/26/2022.

3. The Single Commissioner erred in finding as a fact and concluding as a matter of law that the credit for overpayment of temporary total compensation should be limited to payments made since 7/19/2023 based upon the finding that the delays in getting a final Order for this matter are not attributable to Claimant and, therefore, it would be fundamentally unfair to give Defendants credit back to the date of MMI. The error in this matter is that the delays in getting the final Order for this matter are not attributable to either party and that Defendants have paid to Claimant a total of \$182,875.16 in indemnity since the date of MMI (\$3,578.28 TPD from 1/19/2020 to 4/1/2020; \$845.74 per week from 4/2/2020 to 2/23/2022; \$57,127.36 lump sum following remand for mediation paid 5/18/2023; and \$845.74 weekly until 4/25/2024 when Order instructions were received, for a total of 216 weeks).
4. The Single Commissioner erred in finding as a fact and concluding as a matter of law that Defendants are only entitled to a credit for overpayment of benefits since 7/19/2023 in spite of the fact that MMI was reached on 1/8/2020 in that such a finding is an abuse of discretion and not supported by current case law.
5. The Single Commissioner erred in Finding of Fact No. 31 in that the finding, to wit: that awarding credit back to the date of MMI would be fundamentally unfair to Claimant, does not take into account the fact that he has been paid a total of \$182,875.16 since 1/8/2020, the date of MMI, and is erroneously based upon a presumption that failure to pay his award in lump sum rather than weekly installments is in itself "fundamentally unfair." Further, the findings do not take into account the fact that Claimant did receive a lump-sum payment of \$57,127.36 following the Appellate Panel remand for mediation.
6. The Single Commissioner erred in finding as a fact that Defendants were only entitled to credit for weekly payments after 7/19/2023 in that the finding does not take into consideration the fact that Claimant was gainfully employed from at least May 2022 to January 2023.
7. The Single Commissioner erred in finding as a fact and concluding as a matter of law that Claimant had sustained 45% permanent partial disability to the back, the error being that the only credible medical evidence in the record is that Claimant had sustained 5% permanent partial impairment to his back and had no physical limitations resulting from this injury.

Claimant/2nd Appellant

1. That pursuant to S.C. Code of Laws §42-17-50, Claimant requests a review of all of the Findings of Fact, the Conclusions of Law, the Order and Award and of all rulings and decisions made by the Commissioner at the hearing, as contained in the record or as made at any unrecorded pre-hearing conference, and in any communications concerning the claim, Order, Award and Decision rendered by the Hearing Commissioner in this matter.
2. That Claimant requests review for all the reasons as set forth in the Motion for Reconsideration that was filed with the Commission electronically on June 26, 2024, and incorporated herein by

reference. The Decision of the Hearing Commissioner should be reversed as a matter of law and in fact based on the errors as set forth in the Motion.

3. That wherein Claimant made a request for an Award for total and permanent disability based on a total loss of earning capacity under SC Code §42-9-10 (A), the Hearing Commissioner erred as a matter of law by failing to make one single Finding of Fact or Conclusion of Law or decision on Claimant's entitlement to an Award for total and permanent disability for a total loss of earning capacity as defined in the Act. Claimant's burden is by a preponderance of the evidence, which wherein if the scales and evidence tip ever so slightly in favor of the injured worker, the Award must be made. Quoting from *Broughton v. SC Game & Fish Dept.*, 219 S.C. 50, 64 S.E.2d 152 (1951):

Claimant who asserts the right to compensation carries the burden of establishing the necessary facts to entitle him to such compensation. The evidence will ordinarily be regarded as sufficient where the circumstances shown tend to establish the ultimate facts in issue and prove a basis from which they reasonable may be inferred. An award cannot, however, be based upon mere possibilities, probabilities, surmises or conjectures.

4. The Hearing Commissioner erred by not awarding Claimant total and permanent disability for having lost 50% or more of the functional use of his back to do work requiring the use of his back. Mr. Morales testified that in his opinion he had lost 80% of the functional use of his back to do work requiring the use of his back. There is no Finding of Fact on that testimony or challenging that opinion.

Further, while the Commissioner gave no weight to the testimony of Dr. Leonard Forrest due to the contested Functional Capacity Evaluation, Dr. Forrest's impairment evaluation was based on his evaluation and was made under the AMA Guides. Dr. Forrest assigned a regional impairment to the thoracic spine injury of greater than 100% to the thoracic spine and 22% to the whole person. Dr. Steven Poletti whose opinion was not given any weight because he is a "patient's advocate", in addition Dr. Poletti also based on his evaluation assigned a 28% whole person impairment which converted to over 100% impairment to the thoracic spine as a Regional impairment. The treating physical therapist stated at the end of treatment that Claimant could return to no more than "sedentary" work. The physical therapist who conducted the contested Functional Capacity Evaluation based on the first summary page found the results to be valid based on the valid and consistent effort he gave during the evaluation and limited him to light duty work. Thus, under the decisions of the SC Supreme Court and Court of Appeals, the Commissioner should have awarded Claimant total and permanent disability for having lost 50% or more of the functional use of his back to do work requiring the use of his back based on the medical testimony, testimony of Claimant, and other evidence in the record other than the contested Functional Capacity Evaluation.

5. That the Hearing Commissioner erred by failing to set out the evidence upon which he relied in arriving at his disability award of 45% to the back.

6. That the Hearing Commissioner erred by not addressing the overall loss of use of Claimant's back regardless of whether or not the upper or lower back were compensable under the SC Supreme Court and Court of Appeals decisions. This Commission cannot ignore or change the Law and is not only duty bound to a liberal construction of the Act and to resolve every inference and ambiguity and presumption in favor of benefits to the injured worker, but the Commission is duty bound to decide cases under a preponderance of the evidence and view the evidence in the light most favorable to the injured worker. The preponderance of the evidence standard dictates that benefits should be awarded where if the scales of justice tip ever so slightly in favor of benefits to the injured worker, benefits are to be awarded.
7. That the Hearing Commissioner erred as a matter of law by failing to make Conclusions of Law or even cite Conclusions of Law in reference to SC Code §42-9-10 (A) and failing to note the SC Supreme Court and Court of Appeals decisions on total and permanent disability for a loss of earning capacity including by not following the directions to this Commission under SC Code §42-9-190. That section requires that where a Claimant claims that he is disabled and the employer and its insurance carrier do not offer or procure suitable work within his residual capacity pursuant to their claim that he is not disabled and the worker establishes a prima facie case that he is totally disabled as defined in the Act under SC Code §42-1-120 and §42-9-10 (A) and thus makes a prima facie case entitling him to an award, Defendants must put up evidence to the contrary of, which there is none in this case.
8. That the Hearing Commissioner erred as a matter of law by failing to apply the preponderance of the evidence standard to the evidence in this matter.
9. That the Hearing Commissioner erred as a matter of law by going outside of the record before him in making his decision and specifically citing case law that was not cited to the Commissioner by either party and making such Findings of Fact, as Finding #12, wherein he states and gives no weight to the opinion of Dr. Poletti based on information outside of the record. That very Finding is arbitrary and capricious and constitutes an abuse of discretion and requires a de novo hearing.
10. That having found that Dr. Douglas Stofko did not endorse the Form 14B and thus the impairment or anything else on the Form 14B, by making Finding of Fact #30. The Commissioner nowhere, and Claimant would reiterate nowhere, makes in his Notes for Decision a finding that the greater weight of the evidence indicates that Claimant sustained a 5% impairment to his back. This is simply as the defense lawyer advised the Commission, which is part of the record; her attempt to bolster the decision.
11. That the Hearing Commissioner erred in the Order by endorsing and making Findings of Fact #18, #19, #20, #21, #22, #24, #25, #26, #27, #28, and #30 whereas there is absolutely no mention of any of those Findings of Fact or about that evidence in the Commissioner's Notes for Decision. It is the Commissioner's responsibility to make Findings of Fact upon which he bases his decision and the defense lawyer admitted that these Findings of Fact are entered by her to augment/bolster the Commissioner's Decision.
12. That the Hearing Commissioner erred as a matter of law in his Notes for Decision Finding #8 and

Order Finding of Fact #11 in reference to giving no weight to the vocational evaluation based on due process concerns. Without citing any cases or statutory provisions allowing for such evaluations, the Hearing Commissioner due to Defendants' inability to obtain expert vocational and neurological evaluations in this claim and in order to, "protect Defendants' due process rights, Claimant's vocational evaluation is given no weight." Defendants have absolutely no right to a vocational evaluation under the Act requiring Claimant to submit to an evaluation by a neuropsychologist or a vocational expert, which seems to be the Commissioner's problem. Defendants have every right to take Claimant's discovery deposition and have a vocational analysis done based on that and other evidence, which they did not do in this case. Therefore Claimant did not obstruct, even assuming that Defendants had some kind of due process right by not agreeing to attend such an evaluation, the Commissioner erred in making this decision because it was not violated. The only conceivable violation that could be thought of would be that Claimant would not submit to an evaluation by their vocational expert, which is not required by law nor allowed for under the Act.

13. That the entire Hearing Commissioner's Order is the subject of bias and prejudice, and is arbitrary and capricious, an abuse of discretion in the consideration of the evidence with a bias towards denying Claimant an award for total and permanent disability either on the basis of wage loss or having lost 50% or more of the functional use of his back to do work requiring the use of his back. The Commissioner goes as far as to not making one Finding of Fact or Conclusion of Law in reference to an Award for total loss of earning capacity.
14. That the Hearing Commissioner failed in his statutory duty to make detailed Findings of Fact and Conclusions of Law under SC Code §42-9-5; §42-17-40; and §1-23-380.

IV. DECISION OF THE APPELLATE PANEL

Pursuant to S.C. Code Ann. §42-17-50, we, the Appellate Panel, have reviewed the Decision and Order of the Single Commissioner and weighed the evidence as presented at the initial hearing. We have also considered all issues raised in the respective Appellant and Respondent briefs of the parties, as well as those issues raised at the Full Commission Review Hearing.

After careful review, the Appellate Panel of the South Carolina Workers' Compensation Commission, by unanimous vote, does hereby fully **AFFIRM** the Decision and Order of the Single Commissioner filed on June 21, 2024.

Below are set out the Findings of Fact and Conclusions of Law of the Appellate Panel as to this claim.

FINDINGS OF FACT

1. All parties are subject to and bound by the terms and provisions of the South Carolina Workers' Compensation Act.
2. Jurisdiction and venue are proper.
3. That Claimant's average weekly wage is \$1,302.27 with a resulting compensation rate of \$845.74.
4. Claimant sustained a compensable injury to the thoracic spine (T12 fracture) on 10/10/2019.
5. The only compensable injury in this case is the fracture at T12.
6. The issue of whether or not Claimant sustained compensable injuries to the cervical spine, lumbar spine, and both shoulders was already litigated at an evidentiary hearing held on 8/13/2020. The resulting Order, filed on 1/11/2021, denied compensability of those other claimed body parts, and that Order was not appealed.
7. With regard to the functional capacity evaluation (FCE) dated 10/23/2020 (Claimant APA 1), it is found as a fact that the evaluator stated at page 1: "The results of this evaluation cannot be considered valid."
8. The findings in the functional capacity evaluation carry no evidentiary weight because (1) the evaluator stated that the results cannot be considered valid and (2) the deficits noted on page 3 of the FCE, which are the basis for the evaluation's findings, concern body parts that are not compensable and, therefore, not relevant to this case.
9. Dr. Stofko stated in his deposition that paragraphs 1-4 on page 3 of the FCE were not causally related to the T-12 fracture. (Second Deposition of Dr. Stofko, Defendants APA p. 482, lines 18-25; p. 483, lines 1-23; p 484, lines 6-14).
10. Claimant's vocational evaluation (Claimant APA 4) is not given any weight due to its reliance

on the findings of the functional capacity evaluation, which has been found to carry no evidentiary weight, as the stated limitations were based upon body parts that are not causally related to the compensable injury.

11. Furthermore, Claimant's vocational evaluation is also excluded due to due process concerns.

Defendants requested that Claimant undergo a neuropsychological evaluation and a second evaluation with a vocational expert; however, Claimant declined. Defendants filed a motion to compel, which was denied by the Commission, pursuant to S.C. Code Ann. § 42-15-80, because neither of the requested evaluators was a physician or surgeon. Because of Defendants' inability to obtain expert vocational and neuropsychological evaluations in this claim, to protect Defendants' due process rights, Claimant's vocational evaluation is given no weight.

12. No weight is given to Dr. Poletti's opinion because of his inability to objectively assess Claimants' impairments. In multiple different cases, Dr. Poletti has described himself on the record as an, "unashamed patient advocate"; these statements preclude him from being able to give a truly independent medical evaluation. (See the Order from SC Workers' Compensation Commission case number 2205977, issued on March 15, 2024, pages 10-13.)

13. The opinions stated by Dr. Leonard Forrest (Claimant APA 2) are outweighed by the greater weight of the relevant medical evidence in the case and are based largely on injuries that go beyond the T12 fracture and are not compensable in this case. Furthermore, Dr. Forrest's opinions were heavily based on findings from the FCE which were not relevant to the only compensable injury in this case, the T12 fracture. Therefore, Dr. Forrest's opinions in this case are afforded no evidentiary weight.

14. Dr. Jeffrey Buncher's opinions are largely based upon body parts that are found not to be compensable; therefore, Dr. Buncher's opinions in this case are also given no weight.

15. Claimant was treated in the emergency room by Dr. Douglas Stofko, a board-certified neurosurgeon who was on call the date of the accident.
16. Dr. Stofko performed a two-level fusion from T11 to L1 for the T12 fracture, which was the compensable injury resulting from this accident.
17. Dr. Stofko testified in his deposition that Physician's Assistant Alana Cole was an "extender of me. So all her orders, anything that she's doing is acting under me." (Second Deposition of Dr. Stofko, Defendants' APA p. 457, lines 1-11). However, the record does not appear to contain an instance of Dr. Stofko specifically endorsing PA Alana Cole's opinions contained in her 14B.
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23. Claimant reached maximum medical improvement on 1/8/2020. (Defendants APA 1, p. 24).
24. The MRI of the lumbar spine ordered in the 14B is no longer necessary in light of the lumbar MRI that was done 8/8/2020. (PA Cole Deposition, p. 38, lines 9-24).
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26. Claimant testified in his deposition that from August 2022 to November 2022, he worked at Flores Construction making \$16.00 an hour working 30, 32, 35, and sometimes 40 hours a week. (Morales Deposition p.18, lines 20-25, p. 19, lines 1-16, p. 20 lines 2-9).
27. Payroll records from Flores Contracting LLC indicate Claimant received checks beginning on 11/22/2022 and continuing through 1/12/2023. (Defendants APA Exhibit C).
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29. The parties attempted to resolve the issues at mediation on 7/19/2023, but mediation was unsuccessful.
30. The greater weight of medical evidence indicates that Claimant sustained 5% impairment to his back as a result of the T12 fracture. (Defendants APA 1, p. 24).
31. Defendants are entitled to credit for overpayment of temporary total compensation since 7/19/2023 for the following reasons:

- (a) Even though MMI was reached on 1/8/2020, Defendants' authorized provider did not submit a Form 14B stating Claimant was at MMI until 1/12/2021.
- (b) Following Defendants' filing of their Form 21 on 2/5/2021, a hearing was held on 4/26/2021, Order instructions were not received until 2/23/2022, and the subsequent Order was filed on 3/22/2022.
- (e) Following the Single Commissioner's Order, the case underwent an appeal process by which the Single Commissioner's Order was vacated for being premature, as the case needed to go to mandatory mediation before an Order could be issued.
- (f) The delays in getting a Final Order for this matter are not attributable to Claimant; therefore, it would be fundamentally unfair to give Defendants credit dating back to the date of MMI.

CONCLUSIONS OF LAW

1. S.C. Code Ann. § 42-1-160 defines injury by accident and further defines medical evidence as "an expert opinion or testimony stated to a reasonable degree of medical certainty, documents, records, or other material that is offered by a licensed healthcare provider."
2. Pursuant to *Ashe v. Swenson*, 397 U.S. 436, 443, 90 S.Ct. 1189, 1194, 25 L.Ed.2d 469 (1970), "[w]hen an issue of ultimate fact has once been determined by a valid and final judgement, that issue cannot again be litigated between the same parties in any future lawsuit."
3. Claimant is entitled to lifetime maintenance, repair, and replacement for any hardware he retains as a result of treatment of his compensable T12 vertebra injury.
4. Claimant is entitled to any ongoing treatment for his injury to his T12 vertebra as recommended by the authorized treating physician, Dr. Douglas Stofko.
5. Claimant is entitled to an award of 45% permanent partial disability to the back, which, pursuant to S.C. Code Ann. § 42-9-30 (21), equates to 135 weeks of permanent partial disability. At a

compensation rate of \$845.74, 135 weeks equals \$114,174.90.

6. S.C. Code Ann. § 42-9-210 provides for deduction from compensation of payments made by an employer when not due and payable.
7. Pursuant to the Commission's authority under § 42-9-210, We conclude that Defendants are only entitled to credit dating back to 7/19/2023, the date of the failed mediation.

ORDER

THEREFORE IT IS HEREBY ORDERED that the Decision of the Single Commissioner filed in the above-captioned matter on June 21, 2024, is hereby fully **AFFIRMED**.

ACCORDINGLY:

IT IS FURTHER ORDERED that Defendants may stop payments of temporary disability.

IT IS FURTHER ORDERED that Defendants will pay Claimant permanent partial disability in accordance with his 45% disability rating to the back at a compensation rate of \$845.74, minus credit for weekly benefits paid since 7/19/2023.


IT IS FURTHER ORDERED that Claimant is entitled to any ongoing treatment for his injury to his T12 vertebra as recommended by the authorized treating physician, Dr. Douglas Stofko.


IT IS FURTHER ORDERED that Claimant is entitled to lifetime maintenance, repair, and replacement for any hardware he retains as a result of treatment of his compensable T12 vertebra injury.


IT IS FURTHER ORDERED that no hearing costs or penalties are assessed in this matter.

AND SO IT IS ORDERED.

Columbia, SC (date)


Cynthia C. Dooley, Commissioner


Gene McCaskill, Commissioner


R. Michael Campbell, Commissioner

Appellate Panel Decision and Order

Served via E-Mail:

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Brief Served via USPS:

CERTIFICATE OF SERVICE

This is to certify that the undersigned has on this date served a copy of this order in the above entitled action upon all parties to this case by sending an electronic copy hereof by electronic mail addressed to the attorneys for said parties; or if there is an unrepresented party(ies), by depositing a copy hereof, postage paid in the United States mail, first class, addressed to the unrepresented party(ies) and to the attorney(s) for the represented party(ies).

December 3, 2024

By: Valerie D. Deller, Judicial Department