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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA
SC Workers' Compensation Commission
Appellate Panel

Appellate Case No. 2025-000026

Evaristo Verdugo Morales, Claimant,.....Respondent-Appellant,

v.

Insulation by Cohen's, LLC, Employer, and
Builders Premier Insurance Co., Carrier,...Appellants-Respondents.

INITIAL BRIEF OF RESPONDENT-APPELLANT

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STATEMENT OF THE CASE

These appeals arise out of an admitted injury by accident of October 10, 2019. However, while the accident was admitted, issues remained as to the payment of compensation and medical care for injuries arising out of the accident. The Claimant filed a request for hearing set before Commissioner Susan Barden on April 7, 2020. Prior to the hearing, the parties entered into a Consent Order wherein it was agreed the Claimant had sustained "**a compensable injury by accident to his back**", reserved the right to pursue other body parts, "Defendants are admitting compensability only for the back" and that the authorized treating physician Dr. Douglas L. Stofko would continue to provide causally related medical treatment until the Claimant reached maximum medical improvement. Subsequent to the accident, the Claimant had received his salary from his employer and pursuant to the Consent Order was guaranteed $845.74 per week. As a result, it was not until April 2, 2020, that the Claimant began to receive weekly compensation payments at the maximum compensation rate of $845.74 for the year of his injury in 2019, based on his salary of $1,302.27 which far exceeded the State average weekly wage which is the maximum compensation rate for that year. (Consent Order, 04/14/20).

Further issues arose in reference to the provision of medical care and within months the Claimant again filed for a

hearing, set before Commissioner Melody James on August 13, 2020. The Commissioner issued her Order Instructions on September 10, 2020, in which she held in Instruction #5 that,

> "even though, it may sound like a logical evaluation, the undersigned cannot issue the equivalent of a medical opinion"

and held that since the Claimant did not submit a medical statement stating an opinion to a reasonable degree of medical certainty concerning the lumbar or cervical spine, she could not order the medical care as requested. (Cl. APA, pp. 123-124, 02/09/24). Defense Counsel was asked to draft the Order, not filed until January 11, 2021, which in the Order portion denied the request for additional medical treatment to the lumbar spine, cervical spine and shoulders. However, defense counsel further put in the Order portion that Claimant's injuries related to this accident are limited to the fracture at T12. (Def. 3rd Amended PHB, p. 252, 02/28/24). On that same date, January 11, 2021, the Claimant again filed a request for hearing for medical care specifically by an orthopaedic specialist in the area of the spine. (Form 50, 01/11/21). On February 5, 2021 Defendants filed a Form 21 to pay compensation and requesting an overpayment. (Form 21, 02/05/21).

On February 26, 2021, Preston F. McDaniel notified the SC Workers' Compensation Commission ("Commission") that he had been associated by Mr. Gibson, who had been hospitalized with Covid

and was barely understandable and copied Defense Counsel in this case without knowing the name of the case(s). (Ltr., 02/26/21). A Consent Order to mediate signed by both attorneys, Don C. Gibson and E. Courtney Gruber, was filed with Commissioner Taylor but on March 24, 2021, even though signed and filed with the Commission, defense counsel advised the Commissioner she was withdrawing her consent to mediation and requesting it be reset by email at 2:36pm. At 2:57pm, the Commissioner's Office responded with a Notice putting it back on the April 12th Docket. After a 4:00pm Notice, at 5:45pm, associated counsel advised the Commission, after expressing shock, it was their position the Claimant is totally and permanently disabled making the case subject to mandatory mediation. (Emails of Gruber, Commission AA, Kadoves (for Gibson), McDaniel, 03/24/21).

On March 25th, Defendants filed their Prehearing Brief (Def. PHB, 03/25/21). On March 29th, Claimant again requested it be reset due to Mr. Gibson's hospitalization and associated counsel's schedule. (Ltrs., 3/29/21). After numerous emails requesting a reset date, and after no objection was stated on April 2nd, on April 2nd the matter was reset for April 26th. (Hrg. Not., 04/02/21). On April 8th, by letter Claimant filed: a Form 21 formal response; amended the Form 50 to provide Claimant was requesting an award for total and permanent disability if the Commission determined he was at maximum medical improvement;

notice that once the hearing site was determined, a Hearing Subpoena would be issued for attendance by Alana Cole, PA; and again requested the hearing be cancelled because mediation was mandatory. (Ltr., 04/08/21).

Being set on both the Form 50 and the Form 21, the Claimant filed his Prehearing Brief on April 12th and filed an Amended Prehearing Brief April 14th. (Cl. PHBs, 04/12/21, 04/14/21). The Defendants filed their Prehearing Brief on April 9th and an Amended Prehearing Brief on April 12th. (Def. PHBs, 04/09/21, 04/12/21). Per the previous Notice on **April 13th**, Claimant served Alana Cole, PA with a Subpoena to attend the hearing on April 26th (Ltr./Form 27 Subpoena, 04/13/21). **On April 15th**, Defendants filed a **second Amended** Prehearing Brief. In the second Amended Prehearing Brief, for the first time Defendants listed as APA Submissions documents from Dr. Douglas Stofko's practice Trident Orthopaedic Specialists consisting of two (2) letters from Mr. Gibson, October 15, **2020** and October 27, **2020** and a Questionnaire completed and signed by Dr. Stofko on **November 18, 2020**. (Def. 2nd Amend. PHB/APAs, 04/15/21). At the time of the hearing on April 26th, Alana Cole, PA was hailed but did not appear. The Claimant renewed his request and made a Motion to leave the Record open to take Alana Cole, PA's deposition; the Motion was taken under advisement. (Tr., p. 22, l. 23-p. 25, l. 14, 04/26/21). After eight (8) months and after several requests

for a decision by the Defendants, and having not received a decision from the Commission, on December 15, 2021 by letter Claimant requested: 1) a conference on the Motion to take the depositions of Alana Cole, PA and Dr. Douglas Stofko and 2) a conference subsequent to the admission of that additional evidence. (Ltr., 12/15/21). Almost exactly **ten (10) months to the day** after the hearing, the Commissioner issued Order Instructions asking the defense to prepare an Order and in those same Order Instructions denied Claimant's Motion to Postpone. (Order Instructions, 02/23/22).

The Commissioner subsequently issued her Order on March 22, 2022. Immediately following the Commissioner's Order, weekly temporary disability payments were stopped. A Motion for Reconsideration and a Reply were filed March 24th and April 1st. After hearing nothing concerning that Motion, August 12, 2022 Claimant sent a letter concerning the status. On **October 3, 2022**, **seven (7) months more** after the Motion for Reconsideration was filed and **nineteen (19) months** after the hearing, the Commissioner denied the Motion. (Motion, 03/24/22; Reply, 04/01/22; Ltr., 08/12/22; Order, 10/03/22). In her Order, the Commissioner had found the Claimant at maximum medical improvement as of January 8, 2020, but made absolutely no reference to the report of Dr. Leonard Forrest of July 22, 2020, wherein the Claimant was found to be not at maximum medical

improvement in Dr. Forrest's opinion; nor in fact, is there any reference to any of the evidence submitted by the Claimant in the Order's Evidentiary Summary. The Claimant filed a request for Commission Review on October 14, 2022 (Form 30, 10/14/22). After a decision denying Defendants' Motion to Dismiss the Appeal and Appellant and Defendants filing Briefs on all issues, a Full Commission Panel Zoom Hearing was held February 13, 2023. On March 2, 2023, a request for a Proposed Decision was filed and an Order was issued on April 4, 2023, vacating the Hearing Commissioner's Decision **but not addressing any of the issues** raised for Review except that the case was subject to mandatory Mediation and remanded it for Mediation. (Notes for Decision, 03/02/23; Full Commission Decision, 04/04/23).

Following the Remand, mandatory Mediation was conducted on July 19, 2023, and resulted in an impasse and the case was to be set on "all issues". (Form 70, 07/19/23).

On July 20th, refiled August 1st, the Claimant filed for a hearing requesting additional medical care. (Form 50, 08/01/21). August 8th Defendants then filed a Form 21 to pay compensation and requested a credit after January 8, 2020. (Form 21, 08/08/21). August 18th a hearing was set for October 18, 2023, but only on the Form 21. The Claimant filed a Notice on August 22nd that: 1) the matter was supposed to be reset on all issues and that he filed a Form 50; 2) no ruling had been made

on his request to take the depositions of Alana Cole, PA and Dr. Douglas Stofko; 3) requesting that if the case was heard only on the Form 21, the hearing be limited to whether the Defendants could stop payment and the request for additional medical care; 4) setting out a response to the Form 21; and 5) that if the Claimant was at maximum medical improvement he was entitled to an Award for total and permanent disability. (Ltr., 08/22/23). On August 29th, Defendants filed a Form 51 noting they had set up an appointment with Dr. Douglas Stofko for September 11, 2023 (Form 51, 08/29/23) in response to Claimant's request for further evaluation and/or medical care. That same day Claimant filed a Motion to not be required to attend citing as a basis he had requested a second opinion; wanted to take the deposition of Dr. Stofko and Alana Cole, PA, and that those constituted just cause or excuse not to attend another appointment with Dr. Stofko, especially since the Defendants were taking contradictory positions that the Claimant had reached maximum medical improvement but at the same time were returning Claimant to the same doctor upon which they were relying for maximum medical improvement for a further evaluation for medical care. (Motion, 08/29/23).

On September 1st, the Claimant filed a Request for Postponement of the Hearing due to the contradictory positions taken by the Defendants to his request for medical care and

noting that the Form 21 upon which the hearing was set had only been filed after the Claimant had requested additional medical care. (Ltr., 09/01/23). The Defendants filed a Reply to the August 29th Motion treated as a Motion to Postpone and denied September 13th. On September 7th, Defendants filed a Motion to Compel the Claimant to attend an evaluation with Dr. Stofko (Motion, 09/07/23), to which a Reply was filed September 18th (Reply, 09/18/23) and granted without hearing September 21st. On September 19th, the Defendants filed an Amended Form 21 alleging the Defendants to be allowed to stop payment because the Claimant refused an evaluation by Dr. Stofko. (Amended Form 21, 09/19/23).

October 4th, the Claimant notified the Commission the 60 Day Rule did not apply, noted the filing and new basis for the Amended Form 21, and again requested the Form 50 be set along with the Form 21. (Ltr., 10/04/23). October 15th, the Claimant notified the Commissioner the Defendants were seeking to limit the hearing to just whether they were entitled to stop payment of benefits based on the Claimant's refusal to attend the medical examination and on October 18th notified the Commissioner the Defendants had again stopped payment of the Claimant's benefits without a hearing. (Ltrs., 10/15/23, 10/18/23).

At a pre-hearing conference on October 24th, it was determined the Defendants were not current on payment of weekly

disability benefits and it was agreed the Claimant would attend an evaluation with Dr. Stofko. Defendants drafted a Consent Order to which Claimant objected as not being per the agreement, and subsequently the Commissioner issued an Order October 30th finding the Defendants were not current, ordering the Claimant to be brought current, and ordering Claimant to attend the appointment with Dr. Stofko. On December 1, 2023, the matter was reset for hearing on February 8, 2024, before Commissioner T. Scott Beck in Yemassee, SC. (Hrg. Not., 12/01/23).

The Claimant having originally filed his Prehearing Brief for the hearing to be held on October 24, 2023 on the Form 21, on January 24, 2024 filed an Amended Prehearing Brief and APA Submissions and on February 9th filed a 2nd Amended Prehearing Brief and Amended APA Submissions consisting of pp. 1-19a-c, and pp. 20-103a-e, and pp. 104-110a-e, and pp. 111-124. In addition, the APAs noted that the depositions of Alana Cole, PA-C and Douglas Stofko, MD would be submitted at the hearing. The Defendants filed a 3rd Amended Prehearing Brief on February 28, 2024, consisting of 605 pages, including two (2) depositions of the Claimant for possible use of a deposition at a hearing at which the witness testifies and depositions of Alana Cole, PA-C; and two of Dr. Stofko; objection to one of which was sustained by the Hearing Commissioner as having been taken improperly was excluded but proffered. (Tr., 02/29/24). After the hearing on

February 29th, the Commissioner issued Notes for Decision including treatment on April 25, 2024 and May 31, 2024, the Claimant asked for the medical care prescribed by Dr. Stofko and his physician assistants. (Ltr., 05/21/24). On June 21, 2024, the Hearing Commissioner issued his Decision to which a Motion for Reconsideration was filed June 26th, and a Reply filed June 28th, and a Form Order denying the Motion was issued July 18th. The Claimant submitted a Form 30 on June 28, 2024, requesting Full Commission review and filed an Amended Form 30 on July 1, 2024. The Defendants filed a Form 30 on June 25, 2024. A hearing was scheduled for October 14, 2024 and the injured worker filed his Brief on September 26, 2024, and Defendants filed a Reply Brief on October 7th. (Cl. Brief, 09/26/24; Def. Brief, 10/07/24). The Appellate Panel issued its Decision on December 3, 2024, and the Claimant filed a Motion for Reconsideration on December 5th, and the Defendants filed a Motion to Alter or Amend the Judgment on December 12th. Thereinafter, an Order denying Claimant's Motion for Reconsideration and an Order denying Defendants' Motion were both issued on January 13, 2025. This appeal from the Decision of the Commission follows.

STATEMENT OF FACTS

No separate Statement of Facts will be submitted by the Respondent-Appellant. Those facts pertinent to the issues on appeal by the injured worker as Respondent-Appellant before this

Court will be set out under each Argument. The entire Record prior to the Prehearing Briefs, APA Submissions, depositions, and testimony at the final hearing held before Commissioner T. Scott Beck on February 29, 2024, is submitted mainly in reference to the appeal of the Appellants-Respondents.

The Respondent-Appellant, the injured worker, would only first point out to the Court in its review of the Record to note the one (1) year delay after the April 26, 2021 ruling and the nineteen (19) months total delay before the final Order of Commissioner Taylor; and her total failure to make decisions and detailed Findings of Fact and Conclusions of Law on all of the essential issues before her. Second, the kaleidoscope of procedural and substantive legal errors (too numerous to ask review); and the total lack of commitment by the Commission to the fundamental principles of the Workers' Compensation Act: swift and sure benefits, and a liberal interpretation in favor of benefits to the injured worker and a prevention of delay associated with civil actions.

STANDARDS OF REVIEW

The SC Administrative Procedures Act establishes the substantial evidence standard for judicial review of the factual Decisions of the Workers' Compensation Commission, SC Code Ann. §1-23-380 (5)(e), and an Appellate Court may reverse or modify a Decision of the Commission that is 1) affected by an error of law

or 2) is clearly erroneous in view of the reliable, probative, and substantial evidence in the Record as a whole. Clemmons v. Lowe's Home Centers, Inc. - Harbison, 412 S.C. 366, 772 S.E.2d 517 (SC App. 2015) reh. den.; reversed 2017 WL 920730, withdrawn and superseded on rehearing, 420 S.C. 282, 803 S.E.2d 268 (2017). (Reversed, based on substantial evidence on "loss of use"). Dent v. East Richland County Public Service Dist., 423 S.C. 193, 813 S.E.2d 886, reh. den. (SC App. 2018). (Reversed, substantial evidence on disability due to back injury). Also very pertinent to this appeal is SC Code §1-23-38(5) subsections: (a) in violation of constitutional or statutory provisions; (c) made on lawful procedure, or (f) **arbitrary** or **capricious** or characterized by an **abuse of** discretion or clearly unwarranted exercise of discretion. (Emp. add.).

Under SC Code §42-17-40 the Commission must make Findings of Fact and Rulings of Law on all "questions at issue". Under SC Code §1-23-350, the final Agency Decision shall include Findings of Fact and Conclusions of Law separately stated. SC Code §42-9-5 requires any Award made must be based upon, "specific and written detailed Findings of Fact substantiating the Award". Those mirror our judicial precedents which hold, while recognizing the factual determination is the responsibility and duty of the Commission, that duty to make Findings of Fact requires that "(1) not only **must** Findings of Fact" be made upon **all** essential factual issues

for decision but (2) they must be sufficiently definite and detailed" to enable the Appellate Court properly to determine whether (the) Findings of Fact are supported by evidence" and that (the) "law has been properly applied to them". Drake v. Raybestos-Manhattan, Inc., 241 S.C. 116, 127 S.E.2d 288 (1962); Baldwin v. James River, 304 S.C. 485, 405 S.E.2d 421 (SC App. 1991). (Emp. add.)

ARGUMENTS

I. THE COURT SHOULD REVERSE THE DECISION OF THE COMMISSION AND AWARD RESPONDENT-APPELLANT BENEFITS FOR HAVING LOST 50% OR MORE OF THE USE OF HIS BACK BECAUSE:

A.
THE RECORD ESTABLISHES THE ACTUAL BIAS AND PREJUDICE OF THE HEARING COMMISSIONER AND A FORMED INTENT TO DENY BENEFITS; AND THAT THE DECISION WAS ARBITRARY AND CAPRICIOUS.

Dr. Stephen Poletti's opinions and report is addressed in only one Finding of Fact in the Commissioner's Order and it alone establishes bias and a formed intent to deny benefits. Quoting Finding of Fact #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 'unabashed patient advocate'; these statements preclude him from being able to give a truly independent medical evaluation. (See SC Workers' Compensation Commission case no. 2205977, issued March 15, 2024, pp. 10-13)." (Order, p. 8, 06/21/24).

A Judge should recuse himself when his impartiality might "reasonably" be questioned and it is reasonable to question a

Judge's impartiality where the Findings of Fact are not supported by the Record. Ellis v. Proctor & Gamble Distr. Co., 315 S.C. 283, 433 S.E.2d 856 (1993). Personal bias may disqualify an administrator-adjudicator if the bias stems from a source other than knowledge acquired from participating in the case. Professional Massage Training Ctr., Inc. v. Accreditation ..., 781 F3d. 161 (1986); Duffield v. Charleston Area Medical Center, Inc., 503 F2d. 512 (1974). (To disqualify an administrative tribunal, the bias must stem from an extra-judicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case. The Rule for disqualification of a judge or administrative adjudicator for bias or partiality is the same.) In order to disqualify a hearing officer, actual bias rather than mere potential for bias must be shown. Evidence of actual bias which offends due process consists of statements, such as statements on the merits by the administrator who must make the factual determination on the contested factual issues. Kiser v. Dorchester Cty. Voc. Edu. Bd. of Trust., 287 S.C. 545, 340 S.E.2d 144 (1986). Bias has been defined as the "predisposition" to decide a cause or an issue in a certain way, which does not leave the mind perfectly open to being convinced. Bias can refer to "preconceptions about facts", policy or law; a person, group or object; or a personal interest in the outcome of a

determination, and in order to prove bias, it must be shown the decision-maker has made some sort of commitment, due to bias, to decide the case in a particular way. Dellinger v. Lincoln Cty., 266 NC App. 275, 832 S.E.2d 172, (NC App. 2019); 73 CJS Public Administrative Law and Procedure, §168 "Bias, Prejudice, or Other Disqualification to Exercise Power". Finally, Commissioners are subject to the Judicial Code of Conduct, SC Code §42-3-250. Under Rule 501, SCACR, Judicial Conduct, Canon 3(B)(2), a Judge shall be faithful to the law. Under Canon 3(B)(5), a Commissioner shall perform their judicial duties without, "bias or prejudice".

Here, the Hearing Commissioner's Finding is based on information obtained from "other matters" and with specific reference to another "Order" as a basis for giving no weight to Dr. Poletti's opinion which is unquestionable evidence of "preconceptions about facts" and "a person" and clear evidence of bias. It also makes his decision arbitrary, capricious, and characterized by abuse of discretion and establishes his lack of impartiality. Majors v. SC Securities Com'n., 373 S.C. 153, 644 S.E.2d 710 (SC 2007);

The essential factual issue before the Commission for decision was whether the Respondent-Appellant was entitled to an award for having lost 50% or more of the functional use of his back. Outside of the fact the Hearing Commissioner clearly went

outside of the Record in making his Finding, evidencing bias and prejudice in his review of the evidence submitted (See: Kiser, supra.), this purported, "Finding" has absolutely nothing to do with a substantial review of the weight to be given to Dr. Poletti's report and his opinions which includes his objective Findings and his review of the medical evidence including all the various x-rays, MRIs and CT Scans that had been performed on the Respondent-Appellant. This "Finding" which contains no valid reason for discrediting or not considering Dr. Poletti's opinions is clearly an "**arbitrary**" and "**capricious**" Finding.

In addition to giving no weight to the evidence from Dr. Stephen Poletti based on the Commissioner's stated opinion of Dr. Poletti and his commitment to his patients and the Commissioner's "knowledge acquired" through other cases, all of the Hearing Commissioner's other Findings of Fact are just as arbitrary and capricious and evidence a formed intent to deny an award to the Respondent-Appellant for having lost 50% or more of the use of his back.

As part of his "preconception" to deny Respondent-Appellant an Award based on loss of use, the Commissioner had to discredit and exclude the evidence on "loss of use" based upon which the Supreme Court reversed the Commission's decision to deny benefits for having lost 50% of the use of the back in Clemmons v. Lowe's Home Centers, Inc. - Harbison, supra, and upon which it

affirmed the Commission's decision in Paulino v. Diversified Coatings, Inc., 443 S.C. 150, 903 S.E.2d 503 (2024).

In an attempt to completely discredit the entire Functional capacity evaluation, the Commissioner relied on one (1) Statement by the physical therapist concerning the hand grip test and based on that reached the false conclusion that all the results of the evaluation were not valid. However, the contrary is true based on what the physical therapist actually found and recorded in the report which is that the Respondent-Appellant had given **valid and consistent** effort during the Functional capacity evaluation. Quoting:

> "The claimant demonstrated **consistent participation** during the evaluation. **No inorganic or exaggerated pain behaviors were noted**. He completed all testing areas without **declination** (i.e., refusal)." (Cl. APA, p. 2).

The hand grip test was found to be invalid because it did not produce a bell-shaped curve. Quoting from the American Medical Association's, "Guide to the Evaluation of Functional Ability", p. 247, in reference to the hand grip analysis and the production of a bell-shaped curve as being an indicator of asserting maximum voluntary effort, the Guide notes the fallacy in this:

> "This test is used to measure evaluee's effort. **Multiple studies** have been performed to assess the validity of this protocol and **have produced conflicting results**. People with UE injuries and people with a weak grip **may not produce a bell-**

> **shaped curve even when performing with maximum effort**".

Respondent-Appellant would ask the Court to look at pages 7 and 10 of the Functional capacity evaluation and at the results of his grip as compared to the norm; **he has a very weak grip**. Here again the importance of this is to establish the lack of impartiality and bias, prejudice and a formed intent to deny the Respondent-Appellant benefits and a total lack of a full, fair, and impartial review of the entire contents of the Functional capacity evaluation by the Commissioner.

The Commissioner then sought to totally discredit the vocational evaluator's analysis on several bases, one of which was reliance on the Functional capacity evaluation he had summarily determined to be invalid in toto. However, quoting from the vocational expert's report after her lengthy review of all medical records including the Functional capacity evaluation, and after noting the physical therapist did not have medical records nor a job description, she then made a specific detailed statement and analysis about the validity and invalidity of **parts** of the Functional capacity evaluation. Quoting the Vocational Expert:

> "FCE evaluator noted that in relation to the client's grip and pinch strength testing on the JAMAR dynamometer that there were discrepancies and thus this evaluation 'could not be considered valid'. However, **he went on to state that testing embedded in the FCE for maximum and**

> **consistent effort/validity revealed material handling testing, range of motion testing, and pain complaints were valid/consistent and demonstrated maximum effort. He noted 'the claimant demonstrated consistent participation during the evaluation. No inorganic or exaggerated pain behaviors were noted. He completed all testing areas without declination. Exaggerated or inorganic pain behaviors were not noted ... with material handling assessment'".** (Cl. APA, p. 39).

She then stated as to her opinions in her report:

> "**Therefore, only the areas of testing that were considered valid with maximum and consistent effort will be noted herein.**" (Emp. add.) (Cl. APA, p. 40).

Thus, the vocational expert did not rely on the "invalid" portions in stating her opinions; fact ignored/not addressed by the Commissioner.

The Commissioner also disregarded the vocational expert's report based on due process grounds because the Appellants-Respondents were not allowed to obtain one. First, there was no due process argument made by Appellants-Respondents' Counsel in the Record, and the Commissioner cannot go outside of the arguments made and/or the issues presented to him for consideration. More importantly, there is no statutory authority for and the Appellants-Respondents are not entitled to a vocational evaluation under the Act. As in a civil case, defendants have the right to take a claimant's deposition under SC Code §42-3-160, and can have the claimant submit to

independent medical evaluations conducted by a qualified physician or surgeon under SC Code §42-15-80, and they have the right to choose the medical providers under SC Code §42-15-60. However, nowhere in the Act are they are entitled to have a vocational evaluation performed which includes the personal involvement of the claimant. Thus, there is no "due process" right involved. Therefore, as a matter of law the Commissioner was wrong in failing to consider the report on this basis and again, this clearly establishes a lack of impartiality, neutrality and a failure to base his decision solely on the evidence submitted; it is evidence of bias ("predetermined purpose to reach a determined end"; Kizer, supra.); and that his decision is arbitrary and capricious. One final note, the Commissioner in his zeal to deny an Award on this basis misstates the basis of the denial of the Motion to Quash Respondent-Appellant's Vocational Expert's report and quoting Commissioner Taylor:

> "Interestingly, there is a case directly on point, and it is Tedder v. Darlington County Community Action Agency, and it came out in 2019. Mr. McDaniel is correct in that §42-15-80 does not give me the authority to compel or require a claimant to undergo a vocational evaluation ...". (Tr. p. 11, ll. 17-23, 04/26/21).

Next, in reference to the opinions of Dr. Forrest, under Finding of Fact ("FF") #13 after making the blanket unsupported

statement his opinions "are outweighed by the greater weight of the relevant medical evidence in the case", none of which alleged evidence the Commissioner cites, the Commissioner makes the Finding Dr. Forrest's opinions, "are based largely on injuries that go beyond the T12 fracture and are not compensable in this case". Disregarding the fact that the Commissioner is talking about other parts of the back, whereas loss of use of the back as a whole is what is compensable, his findings that Dr. Forrest's opinions (FF #13),

> "were heavily based on findings from the FCE which were not relevant to the only compensable injury in this case, the T12 fracture".

He then gave Dr. Forrest's opinions "**no evidentiary weight**".

First, in reference to the greater weight of the medical evidence comment that outweighs his opinion, to escape that "Finding" being arbitrary and capricious, the Commissioner would have to do a comparison and make a detailed Finding of Fact showing what that evidence is as compared to the opinions of Dr. Forrest, which he does not do. By statute and by case law, the Commissioners are required to make detailed Findings of Fact and Conclusions of Law on all essential issues. As to the finding that Dr. Forrest's opinions are based largely on other parts of the back and regardless that the issue before the Commissioner for decision is not loss of use of the cervical, lumbar, or thoracic spine, it is loss of use of the back as a whole, this

Finding is simply **not true**! In his first report of July 24, 2020, when Dr. Forrest found that the Respondent-Appellant was **not at maximum medical improvement**, and before the FCE was conducted (Cl. APA, p. 1), Dr. Forrest recorded in his History that:

> "Mr. Morales reports that the pain is in his mid-back. He relates pain that varies from 5 to 10 on a scale of 0 to 10. Certain positions feel better and certain positions feel worse. Activities including bending increase his pain. He reports that sitting back is particularly painful. Mr. Morales also reports occasionally having aching symptoms in his feet and left thigh. **However, he states that it is his mid-back that is his constant and most significant**".

In his Impression he then states:

> "Mr. Morales remains with **significant mid-back pain** and his activities are severely limited, dating directly back to the work injury 10/10/19 noted above. To a reasonable degree of medical certainty, Mr. Morales' current symptoms and limitations were caused by the 10/10/19 work injury.
>
> **The location of the hardware in the low thoracic/upper lumbar region is such that the hardware, itself, may be significantly contributing to Mr. Morales' pain, including the prominent pain he describes with sitting back...**".

Note also: his AMA impairment rating was **only** to the thoracic spine. In his second evaluation of Mr. Morales on 01/20/21, in the History he records:

> "Mr. Morales **most significant symptoms** continue to be **in his mid-back as they were when I evaluated him last July**."

In reference to Dr. Forrest's reports being heavily weighted on the functional capacity evaluation, that again is simply not true! Dr. Forrest, in fact, paid little attention to the functional capacity evaluation in reference to his assessment as to the amount of loss of use that Mr. Morales has, and in his report stated:

> "I reviewed Mr. Morales' functional capacity evaluation which was done on 10/23/20. I see that Mr. Morales tested at what would be a light/medium level of work capacity. **However, as I noted in my 07/22/20 report and confirmed today again with Mr. Morales, although he can do such level of activity, he is not able to continue to be active throughout the day**. I confirmed again with him that he needs to take frequent breaks and also lie down most days and sometimes twice per day. If he does not, his symptoms get worse. **As such, despite Mr. Morales' ability to lift and carry up to 35 lbs. for a short time, he is most probably not capable of meaningful, gainful employment**." (Cl. APA, pp. 15-16).

In a Questionnaire issued many months later is the only place Dr. Forrest references the functional capacity evaluation.

In Finding of Fact #14, which consists of only one (1) sentence in reference to Dr. Jeffrey Buncher's opinions, the Commissioner simply finds again his opinions are largely based on body parts not found compensable and gave his opinion no weight. Also, in his "predetermined purpose to reach a determined end" to deny benefits (Kizer, supra.), the Commissioner overlooked the fact that Dr. Buncher only gives one

impairment rating and the **only impairment rating** he gave was to the **thoracic spine** concurring with Dr. Forrest's opinion. Dr. Buncher then gives the opinion Respondent-Appellant had lost 50% or more of the functional use of his back and was probably incapable of gainful employment.

Dr. Buncher also in detail addresses the functional capacity evaluation that the Commissioner declared invalid in toto, and noted in his report the discrepancy between the formal grip strength in the JAMAR Dynamometer testing and the "**observed material handling capacities**" and the lack of exaggerated or inorganic pain behaviors that were noted in the material handling assessment. Finally, Respondent-Appellant would ask the Court to note Dr. Buncher even had the scans reviewed by a neuroradiologist. (Cl. APA, p. 28, 02/09/24). Here again, this is a cursory Finding and is not a detailed Finding as required by law, and is more evidence of the bias, prejudice and lack of impartiality of the Commissioner and of his formed intent to deny benefits.

All these Findings are absolutely cursory and are not detailed Findings of Fact as required by both statute and case law as decided by this Court and the Supreme Court. Drake, supra; Baldwin, supra.

After declaring the functional capacity evaluation invalid in toto, and after disregarding the vocational evaluation, both

contrary to the Record, the Commissioner systematically attacked and discredited the opinions of all three (3) of the medical doctors, Dr. Stephen Poletti, Dr. Leonard Forrest, and Dr. Jeffrey Buncher, including their opinions on functional loss of use of the back to do work requiring the use of the back. Why? Because all of those doctors stated the opinion that the Claimant had lost 50% or more of the functional use of his back to do work requiring the use of his back, one of the **essential issues** before him for decision. Drake, supra; Baldwin, supra. Their opinions were also the **only** medical opinions on loss of use. This overt and systematic attack on the loss of use evidence establishes the formed intent to discredit all the testimony and evidence in the Record on loss of use so that the Commissioner could make an award for less than that, contrary to the Clemmons and the Paulino decisions, and the **plethora** of decisions by this Court referred to in both Clemmons and Paulino.

Finally, and this is almost comical, in the zeal to discredit all the evidence in reference to loss of use of the back, and that the Claimant had lost 50% or more of the functional use of his back to do work requiring the use of his back, the Commissioner forgot one piece of evidence to discredit. In Paulino, this Court and the Supreme Court held that medical "impairment" evidence alone cannot result in a

denial of benefits for having lost more than 50% of the use of the back in light of the other reliable, probative and substantial evidence in the Record. This Court many years ago, as recited by Justice Few in his decision in Paulino, in Lyles v. Quantum Chemical Co., 315 S.C. 440, 434 S.E.2d 292 (SC App. 1993), affirmed an Award awarding 50% loss of use of the back based strictly on the Claimant's testimony on loss of use. In this case, Mr. Morales testified that he had lost 80% of the functional use of his back to do work requiring the use of his back. (Tr. p. 44, ll. 15-21).

An Administrative decision is arbitrary within the meaning of SC Code §1-23-380(5)(f) if it is without a rational basis, is not based upon any course of reasoning and experience or judgment, is made at pleasure, without adequate determining principles, or is governed by no fixed rules or standards. Jordon v. Harford Fin. Group, 435 S.C. 501, 868 S.E.2d 400 (2021). The Commission's decision under this standard is arbitrary and capricious. There is absolutely no reason stated in any of the Findings of Fact in reference to the functional capacity evaluation, vocational evaluation, and the opinions of three (3) different doctors that would substantiate or constitute a rational basis for giving no weight to any of that evidence; and his findings are actually volatile of both the Workers' Compensation Act and the Judicial Code of Conduct

including: because the Commissioner goes outside of the Record in making them; and they are not based on any facts within the Record; and are made at the pleasure of the Commissioner without any adequate determining principles. In fact, the Findings of Fact evidence a clear personal, preexisting bias prior to the hearing which would disqualify the Commissioner from hearing the case. Rule 501, SCACR, Judicial Conduct, Canon 3(E) Disqualification (1):

> "A judge shall disqualify himself in a proceeding in which the judge's partiality might reasonably be questioned including where (a) a judge has a personal bias or personal knowledge of disputed evidentiary facts concerning in a proceeding. A judge should recuse himself when the bias results in a decision based on information other than what the judge learned from his participation in the case."

A decision is properly said to be capricious if it is against the overwhelming weight of the evidence. Toole v. Toole, 260 S.C. 235, 195 S.E.2d 389 (1973). This decision should be set aside based on the Finding concerning Dr. Poletti alone because it is so shocking and manifestly shows the decision of the Commissioner was not founded on the evidence in the Record. It establishes clear bias. The Federal standard is the same as a State standard and that standard is that the Court will review the Record to ensure that the Agency has examined the relevant evidence and articulated a satisfactory explanation of that evidence for its action. Sierra Club v. West Virginia Dept. of

Env. Protection, 64 Fed.4th 487 (2023). The only difference between this case and Ledford v. Dept. of Public Safety, 428 S.C. 387, 835 S.E.2d 509 (2019) is a false Affidavit. Both Commissioners went outside the Record to achieve their purpose.

B.

BASED ON THE RELIABLE, PROBATIVE AND SUBSTANTIAL EVIDENCE STANDARD AND IN THE RECORD ON LOSS OF USE, THE COURT AS A MATTER OF LAW SHOULD REVERSE THE DECISION AND ENTER AN AWARD TO THE RESPONDENT-APPELLANT FOR HAVING LOST 50% OR MORE OF THE FUNCTIONAL USE OF HIS BACK.

The Respondent-Appellant under the substantial evidence is entitled to an award under SC Code §42-9-30(21) for having lost 50% or more of the functional use of his back to do work requiring the use of his back.

Under the substantial evidence standard of review, while the Findings of an Administrative Agency are presumed correct, they may be set aside if they are unsupported by substantial evidence. Substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which considering the Record as a whole, would allow reasonable minds to reach the conclusion that the Administrative Agency reached or must have reached in order to justify its action. The issue under the schedule-member statute is not impairment as to the whole person, **but rather it is loss of use of** a specific body part - in this case, **the back** and if all the evidence points to one conclusion or the Commissioner's

Findings are based on surmise, speculation, or conjecture, then the issue becomes one of law for the Court. Clemmons v. Lowe's Home Centers, Inc. - Harbison, supra.

First, it should be noted that in Finding of Fact #17, the Commissioner found that Dr. Stofko never endorsed Alana Cole, PA's opinions expressed in Form 14B wherein she assigned a 5% whole person impairment for the thoracic spine. (Order, 06/21/24). That 5% impairment rating in the Form 14B completed on January 12, 2021, is based on an impairment evaluation not conducted by Alana Cole, PA or Dr. Stofko, but by a physical therapist with CORA Physical Therapy on 12/10/20. (Def. APA, pp. 24, 63-64). (Impairment evidence insufficient to deny benefits; Paulino, supra.)

More importantly, not only the substantial evidence but the only evidence in the Record concerning the **essential issue** before the Commissioner for decision under the schedule member statute, which is **loss of use** of the back to do work requiring the use of the back (Clemmons, supra.), establishes that the Respondent-Appellant has lost 50% or greater of the functional use of his back to do work requiring the use of his back.

First, the functional capacity evaluation's valid portions in reference to the material handling and lifting requirements establishes the Respondent-Appellant's physical demand level under the US. Dept. of Labor's, Dictionary of Occupational

Titles, Physical Demand Classification System, to be that of light duty work. Under the Dept. of Labor's Physical Demand Classification System of sedentary, light duty, medium duty, heavy duty, and very heavy duty work from a physical demand standpoint due to the condition of his back, the Respondent-Appellant is excluded totally from three (3) of the five (5) Physical Demand Classification categories, and over 60% of the jobs available in the economy due to his loss of physical demand capabilities alone. (Cl. APA, pp. 2, 41-43).

Second, Dr. Leonard Forrest opined even from a medical impairment standpoint under the AMA Guides, 5th Edition, that he had a whole person impairment of 22%, which converts to a 100% regional impairment rating to the thoracic spine. He further stated the opinion that Mr. Morales had lost 50% or more of the functional use of his back to do work requiring the use of his back. He also opined that he was not, in his opinion, capable of meaningful, gainful employment. (Cl. APA, pp. 12, 15-16).

Third, Dr. Jeffrey Buncher opined on 01/26/21 that the Respondent-Appellant had sustained a regional impairment to the thoracic spine of 100% and that in his opinion he had lost 50% or more of the functional use of his back to do work requiring the use of his back and was not capable of meaningful employment. (Cl. APA, p. 30).

Fourth, Dr. Steven Poletti opinioned on 11/21/23 Respondent-Appellant had sustained a 28% whole person impairment, which converts to a 100% thoracic spine AMA Guides regional impairment rating. (Cl. APA, p. 19b).

The Respondent-Appellant testified at the hearing on February 29, 2024, that in his opinion he had lost 80% of the functional use of his back to do work requiring the use of his back. (Tr., p. 44, ll. 15-21, 02/29/24). Where the evidence is all one way, the issue becomes a matter of law for decision by the Courts, and in this case, the reliable, probative and substantial evidence and, in fact all of the evidence, in the Record concerning the essential issue before the Commissioner "**loss of use of the back**" establishes that the Respondent-Appellant has sustained greater than 50% loss of use of his back to do work requiring the use of his back, and is entitled to an award for total and permanent disability under SC Code §42-9-30(21). Clemmons, supra; Bateman v. Town & Country Furn. Co., 287 S.C. 158, 336 S.E.2d 890 (SC App. 1985); McCollum v. Singer Co., 300 S.C. 103, 386 S.E.2d 471 (SC App. 1989); Lyles, supra.

II. UNDER THE SUBSTANTIAL EVIDENCE IN THE RECORD, RESPONDENT-APPELLANT IS ENTITLED TO AN AWARD FOR TOTAL AND PERMANENT DISABILITY UNDER SC CODE §42-9-10(A) FOR A TOTAL LOSS OF EARNING CAPACITY AS DEFINED IN THE ACT AND BY OUR COURTS.

The definition of total and permanent disability as established by our Courts and as applied by the Commission since

the inception of the Act for a total loss of earning capacity was set out again by this Court in Dent v. East Richland Cty. Public Serv. Dist., 423 S.C. 193, 813 S.E.2d 886 (SC App. 2018), quoting from Wynn v. Peoples Natural Gas Co. of SC, 238 S.C. 1, 118 S.E.2d 812 (1961).[1] The generally accepted definition for total disability is that where based upon the age, education, background and experience, and the physical facts of the injury the services which the injured worker can perform are so limited in quality, dependability, **or** quantity, a reasonably stable job market for them does not exist; the worker is entitled to an Award for total and permanent disability under the Act.

Besides the fact the Commissioner made no Conclusions of Law or Findings on this essential issue, Dr. Stofko, the authorized treating surgeon who did the emergency T11-L1 fusion stated no opinion as to the Respondent-Appellant's ability to work. While he disregarded the functional capacity evaluation as being based on other parts of the back, all the medical evidence establishes that there is limitation on the use of both Respondent-Appellant's upper and lower extremities and range of motion, and there is absolutely no evidence in the Record that

[1] Wynn cites the true precedential case concerning the definition of total disability, Colvin v. E.I. Du Pont de Nemours Co., 227 S.C. 465, 88 S.E.2d 581 (1955). Paraphrasing the Court in Colvin, and very relevant to this case, total disability does not require complete helplessness and the inability to perform common labor is total disability for one who is not qualified by training or experience for any other employment.

the thoracic spine fusion does not contribute to the Respondent-Appellant's overall total body upper and lower extremities impairment of function as related to the thoracic spine fusion.[2] Dent, supra; Simmons v. City of Charleston, 349 S.C. 64, 562 S.E.2d 476 (SC App. 2002).

Dr. Leonard Forrest expressed the opinion that the Respondent-Appellant was disabled from gainful employment based on his condition stemming from his back injury. Dr. Jeffrey Buncher stated the opinion that the Respondent-Appellant was disabled from gainful employment due to his thoracic spine fusion. Dr. Stephen Poletti stated the opinion that his functionally unemployable and a candidate for permanent disability. (Cl. APA (Forrest) pp. 15-16, 19; (Poletti) p. 196; (Buncher) p. 30; 02/09/24).

The vocational expert, after an exhaustive review of his previous employments, none of which included anything less than a medium duty capacity work, and based her evaluation determined that he, at best, was limited to light duty work physically. The vocational expert reviewed his educational and language background including the Respondent-Appellant does not speak English, and that while testifying he had a 4th grade education in Mexico, his test results showed he is performing at a 1.6

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[2] Cl. APA (Forrest 01/20/21) p. 16; (07/22/20) pp. 18-19; (Buncher 01/26/21) pp. 27-30; (PA Cole 01/08/20) p. 91; (07/22/20) p. 97; (Stofko, PA Jennings 01/10/24) p. 103d; (FCE) p. 4; 02/09/24).

grade level in math; a 1.1 grade level in reading; and kindergarten level in spelling; and based on those results was considered illiterate. The vocational expert's conclusions based on a review of the valid parts of the functional capacity evaluation, his work background, educational background and his educational capabilities was that the Respondent-Appellant is totally disabled from gainful employment in any job within the economy. (Cl. APA, p. 31, 02/09/24).

The Respondent-Appellant at hearing testified he is 58 years old; has lived in the US 23 years; went to the 4th grade in Chiapas, Mexico; was married; and has seven children dependent upon him for support. (Tr., p. 22, l. 8 - p. 33, l. 11). He testified that he could not go back to doing any of his past jobs 8 hours per day, 5 days per week and while he would love to, he just could not do those. (Tr., p. 23, l. 17 - p. 31, l. 21). He testified that he could not go back to doing his job as a supervisor in insulation work even though he would love to because "I used to make good money. I used to make good money, but I can't." (Tr., p. 31, ll. 22-24).

Therefore, based upon the reliable, probative and substantial evidence in the Record, the evidence establishes that the Respondent-Appellant has sustained a total loss of earning capacity. He cannot return to heavy duty labor and he is illiterate and does not speak English. Therefore, based on his

age (58), education (illiterate, does not speak English), background and experience (heavy duty and medium duty work, now only sedentary-limited light), and the physical facts of the injury (T11-L1 fusion w/ plates, rods and screws), the jobs he can perform are so limited in quality (Supervisor $1600/wk. now no fulltime), dependability (?) or quantity (no heavy/medium duty-not qualified).

III. THE COMMISSION ERRED AS A MATTER OF LAW BY NOT FINDING/ HOLDING THAT THE RESPONDENT-APPELLANT WAS NOT AT MAXIMUM MEDICAL IMPROVEMENT AND ORDERING MEDICAL CARE BE PROVIDED DIRECTLY RELATED TO THE THORACIC SPINE FUSION AND THE CASUALLY RELATED ISSUES.

After Respondent-Appellant on August 1, 2023, requested medical evaluation/treatment for the T11-L1 fusion, Appellants-Respondents requested an "independent medical evaluation" but **mandated** it be with the **same** authorized doctor, Dr. David Stofko. By Consent Agreement and Order, Mr. Morales attended an evaluation conducted by Dr. Stofko's office, Alana Cole, PA, on November 27, 2023 at which she ordered a CT scan and MRIs, and in reference to the thoracic spine fusion, she noted that:

> "... thoracic back pain, status post T11-L1 percutaneous fusion for stabilization of T12 fracture with three column injury. Will obtain CT thoracolumbar spine to assess fusion and hardware."

Under Treatment she recorded:

> "discussed all of the above in detail with Dr. Stofko who reviewed patient's available imaging and treatment plan **and does agree with the plan**."

In the History she had recorded that day:

> "Patient presents today complaining of pain in his mid-back, that he reports is at the screw sites from his previous surgery." (Emp. add.). (Def. APA, pp. 49-50).

After the CT Scan and MRIs, paid for by Respondents as recommended treatment by Dr. Stofko's office, Mr. Morales was again seen on January 10, 2024, specifically by Josephine L. Jennings, PA, who **specifically** in reference to the T12 fracture and the T11-L1 fusion, from and including **thoracic vertebrae 11 and through and including lumbar vertebrae 1** and involving pedicle screws, recorded:

> "Patient's main complaints are in regards to his thoracic mid-back pain overlying the pedicle screws...".

In reference to the mid-back thoracic back pain:

> "recommend referral to Carolina Pain Management for discussion of a pain treatment plan for his chronic **mid-back pain s/p thoracic fusion** in 2019." (Cl. APA, p. 103d, 02/09/24).

In his Pre-Hearing Brief and at hearing, Mr. Morales **reiterated** and requested that medical care: "**We want the medical care. He wants the screws removed**." (Tr. p. 10, ll. 11-12; Cl. Amended PHB, pp. 7, 11, 01/24/24). As stated by the Hearing Commissioner as to the position of Mr. Morales:

> "From the standpoint of the claimant, Mr. Verdugo asserts that **he is not at maximum medical improvement**, he is entitled to future medical care per the recommendations of Dr. Stofko." (Tr. p. 16, ll. 5-9).

In his deposition, Dr. Stofko testified he agreed with what his PA had recorded and that the Claimant should first go through the progression of what she had recorded before considering the hardware removal to see if that would alleviate the symptoms he continued to have with pain and particularly pain over the incision site and if not relieved by that, at that point Dr. Stofko would recommend hardware removal. Dr. Stofko stated those were his opinions as stated to a reasonable degree of medical certainty. (Depo. Tr. p. 23, l. 1 - p. 26, l. 7).

In his deposition, Dr. Stofko confirmed he relies on his Physician Assistants and that after the initial surgery he did not treat Mr. Morales. (Depo. Tr. p. 38, ll. 21-23). He also confirmed that during the entire time of treatment they did not use a translation service but relied on a family member to translate what Mr. Morales was telling them. **He further confirmed** he did not know a 13 or 14 yr. old niece or nephew was the family member translating. (Depo. Tr. p. 39, ll. 1-21).

Dr. Stofko tried to assert the first report of problems over the screw sites was not made until the later visits with his PA's in November 2023 and January 2024. However, that is not true based on Dr. Stofko's own testimony. Dr. Stofko recited Roper-St. Francis physical therapy records (Depo. Tr., Ex. #7) where Alana Cole, PA, whose opinions he confirmed as being his, had sent him **in 2020** from **March/April of 2020**:

> "Doing good. Some soreness still **where the screws are present**. He reported --" and
>
> "patient says that his lower back hurts all the time **where the screws -- where he has the screws** ...". (Depo. Tr. p. 41, ll. 12-13 and p. 45, ll. 1-2, Ex. #7, 552).

In addition, in his first evaluation of **July 22, 2020** Dr. Leonard Forrest under "Impression" stated:

> "Mr. Morales remains with significant mid-back pain and his activities are severely limited, dating back to the work injury of 10/10/19 noted above. With reasonable degree of medical certainty, Mr. Morales' current symptoms and limitations were caused by that 10/10/19 work injury.
>
> **The location of the hardware** in the low thoracic/upper lumbar region is such that the **hardware itself** may be significantly contributing to Mr. Morales' pain, including the prominent pain **he describes with sitting back**.
>
> **In my opinion, Mr. Morales is not at maximum medical improvement**."

He also recorded:

> "There is tenderness **directly over the surgical area**." (Cl. APA pp. 15-16).

Dr. Forrest when he again saw Mr. Morales on January 20, 2021 for evaluation, found the "most prominent" problems he was having was "his most prominent pain being in his mid-back. It is directly in the area of his fusion." (Cl. APA p. 14).

Dr. Stofko after stating he should first go through the conservative treatment recommended and then consider the hardware removal; and after confirming the 2024 treatment recommendations

of his Physician Assistants, and that they would not recommend that treatment if they did not believe it would help him, stated:

"Q: So that is your office's recommendations at this time?

A: Correct

Q: In reference to his thoracic --

A: Thoracic. Yes, sir.

Q: And those are, all of your opinions have been stated to a reasonable degree of medical certainty?

A: Yes, sir."

(Depo. Tr. p. 25, l. 25 - p. 26, l. 7).

Pictures of Mr. Morales' back were submitted into evidence at the hearing in 2024. He testified at <u>every</u> <u>hearing</u> specifically about the pain he is having over the thoracic fusion screw sites. (Tr., p. 62, l. 12 - p. 63, l. 5, 04/26/21).

Mr. Morales testified at the hearing on February 29, 2024:

"Q: Where are you having problems with your back? Tell me where.

A: Here where my screws are.

Q: Where the screws are? I noticed you are sitting up in the chair. Why is that?

A: Because it -- the back, in the back.

Q: Do you have any problems like driving? For instance?

A: Yes. I cannot be laying on the seat.

(Tr. p. 27, ll. 14-24).

Dr. Stofko confirmed the type of pain he would consider the

kind of pain that would call for hardware removal and quoting Dr. Stofko:

> "So, if he is having incision site pain, **like I lean back, I am on a chair, I can feel the screws...**".

Mr. Morales testified he sits up in a chair and does not lean back against the seat when driving. (Tr. p. 27, ll. 12-24; 04/26/21, infra).

Maximum medical improvement under SC Code §42-15-60 and our caselaw means the injured worker has reached such a plateau that, in the physician's opinion no further medical care or treatment will lessen the period of disability. Curiel v. Environmental Management Services, 376 S.C. 23, 655 S.E.2d 482 (2007); Dodge v. Bruccoli, Clarke, Layman, Inc., 334 S.C. 574, 514 S.E.2d 593 (SC App. 1999). The Commissioner simply did not address whether the medical care and treatment recommended by Dr. Forrest and Dr. Buncher in 2020 and 2021, and Dr. Stofko in 2024, would lessen the disability. On the one hand, he made a Finding of Fact (#23) that Mr. Morales was at maximum medical improvement in 2020 but on the other, he ordered that Mr. Morales was entitled to the medical care "recommended by Dr. Stofko" **in 2024**. (Order, p. 12, 6/21/24).

In addition, Dr. Stofko only stated the opinion that Mr. Morales was at maximum medical improvement as to the fracture being healed. "A. The fracture is healed, yes." (Depo. Tr. p.

64, l. 16).

The Hearing Commissioner committed an error of law by ordering the medical care recommended by Dr. Stofko in 2024 without making detailed Findings of Fact as to why he was entitled to that medical care, but yet either was not at or was at maximum medical improvement at that time in 2025. All doctors opined that the care and treatment recommended including the conservative treatments (PT, injections, etc.) and pedicle screw removal would address decreasing his pain and increasing his function.

IV. ASSUMING THAT THE LAW OF THE CASE PRINCIPLE APPLIES TO THIS CLAIM, COMMISSIONER BECK AND THE FULL COMMISSION PANEL ERRED AS A MATTER OF LAW BY NOT APPLYING THE LAW OF THE CASE CONCEPT TO THE CONSENT ORDER ENTERED INTO BY AND BETWEEN THE PARTIES WHICH COMMISSIONER BARDEN FILED APRIL 14, 2020.

While the Respondent-Appellant is of the opinion that Commissioner Beck erred by applying the Law of the Case maxim to the provision of medical care in an ongoing workers' compensation case and based on it denying benefits to the lumbar and cervical spine, assuming that that maxim applies, Commissioner Beck and the Full Commission erred by not applying that maxim to the first Consent Order entered into by and between the parties and affirmed as the Order of the Commission by Commissioner Barden on April 14, 2020, which was not appealed.

That Consent Order specifically states and quoting:

> "1. The claimant sustained a compensable injury by accident to his **back** on October 10, 2019, as defined by §42-1-160...
>
> 7. The Defendants will be responsible for all medical treatment causally related to the work-related injury to the **back** pursuant to §42-15-60." (Emp. add.).

That Order does not limit nor do the Defendants in any way assert in the Consent Order that causally related medical treatment is limited to the T12 fracture or the fusion from T11-L1, or even to the thoracic spine. They agreed and admitted that they are responsible for injury to and treatment for the **back**. Applying the Law of the Case maxim and the liberal interpretation in favor of benefits to the injured worker maxim and the wording of the agreement of the Defendants they are responsible for all treatment related to the back, which is their admitted accepted body part, whether that be the lumbar, thoracic, or cervical part of the back. Alana Cole, PA on July 22, **2020**, and Dr. Leonard Forrest by report dated July 24, **2020** found the Claimant not to be at maximum medical improvement and in need of additional medical care for his lumbar spine and his cervical spine in addition to his thoracic spine. Then on January 10, 2024, Josephine L. Jennings, PA, of Dr. Stofko's Trident Neurosurgical Specialists office reaffirmed that need for treatment.

Assuming that the Law of the Case applies, Commissioner T. Scott Beck and the Commission Panel erred by not applying that maxim to the unappealed Consent Order filed April 14, 2020, and not ordering benefits be provided for treatment to the Claimant's back.

V. THE COMMISSION COMMITTED AN ERROR OF LAW BY NOT APPLYING THE PREPONDERANCE OF THE EVIDENCE BURDEN OF PROOF STANDARD IN THIS CASE.

SC Code §1-23-380(5) provides that the Court may affirm the decision of an Agency or remand the case for further proceedings. However, the statute goes on and provides that the Court may **reverse** or modify the decision if the substantial rights of the Respondent-Appellant have been prejudiced because of the Administrative findings, inferences, conclusions, or decisions are in violation of one or more of six (6) enumerated reasons. One of those reasons is the findings or decisions is affected by error(s) of law. Two (2) of the other reasons include clearly erroneous in view of the reliable, probative and substantial evidence in the whole Record; or that the decision is arbitrary and capricious or characterized by an abuse of discretion or clearly unwarranted exercise of discretion.

While all three (3) are involved in this appeal, this argument will address something that has not been addressed in the case law, that is to say whether the Commission as a matter of law applied the legal maxim burden of proof of "by a

preponderance of the evidence" to this worker's claim for benefits. A claimant's burden of proof in a workers' compensation claim is to establish entitlement to benefits by a "preponderance of the evidence", which is the same burden that applies in a civil action. However, unlike a civil action a Commissioner is both judge and jury identical to a Family Court Judge. The question posed by this argument of whether as a matter of law the Commissioner applied the preponderance of the evidence standard to the evidence must be answered before you reach the question of whether or not there is substantial evidence in the Record to sustain the Commissioner's decision. The Court must decide as a matter of law did the Commission looking at the Record apply the correct standard of proof. The seminal case defining what is meant by a preponderance of the evidence standard is Ford v. Atlantic Coastline Railroad Co., 169 S.C. 41, 168 S.E. 143, and the charge in that case has been the basis for that charge to a jury since that time. The judge in the Ford case charged the jury quoting:

> "When we prepared ourselves to be lawyers, the illustration is given of what is meant by the greater weight or preponderance of the evidence: you place in your hand an imaginary set of scales. In the one side, you place the evidence in support of the allegations of the complaint; in the other side you place the evidence contrary to the allegations of the complaint; if the evidence in support of the allegations of the complaint preponderates, or outweighs the other, then the plaintiff has sustained the

> allegations of her complaint by a preponderance of the evidence. But if the evidence on both sides balance, or if the complaint weighs down, then the plaintiff has not sustained the allegations of the complaint by the preponderance or greater weight of the evidence. After all, gentlemen, my conception of what is meant by a preponderance or greater weight of the evidence is that evidence which carries to your heart, minds and your understanding the conviction of its truth."

The Respondent-Appellant simply requests that this Court as a matter of law apply that legal standard to a review of the evidence presented and verily believes that the Court will find that the Commission placed a higher standard of burden of proof on the Claimant to prove his claim for benefits in this workers' compensation action than is required by law, which is supposed to be interpreted in favor of benefits and with a liberal interpretation in favor of benefits to the injured worker, and will reverse the decision as a matter of law based on this error of law.

For decades the Courts have recited the burden of proof that applies but never really put meat on the bone by defining it in workers' compensation nor addressed whether or not it was applied. It is time we quit giving lip service to the maxim and quit putting lipstick on a pig, which is still a pig.

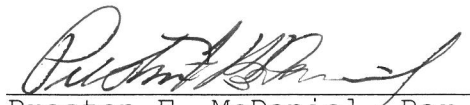
CONCLUSION

For the foregoing reasons, the Court should reverse the Decision of the Commission and either award the Respondent-

Appellant total and permanent disability based on having lost 50% or more of the functional use of his back and/or for having sustained a total loss of earning capacity as defined in our law. In the alternative, the Court should find that the Commission failed to address and made inadequate Findings of Fact and Conclusions of Law and contradictory Findings and find under the evidence that the Respondent-Appellant is not at maximum medical improvement and award him continuing temporary total disability benefits and the medical care as recommended by Dr. Stofko's office, designed to decrease the disability and increase his functionality, and/or the Court should find him not at maximum medical improvement and award him further medical care and benefits based on the application of the Law of the Case maxim as applied to the unappealed Consent Order of April 2020.

In the further alternative, the Court based on a review of the evidence under the applicable standard of proof applied to a workers' compensation case, reverse the Commission Decision and award him benefits for the error of law of failing to apply the correct burden of proof standard of by a preponderance of the evidence.

Respectfully submitted,



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