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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from The South Carolina
Workers' Compensation Commission

Cynthia C. Dooley, Commissioner
Gene McCaskill, Commissioner
R. Michael Campbell, Commissioner

Appellate Case No. 2025-000026
WCC File No. 1921668

Evaristo Verdugo Morales, Claimant,

Respondent-Appellant,

v.

Insulation By Cohen's & Sprayfoam by Cohen's, LLC, Employer,
and Builders Premier Insurance Company, Carrier,

Appellants-Respondents.

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STATEMENT OF ISSUES ON APPEAL

I. Did the commission err in ruling that Employer/Carrier were not entitled to credit for overpayment of temporary total benefits?

II. Did the commission err in ruling that Mr. Morales sustained a forty-five percent permanent partial disability rating to his back?

STATEMENT OF THE CASE

On October 10, 2019, Mr. Morales fell off a ladder while working and sought workers' compensation benefits from his employer, Insulation By Cohen's & Sprayfoam by Cohen's, LLC, and its insurer, Builders Premier Insurance Company (collectively, "Employer/Carrier"). (Order 1/11/21 p. 4.) Mr. Morales was diagnosed with an acute compression fracture/"Chance fracture" of his T12 vertebra, and Doctor Douglas Stofko ("Dr. Stofko") performed a spinal fusion surgery from his T11 vertebra to his L1 vertebra the following day. (Order 3/22/22 p. 5-6; Order 1/11/21 p. 5-6; Defendant's APA pp. 77, dated February 28, 2024.) Dr. Stofko continued to treat Mr. Morales afterwards along with his physician's assistant Alana Cole ("P.A. Cole"). (3/22/22 Order p. 6; 4/4/23 Order p. 2; 6/21/24 Order p. 5.)

On April 14, 2020, the parties entered into a consent order in which they agreed that Mr. Morales had sustained a compensable injury to his back and was not yet at maximum medical improvement ("MMI"). (4/14/20 Consent Order p.1-2.) Mr. Morales subsequently filed a Form 50 Request for Hearing on June 16, 2020 seeking additional medical treatment for his neck/cervical spine, shoulders,

and lumbar spine. (1/11/21 Order p. 1, 3; 6/16/20 Form 50.) Employer/Carrier responded with a Form 51 Request for Hearing contending that Mr. Morales's only compensable injury was the T12 vertebra fracture, and the medical evidence did not support a causal connection between Mr. Morales's complaints of pain in other areas of his body. (1/11/21 Order p. 1, 4; 6/19/20 Form 51.) A single commissioner/Commissioner Melody James heard the matter on August 13, 2020. (1/11/21 Order p. 3.)

On January 11, 2021, the single commissioner/Commissioner James ruled that Mr. Morales's compensable injuries were limited to his T12 vertebra and denied Mr. Morales's request for additional medical treatment to his neck/cervical spine, shoulders, and lumbar spine. (1/11/21 Order p. 9.) The single commissioner/Commissioner James also ruled that Mr. Morales had still not yet reached maximum medical improvement and noted that authorized medical treatment only as it related to Mr. Morales's T12 vertebra was continuing to be provided. (1/11/21 Order p. 10.) Mr. Morales did not appeal this order. (3/22/22 Order p. 7; 6/21/24 Order p. 5.)

That same day, Mr. Morales requested another hearing realleging that the injuries to his neck/cervical spine, shoulders, and lumbar spine were compensable, despite the single commissioner's/Commissioner James's unappealed ruling that they were not causally related to the accident. (6/21/24 Order p. 5; 1/11/21 Form

50; 1/11/21 Order p. 10.) On February 5, 2021, Employer/Carrier filed Forms 51 and 21 Requests for Hearing, maintaining that Mr. Morales's only compensable injury was his T12 vertebra fracture as determined in the unappealed January 11, 2021 order. (3/22/22 Order p. 4-5; 2/5/21 Form 51; 2/5/21 Form 21.)

Additionally, Employer/Carrier asserted that Mr. Morales reached maximum medical improvement ("MMI") on January 8, 2020 based the Form 14B Physician's Statement dated January 12, 2021 that stated that Mr. Morales had a five percent permanent impairment to his back. (1/12/21 Form 14B; 3/22/22 Order p. 7; 4/4/23 Order p. 3; 6/21/24 Order p. 5.) Employer/Carrier also sought credit for overpayment of temporary total compensation paid since January 8, 2020, the date Mr. Morales reached MMI. (3/22/22 Order p. 5.) A new single commissioner/Commissioner Aisha Taylor heard the matter on April 26, 2021, but the single commissioner/Commissioner Taylor did not issue any order instructions until February 23, 2022. (3/22/22 Order p. 1; 6/21/24 Order p. 5-6.)

On March 22, 2022, the single commissioner/Commissioner Taylor ruled that Mr. Morales reached MMI on January 8, 2020. Additionally, the single commissioner/Commissioner Taylor ruled that Employer/Carrier were entitled to terminate temporary total compensation immediately, and Employer/Carrier were entitled to credit for overpayment of weekly benefits since January 8, 2020, the date Mr. Morales reached MMI. (3/22/22 Order p. 13; 6/21/24 Order p. 6.) The

single commissioner/Commissioner Taylor also concluded that Mr. Morales had sustained twenty percent permanent partial disability to his back as a result of the compensable T12 fracture, and he failed to prove that he was entitled to any additional medical treatment for that injury. (3/22/22 Order p. 13-14; 6/21/24 Order p. 6.) Additionally, the single commissioner/Commissioner Taylor determined that the January 11, 2020 order was the law of the case regarding the causal connection between Mr. Morales's T12 fracture and his other alleged injuries to his neck/cervical spine, shoulders, and lumbar spine because Mr. Morales did not appeal that order. (3/22/22 Order p. 9; 6/21/24 Order p. 6.)

On March 22, 2022, Mr. Morales filed a motion to reconsider, but the single commissioner/Commissioner Taylor did not deny that motion until October 3, 2022. (6/21/24 Order p. 6; 10/14/2022 Form 30.) Mr. Morales appealed that decision, and an appellate panel held a hearing on February 13, 2023. (6/21/24 Order p. 6; 10/14/2022 Form 30.) On April 4, 2023, the appellate panel vacated the March 22, 2022 order because the claim was subject to mandatory mediation pursuant to S.C. Code Regs. 67-1802(A), and the parties had not conducted a mediation. (4/4/23 Order p. 12.) Mediation was unsuccessfully attempted on July 19, 2023, and both parties subsequently requested another hearing. (6/21/24 Order pp. 1-2, 6; 12/3/24 Order p. 2; 8/1/2023 Form 50; 8/8/2023 Form 21; 8/29/2023 Form 51.)

A third single commissioner/Commissioner Beck heard the matter on February 29, 2024. (6/21/24 Order pp. 1-2, 6; 12/3/24 Order p. 2.) Mr. Morales maintained: (1) he was not at MMI for his compensable T12 injury; (2) if the single commissioner/Commissioner Beck determined he was at MMI, then he was permanently and totally disabled; and (3) if the single commissioner/Commissioner Beck determined he was not permanently and totally disabled, then he was permanently partially disabled with a substantial disability rating. (6/21/24 Order p. 2; 12/3/24 Order p. 2.) Mr. Morales also asserted that Employer/Carrier were not entitled to a credit for overpayment of temporary compensation, but if the single commissioner/Commissioner Beck determined that Employer/Carrier were entitled to credit for overpayment, the credit should date back to the date Employer/Carrier requested a hearing on August 8, 2023, rather than the date Mr. Morales achieved MMI on January 8, 2020.[1] (6/21/24 Order p. 2; 12/3/24 Order p. 2.)

Employer/Carrier again maintained, as previously determined by Commissioner Taylor, that Mr. Morales reached MMI on January 8, 2020 based on the physician's statement dated January 12, 2021. (6/21/24 Order p. 2; 12/3/24 Order p. 2.) Employer/Carrier sought to stop temporary compensation payments, obtain a permanent partial disability determination, and receive credit for

[1] The evidence presented to Commissioner Taylor supported the determination that Mr. Morales achieved MMI on January 8, 2020.

overpayment of temporary compensation paid after Mr. Morales reached MMI on January 8, 2020. (6/21/24 Order p. 2; 12/3/24 Order p. 2.)

On June 21, 2024, the single commissioner/Commissioner Beck ruled that Employer/Carrier could stop payments for temporary disability and pay Mr. Morales permanent partial disability in accordance with a **forty-five percent disability rating** to his back at a compensation rate of $845.74 minus credit for weekly benefits paid since **July 19, 2023, the date of the unsuccessful mediation**. (6/21/24 Order p. 12; 12/3/24 Order p. 2.) The single commissioner/Commissioner Beck did not award Employer/Carrier with credit for overpayment of temporary benefits paid between January 8, 2020, the date Mr. Morales reached MMI, and the date of the unsuccessful mediation three and a half years later because "the delays in getting a final order for this matter [we]re not attributable to [Mr. Morales]; therefore, it would be fundamentally unfair to give [Employer/Carrier] credit . . . back to the date of MMI."[2] (6/21/24 Order p. 10, 12-13; 12/3/24 Order p. 17-18.) The single commissioner/Commissioner Beck also determined that Mr. Morales was entitled to any ongoing treatment for the compensable injury to his T12 vertebra as recommended by Dr. Stofko, and lifetime maintenance, repair, and replacement for any hardware Mr. Morales retained as a result of treatment for that

[2] The record is devoid of any evidence this delay was attributable to Employer/Carrier as well.

compensable injury. (6/21/24 Order p. 12; 12/3/24 Order p. 2.) On December 3, 2024, an appellate panel of the commission fully affirmed the single commissioner's/Commissioner Beck's June 21, 2024 Order. (12/3/24 Order p. 12-18.) This appeal followed.[3]

STATEMENT OF THE FACTS

On October 23, 2020, Mr. Morales underwent a functional capacity evaluation ("FCE") conducted by occupational therapist Rod Taylor ("OTR/L Taylor"). (FCE p. 1-2.) OTR/L Taylor stated that Dr. Stofko had requested evaluation for the thoracic spine, but that was beyond the scope of the FCE. (FCE p. 2.) Dr. Stofko testified that the deficits noted in the FCE were not causally related to the T12 fracture. (2/13/24 Stofko Depo pp. 65-66.)

On March 26, 2021, fourteen months after the work-related fall at issue, Mr. Morales received treatment for head and neck pain resulting from a car accident after his vehicle was struck from behind. (Defendant's APA p. 103, dated February 28, 2024.) Mr. Morales worked for a new employer, Integrated Site Management, from May 2022 until August 2022. (12/3/24 Order p. 16; 9/25/23 Morales Depo p. 14, 18, 20.) On July 12, 2022, Mr. Morales received further treatment, this time for a laceration to his left forearm he sustained while working for Integrated Site Management. (Defendant's APA p. 111, dated February 28, 2024; 9/25/23 Morales

[3] This case is subject to cross-appeals.

Depo p. 14, 18, 20.) Mr. Morales ceased work for Integrated Site Management in August 2022 and began working for Flores Construction until November 2022. (12/3/24 Order p. 16; Morales Depo p. 14, 18, 20.)

On December 31, 2022, Mr. Morales sustained significant injuries due to a car wreck that law enforcement determined he caused. (Defendant's APA pp. 65-157, dated February 28, 2024; 9/25/23 Morales Depo.) Mr. Morales had nondisplaced fractures of ribs 5 and 6 on the right side and ribs 3, 4, 5, 6 on the left side, a sternal fracture, and a heavily comminuted fracture of left proximal tibia with involvement of the medial and lateral tibial plateaus. (Defendant's APA pp. 65-157, dated February 28, 2024.) On January 2, 2023, Mr. Morales underwent surgery to implant a plate and screws to treat his leg fracture. (Defendant's APA pp. 65-157, dated February 28, 2024.)

On November 21, 2023, over four years after the accident after the work-related fall at issue, Mr. Morales's expert, Dr. Poletti, performed an "independent medical examination" ("IME") in preparation for this litigation. (Dr. Poletti's IME, dated November 21, 2023, p. 1.) Dr. Poletti's statements regarding previous medical treatment did not reflect a careful or thorough reading of prior records. (Trident Medical Documents pp. 4-81 a/k/a 10/9/2023 APA p. 66-150.) Regarding Mr. Morales's significant car wreck, Dr. Poletti incorrectly stated that it "involv[ed] injury to his leg to include a broken leg for which he was treated nonoperatively

with crutches." (Dr. Poletti's IME, dated November 21, 2023, p. 1.) Additionally, Dr. Poletti incorrectly wrote in his report that "CT scan on date of injury indicating the 'T2' flexion distraction injury which was greater than 50% compression of the vertebral body is noted." (Dr. Poletti's IME, dated November 21, 2023, p. 1.) Dr. Poletti further opined that Mr. Morales sustained the maximum allowable impairment available under the AMA *Guides,* 5th Edition, for compression greater than fifty percent. (Dr. Poletti's IME, dated November 21, 2023, p. 2.) Dr. Poletti's concluded that Mr. Morales's hardware was "probably" loosening. (2/13/24 Stofko Depo p. 12-18; Dr. Poletti's IME, dated November 21, 2023, p. 1.) The commission found that the Dr. Poletti's opinions were not credible. (12/3/24 Order p. 14; 6/21/24 Order p. 8.)

The commission further found that the opinions of the other two physicians Mr. Morales relied on, Dr. Forrest and Dr. Buncher, were outweighed by the greater weight of the relevant medical evidence in the record because they were based on injuries that went beyond the T12 fracture and based on findings from the FCE that were not relevant to the T12 fracture, the only compensable injury in this case. (12/3/24 Order pp. 14-15; 6/21/24 Order p. 8.) The commission found that Dr. Stofko's opinions were the only credible medical opinions in this matter, and he opined that Mr. Morales sustained a five percent impairment to his back as a result of the T12 fracture. (12/3/24 Order pp. 15-16; 6/21/24 Order pp. 8-10; 2/13/24

Stofko Depo pp. 1-70.) Yet the commission affirmed a forty-five percent permanent partial disability award to Mr. Morales's back based upon this record, which is not supported by competent and substantial evidence. (12/3/24 Order p. 18.)

STANDARD OF REVIEW

"The South Carolina Administrative Procedures Act [("APA")] establishes the substantial evidence standard for judicial review of decisions by the [c]ommission." *Potter v. Spartanburg Sch. Dist. 7*, 395 S.C. 17, 22, 716 S.E.2d 123, 126 (Ct. App. 2011) (citing S.C. Code Ann. § 1-23-380). "Under the APA, this court can reverse or modify the decision of the Appellate Panel when the substantial rights of the appellant have been prejudiced because the decision is affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence considering the record as a whole." *McMahan v. S.C. Dep't of Educ.-Transportation*, 417 S.C. 481, 487, 790 S.E.2d 393, 396 (Ct. App. 2016). "Substantial evidence . . . is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusions the administrative agency reached in order to justify its actions." *Potter v. Spartanburg Sch. Dist. 7*, 395 S.C. 17, 22, 716 S.E.2d 123, 126 (Ct. App. 2011) (quoting *Broughton v. S. of the Border,* 336 S.C. 488, 495, 520 S.E.2d 634, 637 (Ct. App. 1999)).

ARGUMENT

I. The commission erred in ruling that Employer/Carrier were not entitled to credit for overpayment of temporary total benefits since Mr. Morales achieved MMI on January 8, 2020.

"The core function or primary goal of workers' compensation statutes is to provide wage replacement for employees who are injured on the job." 82 Am.Jur.2d Workers Compensation Section 11, Wage Replacement. "[W]orkers' compensation benefits accrue along a time continuum: temporary total disability benefits are available from the date of injury through the date of [MMI]; post-MMI benefits may then be awarded either as a permanent total or partial disability, or as a percentage of impairment to a scheduled member." *Curiel v. Env't Mgmt. Servs. (MS)*, 376 S.C. 23, 29, 655 S.E.2d 482, 485 (2007). "Accordingly, the date of maximum medical improvement signals the end of entitlement to temporary total benefits." *Curiel v. Env't Mgmt. Servs. (MS)*, 376 S.C. 23, 29, 655 S.E.2d 482, 485 (2007).

"[T]emporary benefits may be terminated upon a showing of MMI." *Smith v. SC Dep't of Mental Health*, 335 S.C. 396, 400, 517 S.E.2d 694, 696 (1999). "The rationale for ceasing temporary benefits upon a finding of MMI is to permit entry of a permanent award." *Smith v. SC Dep't of Mental Health*, 335 S.C. 396, 399, 517 S.E.2d 694, 695 (1999). "Clearly, if an employee has reached MMI and remains disabled, then his injury is permanent. This is precisely the reason to terminate

temporary benefits in favor of permanent benefits upon a finding of MMI." *Smith v. SC Dep't of Mental Health*, 335 S.C. 396, 399, 517 S.E.2d 694, 695–96 (1999).

"Any payments made by an employer to an injured employee during the period of his disability . . . which by the terms of this title were not due and payable when made may, subject to the approval of the commission, be deducted from the amount to be paid as compensation . . . ." S.C. Code Ann. § 42-9-210. Such was not done in this case.

In *Sanders v. MeadWestvaco Corp.*, it was undisputed that the claimant reached MMI on August 21, 2002. 371 S.C. 284, 294, 638 S.E.2d 66, 72 (Ct. App. 2006), *dismissed as improvidently granted,* 381 S.C. 208, 672 S.E.2d 785 (2009). A single commissioner presided over a hearing on the matter on January 16, 2003. *Id.* at 294–95, 672 S.E.2d at 72. An appellate panel found that the employer was entitled to credit for overpayments only after the date of the hearing because it "was rescheduled 'several times.'" *Id.* at 295, 672 S.E.2d at 72. This Court found that the record lacked substantial evidence to support the appellate panel's decision because "the delay in having a timely hearing [fell] squarely on both parties." *Id.* This Court remanded the issue to the appellate panel to determine the appropriate date for crediting the employer with overpayments. *Id.*

In *Hendricks v. Pickens County*, the claimant argued that the commission erred in granting the employer credit for overpayment of temporary disability

benefits paid between the date claimant reached MMI on December 11, 1995 and the commission's order on the matter dated October 23, 1996. 335 S.C. 405, 413, 517 S.E.2d 698, 702 (1999). This Court affirmed the commission's credit for overpayment back to the date claimant reached MMI, reasoning that "[o]nce the commission affirmed that [claimant] had reached MMI, it was then appropriate to terminate [temporary total disability] benefits in favor of either permanent partial or permanent total disability benefits, **if warranted by substantial evidence in the record**." *Id.* at 414, 517 S.E.2d at 703 (emphasis added). This Court elaborated that "terminating *temporary* total disability payments does not prevent a claimant from receiving *permanent* total disability payments." *Id.* at 414 n.2, 517 S.E.2d at 703 n.2. Additionally, this Court noted that the claimant "tacitly agreed to terminate his [temporary total disability] benefits as of his last MMI date" by "not appealing the first single commissioner's order." *Id.* at 416, 517 S.E.2d at 704. The same holds true in this case.

Here, like the commission's awards in *Sanders* and *Hendricks*, the commission awarded Mr. Morales temporary disability benefits *after* he reached MMI. The record does not contain any evidence—let alone substantial evidence—to support the commission's decision to restrict the credit for overpayment of benefits to the date of the unsuccessful mediation. The ruling in *Curiel* made clear that the date of MMI triggers the end of temporary total disability benefits and the

start of permanent disability benefits. The commission's ruling awarded temporary disability benefits after the date of MMI, which is simply not the appliable law under the facts presented in this case.

Similar to the commission's reasoning in *Sanders*, the commission reasoned that credit for overpayment of benefits should be restricted to the latter date of the unsuccessful mediation because the delays in getting a final order in this matter were not attributable to Mr. Morales; thus, it would therefore be fundamentally unfair to Mr. Morales for Employer/Carrier to receive credit for overpayments made between the date of MMI and the date of the unsuccessful mediation. Like the commission in *Sanders*, the commission erred in its reasoning because it is based on a presumption that Mr. Morales has been prejudiced in some way, despite the fact that he received three and a half years' worth of overpayments in temporary disability benefits he was not entitled to receive. The commission failed to explain how Mr. Morales would be prejudiced by, or be the victim, of fundamental unfairness if credit were to be awarded back to the date of MMI. The commission also did not address how it was not fundamentally unfair to require Employer/Carrier to pay temporary total disability benefits after an unappealed ruling that Mr. Morales reached MMI on January 8, 2020. Indeed, the Employer/Carrier were not at fault for the delays in this case and has been forced to grossly overpay this claim. This is not fundamental fairness, it is an unfair windfall unsupported by the law.

Section 42-9-210 of the South Carolina Code provides for the deduction of payments made by employers when they were not due and payable. By definition, payments made for *temporary* total disability benefits *after* the date of MMI were not due and payable. *See Curiel v. Env't Mgmt. Servs. (MS)*, 376 S.C. at 29, 655 S.E.2d at 485 ("[T]emporary total disability benefits are available from the date of injury through the date of [MMI]; post-MMI benefits may then be awarded either as a permanent total or partial disability, or as a percentage of impairment to a scheduled member."). Therefore, if Mr. Morales was entitled to any payments made after the date of MMI, it was as permanent partial disability payments. *See Smith*, 335 S.C. at 399, 517 S.E.2d at 695 ("The rationale for ceasing temporary benefits upon a finding of MMI is to permit entry of a permanent award."). While deductions pursuant to § 42-9-210 are "subject to the approval of the commission," there is no justification for the commission's finding that the awarding credit for overpayment back to the date of MMI would be fundamentally unfair to Mr. Morales.

Additionally, the commission seemingly ignored the fact that Mr. Morales was gainfully employed from at least May of 2022 until January of 2023, even though Findings of Fact 25-27 clearly reference the fact that the Claimant was working and earning wages during that period of time. (12/3/24 Order p. 16; 6/21/24 Order p. 10.) Nowhere in the APA is a claimant entitled to receive temporary total disability during a period of time that he is employed and earning

wages. In fact, return to work is, in itself, justification to stop temporary total disability or for Employer/Carrier to request a hearing to terminate temporary benefits. Failure to grant credit during that period of time is clearly erroneous as a matter of law. Accordingly, Employer/Carrier ask this Court to remand to the commission and order it to award credit for overpayment of temporary total disability benefits paid after the date Mr. Morales reached MMI.

II. The commission erred in ruling that Mr. Morales sustained a forty-five percent permanent partial disability rating to his back.

"Expert medical testimony is designed to aid the [c]ommission in coming to the correct conclusion; therefore, the [c]ommission determines the weight and credit to be given to expert testimony." *Tiller v. National Health Care Center of Sumter*, 334 S.C. 333, 513 S.E.2d 843 (1999). "Thus, while medical testimony is entitled to great respect, the fact finder may disregard it if there is other competent evidence in the record." *Tiller v. Nat'l Health Care Ctr. of Sumter*, 334 S.C. 333, 340, 513 S.E.2d 843, 846 (1999). "Indeed, 'medical testimony should not be held conclusive irrespective of other evidence.'" *Tiller v. Nat'l Health Care Ctr. of Sumter*, 334 S.C. 333, 340, 513 S.E.2d 843, 846 (1999) (quoting *Ballenger v. Southern Worsted Corp.*, 209 S.C. 463, 467, 40 S.E.2d 681, 682–83 (1946)). An award, however, must be supported by competent evidence in the record which provides support to a finding of substantial evidence.

A. The commission correctly determined that Dr. Stofko's opinions were the only credible medical opinions in this matter.

First, the commission correctly determined that the FCE carried no evidentiary weight. Employer/Carrier conceded that Mr. Morales's T12 fracture was a compensable injury. OTR/L Taylor stated that the FCE did not evaluate the thoracic spine, and Dr. Stofko testified that the deficits noted in the FCE were not causally related to the T12 fracture. (FCE p. 2; 2/13/24 Stofko Depo pp. 65-66.) Accordingly, none of the deficits noted in the FCE should have been considered in a disability award.

Additionally, the commission correctly determined that Dr. Poletti's opinions were not credible. Dr. Poletti's statements regarding Mr. Morales's medical treatment did not reflect a careful reading of prior records.

For example, Dr. Poletti characterized Mr. Morales's significant car wreck as one "which was involving injury to his leg to include a broken leg for which he was treated nonoperatively with crutches." (Dr. Poletti's IME, dated November 21, 2023.) Clearly, Dr. Poletti either did not accurately read the medical records concerning injuries sustained in that accident or failed to appreciate the seriousness of Mr. Morales's vehicular injury. Mr. Morales sustained multiple fractured ribs, a fractured sternum, and a severely fractured leg that required surgery to implant plates and screws. (Dr. Poletti's IME, dated November 21, 2023.)

Further, even assuming that Dr. Poletti's reference to "T2" rather than T12 in his report is a scrivener's error, none of the medical records generated on the date of injury stated that Mr. Morales had greater than fifty percent compression. In fact, the CT report that Dr. Poletti referenced stated "Chance fracture T12. No displacement. Mild loss of height" and "[t]here is a T12 compression fracture as seen on the CT scan. . . . [M]ild loss of height approximate[ly] 25%." Moreover, Dr. Poletti's report does not reflect that he reviewed the subsequent CT scans of thoracic and lumbar spines and MRI of cervical and lumbar spines that showed stable posterior fusion hardware at T11-L1. Therefore, Dr. Poletti's IME report on its face is based on an inaccurate review of the medical records and is simply a blatant attempt to bolster Mr. Morales's case. Accordingly, the commission correctly gave no weight to Dr. Poletti's opinion that Mr. Morales sustained the maximum allowable impairment available for compression greater than fifty percent and his opinion that the hardware was "probably" loosening.[4]

Further, the commission correctly found that the opinions of the other two physicians Mr. Morales relied on, Dr. Forrest and Dr. Buncher, were outweighed by the greater weight of the relevant medical evidence in the record. Dr. Forrest and Dr. Buncher's opinions were based on injuries that went beyond the T12 fracture

[4] The rarity of such a finding by the commission and the language used in the commission's order should alter this Court to the serious concern the commission had with the "opinions" offered by Dr. Poletti in this case.

and based on findings from the FCE that were not relevant to the T12 fracture, which the law of the case established was the only compensable injury in this case. *Transportation Ins. Co. & Flagstar Corp. v. S.C. Second Inj. Fund*, 389 S.C. 422, 431, 699 S.E.2d 687, 691–92 (2010) (ruling that failure to appeal the decision of the single commissioner to the full commission rendered that decision the law of the case.) Accordingly, the commission correctly determined that Dr. Stofko's opinions were the only credible medical opinions in this matter.

B. The record does not contain substantial evidence to support the commission's forty-five percent permanent partial disability award.

Dr. Stofko's opinion that Mr. Morales sustained a five percent permanent impairment to his back, the only medical opinions the commission deemed credible in this matter, did not support the commission's disability award. While disability awards include other factors besides permanent impairment, the commission's disability award of forty-five percent greatly exceeded Dr. Stofko's five percent permanent impairment determination. The commission acknowledged that Dr. Stofko testified that anything P.A. Cole did was done with his approval. (12/3/2024 Order p. 5, 15.) Nevertheless, the commission stated that nothing in the record showed that Dr. Stofko specifically endorsed P.A. Cole's opinions in the 14B physician's statement. (12/3/2024 Order p. 5, 15.)

First, there is no requirement that Dr. Stofko specifically endorse the 14B physician's statement prepared by his physician's assistant, a licensed healthcare provider, for the opinions contained in it to have validity or probative value. Second, that is not substantial evidence that Mr. Morales sustained a forty-five percent permanent partial disability award. The commission apparently used the lack of Dr. Stofko's express endorsement as an excuse to effectively ignore his impairment rating of five percent to the back and assign its own rating without any justification. The record is devoid of any other evidence, medical or otherwise, which supports such an upward departure from the medical evidence. Accordingly, Employer/Carrier ask this Court to rule that Mr. Morales sustained a five percent permanent disability to his back as a result of the T12 fracture, his only compensable injury.

CONCLUSION

The commission erred in ruling that Employer/Carrier were not entitled to credit for overpayment of temporary total benefits since Mr. Morales achieved MMI on January 8, 2020. The commission also erred in ruling that Mr. Morales sustained a forty-five percent permanent partial disability rating to his back. Accordingly, Employer/Carier ask this Court to rule that they are entitled to credit for overpayment back to Mr. Morales's date of MMI, January 8, 2020, to determine that Mr. Morales has a five percent permanent partial disability to his back, and to remand this matter to the commission to award such relief.

[*Signature page for Initial Brief of Appellants-Respondents, Appellate Case No. 2025-000026*]

Respectfully submitted,

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