PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS

IN THE STATE OF SOUTH CAROLINA

In the Supreme Court

APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

APPELLATE PANEL

Case No. 2012-210487

Emma Hamilton

Appellant,

v.

Martin Color-Fi, Inc., Employer, and
Liberty Mutual Insurance Company, Carrier,

Respondents.

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Appellant certifies that the Petition for Rehearing was denied by the Court of Appeals on September 27, 2013.

QUESTIONS PRESENTED

I. THE COURT OF APPEALS SHOULD HAVE HELD THAT THE RESPONDENTS DID NOT COMPLY WITH SECTION 42-9-260(F) OF THE SOUTH CAROLINA CODE OF LAWS (1976, AS AMENDED) AND REGULATION 67-506 OF SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION AND THAT RESPONDENTS' REQUEST FOR TERMINATION OF BENEFITS SHOULD HAVE BEEN DENIED, BECAUSE THE AUTHORIZED HEALTH CARE PROVIDER DID NOT "REPORT THAT THE CLAIMANT HAS REACHED MAXIMUM MEDICAL IMPROVEMENT.

II. THE COURT OF APPEALS SHOULD HAVE HELD THAT THERE WAS NO COMPETENT, TIMELY EVIDENCE OF MAXIMUM MEDICAL IMPROVEMENT.

STATEMENT OF THE CASE

The Appellant/Claimant, Emma Hamilton (Emma) was injured at work on July 22, 2008, when her right arm was pulled into a roller on the machine she was operating—a "roller-crush injury". She received treatment at Tuomey Industrial Medicine and Wellness Clinic from a physician, Dr. Gee. The only "authorized health care provider"[1] throughout this claim was Dr. Gee.

On March 27, 2009, Dr. Gee wrote that Emma reached maximum medical improvement (MMI) "between February 25, 2009, and March 25, 2009." TR p. 85. The Respondents required Emma to go to Dr. Green, an orthopedist, for an "independent medical evaluation (IME)". This referral was not for treatment, and Dr. Green provided none. Dr. Green did find MMI on the date of the appointment, February 11, 2009; but Dr. Green also recommended occupational therapy. TR p. 92.

Dr. Gee concurred with the request for occupational therapy and continued to treat Emma in his office every four to six weeks through February 25, 2010. TR 109. Just one week

[1] To the best of this writer's knowledge, this term appears only twice in the regulations and statutes governing workers' compensation law in our state, in Regulations 67-505 and 67-506 governing suspension or termination of benefits when more than 150 days have elapsed since the injury was reported. See also §42-9-260(F).

earlier (February 18, 2010), he had stopped occupational therapy because the therapist was concerned about Emma hurting herself. TR pp. 129 and 209. He also wrote in this report: "I think the first thing that needs to be done is get another MRI of her wrist and maybe get more than one opinion as well as seeing if anything has changed since the previous MRI." Dr. Gee confirmed all of this in a handwritten note asking for referral to a hand specialist. TR p. 133. He obviously changed his opinion about MMI.

The Court of Appeals did not mention that Dr. Gee signed and gave to the Respondents a Form 14B dated November 11, 2009, stating that Emma was not at MMI. Dr. Gee never mentioned MMI again. So his last statement on the issue is that Emma was not at MMI.

The Respondents sent Emma to another orthopedist for an IME, and not for treatment. Dr. Fulton wrote on June 30, 2010, that he "did not believe any further treatment or testing is medically necessary", that he did not "see" any permanent impairment, and that he saw "no contraindication to return to work without restriction", and that he "did not believe" any further treatment or testing was necessary. TR p. 93.

Emma was denied further treatment despite her consistent complaints and Dr. Gee's requests for a repeat MRI and a repeat "nerve conduction study/ electromyography (NCS/EMG)". No one has yet diagnosed Emma's problem and certain mentioned diagnoses have not been excluded, e.g. reflex sympathetic dystrophy (RSD).

This honorable Court will note that Emma has abandoned two of the issues she raised in the Court of Appeals. She is not questioning the finding that she lacked credibility, although she strongly believes that characterization has no basis in fact and knows that she told the truth. (Compare her deposition testimony with her hearing testimony.) She is not questioning amount of permanent impairment awarded, although she does not believe that she received a fair award. She has always wanted more medical treatment so that she can return to work.

Emma requests certiorari because neither the South Carolina Workers' Compensation Commission (WCC) nor the South Carolina Court of Appeals answered the two basic questions she has posed in this petition: Does a carrier/employer have to present a finding of maximum medical improvement from an authorized treating physician or authorized health care provider before payment can be stopped; and does expert testimony have to be stated to a reasonable degree of medical certainty—not words like "believe", "see", and "contraindicate"? This writer cannot find that the former has ever been addressed by this Court and that the latter needs elucidation in light of several opinions on the subject of when testimony is required "to a reasonable degree of medical certainty" and what language will suffice for such a standard to be met.

The South Carolina Court of Appeals affirmed the Decision of the Commission. Emma Hamilton v. Martin Color-Fi, Inc., and Liberty Mutual Insurance Co., Op. No. 5144 (S.C. Court of App. Filed June 19, 2013.) The Appellant petitioned for a rehearing and for a rehearing en banc. Both requests were denied on September 27, 2013.

ARGUMENT

I. THE COURT OF APPEALS SHOULD HAVE HELD THAT THE RESPONDENTS DID NOT COMPLY WITH SECTION 42-9-260(F) OF THE SOUTH CAROLINA CODE OF LAWS (1976, AS AMENDED) AND REGULATION 67-506 OF SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION AND THAT RESPONDENTS' REQUEST FOR TERMINATION OF BENEFITS SHOULD HAVE BEEN DENIED, BECAUSE THE "AUTHORIZED HEALTH CARE PROVIDER" DID NOT "REPORT THAT THE CLAIMANT HAS REACHED MAXIMUM MEDICAL IMPROVEMENT."

Section 42-9-260 deals with suspension or termination of payments, commonly called "temporary total disability" or "TTD". The statute gives employers/carriers a one hundred fifty (150) day period within which to investigate a claim, during which time they can even stop payment that has been commenced. The standards for suspending or terminating payment in the first one hundred fifty (150) days are very relaxed. §42-9-260 (A-E), S.C. Code Ann. (1976, as amended); WCC Reg. 67-504. For instance, TTD can be suspended or terminated immediately if the "treating physician" says one can return to work full duty or light duty. After the one hundred fifty days, however, either the consent of the injured worker or a Commission order is required to suspend or terminate TTD ("stop payment").

The gist of Emma's argument on this issue is simple and inescapable. Section 42-9-260(F) says that the Commission "shall provide by regulation the method and procedure by which benefits may be suspended or terminated for any cause ..." Regulation 67-506 reads as follows, in pertinent part:

> A. After the one hundred fifty day period, the employer's representative shall not suspend or terminate temporary compensation except as provided in this regulation or in R. 67-505.[2] Disability is presumed to continue until the employee returns to work, except as provided herein.
>
> B. After the one hundred fifty day period, when the claimant is receiving temporary compensation and the authorized health care provider reports the claimant has reached maximum medical improvement, the employer's representative may terminate compensation .... Emphasis added.

So the applicable statute and regulation make it clear that the Commission sets the rules for "stop payment"; and the regulation makes it clear that the authorized health care provider or treating physician must report that a claimant has reached MMI before compensation can be terminated. An IME doctor is not an "authorized" doctor.

Neither the Commission nor the Court of Appeals responded to this issue. The Commission ignored it. The Court of Appeals said that the authorized doctor found MMI "between February 25, 2009 and March 25, 2009". This is an accurate statement, but this

[2] This regulation is entitled "Suspending Temporary Compensation after the First One Hundred Fifty Days after the Employer's Notice of Injury."

writer submits that it ignores the intent of the statute and regulation, as Dr. Gee subsequently opined on November 11, 2009, that Emma had not reached MMI.

MMI is a term used to indicate that a person has reached such a plateau that in the physician's opinion there is no further medical care or treatment which will lessen the degree of impairment. O'Banner v. Westinghouse Elec. Corp., 319 S.C.24, 28, 459 S.E.2d 324, 327 (S.C. App. 1995). It presupposes that active medical procedures have ceased. Yes, one can be at MMI and still get treatment designed to help her maintain that status. However, this writer submits that continuing appointments every four to six weeks with an industrial medicine physician, physical therapy, occupational therapy, and ordering tests, e.g. and MRI, is not MMI. In fact, as stated above, Dr. Gee himself said Emma was not at MMI on November 11, 2009. The statements of MMI made by Drs. Gee and Green in February or March, 2009, are meaningless, when treatment continues for another year.

The point is that, since the Respondents do not have a report of MMI from the authorized doctor, Dr. Gee, then they were not entitled to "stop payment". Attention is invited to the Form 21 filed by the Respondents requesting a hearing. TR p. 274. This is the official form of the Commission for an Employer requesting a hearing. The Respondents checked the box which reads: "The authorized health care provider states the claimant has reached maximum medical improvement." To rely on an indefinite report of MMI and reject a statement eight months later that Emma was not at MMI clearly abuses the intent of the above-cited statute and regulation.

Dr. Gee, the only authorized health care provider or treating doctor, clearly did not believe Emma was at MMI when he referred her to a "hand specialist" in 2010.

One other important factor is that the Commission, through its Medical Services Provider Manual, S. C. Workers' Compensation Commission, effective July 1, 2010, p. 466[3], states as follows:

> The medical provider performing an IME may not be the medical provider selected to provide the treatment or follow-up care, unless the carrier or self-insurer and the employee agree to this, or unless an emergency exists.

Drs. Green and Fulton clearly state in their reports that they performed IMEs. They were not authorized treating doctors, nor could they be without Emma's consent. She did not consent.

The reason an IME doctor cannot be a treating doctor under our workers' compensation system without consent of the claimant is because the IME doctor does not form a patient-physician relationship with the claimant. The IME doctor "owes his or her allegiance to the hiring entity, and not the examinee." L. Postol, Disability Evaluation, 2nd Ed., Chapter 7, "The Medical-Legal Interface", p. 64 (American Medical Association, 2003).

[3] The language quoted below is the same in the predecessor manual, which was effective beginning January 1, 2003. In fact, all of the language in the section on IMEs is identical to the latest version.

This writer respectfully submits that the General Assembly and the Commission meant what they said when they required "treating physicians" or "authorized health care providers" to report MMI before payment and benefits could be stopped. This is a very important protection for claimants, knowing that the doctor deciding whether or not their treatment and compensation end has at least accepted them as a patient.

This claim makes the point. Emma was not satisfied with the treatment she got from Dr. Gee; her testimony makes that clear. However, Dr. Gee may not be to blame, as he ordered tests that were not done and he ordered treatment that was not authorized for long periods. If one reads the last note Dr. Gee wrote, he has been unable to find what Emma's problem was, and he wants her referred to a "hand specialist". He thinks a repeat MRI is in order.

The Respondents did not authorize Dr. Fulton (or Dr. Green earlier) to treat; they ordered an IME. Reading Emma's testimony about how she was treated by the IME doctors shows that there is a different standard when the doctor does not accept the injured worker as a patient.

Dr. Fulton's report, relied upon most heavily by the Commission, will be discussed below for its shortcomings as medical evidence. It cannot, however, satisfy the mandatory dictates of the statute ("[After one hundred fifty days]... the commission shall provide by regulation the method and procedure by which benefits may be suspended or terminated for any cause....") and regulation ("[A carrier] ... shall not ... terminate temporary compensation except as provided in this regulation ....").

If Emma is correct in her argument on this issue, then the request of the Respondents to stop payment, as well as other requests in the Form 21, should have been denied.[4]

II. THE COURT OF APPEALS SHOULD HAVE HELD THAT THERE WAS NO COMPETENT, TIMELY EVIDENCE OF MAXIMUM MEDICAL IMPROVEMENT.

As shown above, the statements of Drs. Gee and Green that Emma was at MMI were not timely, being made as they were about eight months before Dr. Gee referred Emma to Dr. Fulton. Also established above is that in November, 2009, Dr. Gee wrote that Emma was not at MMI. The Respondents must rely on a report from Dr. Fulton dated June 30, 2010, to support their claim that Emma has reached MMI.[5] The only other evidence is from Emma, who certainly does not believe that she is at MMI.

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[4] Respondents may argue that physical therapy, occupational therapy and work hardening do not tend to reduce her disability or make Emma better. In Scruggs v. Tuscarora Yarns, Inc., 362 S.E.2d 319, 294 S.C. 47 (S.C.App. 1987), the carrier argued Ms. Scruggs was not at MMI because she was getting physical therapy and it was "helping her some". The Court of Appeals relied on the authorized physician in finding MMI. In this case, an IME doctor, Dr. Green, said on February 11, 2009, that Emma was at MMI, but he said she "may have some strength issues that may respond to a supervised work-hardening/BTE rehabilitation program." TR p. 88. Every report from the authorized physician after that is consistent with continuing treatment and hoped-for improvement. For instance, on July 1, 2009, Dr. Gee wrote: "I am requesting that she indeed be in the therapy program and that she "work-up to" and complete the work hardening program." TR p. 88. As opposed to Scruggs, Dr. Gee was providing strengthening with a goal of improving Emma's function—tending to reduce her disability. The goal clearly was to improve Emma's condition so that she could return to work. That is what Emma is seeking through this petition.

[5] Emma respectfully submits that, even if Dr. Fulton's report is found to be an adequate or competent statement of MMI, which Emma of course denies, the Decision and Order of the Commission cannot stand for reasons stated in the

Dr. Fulton never uses the phrase "maximum medical improvement" to categorize his findings, nor does he use the phrases "to a reasonable degree of medical certainty" or "most probably" to give the required authenticity to his statements or opinions. He saw Emma one time for the sole purpose of giving a medical opinion. He has no evidence other than that opinion. If that opinion is not stated to the "reasonable degree of medical certainty" standard or its equivalent, it is worthless.

In Micheau v. Georgetown County, 396 S.C. 589, 726 S.E.2d 468 (2012), this Court held that in repetitive trauma cases medical opinions must be stated to a reasonable degree of medical certainty, based on the requirements of Section 42-9-172. In other words, in such cases, the words must be expressly used. Section 42-9-160 has the same language relative to "medically complex cases".[6] An "expert opinion" concerning work-relatedness of an injury must be stated "to a reasonable degree of medical certainty".

These statutes require that the actual words "to a reasonable degree of medical certainty" to be used only in repetitive trauma and medically complex cases; but they can be instructive about what is required of an "expert opinion" generally, because Dr. Fulton, just like the doctor whose opinion was questioned in Micheau, was not a treating doctor. Even if properly in evidence, Dr. Fulton's report adds nothing to Respondent's claims. Compare it to Dr. Moore's opinions, which are stated to a reasonable degree of medical certainty, but were ignored. The expert opinion of Dr. Fulton is in evidence; but its truth was not admitted. Its actual words prove nothing medically, except what Dr. Fulton "thinks". It is as though he almost purposefully was vague and ambiguous.

Whether the actual words "maximum medical improvement" and "to a reasonable degree of medical certainty" are mandatory or not, an expert opinion must be definite and certain to be of any probative value. In workers' compensation cases, the system is supposed to provide benefits for injured workers through procedures that are relatively simple, fast, and not expensive. The rules of evidence are not strictly applied. Evidence comes in through the Administrative Procedures Act, Section 1-23-310, et seq.. Records come in as submitted by doctors and other experts. Depositions are expensive, so few are taken in the average case.

Expert reports need to be clear as to what they mean. Dr. Moore stated: "This is opined to the standard of reasonable medical certainty. ... [S]he has not achieved a plateau that is unlikely to change within the next year with intervention, as I believe her strength will augment with rehab efforts provided. She is NOT at MMI, and further treatment is indicated. ... Once again she clearly is NOT at MMI." TR p. 246. No equivocation or doubt there. Compare that to Dr. Fulton's statements: no statement of MMI; he states what he "believes" and what he does or does not "see" or what is "contraindicated"; but does his report reach the level of medical certainty sufficient to deny treatment to a claimant? Certainly, more than this should be required.

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first argument in this brief. A report of MMI from the authorized physician is indispensable for termination of temporary compensation or treatment.

[6] Compare Section 42-9-160(F) and Section 42-9-172(C).

The problem here is that Dr. Fulton's statements do not reach the level required for expert medical opinion evidence of maximum medical improvement, whether the Micheau standard is used or not.. He makes no statement on the issue that reaches the level of reliability required.

Dr. Gee said Emma was not at MMI in November, 2009. Dr. Moore said the same on June 1, 2009 and September 4, 2010. Their opinions are clear and stated to a reasonable degree of medical certainty. Dr. Green's opinion on MMI is so remote as to be useless, being in March, 2009. Dr. Fulton's opinion is so indefinite as to be useless.

There is no competent, timely evidence that Emma is at MMI; and the standard for definiteness of medical testimony in South Carolina is greater than in other states. In Larson's Workers' Compensation Law, Section 130.06[2][d], page 130-119 (LexisNexis, 2001), the following statement is found: "In South Carolina, even 'probably' and 'likely' are not strong enough, but the court has indicated that it will be satisfied with phrases such as 'more than likely' or 'more than probable' because these indicate a 'a greater degree of certainty.'

In the case of Ducker v. Dunean Mills, 63 S.E.2d 314, 218 S.C. 465 (S.C. 1951), this Court wrote as follows:

> This Court, in a number of cases, has already held that where medical testimony is relied upon to sustain an award, the medical witness must testify, taking into consideration all attending data, it is his or their professional opinion that the result in question most probably came from the cause alleged. It will be seen that it is not sufficient to say that the result in question probably came from the cause alleged, but most probably, or words of similar import.

Similarly, in Cross v. Concrete Materials, 114 S.E.2d 828, 236 S.C. 440 (S.C. 1960), this Court stated the following in reversing an award of the Commission that had been upheld by the Circuit Court:

> It is inescapable that the opinion of the witness, as first and finally expressed by him, is that the causal connection here is possible but he was unwilling to opine that it is 'most probable.' That is the fair appraisal of his testimony. Therefore, the evidence was insufficient to sustain the finding of causal connection, for which the judgment will have to be reversed and the award set aside.

These two cases do not involve MMI, but they do relate to medical evidence. When one compares the words used by Dr. Fulton, they do not reach the level required by South Carolina cases.

In light of the Micheau case and the two statutes and two cases mentioned above, clarification is needed as to when medical evidence is required to be given to a reasonable degree of medical certainty or, stated another way, must a doctor say more than that he "believes" an injured worker can return to work or does not require more medical treatment

or that returning to work is not "contraindicated"? Propositions stated in the negative ("nothing contraindicates" or "seeing nothing") are less definite than a direct statement. More importantly, "believing" is more frequently associated with an opinion or faith in something. The "contraindicate", "see" or "believe" are not words used in science or medicine to state an expert opinion. In fact, they often are used to equivocate or express lack of full information. Maybe something else is out there that Dr. Fulton knows about but did not have provided to him by the Respondents: the functional capacity evaluation, perhaps. In Gamble v. Price, 289 S.C. 538, 347 S.E.2d 131 (1986), a motor vehicle accident case, the Court of Appeals stated the following:

> Dr. Piggot testified Gamble " *has* (emphasis added) sustained disability from this accident...." The word "has" is more definite than the words "most probably." Thus, we hold Dr. Piggot's testimony satisfies the standard set down by *Armstrong* and other South Carolina case law on this point.

Emma submits that the words used by Dr. Fulton do not equate with "most probably" or "most definitely".

If Regulation 67-201 and many cases stating a similar intent are to be given meaning, the Decision and Order of the Commission should be vacated or reversed and Emma should be allowed the medical treatment she has requested for years now:

67-201. Application of Regulations

A. These regulations are entitled to a liberal construction in the furtherance of the purpose for which the South Carolina Workers' Compensation Law is intended.

B. In doubtful cases, the application of these regulations shall be in favor of the injured employee.

CONCLUSION

The Respondent failed to present a timely report from the authorized health care provider that Emma was at MMI, because they could not get one. If the applicable statute and regulation are to be given meaning, "stop payment" should have been denied for that reason alone. The last statement of the authorized provider was that Emma had not reached MMI.

Furthermore, Emma does not believe there is any timely, competent evidence of MMI. However, this issue should not have to be considered because there is no timely report of MMI by the authorized provider. Even if an IME doctor in the usual case does not have to specifically use the "magic words" of MMI and "reasonable degree of medical certainty", his report must use other words that support a definitive determination that a claimant has reached that point where further treatment "is static or is stabilized with or without medical

treatment. The determination is appropriate when there are no physical limitations on the claimant's ability to perform the same or other suitable job as the claimant performed before the injury." Regulation 67-502(D).

Our Workers' Compensation Act is clear about why it was enacted and for whose benefit. It has not been applied as it should for Emma Hamilton. The Cross case makes it clear that liberal construction does not trump competent proof, even for a claimant. In this case, the Respondents have not followed the law, nor have they presented competent proof of MMI.

Respectfully submitted,

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October 24, 2013

IN THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

WCC NO. 0810330

Emma
Hamilton.....Appellant,

v.

Martin Color-Fi, Inc., Employer and
Liberty Mutual Insurance Company,
Carrier.....Respondents.

PROOF OF SERVICE

I certify that I have served the Appellant's Petition for a Writ of Certiorari to the South Carolina Supreme Court, by hand delivering same, on October 25, 2013, located at 1231 Gervias St., Columbia, SC 29201, on October 25, 2013.

10/28/13
Date

Chris Sumpter

IN THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

SUPREME COURT

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

WCC NO. 0810330

Emma
Hamilton.....Appellant,

v.

Martin Color-Fi, Inc., Employer and
Liberty Mutual Insurance Company,
Carrier.....Respondents.

PROOF OF SERVICE

I certify that I have served the Appellant's Petition for a Writ of Certiorari on the Respondents, by depositing a copy of it in the United States Mail, postage prepaid, on 10/25/13, addressed to their attorney of records, Candace Hindersman, Esquire, 4500 Fort Jackson Blvd., Columbia, SC 29209, on 10/25/13.

10/25/13
Date

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October 24, 2013

The Honorable Daniel E. Shearhouse
Clerk of Court
The South Carolina Supreme Court
P.O. Box 11330
Columbia, SC 29211

RE:

Claimant:	**Emma Hamilton**
Employer:	**Martin Color-Fi, Inc.**
Carrier:	**Liberty Insurance Corporation**
Carrier File No.:	**WC550-614499**
W.C.C. File No.:	**0810330**
Our File No.:	**15438.0895**

Dear Clerk Shearhouse.

Enclosed please find herewith for filing with the Court the original and 6 copies of the Appellants Petition for a Writ of Certiorari. I have included a check in the amount of $100.00 for the filing fee. I would appreciate your filing the original and returning one (1) clocked copy of the Petition for a Writ of Certiorari in the attached self-addressed, stamped envelope. By copy of this letter, I am serving the same upon the opposing counsel.

With kind regards, I am

Sincerely,

Joseph T. McElveen, Jr.

JTMcjr/ewn
Enclosure
cc. Emma Hamilton
Candy Hindersman, Esquire