THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE APPELLATE PANEL OF THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Appellate Case No.: 2013-000156
W.C.C. File No.: 1017656

Reginald T. Robinson,.....Respondent,

v.

Pella Corporation and Sentry Insurance Company,.....Appellants.

INITIAL BRIEF OF APPELLANTS

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2. Did the South Carolina Workers' Compensation Commission err in failing to find that the claim was barred by Havird v. Columbia YMCA, 308 S.C. 397, 418 S.E.2d 329 (Ct. App. 1992) and Capers v. Flautt, 305 S.C. 254, 407 S.E.2d 660 (Ct. App. 1991)?

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4. Did the SCWCC err in finding that the Respondent Robinson had not reached MMI when his authorized treating physician had determined otherwise?

STATEMENT OF THE CASE

This appeal arises out of an Order of South Carolina Workers' Compensation Commission ("SCWCC"), affirming an order of the Single Commissioner that awarded the Respondent Reginald T. Robinson (Robinson) workers' compensation benefits.

On November 12, 2010, Robinson, while an employee of the Appellant Pella, was driving a forklift when he and a co-employee collided. (Hearing Transcript, p. 7, 10, 12). Though the forklift required him to operate it standing up, the collision did not eject him or toss him off the forklift. (Appellant's APA # 10, p. 50). After the accident, Robinson was sent to Occupational Medicine by Pella (Hearing Transcript, p. 13). Robinson continued to treat with Occupational Medicine and was placed on light duty. (Hearing Transcript, p. 13, 14). The Appellants accepted the accident at that time and sent Robinson for further medical care with Dr. Felmly. (Hearing Transcript, p. 14).

On December 2, 2010, Robinson underwent an MRI of his lumbar spine. The MRI revealed, per Dr. Felmly's note of February 1, 2011, a solid fusion at L4-5 and L5-S1. (Defendants' APA #10, p. 52). Dr. Felmly also noted the fusion was well-healed, and there did not appear to be any instability. (Id.) Interestingly, Dr. Felmly opined there was no objective evidence to suggest Robinson even had a new injury to his back. Id. Dr. Felmly felt that Robinson was engaging in symptom magnification. (Hearing Transcript, p. 24). He further found Robinson was able to return to normal activities. (Id. at 53; Hearing Transcript, p. 19-20). Even Dr. Holbrook, who had treated Robinson in the past, including performing his prior back surgery, testified that the December 2010 MRI did not reveal any acute problems but only showed the *natural progression of Robinson's pre-existing degenerative disc disease*. (Emphasis added) (Deposition of Dr. Thomas Holbrook, pp. 21-22).

Dr. Felmly released Robinson on February 1, 2011. (Hearing Transcript, p. 19-20). At that point, Robinson continued to complain of problems; however, he returned to work. (Hearing Transcript, p. 14) Robinson subsequently left work and went to see his family physician, Dr. Harmon Patrick. (Hearing Transcript p. 14, 15). Dr. Patrick was not an authorized treating physician, and Robinson never attempted to have him authorized. (Hearing Transcript, p. 22). Dr. Patrick placed Robinson on light duty following that evaluation. (Hearing Transcript, p. 15). However, Pella did not have any light duty for Robinson, and he has not worked since that time.

In the investigation following this incident, it was discovered that Robinson had significant prior back problems. More specifically, it was discovered that in 2001, Robinson suffered a work-related back injury while working for a different employer. (Hearing Transcript, p. 7). This injury later resulted in Robinson undergoing back surgery by Dr. Holbrook. (Id.) In 2004, the Respondent resolved his workers' compensation case arising out of this injury for $107,000, which equated roughly to a disability rating of 68% to his back. (Id.) Regarding his prior injury, Robinson testified that he was given permanent restrictions of no repetitive bending, stooping, or lifting. (Hearing Transcript, p. 8). Additionally, he testified he was given restrictions of no lifting of more than 25 pounds.

In addition, Robinson also complained of back pain in January 2009, in an office visit to Dr. Patrick. (Appellant's APA # 8, p. 45). In an office noted from Dr. Dennis Wilson dated July 27, 2010, Robinson also complained of joint stiffness, swelling, and back pain. (Id. at 48).

Despite his prior back injury, and multiple complaints of continued back pain into 2005, Robinson applied for a job with Pella Corporation. Robinson testified that he informed

Pella of his previous back surgery. (Hearing Transcript, p. 8, 9). As a result of this, Robinson was sent to Lexington Medical Center Occupational Medicine for an evaluation on November 7, 2005, by Donna Padgett, a nurse. Her records reflected that Robinson had a prior back injury that resulted in back surgery in 2002. However, Robinson did not inform Padgett that he had been given work restrictions by Dr. Holbrook, including that he should not lift over 10 pounds for the remainder of his working life due to his prior back surgery and continued issues. (Hearing Transcript 30- 36, 99).

The current claim proceeded before the SCWCC pursuant to the Form 50 filed by Robinson on February 14, 2011. Robinson alleged that he sustained a compensable injury by accident to his back and legs and sought additional medical treatment and temporary total disability ("TTD") benefits from February 28, 2011 until such time as maximum medical improvement ("MMI") was reached. (Form 50). Robinson admitted he had a pre-existing fusion but alleged it was aggravated by this accident. (Form 50).

Appellants admitted Robinson was involved in a work incident but denied that the incident rose to the level of a compensable injury pursuant S.C. Code Ann. § 42-1-160. (Form 51). Appellants also denied Robinson was entitled to additional medical treatment as provided under S.C. Code Ann. § 42-15-60 of the Act. (Id.) Moreover, Appellants contended all additional benefits requested under the Act with regard to this alleged accident were barred as a matter of law pursuant to Havird v. YMCA, 308 S.C. 397, 418 S.E.2d 329 (1992) and Capers v. Flautt, 305 S.C. 254, 407 S.E.2d 660 (1991). Finally, Appellants argued that because Robinson had already been compensated once for a total and permanent injury to his back (i.e. greater then 50% disability to his back), he was prohibited as a matter of law from recovering a

second time for his back injury, pursuant to Medlin v. Greenville County, 303 S.C. 484, 401 S.E.2d 667 (1991).

A hearing was held in this matter on November 17, 2011, in Lexington, South Carolina, before Commissioner Andrea C. Roche ("Hearing Commissioner"). By way of the Decision and Order dated May 3, 2012, the Hearing Commissioner determined Robinson sustained a compensable injury to his back, had not reached MMI, and was entitled to additional medical treatment per the recommendation of Dr. Holbrook. (Order of Commissioner Roche). In addition, the Hearing Commissioner determined Robinson was entitled to TTD benefits from July 6, 2011 until such time as MMI was reached. (Id.)

Appellants timely appealed to the Full Commission Appellate Panel (hereinafter "SCWCC"). While the matter was under consideration by the SCWCC, Commissioner Derrick Williams stepped down as a commissioner. The two remaining commissioners on the panel subsequently affirmed the Single Commissioner. This appeal follows.

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act (APA) establishes the standard for judicial review of decisions by the Appellate Panel of the Workers' Compensation Commission. Fredrick v. Wellman, Inc., 385 S.C. 8, 15-16, 682 S.E.2d 516, 519 (Ct. App. 2009); see Lark v. Bi–Lo, Inc., 276 S.C. 130, 134-35, 276 S.E.2d 304, 306 (1981). Under the scope of review established in the APA, this court may not substitute its judgment for that of the Appellate Panel as to the weight of the evidence on questions of fact, but may reverse or modify the Appellate Panel's decision if the appellant's substantial rights have been prejudiced because the decision is affected by an error of law or is "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." See S.C. Code Ann. § 1-23-380(5)(e) (Supp. 2010); Stone v. Traylor Bros., Inc., 360 S.C. 271, 274, 600 S.E.2d 551, 552 (Ct. App. 2004). Our supreme court has defined substantial evidence as evidence that, in viewing the record as a whole, would allow reasonable minds to reach the same conclusion the Appellate Panel reached. Lark, 276 S.C. at 135, 276 S.E.2d at 306. "[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." Palmetto Alliance, Inc. v. S.C. Pub. Serv. Comm'n, 282 S.C. 430, 432, 319 S.E.2d 695, 696 (1984).

Argument

I. The SCWCC erred in finding that Robinson sustained a compensable injury to his lower back insofar as the Respondent's current medical problems are the result of his pre-existing back surgery, the natural progression of his pre-existing condition, and unrelated to the incident at work on November 12, 2010.

Pursuant to South Carolina law, a claimant has the burden of proving by a preponderance of the evidence that his alleged injuries are causally-related to his employment and that he is entitled to any compensation or medical care as a result. S.C. Code Ann. § 42-1-160; Mims v. Nehi Bottling Co., 218 S.C. 513, 63 S.E.2d 305 (1991). However, an award under the Act cannot be based upon surmise, conjecture, or speculation, but must be founded upon sufficient substance to afford it a reasonable basis. Linen v. Ruscon Constr. Co., 286 S.C. 67, 332 S.E.2d 211 (1985).

In the present case, the SCWCC erred in determining Robinson sustained a compensable injury to his back, as such a finding is based purely upon speculation and Robinson's own self-serving testimony. Additionally, the SCWCC failed to properly consider the causal relationship between Robinson's pre-existing back condition, the natural progression of that condition as documented by Dr. Holbrook, his minor work-related incident on November 12, 2010, and his lack of credibility in determining he suffered a work-related back injury.

In determining that Robinson's injury was compensable, the SCWCC relied heavily upon the testimony of Robinson. However, in reaching its conclusion, the SCWCC also ignored substantial medical evidence that revealed the injury was not compensable. Moreover, while the SCWCC specifically held that Robinson had engaged in symptom magnification, it erred in not finding his testimony wholly unreliable given the multiple episodes of his

untruthfulness relating to his alleged back injury and failed to give his lack of credibility due consideration in determining that Robinson suffered a compensable injury.

As noted above, Robinson saw Dr. Felmly for his reported back injury. However, Dr. Felmly noted during Robinson's February 2, 2011, visit, that Robinson claimed he was pain-free, discomfort-free, and had no difficulties with his back following his 2002 surgery by Dr. Holbrook. Dr. Felmly noted the contradiction between Dr. Holbrook's medical notes and Robinson's misrepresentation to him, as Robinson complained multiple times of pain and discomfort following the surgery, and as recently as 2005. He further complained of back pain in 2009 and 2010 prior to the forklift collision with two other physicians.

In addition to attempting to mislead Dr. Felmly, Robinson testified inconsistently on numerous occasions when comparing his deposition testimony to his commission testimony. Robinson's seemingly canned response of "I can't recall" was somewhat incredible. During the Hearing, Robinson did not recall his previous 2004 deposition testimony where he testified he did not know if there was any job he could do because of his back pain. (Hearing transcript p.25). Robinson did not recall requiring pain medications up to 2005 for his back pain as documented by the reports of Dr. Holbrook. (Hearing transcript, p. 28). Robinson did not recall being advised by Dr. Holbrook against working in industrial setting, despite Dr. Holbrook's medical report of same. (Hearing transcript, p, 29). Interestingly, Robinson admitted he was able to recall his surgery, receiving compensation for his prior claim and the forklift accident. (Hearing transcript, p. 58). Accordingly, the greater weight of the evidence in the record, when reviewed in total, establishes Robinson failed to present credible testimony before the Hearing Commissioner and in his deposition.

Furthermore, Robinson was less than honest during his hearing testimony regarding his previous back condition. During his hearing testimony, Robinson testified:

Q: All right, now you told Dr. Hol – Dr. Felmly on February 1st he said asked you if you had any pain or discomfort in your back after your surgery and you said no; is that correct?
A: Yeah.
Q: Okay. It said he asked you whether or not you had any chronic history of back issues before your most recent episode of an injury at Pella and you said no; is that correct?
A: Yes.
Q: Okay. And it says, "He then reviewed all the clinical notes of Dr. Holbrook all the way up to that time from 2005 which would have been three years after your surgery. And it said it clearly showed you had chronic back pain after your surgery, so you lied to Dr. Felmly didn't you?"
A: No, I didn't lie to Dr. Felmly.

(Hearing transcript, p. 27, ll. 13-17; p. 28., ll. 3-9).

Additionally, Robinson was untruthful in advising his employer of his permanent restrictions related to his pre-existing chronic back condition. Robinson was repeatedly advised by Dr. Holbrook, even as early as nine months before accepting this position at Pella, that any heavy manual labor type work would in fact, aggravate his back condition. (Holbrook deposition, p. 17, 18). Robinson knew of it but intentionally decided to withhold these restrictions from Pella and Nurse Padgett. (Hearing transcript, pp. 30, 31, 36 and 37). Padgett testified Robinson never revealed, during his pre-employment examination, he was under any restrictions from a doctor or that he was never to lift over twenty pounds.[1] (Hearing transcript, p. 99). Padgett further testified Robinson did not advise Pella of his previous well documented shoulder and hand injuries. (Hearing transcript, p. 44, 104-105).

[1] Robinson admitted that his job required him to lift over 100 pounds at times. Deposition of Claimant, p. 21, l. 4 - p. 22, l. 20.

Contrary to the untruthful testimony of Robinson alleging that he suffered a back injury as a result of a minor accident, the medical evidence in this case presents a largely different picture. On December 2, 2010, Robinson underwent an MRI of his lumbar spine which revealed, per Dr. Felmly's note of February 1, 2011, a fairly solid fusion at L4-5 and L5-S1. (Defendants' APA #10, p. 52). Dr. Felmly also noted the fusion was well-healed, and there did not appear to be any instability. (Id.) Dr. Felmly opined there was no objective evidence to suggest Robinson even had a new injury to his back. (Id.) He further found Robinson was able to return to normal activities, including work. (Id. at 53). In other words, the only evidence of a back injury was Robinson's own subjective complaints told upon a background of misleading information given to Dr. Felmly following Robinson's earlier back surgery.

As to the injury itself, Dr. Felmly found Robinson's neurological exam to be normal. (Id.) He further opined there was no evidence to suggest Robinson had a new injury to his back, and that his subjective complaints far outweighed any objective clinical findings. (Id. at 55). Dr. Felmly found there was no clinical injury preventing Robinson from returning to work, and he suggested Robinson return to normal activities and duties. Id. Even Dr. Holbrook testified in his deposition that the December 2010 MRI did not reveal any acute problems but instead showed the *natural progression of the Robinson's pre-existing degenerative disc disease*. (Emphasis added) (Holbrook depo., pp. 21-22).

Given the complete lack of any medical evidence to support Robinson's allegation that he actually suffered a back injury, and Robinson's repeated lack of credibility, the SCWCC erred in finding that Robinson sustained a compensable injury on November 12, 2010, as the decision is not supported by substantial evidence.

II. The SCWCC erred in finding that the Respondent's back injury was not compensable pursuant to Havird v. Columbia YMCA and Capers v. Flautt.

Even if there was substantial evidence in the record to conclude that Robinson sustained a new injury to his back, which the Appellants deny, the SCWCC erred in concluding such an injury was compensable, as any alleged back injury was not an unexpected or unlooked for event. Accordingly, under Havird v. Columbia YMCA, 308 S.C. 397, 418 S.E.2d 329 (Ct. App. 1992) and Capers v. Flautt, 305 S.C. 254, 407 S.E.2d 660 (Ct. App. 1991), the claim should have been denied by the SCWCC.

In Havird v. Columbia YMCA, *supra*, the claimant suffered with varicose veins and worked as a masseur from 1984 to 1987. The claimant received treatment for his condition in 1984 and was advised by his vascular surgeon that the prolonged standing would cause further damage to his varicose veins. The claimant did return to his employment but was forced to retire because of this condition. The Court of Appeals found the claimant "himself knew standing would worsen his condition over time and did his best to reduce further injury to his legs." Id. at 400, 418 S.E.2d at 331. The Court ultimately held the claimant was barred from recovering workers' compensation benefits because his condition was not "accidental" and, therefore, did not constitute an injury by accident. Id.

A similar issue was also decided in Capers v. Flautt, *supra*. In Capers, the claimant sought workers' compensation benefits for contact dermatitis. The claimant had received medical treatment for contact dermatitis of the hands during his previous employment and his physician opined him to be "totally disabled from work which involved exposure to soaps, detergents, and/or water." The Court held there was substantial evidence in the record to

support the conclusion that the claimant's condition was not accidental as the claimant knew of his condition and had previously left a job because of it. Id. at 257.

In the present case, Robinson had actual knowledge that his continued employment with the employer would likely aggravate and/or exacerbate his pre-existing medical condition which Dr. Holbrook had predictably concluded. On November 19, 2001, Robinson presented to Dr. Holbrook with complaints of low back pain. (Defendants' APA #4, p. 23). An MRI of the lumbar spine revealed a disc herniation on the left at L4-5. (Id.) Dr. Holbrook recommended a series of steroid injections and possibly lumbar discography at L4-5 and L5-S1. (Id.) Robinson continued to have significant back pain despite conservative measures and ultimately underwent an anterior lumbar diskectomy and fusion at L4-5. (Id. at 16).

As a result of this surgery, Dr. Holbrook opined Robinson sustained twenty-five (25%) percent impairment to his back, and placed permanent restrictions on Robinson of no lifting greater than ten pounds, and no repetitive bending or stooping. (Defendants' Ex. A, p. 25)[2]. In his deposition related to his earlier claim, Robinson testified that there was not a single job out there that he could do at the time due to his back. (Hearing Transcript, p. 24, 25); (Deposition Transcript of Reginald Robinson dated April 5, 2004, p. 9-18, 39-43). In fact, only a few months before Robinson applied for a job with Pella, he was seen by Dr. Holbrook who opined that Robinson's continued involvement in "manual labor type" employment "constantly aggravates his pain." (Defendants' APA #4, p. 31). Dr. Holbrook opined that had Robinson discussed the position with him, Dr. Holbrook would have advised against accepting the position because of his chronic back condition. (Id. at 31). In spite of Dr. Holbrook's

[2] During his deposition, Dr. Felmly actually increased the rating to the 30% impairment range to the back due to the 2002 surgery. (Holbrook depo., p. 12).

recommendation and directive, Robinson chose to apply for a manual labor position with Pella doing manual labor that exceeded those work restrictions given to him by Dr. Holbrook but not disclosed by him to Pella.

Because Robinson's prior back surgery, his continuation of back pain following manual labor following his surgery, his restrictions which he chose to ignore, and the fact that he was told by Dr. Holbrook that he could not continue doing manual labor jobs without aggravating his back, Robinson was aware that his manual labor job at Pella which required him to lift between 20 pounds and 100 pounds would result in his suffering future back problems as he alleges he is suffering. He had these problems in 2009 and 2010 when he complained about them to other physicians. Pursuant to Havird and Capers, the Appellants contend Robinson's current problems, for which he has received substantial benefits, were not an unexpected or unlooked for event. As such the Appellants request this Court reverse the Order of the SCWCC and find that the injury is not compensable as a matter of law.

III. The SCWCC's Order is without any force or effect due to the fact that the Order was only signed by two of the three Commissioners, in violation of S.C. Regulation 67-709

Because only two commissioners of the Full Commission signed the Order affirming the single commissioner, the SCWCC violated S.C. Regulation 67-709 and the matter must be remanded to the Full Commission for a *de novo* hearing before three commissioners.

"Regulations are interpreted using the same rules of construction as statutes." Murphy v. S.C. Dep't of Health and Envtl. Control, 396 S.C. 633, 639, 723 S.E.2d 191, 195 (2012); see S.C. Ambulatory Surgery Ctr. Ass'n v. S.C. Workers' Comp. Comm'n, 389 S.C. 380, 389, 699 S.E.2d 146, 151 (2010). "'When interpreting a regulation, we look for the plain and ordinary meaning of the words of the regulation, without resort to subtle or forced construction

to limit or expand [its] operation.'" Murphy, 396 S.C. at 639–40, 723 S.E.2d at 195 (quoting Converse Power Corp. v. S.C. Dep't of Health & Envtl. Control, 350 S.C. 39, 47, 564 S.E.2d 341, 346 (Ct. App. 2002)).

S.C. Regulation 67-709 states in relevant part:

> A. Commission review may be conducted by a *three or six member* review panel either of which excludes the original Hearing Commissioner. *An order of a three member review panel* has the same force and effect as a six member review panel and is the final decision of the Commission.
>
> B. The Commission's Chair with approval of the majority of the other Commissioners shall assign cases to *a three member panel* ...
>
> ....
>
> (3) If one Commissioner is temporarily incapacitated or a vacancy exists on the Commission, *review may be conducted by the remaining Commissioners sitting as a five or three member panel.*
>
> ...

S.C. Regulation 67-709.

The plain language of the regulation states that all decisions must be made by a three commissioner panel, and in the event that one of the commissioners is unavailable, the matter must be re-heard either as a new three member panel or a five member panel. The Regulation does not allow for a two member panel to hear a case or issue an opinion in this case for obvious reasons: First, a two person panel could obviously disagree amongst themselves and thereby create a deadlock as to the result of the panel. Second, by only deciding the case with a two member panel, the SCWCC deprived the Appellants of the opportunity afforded to it—to sway a member of the Commission to dissent and possibly bring with him another Commissioner, thereby reversing an Order of the Single Commissioner.

In the present case, there is no question that only two commissioners signed the Order issued by the SCWCC. Because the Regulation is unambiguous in his language, this matter must be remanded to the SCWCC so that it may assign either a new three member panel or so that it can be heard by a five member panel in accordance with S.C. Regulation 67-709.

IV. The SCWCC erred in finding that Robinson had not reached maximum medical improvement ("MMI") when the authorized treating physician had determined otherwise.

Under South Carolina jurisprudence, "[m]aximum medical improvement 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." Curiel v. Environmental Management Services, 376 S.C. 23, 655 S.E.2d 482 (2007); Dodge v. Bruccoli, Clark, Layman, Inc., 334 S.C. 574, 514 S.E.2d 593 (Ct. App. 1999). MMI is a factual determination made by the Commission which must be upheld if there is any evidence to support it. Id.

MMI is controlled by S.C. Regulation 67-506(B), which states:

> 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 shall continue payment of temporary compensation until the Commission finds the employer's representative may terminate compensation unless compensation has been suspended according to R.67–505.

S.C. Regulation 67–506(B) (2012).

In the case at bar, the authorized physician determined that Robinson had reached MMI. During his February 2, 2011, examination of Robinson, Dr. Felmly found nothing to suggest Robinson sustained a "new significant clinical injury to his back that represents his

need for absence from employment." (Claimant's APA #6, p. 55). At that time, Robinson was released to return to work. Rather than return to work as directed, Robinson first sought unauthorized medical treatment from his family physician, Dr. Patrick,[3] followed by additional unauthorized medical treatment from Dr. Holbrook.

The SCWCC's finding that Robinson was not at MMI at the time of the hearing was apparently based, in large part, on the unauthorized treatment of Dr. Thomas Holbrook on July 6, 2011. On July 6, 2011, Robinson presented to Dr. Holbrook with complaints of low back pain. Dr. Holbrook recommended Robinson "try an epidural steroid injection." (Id.) During his deposition, Dr. Holbrook testified that he agreed with Dr. Felmly that there was no objective evidence of any acute problems as it relates to Robinson's incident. (Id. at 25).

Though South Carolina has recognized the fact that the SCWCC can rely upon other physicians who are not the authorizing physicians to determine a claimant has not reached MMI, the facts which allow such a conclusion are not present in this case.

In Hall v. United Rentals, Inc., 371 S.C. 69, 636 S.E.2d 876 (Ct. App. 2006), the Court of Appeals upheld the decision of the Full Commission that determined Hall had not reached MMI despite the fact that the authorizing physician declared that Hall had reached MMI but an unauthorized treating physician had determined that he not reached MMI. In that case, the unauthorized treating physician determined that Hall's condition continued to improve, including his pain levels and his mobility.

In the present case, there is no evidence that Robinson's condition has improved since Dr. Felmly placed him at MMI. Robinson testified that his symptoms have been the same

[3] During the hearing, he testified he did not advise the employer of his visits with Dr. Patrick, who wrote him out of work. *See* H.T, pp. 38, 40.

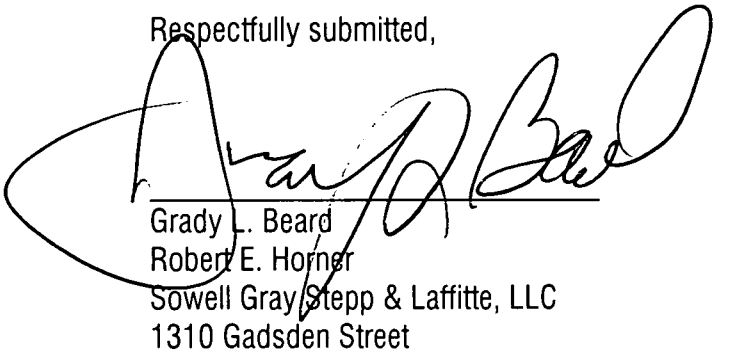
since his injury. (Hearing Transcript, p. 17). There is no evidence that his back had improved or that his mobility had continued to improve. (Id.). There is no evidence that Dr. Felmly, the authorized treating physician, was incorrect in concluding that Robinson had reached MMI. Accordingly, the SCWCC should have accepted the decision of the authorized treating physician, Dr. Felmly, and held that Robinson had reached MMI.

Conclusion

The Appellants submit that the SCWCC erred in finding that Robinson had suffered from a compensable injury to his shoulder. Additionally, even if the injury was compensable, it was not an unexpected event, as Robinson had years and years of problems with his back even following surgery and was told by Dr. Holbrook that he could not perform manual labor jobs or lift over 10 pounds without suffering back pain. Accordingly, Robinson was barred from recovery under Havird and Capers. Moreover, the SCWCC erred in not accepting Dr. Felmly's opinion that Robinson was at MMI when there was no evidence that Robinson actually improved following Dr. Felmly's opinion due to further treatment from others.

Finally, even if this Court finds there is substantial evidence to support the decision, this Court must remand the matter to the SCWCC for a *de novo* hearing before a full appellate panel due to the fact that the Full Commission issued an opinion by only two commissioners, in violation of S.C. Regulation 67-709.

Respectfully submitted,



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