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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.

INITIAL RESPONDENTS' BRIEF OF APPELLANTS-RESPONDENTS

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II. Was Mr. Morales totally and permanently disabled under any provision of the South Carolina Workers Compensation Act as a result of his work-related injury?

III. Did the commission err in failing to apply the law of the case concept to the consent order the parties entered on April 14, 2020?

IV. Did the commission err in applying a higher standard of proof than the preponderance of the evidence?

INTRODUCTION

Mr. Morales's counsel goes through a tortured recitation of the procedural history and facts in this matter, much of which are unrelated and irrelevant to Mr. Morales's appeal. The only issues relevant to Mr. Morales's appeal is whether the commission's findings were supported by substantial evidence in the record. Employer/Carrier's statement of the case section in their appellants' brief is fully incorporated to this brief rather than reproduced.

STATEMENT OF THE FACTS

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.) Employer/Carrier agreed that they would "be responsible for all medical

treatment causally related to the work-related injury to [Mr. Morales's] back." (4/14/20 consent Order p. 2.) On October 23, 2020, Mr. Morales underwent a functional capacity evaluation ("FCE") conducted by occupational therapist Rod Taylor ("OTR/L Taylor"), and 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.)

Mr. Morales also sustained several serious injuries after his work-related fall in October 2019. 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.) On July 12, 2022, Mr. Morales received additional treatment for a laceration to his left forearm he sustained while working for a later employer, Integrated Site Management. (12/3/24 Order p. 16; 9/25/23 Morales Depo p. 14, 18, 20; Defendant's APA p. 111, dated February 28, 2024; 9/25/23 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 fractured several ribs on both his left and right sides, fractured his sternum, and severely fractured his left leg. (Defendant's APA pp. 65-157, dated February 28, 2024.)

Mr. Morales's leg fracture was so severe that it required surgery to implant a plate and screws. (Defendant's APA pp. 65-157, dated February 28, 2024.)

Mr. Morales's expert, Dr. Poletti, proved to be unreliable in his evaluation of Mr. Morales. Dr. Poletti did not perform an "independent medical examination" ("IME") in preparation for this litigation until November 21, 2023, over four years after the work-related fall at issue and after Mr. Morales's injuries sustained while subsequently working for another employer and his significant injuries that resulted from his car wrecks. (Dr. Poletti's IME, dated November 21, 2023, p. 1.) Additionally, 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."[1] (Dr. Poletti's IME, dated November 21, 2023, p. 1 (emphasis added).) Dr. Poletti also 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 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.)

Dr. Poletti's reference to an injury to "T2" rather than T12 and observation of compression greater than fifty percent is at odds with the medical records generated on the date of injury, none of which stated that Mr. Morales had an injury to T2 or compression greater than fifty percent. Accordingly, 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.) Based upon the totality of all the evidence, the commission awarded Mr. Morales a forty-five percent disability rating of his back.

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[1] As previously noted, Mr. Morales's broken leg did require surgical

STANDARD OF REVIEW

"In workers' compensation cases, the [appellate panel] is the ultimate fact finder. An appellate court must affirm the findings made by the [appellate panel] if they are supported by substantial evidence." *Frampton v. S.C. Dep't of Nat. Res.*, 432 S.C. 247, 256, 851 S.E.2d 714, 719 (Ct. App. 2020) (quoting *Holmes v. Nat'l Serv. Indus., Inc.*, 395 S.C. 305, 308, 717 S.E.2d 751, 752 (2011)). "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)).

"The final determination of witness credibility and the weight assigned to the evidence is reserved to the appellate panel. Where there are conflicts in the evidence over a factual issue, the findings of the appellate panel are conclusive." *Frampton*, 432 S.C. at 257, 851 S.E.2d at 719 (quoting *Houston v. Deloach & Deloach*, 378 S.C. 543, 551, 663 S.E.2d 85, 89 (Ct. App. 2008)). "Accordingly, a reviewing court may not substitute its judgment for that of the [appellate panel] as to the weight of the evidence on questions of fact." *Id.* (quoting *Clark v. Aiken Cty. Gov't,* 366 S.C. 102, 107, 620 S.E.2d 99, 101 (Ct. App. 2005)).

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intervention.

ARGUMENT

I. The commission properly determined that Mr. Morales did not lose fifty percent or more of the use of his back and achieved maximum medical improvement on January 8, 2020.

"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, 340, 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." *Id.* "Indeed, 'medical testimony should not be held conclusive irrespective of other evidence.'" *Id.* (quoting *Ballenger v. Southern Worsted Corp.*, 209 S.C. 463, 467, 40 S.E.2d 681, 682–83 (1946)). An award must merely be supported by competent evidence in the record which provides support to a finding of substantial evidence.

A. The record does not contain evidence that establishes the commission's actual bias or prejudice, and the commission's decision was not arbitrary or capricious.

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 or proper knowledge of Mr. Morales's work-related injury and his subsequent unrelated injuries. For example, Dr. Poletti either did not accurately read the medical records concerning Mr. Morales's

injuries sustained in his car wreck, or Dr. Poletti failed to appreciate and consider the seriousness of Mr. Morales's vehicular injuries. 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.) Dr. Poletti understatedly 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.)

Regarding Mr. Morales's work-related injury at issue here, Dr. Poletti's referenced an injury to "T2" rather than T12 in his report. More importantly, Dr. Poletti noted a compression greater than fifty percent when none of the medical records generated on the date of injury stated that Mr. Morales had a compression greater than fifty percent. In fact, the CT report that Dr. Poletti referenced stated the following: "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%." These errors are not examples of a doctor missing some minor detail. They are significant errors and substantial evidence that supports the commission's decision to disregard Dr. Poletti's opinions.

Additionally, 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. 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.[2]

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 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.)

Additionally, the commission correctly determined that factually, the FCE carried no evidentiary weight. Employer/Carrier conceded that Mr. Morales's T12

[2] Even if this Court finds that the commission's language regarding Dr. Poletti's opinions was improper, any error was harmless in light of the numerous obvious errors in his report discussed.

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.) The deficits noted in the FCE could not and were not considered in evaluating and awarding benefits to Mr. Morales. Accordingly, the commission correctly determined that Dr. Stofko's opinions were the only credible medical opinions in this matter, and no evidence in the record supports Mr. Morales's claim that commission's determination regarding Mr. Morales's disability rating was the result of actual bias or prejudice, or arbitrary or capricious.

B. The record contains substantial evidence that supports the commission's finding that Mr. Morales achieved MMI on January 8, 2020.

As discussed in section I.A., Dr. Stofko's opinion was the only medical opinion that the commission deemed credible. No credible evidence in the record supports Mr. Morales's assertion that he has not achieved MMI, and Dr. Stofko's opinions constitute substantial evidence that supports the commission's finding that Mr. Morales achieved MMI on January 8, 2020. 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, and affirm the commission's finding that Mr. Morales achieved MMI on January 8, 2020.

II. Mr. Morales was not totally and permanently disabled.

"A claimant is entitled to permanent and total disability benefits '[w]hen the incapacity for work resulting from an injury is total.'" *Dozier v. Am. Red Cross*, 411 S.C. 274, 286, 768 S.E.2d 222, 228 (Ct. App. 2014) (alteration in original) (quoting S.C. Code Ann. § 42-9-10(A)). "There are two situations in which the [appellate panel] can find a claimant totally disabled. First, for certain conditions resulting from work-related injuries, a claimant is deemed totally disabled and need not demonstrate loss of earning capacity to recover workers' compensation benefits." *Id.* (quoting *Stephenson v. Rice Services, Inc.*, 323 S.C. 113, 117–18, 473 S.E.2d 699, 701–02 (1996)). "Under the circumstances in which a worker is deemed totally disabled, the medical model of workers' compensation predominates." *Id.* (quoting *Stephenson*, 323 S.C. at 117–18, 473 S.E.2d at 701–02).

"In contrast, the earning impairment model predominates when a worker is not statutorily deemed totally disabled. Under this model, the [appellate panel] may predicate a finding of total disability on the claimant's complete loss of earning capacity as a result of a work-related injury." *Id.* (quoting *Stephenson*, 323 S.C. at 117–18, 473 S.E.2d at 701–02). "Employees who because of a work–related injury can perform only limited tasks for which no reasonably stable market exists are considered totally disabled notwithstanding their nominal earning capacity." *Id.* (quoting *Stephenson*, 323 S.C. at 117–18, 473 S.E.2d at 701–02).

Like the claimant's impairment rating in *Dozier*, 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, does not equate to permanent and total disability under S.C. Code Ann. 42-9-10. Therefore, the relevant question before the appellate panel was whether Mr. Morales had "the ability to perform services other than those that are so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist." *Id.* The appellate panel aptly noted that Mr. Morales was employed **after** his work-related injury for two different employers. Mr. Morales was employed at Integrated Site Management from May 2022 until August 2022, and Mr. Morales was employed at Flores Construction from August 2022 until January 2023. (12/3/24 Order p. 16.) Accordingly, the admitted T12 claim did not cause Mr. Morales to have a complete loss of earning capacity.

Clearly, the appellate panel weighed all of the evidence in the record chose to rely on Dr. Stofko's opinions. Again, Dr. Stofko determined that Mr. Morales had a five percent disability rating, and there was clearly still a market for Mr. Morales's services because he returned to work after his work-related injury. Thus, Employer/Carrier ask this Court to affirm that Mr. Morales was not totally and permanently disabled as a result of his work-related injury.

III. The parties' consent order dated April 14, 2020 states that Employer/Carrier will only be responsible for medical treatment causally related to Mr. Morales's work-related injury.

A. Mr. Morales abandoned his argument regarding the consent order by making a conclusory argument and failing to cite any authority supporting that argument.

Pursuant to Rule 208 of the South Carolina Appellate Court Rules, "the particular issue to be addressed shall be set forth in distinctive type, followed by discussion *and citations of authority*." Rule 208(b)(1)(E), SCACR (emphasis added). "South Carolina law clearly states that short, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review. *Glasscock, Inc. v. U.S. Fid. & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001). "Numerous cases have held that where an issue is not argued within the body of the brief but is only a short conclusory statement, it is abandoned on appeal." *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 99, 594 S.E.2d 485, 496 (Ct. App. 2004).

Mr. Morales does not cite any authority to support his argument regarding the consent order. Moreover, Mr. Morales's argument is conclusory and can be summarized as follows: because Employer/Carrier agreed that to compensate Mr. Morales for his back injury, Employer/Carrier are responsible for all treatment related to Mr. Morales's back even if unrelated to the work-related injury at issue.

This Court should consider such a conclusory argument unsupported by any citation to authority abandoned.

B. The consent order specifically states that Employer/Carrier is only "responsible for all medical treatment causally related to the work-related injury to [Mr. Morales's] back."

The parties' consent order dated April 14, 2020 states that Employer/Carrier would "be responsible for all medical treatment *causally related to the work-related injury to [Mr. Morales's] back*." (4/14/20 consent Order p. 2 (emphasis added).) Employer/Carrier disputes Mr. Morales's claims that the additional medical treatment he seeks is "causally related to the work-related injury to [his] back." (4/14/20 consent Order p. 2.) Further, the commission properly determined that the additional treatment sought by Mr. Morales is not causally related to the work-related injury to his back. Accordingly, the parties' consent order does not require Employer/Carrier to provide treatment for Mr. Morales's back that is not casually related to his fall at work.

IV. The commission clearly applied the proper preponderance of the evidence standard of proof.

A. Mr. Morales abandoned his argument regarding whether the commission applied the proper standard of proof by making a conclusory argument and failing to cite any relevant authority supporting that argument.

For similar reasons discussed in section III.A., this Court should conclude that Mr. Morales abandoned his argument that the commission applied a standard

of proof higher than the preponderance of the evidence because his argument is conclusory and he does not cite any evidence in the record to support his argument. Moreover, Mr. Morales does not cite any relevant authority. While Mr. Morales does cite one statute and one case, they are completely irrelevant to his argument that the commission applied a standard of proof higher than the preponderance of the evidence. Mr. Morales simply asserts that the commission applied a higher standard and contends that this Court will agree if it reviews the record. Again, this Court should consider such a conclusory argument unsupported by any citation to authority or the record abandoned and not proper for appellate review.

B. No evidence in the record supports Mr. Morales's argument that the commission applied a standard of proof higher than a preponderance of the evidence.

Nothing in the commission's order dated December 3, 2024 indicates that it applied a standard of proof higher than a preponderance of the evidence. The language in the order is consistent with the application of the preponderance of the evidence standard of proof. The appellate panel adopted the order of the single commissioner dated June 21, 2024, which it is entitled to do. Mr. Morales's brief contains language indicating the standard of review applied by the commission is some great unknown which has not been properly addressed "for decades" and that this Court should "put meat on the bone" by defining the standard of review used by the commission. (Respondent-Appellant's appellant's brief p. 45.)

Respectfully, this is a red herring. For decades, this Court as well as our supreme court have had no difficulties discerning the standard of review utilized by the commission. Nothing supports this argument in the record or in the untold workers compensation cases decided by our courts over the years. Accordingly, this Court should rule that the commission applied the proper standard of proof.

CONCLUSION

The commission properly determined that Mr. Morales did not lose fifty percent or more of the use of his back and Mr. Morales achieved MMI on January 8, 2020. Moreover, Mr. Morales was not totally and permanently disabled as a result of his work-related injury. Further Mr. Morales abandoned his arguments regarding the parties' consent order and the burden of proof higher; regardless, those arguments fail on the merits because the parties' consent order specifies Employer/Carrier are only responsible for back injuries casually related to Mr. Morales's work injury, and the commission clearly applied the proper preponderance of the evidence standard. Accordingly, Employer/Carier ask that this Court to deny Mr. Morales's requested relief.

[*Signature on next page*]

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

Respectfully submitted,

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Attachments: Initial Brief as Respondents.pdf

Enclosed please find Appellants-Respondents' Initial Respondents' Brief for service upon you in the above-referenced matter.

Thank you,

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