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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA
SC Workers' Compensation Commission
Appellate Panel

Appellate Case No. 2025-000026

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

v.

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

INITIAL RESPONDENT'S BRIEF OF RESPONDENT-APPELLANT

Preston F. McDaniel, Bar #3770
McDANIEL LAW FIRM
1315 Elmwood Avenue
Columbia, SC 29201
(803) 771-7211

and

Don C. Gibson, Bar #2466
GIBSON LAW FIRM, LLC
Post Office Box 60669
North Charleston, SC 29419
(843) 744-1887

Attorneys for Respondent-Appellant

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AMENDMENTS TO THE STATEMENT OF THE CASE

Both parties in their Statements of the Case reference the April 14, 2020 Consent Order and that the parties agreed in that Consent Order that the Claimant had sustained a compensable injury **to his back**. However, the Appellants-Respondents do not point out that the Consent Order of April 14, 2020, was as a result of and based on the claimant's Form 50 filed January 22, 2020, in which and in reference to the back, the claimant alleged injuries to the upper, middle, and lower back. (Form 50 Request for Hearing, 01/22/20).

Next, the Respondent-Appellant's Statement of the Case makes clear the difference between Commissioner James' Order Instructions and defense counsel's proposed Order, and the Commissioner's basis for her ruling January 11, 2021, which was simply that in the claimant's medical evidence he had not submitted an opinion pursuant to amended SC Code §42-15-60 (2007) of the Act that the medical care for the back was necessary in the opinions of the treating physicians as stated to "a reasonable degree of medical certainty".

Next, while both parties in their Statement of the Case refer to the Order of Commissioner Taylor being vacated by the Full Commission, the defendants in their Statement of the Case seek to go beyond that which is contrary to the ruling of the

Full Commission which vacated as to all of the numerous issues including almost a year and a half delay in the issuance of the Order. Additionally, in the Order of Commissioner Taylor of April 26, 2021 as a part of the Record, a review by the Court will show that the claimant in his Request for Hearing and in his Prehearing Brief had requested an Award for total and permanent disability based on **either** SC Code §42-9-10(A) based on wage loss and/or based on SC Code §42-9-30(21) for having lost 50% or more of the functional use of his back to do work requiring the use of his back. The Court upon review of the Order of Commissioner Taylor will find absolutely no reference to the functional capacity evaluation in their Findings of Fact nor any Findings of Fact in reference to the opinions of three doctors or in reference to disability for loss of earning capacity or the vocational expert, nor is there any Finding of Fact concerning disability and just as important, there is absolutely no Conclusions of Law even referencing SC Code §42-9-10, nor is there a ruling in that regard.

Appellants-Respondents while noting that they had filed a subsequent Form 21 on August 29, 2023, two weeks after the claimant had already filed a Request for Hearing asking for additional medical care specifically in reference to his T-12 fracture, they failed to include the history that they mandated a return appointment with Dr. Stofko at which Dr. Stofko through

his PAs determined that Mr. Morales was in need of additional medical care in reference to his fusion from T11-L1. (See Respondent-Appellant's Statement of the Case.)

STATEMENT OF FACTS
(Correction/Clarified)

By way of Return to the Appellants-Respondents' Statement of Facts, the Statement of Facts in large measure is simply not true or inaccurate to say at best, or constitutes an effort to make Findings of Fact that were not made by the Hearing Commissioner. Outside of the initial references to the functional capacity evaluation and the part-time work that Mr. Morales did, which is all clarified in Respondent's-Appellant's Brief, in reference to the paragraphs concerning Dr. Poletti, they are simply inaccurate and constitute what the Appellants-Respondents wished the Commissioner had found. None of the facts cited serves as the basis for the Commissioner's Findings of Fact made concerning Dr. Poletti. That Finding of Fact, again, simply gave no weight to Dr. Poletti's opinion,

> "because of his inability to objectively assess claimant's impairments. In multiple different cases, Dr. Poletti has described himself on the Record as an 'unabashed patient advocate', these statements preclude him from being able to give a truly independent medical evaluation...".

The Commissioner then cites an Order outside of the Record. None of the alleged facts set forth by the defendants are referred to by the Hearing Commissioner in his Findings of Fact and Order.

In reference to Dr. Forrest and Dr. Buncher, first the Commissioner's Findings concerning Dr. Buncher, and contrary to the Appellants-Respondents' assertion, are inaccurate and evidence a lack of review of his report. An accurate review of the evidence from his report is set out in the argument of the Respondent-Appellant which included that Dr. Buncher's impairment rating and his focus was on the severe injuries to the thoracic spine and not other injuries (which is also true for Dr. Forrest). Further, in reference to Dr. Buncher, the Commissioner's actual only ruling was that because his opinions were largely based on other body parts, Dr. Buncher's opinions in this case are also given no weight. That is, again, the only Finding of Fact made and it is contrary to the evidence as set forth in the Respondent-Appellant's Brief and is simply wrong. Further, a reading of Dr. Buncher's report establishes that the Commissioner's Finding of Fact is not based on reason and is arbitrary.

The same is true as to Dr. Leonard Forrest whose real findings and opinions the Commissioner completely ignores and he simply did not make any of the Findings of Facts as set forth in the Appellants-Respondents' Statement of the Case.

The Respondent-Appellant will leave it to the Court's reading, but nowhere in his Findings of Fact did the Commissioner find that Dr. Stokfo's opinions were the "only credible medical opinions in this matter". He also did not find Dr. Stokfo had opined that Mr. Morales had sustained a 5% impairment to his back. In fact, the contrary is true and again it points out the inaccuracy of the Appellants-Respondents' Statement of the Case. What the Commissioner actually found in reference to Dr. Stofko and the 5% impairment set forth by Alana Cole, his PA, was:

> "However, the Record does not appear to contain an instance of Dr. Stokfo specifically endorsing PA Alana Cole's opinions contained in her 14B." (Order, 6/21/24, pp. 8-9; Finding of Fact #17).

ARGUMENTS

I. THE COMMISSION DID NOT ERR IN RULING THAT THE EMPLOYER/ CARRIER WERE NOT ENTITLED TO A CREDIT FOR OVERPAYMENT OF TEMPORARY TOTAL BENEFITS SINCE JANUARY 8, 2020.

First, the Court should reverse the decision based on the numerous errors of law including that the Hearing Commissioner's decision establishes actual bias and prejudice and a formed intent to deny benefits; and his failure to make any Findings of Fact and even cite a Conclusion of Law in reference to SC Code §42-9-10; and applying the substantial evidence in the Record establishes the claimant's entitlement to an award for total and permanent disability under either or both SC Code §42-9-10(A)

and §42-9-30(21). See: Dent v. East Richland County Public Service Dist., 423 S.C. 193, 813 S.E.2d 886, reh. den. (SC App. 2018) and Clemmons v. Lowe's Home Centers, Inc. - Harbison, 412 S.C. 366, 772 S.E.2d 517 (SC App. 2015), reh. den., rev. 2017, WL 920730, withdrawn and superseded on reh., 420 S.C. 282, 803 S.E.2d 268 (2017); and Paulino v. Diversified Coatings, Inc., 443 S.C. 150, 903 S.E.2d 503 (2024).

Assuming arguendo that the Order of the Hearing Commissioner affirmed by the Full Commission does not require either a reversal and an award of total and permanent disability or, at a minimum a remand for, unfortunately, a new hearing for the Commission to do its job and make detailed Findings of Fact and Conclusions of Law "sufficiently definite enough" to allow for judicial review as required by the law, the reason the defendants are not entitled to a credit lies within the law; the inconsistent Findings of Fact, Conclusions of Law, and decision made by the Hearing Commissioner, and also lack thereof; and the fault in not requesting a prompt hearing on termination of benefits after the alleged date of maximum medical improvement, which falls squarely on the Appellants-Respondents and the Commission.

The Appellants-Respondents base their argument on Sanders v. Mead Westvaco Corp., 371 S.C. 284, 638 S.E.2d 66 (SC App. 2006), dismissed as improvidently granted, 381 S.C. 208, 672

S.E.2d 785 (2009). Very importantly, unlike Sanders here, it was not stipulated or agreed that the claimant had reached maximum medical improvement. In fact, the exact opposite is true. The claimant requested additional medical care which was found to be necessary by the defendants chosen treating physician, Dr. Stofko, through his PAs. His PAs, who he testified upon whose opinions he relies and affirms as his, found that claimant needed further medical care specifically related to the T11-L1 fracture. Thus, the Hearing Commissioner was first faced with a situation where the claimant was requesting additional medical care as opposed to a finding of maximum medical improvement and time for an award of total and permanent disability. Also, contrary to the facts in Sanders, the Court placed the fault in the delay of holding a hearing on both parties.

In addition, as again as set out by the Appellants-Respondents in their Brief, in both Hendricks v. Pickens County, 335 S.C. 405, 517 S.E.2d 698 (SC App. 1999) and as cited in Hendricks, Williams v. SC Dept. of Mental Retardation, 308 S.C. 438, 418 S.E.2d 555 (SC App. 1992), this Court noted that the determination to terminate temporary total benefits is based on a finding that the claimant had reached maximum medical improvement and is to be made if warranted by substantial evidence in the Record. Here, the defendants rely on and the Commissioner made the decision of maximum medical improvement

based on a Form 14B that was not based on Dr. Stofko, the authorized treating physician's opinion, and which as the Commissioner found, he never endorsed. Also, the Hearing Commissioner made inconsistent Findings of Fact by awarding the claimant the medical care as determined to be necessary for his admitted injury to the thoracic spine in his other Findings of Fact. Further, and again, the claimant was seeking additional medical care and claimed that he was not at maximum medical improvement which was affirmed by the Hearing Commissioner's Findings. Further, the cases cited by the Appellants-Respondents hold they are entitled to a quick hearing within sixty days. However, in this case, when they first filed the initial Form 21 **it was filed a year** after the Form 14B on which they based their request for a finding of maximum medical improvement had been filed. In fact, the defendants cite Commissioner Melody James' Order of **January 11, 2021** as the law of the case wherein she determined that Mr. Morales was not at maximum medical improvement, but yet assert their position based on a statement of maximum medical improvement of January 8, 2020. In other words, their claimed date of maximum medical improvement, January 8, 2020, is exactly one year less than and before the Hearing Commissioner's Order that they assert is the law of the case finding that Mr. Morales was not yet at maximum medical improvement as of that date; January 11, 2021.

Finally, as noted in Sanders, the fault in the delay of the defendants obtaining a prompt hearing on their request to stop payment and to pay benefits, was the fault of both parties. Whereas, in this case they delayed a year before filing for a hearing; the original Hearing Commissioner **delayed a year** before her final Order was issued on March 22, 2022, which was then **another six months later** vacated by the Full Commission. The Appellants-Respondents then refiled a new Form 21 using that same date of maximum medical improvement after that Order was vacated. However, again, that statement of maximum medical improvement was a year before Commissioner James' Order, which is the law of the case according to the Appellants-Respondents wherein Commissioner Melody James found him not to be at maximum medical improvement as of January 2021. Thus, as the Commissioner appropriately found in his decision deciding his entitlement to permanent benefits, the delays were in no way due to the fault of the claimant. It was in fact due to the fault of the Commission for multiple delays of almost two years and then the defendants delay in even requesting a hearing to start with of over a year.

Neither the law nor substantial evidence support a finding of maximum medical improvement of January 8, 2020, it is contrary to the law of the case alone as argued by the Appellants-Respondents and the Respondent-Appellant in reference

to the Order of Commissioner Melody James. (Def. APA, 02/28/24, p. 253). It is contrary to the substantial evidence based on the claimant's position that he was not at maximum medical improvement and was in need of additional medical care, which is also supported by the very findings of the **authorized** treating physician, Dr. Stofko (Cl. APA, 01/24/24, p. 103d); and due to the Commission caused a year and a half (1 ½) delay and Appellants-Respondents caused a one year delay in filing a request for hearing.

Finally, as the Commissioner found in deciding the date from which he would allow the defendants a credit and not allow the credit back to 2020 because it would unfairly penalize the claimant when the delay was through no fault of his own, the reasoning of the Commissioner is in accord with the Supreme Court's reasoning in Case v. Hermitage Cotton Mills, 236 S.C. 515, 115 S.E.2d 57 (1960) in upholding pursuant to current SC Code §42-17-60 that the employer and its insurance carrier were and are required to make payment of weekly compensation during the pendency of the appeal. The Court first reasoned and held that the requirement to make payment pursuant to that statute even though the award may ultimately be reversed was in accord with the beneficial purposes of the Act of compensating employees in predetermined amounts based upon his wages and disregarding the tort concept of liability and recognizing the

fundamental principle of law that the workers' compensation laws was intended to be primarily for the benefit of the injured employee and was to be construed liberally for his protection. The Court went on to hold and note that the employee did not have the benefit of restitution as in a general civil matter such that if the award is overturned on appeal, the employee would not be obliged to repay the payments made during the appeal where he had in fact had been awarded benefits. The Court then in noting that this is in accord, again, with the beneficial purposes of the Act which during the pendency of an appeal is to ensure:

> "**some means of subsistence for the injured employee pending determination of the employer's appeal and that to rule otherwise would defeat that very purpose**".

The Court noted that unlike a civil action, the employer is required to pay but the injured worker probably would not be able to repay the benefits anyway but is not required to.

Similarly, in this case the very reason for the payment of temporary total disability benefits while the injured worker is under medical care and suffering from a disability is to ensure income to the injured worker, but all the workers' compensation statutes are written and have been interpreted to ensure that goal. Here, if the Court of Appeals' decision takes two years; that coupled with the one year delay of the Appellants-

Respondents in filing, the time it took for the original Hearing Commissioner to make a decision plus the appeal totally over one and a half (1 ½) years and it being vacated and remanded for a de novo hearing, if an injured worker were required to repay those amounts, it would defeat the very purpose of the Act. Finally, under equitable principles a claimant should not be punished for the defendants lack of due diligence of over a year to bring a stop payment action, or basing their request for stop payment on that statement of maximum medical improvement when a Commissioner had found eight months subsequent to the date of that document **that the claimant was not at maximum medical improvement**.

II. THE RESPONDENT-APPELLANT AGREES THAT THE COMMISSION ERRED IN RULING THAT MR. MORALES SUSTAINED A 45% PERMANENT PARTIAL "DISABILITY RATING" TO HIS BACK.

In the introductory section of Argument II setting out the substantial law, the Appellants-Respondents refer to the most recent decisions by the Supreme Court concerning loss of use of the back, that being Clemmons v. Lowes Home Improvement - Harbison, supra, and Paulino v. Diversified Coatings, Inc., supra. In Clemmons, the Court held based on the reliable, probative and substantial evidence in the Record, Mr. Clemmons was entitled to an award for total and permanent disability for having sustained 50% or greater loss of use of his back to do work requiring the use of his back. Most importantly in

Clemmons, which remained in the modified decision, is the Court's reaffirmance that the issue before the Commission for decision in a scheduled member back award is "**loss of use**". It is not disability and it is not impairment. Disability is specifically defined in SC Code §42-1-120. In Clemmons, also the Court converted any whole person impairment ratings given to back to regional impairment ratings.[1]

In Paulino, a case in which the defendants tried to argue that because all of the medical impairment ratings were below 50% that that was determinative of the award to be made and that the Commission could not give an award of greater than 50%. After noting the Court's decision in Clemmons, and that the decision before the Commission was loss of use referred to in the decision as "functional capacity to his back", the Supreme Court then noted the plethora of decisions, mostly by this Court, affirming awards of 50% or more loss of use of the back, including Linen v. Ruscon Constr. Co., 286 S.C. 67, 332 S.E.2d 211 (1985) affirming an award of total and permanent disability due to a loss of 50% or more of the use of the back. The

[1] The Respondent-Appellant would point out to the Court that first under the AMA Guides, 5th Ed., pp. 4-5, the Guides instruct that **medical impairment ratings have nothing to do with the ability to do work** with the injured body part. Further, and most importantly, in reference to the total lack of importance of medical impairment ratings in reference to loss of use to do work, it is absolutely impossible to receive a greater than 50% impairment rating to the back due to a lumbar back injury. The AMA Guides, 5th Ed., Conversion Chart, p. 427. While this case involves a thoracic spine injury, that fact affirms the Supreme Court's view of impairment ratings as not being determinative on any issue and particularly loss of use.

impairment ratings in Linen were 15%, 20%-30%. In Lyles v. Quantum Chemical Co., 315 S.C. 440, 434 S.E.2d 292 (SC App. 1993), this Court affirmed a permanent and total disability award for having lost 50% or more of the back based on a 58% regional impairment rating and on the claimant's testimony. The Court also cited Tiller v. National Healthcare Ctr. of Sumter, 334 S.C. 333, 513 S.E.2d 843 (1999) for the same proposition as the Appellants-Respondents that medical testimony alone is not conclusive irrespective of the other evidence. In Pruitt v. Thermo-Kinetics Industries, Inc., 295 S.C. 431, 368 S.E.2d 913 (SC App. 1988), reh. and cert. den., the Court affirmed a 50% loss of use award based solely on the claimant's testimony. See also: Linen v. Ruscon Constr. Co., supra. In Paulino, the Commission relied on the testimony of the Claimant and the evidence from the doctors, not including the impairment ratings, but as to the ability of the claimant to do work with his back; and on the functional capacity evaluation.

Also, very notably the Court in Paulino noted that the defendants, and in this case the Appellants-Respondents, bore the burden of rebutting the presumption of total and permanent disability that arises under subsections §42-9-30(21) and §42-9-10(B). The Court also did not address the claimant's claim for benefits for total and permanent disability under §42-9-10(A) for loss of earning capacity.

Thus, the Respondent-Appellant agrees with the Appellants-Respondents that an award must be supported by competent evidence in the Record that constitutes substantial evidence to support the Finding. While the Hearing Commissioner made a valiant effort to discredit all the medical, vocational, and functional capacity evaluation evidence on loss of use, the claimant's unchallenged opinion he lost 80% of the use of his back is substantial evidence that he has lost 50% or more of the use of his back. Pruitt, supra, and Linen, supra.

II A.
THE COMMISSION SIMPLY DID NOT DETERMINE THAT DR. STOFKO'S OPINIONS WERE THE ONLY CREDIBLE MEDICAL OPINIONS IN THIS MATTER.

The Respondent-Appellant would first ask the Court to take note that while the Appellants-Respondents use the phrase that Dr. Stofko's opinions were the "only credible medical opinions" in this matter, the Commissioner does not make that Finding of Fact anywhere in his Findings of Fact or Order. (Order, 06/21/24). The Respondent-Appellant would also ask the Court to note that throughout the argument on this issue and in their arguments that the Appellants-Respondents copiously refer to the Record **except** in reference to that statement/allegation.

Argument II A. is actually a restatement of why the Appellants-Respondents do not think the other evidence in the Record warrants consideration. The actual reference to Dr.

Stofko's actual evidence consists of several sentences in the first paragraph and after attacking, in an attempt to discredit the evidence from the Respondent-Appellant, the last conclusory sentence is that the Commission again correctly determined that Dr. Stofko's opinions were the "only credible medical opinions".

First, in reference to this argument, again, Dr. Stofko never endorsed the impairment rating of 5% to the whole person given by, not Alana Cole, PA, but by CORA Physical Therapy. (Def. APA, 02/28/24, pp. 63-64). There is no reference in the visit with Alana Cole on January 8, 2020, to an impairment evaluation or even her review of anything from CORA Physical Therapy, and the only mention of it is in the Form 14B completed by Alana Cole, PA four days after the date of the last treatment visit on January 8th. (Def. APA, 02/28/24, p. 24). That impairment rating was a whole person impairment rating which was not converted as both this Court and the Supreme Court, specifically in both Clemmons, supra, and in Paulino, supra, says needs to be done in reference to the consideration of the evidence on loss of use of the back, and under the substantial evidence Rule.

The Appellants-Respondents then again attack the three doctors, Dr. Poletti, Dr. Forrest and Dr. Buncher, and their opinions. They erroneously attack and attribute their opinions to consideration of issues outside of the thoracic spine.

However, they cannot get around the fact, the uncontested evidence and the reliable, probative and substantial evidence in the Record that the impairment ratings assigned by all three of those doctors were to the **thoracic spine**, not any other part of the back and were attributed to specifically the T12 fracture. The Respondent-Appellant would point the Court to the claimant's APA Submissions pp. 15, 19b, and 28. As to the other evidence from these doctors in reference to the functional loss of use that the Respondent-Appellant has of his back, the Respondent-Appellant will leave it to the Court's reading but would submit that the Court will find that their opinions concerning his ability to use his back to do work are not based on the functional capacity evaluation. In fact, Dr. Leonard Forrest in his initial/first evaluation conducted on **July 22, 2020**, conducted before the functional capacity evaluation, after stating the opinion that in his opinion Mr. Morales was not at maximum medical improvement, and to refute the Appellants-Respondents' efforts to claim all of the other evidence as tainted by the functional capacity evaluation that:

> "with respect to work for Mr. Morales, at the present time I don't believe he is capable of meaningful, gainful employment. His need to lie down during the day most days to lessen his prominent pain would preclude that. With treatment, ideally he would improve functionally as well as symptomatically." (Cl. APA, p. 19).

The Respondent-Appellant will not bore the Court with the entire quote, but quoting from Dr. Forrest's report of January 20, 2021, from his second evaluation in reference to work:

> "However, **as I stated in my 07/22/20** report, and confirmed again today with Mr. Morales, although he can do such level of activity, he is not able to continue to be active throughout a day. I confirmed, again, with him that he needs to take frequent breaks and also lay down most days, and sometimes twice a day... as such ... he is most probably not capable of meaningful, gainful employment." (Emp. add.)

In addition, this Court and the Supreme Court have on multiple occasions affirmed an award of 50% loss of use of the back based exclusively or mainly upon the testimony of the claimant as to the loss of use of his back to do work requiring the use of his back. See, for example, this Court's decision in Pruitt v. Thermo-Kinetics Industries, Inc., supra, and Linen v. Ruscon, supra, and the Supreme Court in Lyles v. Quantum Chemical Co., supra, as referred to in Paulino. Thus, the substantial evidence in the Record establishes that the claimant is entitled to an award for having lost 50% or more of the functional use of his back to do work and/or is entitled to an award for total and permanent disability based on a loss of earning capacity wherein based on his age, education, background and experience, the jobs that he can perform which are so limited in quality, quantity or dependability that a reasonably stable job market for him does not exist. That "essential" issue for decision **is not even**

addressed by the Hearing Commissioner nor the Commission in any of their Findings of Fact or Conclusions of Law. **The Commission's job and responsibility and duty**, well before all the statutory mandates were put in place per the Court's, Drake v. Raybestos-Manhattan, Inc., 241 S.C. 116, 127 S.E.2d 288 (1962):

> "Thus duty on the part of the Commission requires that not only must findings of fact be made upon the **essential factual issues** but that **they be sufficiently definite and detailed** to enable the appellate court to properly determine **whether the findings of fact are supported by the evidence** and whether **the law has been properly applied to those findings**."

The Commission made no Findings here on SC Code §42-9-10(A).

Finally, the facts in this case are almost identical to those in this Court's decision in Dent v. East Richland Cty. Pub. Serv. Dist., 423 S.C. 193, 813 S.E.2d 886, reh. den. (SC App. 2018), and the same decision should be made.

CONCLUSION

For the foregoing reasons, the Commission did not err in not granting the credit for overpayment of temporary disability benefits to Mr. Morales as claimed by the Appellants-Respondents since January 8, 2020. The Commission also erred by not awarding the Respondent-Appellant an award for total and permanent disability based on the reliable, probative, and substantial evidence in the Record, which includes the uncontested testimony

from the claimant that he had lost 80% of the functional use of his back to do work requiring the use of his back. No where in the Commissioner's Order does he find the Respondent-Appellant to be not credible and relied in part on his testimony to make the Findings of Fact that he did make, but did not address his testimony in reference to either his work or the loss of use of his back.

Respectfully submitted,

Preston F. McDaniel, Bar #3770
McDANIEL LAW FIRM
1315 Elmwood Avenue
Columbia, SC 29201
(803) 771-7211

and

Don C. Gibson, Bar #2466
GIBSON LAW FIRM, LLC
Post Office Box 60669
North Charleston, SC 29419
(843) 744-1887

Attorneys for Respondent-Appellant

August 18, 2025