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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE
SOUTH CAROLINA WORKER'S COMPENSATION COMMISSION

Honorable R. Michael Campbell, II, Commissioner
Honorable Cynthia C. Dooley, Commissioner
Honorable Aisha Taylor, Commissioner

SCWCC File No. 1925782

Appellate Case No. 2025-001254

Bilma Sanchez-Martinez,
Claimant

Appellant,

v.

Techtronic Industries, N.A.,
Employer, and Ace American
Ins. Co., Carrier

Respondents.

INITIAL BRIEF OF THE APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. The Single Commissioner and Full Commission erred in finding that the Claimant had achieved maximum medical improvement and such finding is clearly erroneous in view of reliable, probative, and substantial evidence in the whole record. Although whether a Claimant has achieved maximum medical improvement is usually a question of fact for the Commission, the question becomes an issue of law when the evidence points to only one conclusion or when the Commission's findings are based on surmise, speculation, or conjecture. In the instant matter, all evidence leads to the conclusion that the Claimant has not achieved maximum medical improvement, and instead, the *only* conclusion that can be reached from the evidence in the record is that the Claimant has *not* achieved maximum medical improvement for the admitted injury to her left foot.
2. The Single Commissioner and Full Commission erred in finding that the Claimant had achieved maximum medical improvement and such finding is arbitrary and/or capricious and/or characterized by abuse of discretion and/or clearly unwarranted exercise of discretion. In the instant matter, all evidence leads to the conclusion that the Claimant has not achieved maximum medical improvement, and instead, the *only* conclusion that can be reached from the evidence in the record is that the Claimant has *not* achieved maximum medical improvement for the admitted injury to her left foot.
3. Every single issue alleged by the Appellant to be erroneous on appeal is resolved if the Single Commissioner had not *incorrectly* found that the Claimant had achieved maximum medical improvement—(1) whether Claimant was provided treatment consistent with the Consent Order, (2) whether the Claimant had suffered any permanent impairment, (3) whether the Claimant has any permanent work restrictions, (4) whether Defendants were entitled to

terminate TTD benefits—all these issues are resolved if the Single Commissioner had not *incorrectly* found that the Claimant had achieved maximum medical improvement. There is no evidence in the record as a whole to support the aforementioned finding(s) and conclusion.

4. It is respectfully submitted that the Single Commissioner erred in the following findings of fact:

- a. Defendants provided treatment with Dr. David Barcel on May 20, 2023 which was a doctor of their choosing pursuant to the Consent Order.
- b. Dr. Barcel opined that she has reached MMI for her compensable injury to the left foot. (Depo Tr. p. 15, ln 1-3).
- c. Dr. Barcel opined that Claimant has no permanent impairment as a result of her work accident/injury (Depo. Tr. p. 15, 4-7), and would not need additional or future medical treatment. (Depo Tr. p. 15, ln 8-12).
- d. Dr. Barcel opined that Claimant has no permanent work restrictions. (Depo Tr. p. 15, ln 13-18).
- e. Dr. Barcel opined within a reasonable degree of medical certainty that Claimant's condition of flatfoot is not related to her employment and while he would recommend treatment for the unrelated condition, he does not recommend any treatment or believe she has sustained an impairment due to the work accident. (Depo. Tr. p. 16)
- f. Dr. Barcel opined that Claimant's condition of flatfoot likely warrants more treatment but that this condition is not related to her work accident. (Depo. Tr. p. 26-29)
- g. The undersigned grants greater weight to the opinion of Dr. Barcel over any of the other doctors as he is a board certified orthopedic surgeon.
- h. Claimant has reached MMI for her compensable injury.

- i. The only doctor stating that her flat foot was pre-existing and this has redefined the baseline as 0%. Thus, Claimant has sustained zero impairment from the May 30, 2023 visit.
 - j. Claimant is not entitled to any award of PPD benefits as she has not sustained any permanent disability.
 - k. Defendants may terminate payment of TTD benefits and are entitled to a credit for overpayment of TTD benefits from June 12, 2023.
5. It is respectfully submitted that the Single Commissioner erred in the following Conclusions of Law:
 - a. Pursuant to § 42-15-60, Claimant was evaluated by Dr. Barcel who opined within a reasonable degree of medical certainty that she had reached MMI as of May 30, 2023.
 - b. Pursuant to § 42-9-30, Claimant has not sustained any loss of use of her left foot and is not entitled to any award of PPD benefits.
 - c. Pursuant to § 42-9-10, Claimant has reached MMI and is not entitled to TTD benefits beyond June 12, 2023, the date of the filing of Form 21/Hearing Request.
 - d. Pursuant to § 42-9-10, Defendants are entitled to a credit of overpayment of TTD benefits paid after June 12, 2023.
6. It is respectfully submitted that the Single Commissioner erred in the following Order: “IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Claimant has reached MMI for her compensable injury and has not sustained any degree of permanent partial disability and thus is not entitled to any award of additional benefits, indemnity or medical. Further, Defendants may terminate payment of TTD benefits and are entitled to a credit for

overpayment of TTD benefits from June 12, 2023, the date of the filing of Form 21/Hearing Request.”

7. The Single Commissioner and Full is arbitrary and/or capricious and/or characterized by abuse of discretion and/or clearly unwarranted exercise of discretion in finding and/or concluding that on the one hand (1) the Claimant was still in need of treatment for her admitted injury while at the same time (2) finding and concluding that the Claimant had achieved maximum medical improvement for her admitted injury.

STATEMENT OF THE CASE

This claim arises out of an admitted repetitive motion injury to the Claimant's left foot occurring on or about January 24, 2022. After extensive discovery—and on the eve of a hearing to determine compensability scheduled October 18, 2022—the Parties entered into a Consent Order dated December 7, 2022.¹ **By way of consent, the Parties most notably agreed that: (1) The Claimant sustained a compensable injury to her left foot as a result of repetitive trauma, and (2) the Defendants shall provide causally-related medical treatment for Claimant's left foot injury.**

After several months, Defendants finally scheduled an evaluation with Dr. Barcel on May 30, 2023. As a result of this evaluation, Defendants took the position that Claimant had achieved maximum medical improvement, suspended any further treatment, and filed a Form 21 to suspend benefits. A hearing was set for May 20, 2024.

At the Single Commissioner hearing and the Full Commission hearing, both parties presented their positions on various issues. Defendants admitted that Claimant sustained a compensable, repetitive motion injury to the left foot pursuant to the Consent Order dated December 7, 2022. Defendants further contended that Claimant had achieved maximum medical improvement as per Dr. Barcel's opinion and sought (1) an Order to terminate payment of TTD benefits, (2) an award of PPD benefits, if any, and (3) a credit for overpayment of temporary compensation back to the date on which the Form 21/Hearing Request was filed, June 12, 2023. Conversely, Claimant contended that she had not achieved maximum medical improvement for her compensable left foot injury and sought ongoing TTD benefits as well as additional medical

¹ Consent Order dated December 7, 2022.

treatment for the left foot as recommended by Dr. Barcel.²

More specifically, Defendants contended that pursuant to prior Consent Order, they admitted Claimant sustained a compensable injury to the left foot and provided causally related medical treatment with Dr. Barcel, an orthopedic doctor specializing in foot/ankle injuries and conditions. Defendants continued, arguing that Dr. Barcel evaluated Claimant and opined within a reasonable degree of medical certainty that she had reached MMI for her injury and that the Claimant had sustained zero impairment. Defendants further argued that Dr. Barcel opined that Claimant would not need further medical treatment related to her work injury. Defendants also contended that they were entitled to terminate payment of temporary total disability benefits and that they should be afforded a credit for overpayment of temporary compensation back to June 12, 2023, the date on which they filed the Form 21/Hearing Request. Additionally, Defendants contended that Claimant had not suffered any permanent partial disability and was not entitled to an award of any further benefits, indemnity or medical. Defendants further contended that while Claimant relies on the opinion of Dr. Clemow for further medical treatment, Dr. Clemow had not seen the Claimant in over two years and Dr. Barcel is the most recent physician to evaluate and treat her. As such, Defendants contended that Dr. Barcel's opinion should be given the most weight.³

Claimant contended that the issue of whether the Claimant's foot injury was compensable and causally related to the Claimant's employment with the Defendant Employer had already been decided by the Consent Order dated December 7, 2022. Claimant noted that although Dr. Clemow *and* Dr. Barcel (ATP) *disagreed* as to the causal relationship between the injury and the work

² See Full Commission Hearing Transcript.

³ *Id.*

condition, both physicians *did* agree as to the diagnosis of injury and the recommended treatment. Claimant argued that Dr. Barcel's opinion regarding causal relationship was irrelevant as the issue of causal relationship had already been decided by the Consent Order dated December 7, 2022, however, Claimant further contended that Defendants had *not* provided treatment consistent with the Consent Order dated December 7, 2022. Claimant argued that Dr. Barcel testified that Claimant continues to suffer from the same condition which the Defendants have admitted is compensable and that Claimant needs further treatment for same. Claimant also argued that she was in need of additional treatment and that she had not achieved MMI. Claimant relied upon the opinion of Dr. Clemow and Dr. Barcel to support her position that she is in need of additional treatment.⁴

⁴ See Full Commission Hearing Transcript.

STANDARD OF REVIEW

The standard of review in the instant matter is governed by S.C. Code § 1-23-380. The review must be confined to the record.⁵ The Court may not substitute its judgment for the judgment of the Full Commission as to the weight of the evidence on questions of fact and may only affirm or remand the case for further proceedings.⁶ However, the Court may reverse or modify the decision of the Full Commission if substantial rights of the Appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: (a) in violation of constitutional or statutory provisions, (b) in excess of the statutory authority of the agency, (c) made upon unlawful procedure, (d) affected by other error of law, (e) clearly erroneous in view of reliable, probative, and substantial evidence in the whole record, or (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.⁷ Claimant/Appellant asserts, as grounds for appeal, that the Single Commissioner's and Full Commission's findings, inferences, conclusions, and/or decisions (1) are clearly erroneous in view of the reliable, probative, and substantial evidence in the whole record and (2) are arbitrary, capricious, and/or characterized by abuse of discretion.

⁵ S.C. Code § 1-23-380(4).

⁶ S.C. Code § 1-23-380(5); *see also Potter v. Spartanburg*, 395 S.C. 17, 716 S.E.2d 123 (S.C.App. 2011)

⁷ *Id.*

ARGUMENT

- I. **THE SINGLE COMMISSIONER AND THE FULL COMMISSION ERRED IN FINDING THAT THE CLAIMANT HAD REACH MAXIMUM MEDICAL IMPROVEMENT FOR HER ADMITTED INJURY TO THE LEFT FOOT AND THERE IS NO EVIDENCE IN THE RECORD AS A WHOLE TO SUPPORT THAT FINDING AND/OR CONCLUSION OF LAW.**
- II. **THE PREPONDERANCE OF THE EVIDENCE REVEALS THAT DR. BARCEL DID NOT OPINE THAT CLAIMANT HAD ACHIEVED MAXIMUM MEDICAL IMPROVEMENT. INSTEAD, DR. BARCEL OPINED THAT THE CLAIMANT'S COMPENSABLE CONDITION WAS NOT RELATED TO WORK, THEREBY LEADING DR. BARCEL TO CONFLATE THE ISSUE OF CAUSAL RELATIONSHIP TO WORK WITH THE ISSUE OF MAXIMUM MEDICAL IMPROVEMENT. THE SINGLE COMMISSIONER ERRED IN RELYING ON DR. BARCEL'S CAUSATION OPINION IN FINDING THAT THE CLAIMANT HAD ACHIEVED MAXIMUM MEDICAL IMPROVEMENT FOR HER COMPENSABLE CONDITION.**
- III. **EVERY PHYSICIAN INVOLVED IN THE CLAIMANT'S TREATMENT AGREED THAT THE CLAIMANT'S COMPENSABLE CONDITION WAS THE ROOT CAUSE OF HER LOWER EXTREMITY ISSUES. THERE WAS NO DEVIATION IN ANY OF THE MEDICAL OPINIONS IN THE RECORD AS TO THE CLAIMANT'S HISTORY, PRESENTATION, AND RECOMMENDATION FOR CONTINUED TREATMENT REGARDING THE CLAIMANT'S COMPENSABLE INJURY. THE ONLY DIVERGENCE OF OPINION THROUGHOUT THE MEDICAL RECORD IS WHETHER THE CLAIMANT'S COMPENSABLE CONDITION WAS CAUSALLY RELATED TO WORK—AN ISSUE THAT HAD ALREADY BEEN DECIDED BY CONSENT ORDER.**

Claimant contends that the Single Commissioner and Full Commission erred in various findings of fact, in various conclusions of law, and ultimately, in their Order(s). However, all the issues on appeal stem from the finding by the Single Commissioner and Full Commission that the Claimant has achieved maximum medical improvement according to Dr. Barcel (the Defendants'/Respondents' Expert physician).⁸ Every single issue on appeal is resolved if the Single Commissioner and/or Full Commission had not *incorrectly* found that the Claimant had achieved maximum medical improvement—(1) whether Claimant was provided treatment

⁸ Full Commission Order, Finding of Fact 21 and Conclusions of Law 3 and 5.

consistent with the Consent Order, (2) whether the Claimant had suffered any permanent impairment, (3) whether the Claimant has any permanent work restrictions, (4) whether Defendants were entitled to terminate Temporary Total Disability benefits—all these issues are resolved if the Single Commissioner and Full Commission had not *incorrectly* found that the Claimant had achieved maximum medical improvement. In the following paragraphs, the undersigned will show, with specificity, that the Single Commissioner and Full Commission were clearly erroneous and/or capricious and/or arbitrary in finding that the Claimant had achieved maximum medical improvement, and in turn, *incorrectly* found that (1) the Claimant *has* achieved maximum medical improvement, (2) the Claimant was *not* entitled to additional treatment, and (3) the Claimant had *not* suffered any permanent partial impairment. The undersigned will also show that the Claimant was *never* provided treatment consistent with the Consent Order dated December 7, 2022⁹, and in lieu thereof, the Claimant was made to submit to an IME to determine issues that had already been decided—causality and compensability—and that there was never *any* intention of providing Claimant with treatment consistent with the aforementioned Consent Order.

It should be noted that the undersigned certainly does not dispute the Finding by the Single Commissioner and the Full Commission that “the greater weight of the evidence supports that Claimant has a pre-existing condition aggravated by her employment with [the Defendant Employer]”¹⁰ and the Conclusion that “[p]ursuant to § 42-1-160, Claimant sustained a compensable injury to the left foot... due to repetitive trauma.”¹¹ However, although not an issue on appeal, the method by which the Single Commissioner and Full Commission *reached* this

⁹ See Consent Order dated December 7, 2022.

¹⁰ Full Commission Order p. 8, Finding of Fact No. 19.

¹¹ Full Commission Order p. 9, Conclusion of Law No. 2.

conclusion was error (albeit, harmless). Again, the issues of causality and compensability *had already been decided* by consent of the parties pursuant to the Consent Order dated December 7, 2022,¹² and therefore, the issues of causality and compensability were not properly ruled upon by the Single Commissioner nor Full Commission.

Put plainly, there is not a single note or opinion in the record as a whole that states that the Claimant has achieved maximum medical improvement *for her current, compensable condition*. In fact, in both his evaluation notes and in his deposition, Dr. Barcel (the Defendant’s Expert physician) opined that the Claimant still needed treatment for her current, compensable condition. In his note dated May 30, 2023, Dr. Barcel stated:¹³

Plan:
 The client certainly has features of an adult acquired flatfoot with posterior tibial tendon dysfunction. Her symptoms started atraumatically in October 2021. There was no specific injury. There is no sign that she had any specific ligament or tendon tear that would explain progression of flatfoot and there are no specific tears identified on her MRI. I do suspect that she may benefit from a flatfoot reconstruction, however I do not feel that I can say to a reasonable degree of medical certainty that her adult acquired flatfoot and posterior tibial tendon deficiency as well as any other above-mentioned diagnosis is causally related to any specific workplace injury or workplace causative factor. Certainly she does have a demanding job and she is on her feet quite a bit but the development of this condition is more likely than not unrelated to any specific work injury nor any workplace condition or factor. The development of adult acquired flatfoot can happen unilaterally or bilaterally there is likely a genetic component and again in the absence of a specific injury with an obvious discrete tear of the posterior tibial tendon or the spring ligament or other identified fracture or ligamentous injury I do not feel again that this is causally related to her work. **It is likely that she will require a flatfoot reconstruction at some point in her future and if needed at any point I am happy to provide the details of what that would be and this would likely improve her symptoms. She has tried and failed appropriate conservative management.**

Dr. Barcel reiterated his opinion regarding the need for additional treatment in his deposition¹⁴:

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|--|---|
| 1 alignment. | 1 in the treatment toolbox. Occasionally, we may use |
| 2 Q Okay. | 2 injections to help alleviate pain. That doesn't really |
| 3 A And that, I think, was pretty clear from that visit. | 3 change the shape of her foot. Physical therapy, I |
| 4 Yeah. | 4 think, can be beneficial. It can help strengthen |
| 5 Q Fair enough. There -- you may have touched on this, | 5 muscles and provide additional strength to an ankle |
| 6 but I'm going to try to be more specific. | 6 that maybe is somewhat dysfunctional. It's probably |
| 7 A Okay. | 7 not going to change the shape of the foot, but it could |
| 8 Q It appears, towards the end of your plan, that there's | 8 help with their condition and maybe help them avoid |
| 9 a suggestion that she may benefit from a procedure to | 9 surgery. And if they fail all that, and if their |
| 10 help with her current condition, regardless of whether | 10 symptoms are severe enough, then it would be reasonable |
| 11 it's related to work. | 11 to do something more. And in her case, if she had |
| 12 A That's correct. | 12 failed those things, surgery to reconstruct her |
| 13 Q Right? And do you still feel -- | 13 flatfoot would be reasonable. And so, yeah, and it -- |
| 14 A Yes. | 14 I don't know if you have questions about what that |
| 15 Q -- that she would benefit from additional treatment? | 15 would be? |
| 16 A Yeah, I think, you know -- and usually, with somebody | 16 Q No, no. I -- honestly, it would probably go right over |
| 17 like this, I would, you know, obviously get to know | 17 my head. Right? If I'm being fair. So, what I -- |
| 18 them with time, try my own set of conservative | 18 what I was getting at is this, though. So, it sounds |
| 19 treatment options, and it would depend on what all | 19 to me -- and correct me if I'm wrong here -- the way |
| 20 they've tried and what they might still need to try. | 20 the patient presented to all of the medical providers |
| 21 In general, the way I think about this condition was a | 21 is fairly consistent. Is that correct? |
| 22 separate-from-work is what's in the -- I always say | 22 A It does seem that way. |
| 23 what's in the toolbox to treat this condition? Well, | 23 Q And it seems like the recommendations for treatment, |
| 24 there may be medications such as anti-inflammatories, | 24 both treatment that had already been performed and |
| 25 she tried. Bracing and orthotics is another category | 25 treatment that may have been recommended, seemed to be |

¹² See Consent Order dated December 7, 2022.

¹³ APA p. 39

¹⁴ Deposition Transcript of Dr. Barcel, p. 26, line 8 through p. 27, line 13.

In fact, when asked whether there was any disagreement by the various medical providers as to the Claimant's need for additional treatment for her compensable condition, Dr. Barcel stated in his deposition that there was no disagreement regarding presentation, diagnosis, and recommended treatment¹⁵:

| Page 27 | Page 28 |
|---|---|
| 1 in the treatment toolbox. Occasionally, we may use | 1 fairly consistent. Is that correct? |
| 2 injections to help alleviate pain. That doesn't really | 2 A Yes. |
| 3 change the shape of her foot. Physical therapy, I | 3 Q And of course, the diagnoses are -- seem to be |
| 4 think, can be beneficial. It can help strengthen | 4 consistent. Is that correct? |
| 5 muscles and provide additional strength to an ankle | 5 A Yes. |
| 6 that maybe is somewhat dysfunctional. It's probably | 6 Q Okay. And, so, really the only disagreement, if you |
| 7 not going to change the shape of the foot, but it could | 7 will -- |
| 8 help with their condition and maybe help them avoid | 8 A Is whether there's causation. |
| 9 surgery. And if they fail all that, and if their | 9 Q -- is the causal relationship. |
| 10 symptoms are severe enough, then it would be reasonable | 10 A And I hear what you're saying. I'm not sure what kind |
| 11 to do something more. And in her case, if she had | 11 of physician Dr. Clemow is. |
| 12 failed those things, surgery to reconstruct her | 12 Q Sure. |
| 13 flatfoot would be reasonable. And so, yeah, and it -- | 13 A I would assume it's not a foot and ankle specialist, |
| 14 I don't know if you have questions about what that | 14 because they ended up referring this patient to a non |
| 15 would be? | 15 M.D. provider podiatrist, Dr. Bastian. And I would |
| 16 Q No, no. I -- honestly, it would probably go right over | 16 just say the difference in opinion, I think, comes in |
| 17 my head. Right? If I'm being fair. So, what I -- | 17 this regard. |
| 18 what I was getting at is this, though. So, it sounds | 18 Q Sure. |
| 19 to me -- and correct me if I'm wrong here -- the way | 19 A From experience and understanding of this condition, I |
| 20 the patient presented to all of the medical providers | 20 think -- they got the right diagnosis. I think they |
| 21 is fairly consistent. Is that correct? | 21 did some conservative treatment options that were |
| 22 A It does seem that way. | 22 moving in the right direction. But I think if you have |
| 23 Q And it seems like the recommendations for treatment, | 23 a full understanding of this condition, to me, if I |
| 24 both treatment that had already been performed and | 24 really sit there and think about what she has, if I had |
| 25 treatment that may have been recommended, seemed to be | 25 to -- and again, it's -- and I know what you guys need. |

Respectfully, based on the above, the finding that the Claimant has achieved MMI is not supported by *any* evidence in the record. Again, not a single note or opinion exists to support a finding that the Claimant has achieved MMI *for her current, compensable condition*. The record, as a whole, is devoid of any evidence to support that finding and/or conclusion of law.

The undersigned speculates that the confusion may lie in Dr. Barcel's opinion that the Claimant's compensable condition was not related to work. Because Dr. Barcel opined that the Claimant's compensable condition was not related to work, he further opined that as to any *work-*

¹⁵ Deposition Transcript of Dr. Barcel, p. 27, line 23 through p. 28, line 2.

related issue, the Claimant had achieved maximum medical improvement.¹⁶ However, if one were to read a little further in that same line of questioning, Dr. Barcel also stated that the Claimant suffered from disability and/or dysfunction as a result of her condition, but because he did not believe that the compensable condition was related to work—again, an issue that had already been decided by consent of the parties—Dr. Barcel did not assign an impairment for *any injury related to work*¹⁷:

| | | |
|---|---|--|
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| 1 Q All right. So, all -- so, based on your physical exam | 1 essentially, from a work perspective, would she be then | 1 degree of medical certainty that whatever happened to |
| 2 and her HPL, your assessment here from this report, | 2 at MMI at this point? | 2 her, the development of this condition was clearly |
| 3 what -- what was your -- what were your findings? And | 3 A I would say yes. | 3 causally related and, as a result, I wouldn't say that |
| 4 you can -- I guess, your plan also says that. | 4 Q Okay. Does she have any impairment that would be -- | 4 I have a restriction for her from a work standpoint. |
| 5 A Yeah, I just felt like this was -- I felt like this was | 5 that you could say to reasonable degree of medical | 5 But if she came to me separate from a workplace injury, |
| 6 a pretty standard flatfoot. I don't feel like I | 6 certainty is caused by her working conditions? | 6 there's a chance I might say, hey, you need to restrict |
| 7 identified any specific acute injuries. Nothing that | 7 A No. | 7 your work based on that. But I feel like that's a |
| 8 was, like, clearly torn or broken, based on an injury. | 8 Q Okay. Does she require any future medical treatment | 8 separate thing. Is that correct? Am I thinking of |
| 9 She didn't really describe an injury. And, so, I think | 9 that you would be able to say to a reasonable degree of | 9 that correctly? |
| 10 the question probably really right now is -- and maybe | 10 medical certainty are a result of her working | 10 Q Well, I think what you're saying is, based on what |
| 11 I'm jumping, beating y'all to this question, but was | 11 conditions that she described to you? | 11 she's described to you from her working conditions, |
| 12 this an exacerbation of a preexisting condition, and my | 12 A No. | 12 that her symptoms are not caused to a reasonable degree |
| 13 suspicion is, with this, that most likely and to a | 13 Q Okay. And does she require any permanent restrictions | 13 of medical certainty -- |
| 14 reasonable degree of medical certainty, this was the | 14 that you could say to a reasonable degree of medical | 14 A Not caused, yeah. |
| 15 natural progression of her flatfoot and that would not | 15 certainty would be -- | 15 Q -- or caused by that and, therefore, impairment or |
| 16 be really caused by her work. | 16 A Not based on a workplace accident, no. | 16 permanent restrictions wouldn't necessarily be caused |
| 17 Q Okay. | 17 Q Okay. The conditions that she had described to you for | 17 by that -- |
| 18 A And I know the question might be, well, if it's an | 18 her work. | 18 A Correct. |
| 19 active job, but, I mean, this could just as easily have | 19 A No. | 19 Q -- but it could be assigned to her underlying |
| 20 happened walking through the grocery store. I mean, I | 20 Q Okay. | 20 condition? |
| 21 have patients who are completely sedentary who have | 21 A And let me just clarify that, just simply because I do | 21 A Correct. Yeah, just an underlying condition could |
| 22 this same constellation of symptoms with just simple | 22 think that this condition can be painful and cause | 22 progress, just as we're seeing and then resulting in |
| 23 walking, you know. And, yeah, so that was sort of, I | 23 dysfunction. So, it's possible that a demanding job | 23 some difficulty with activity. |
| 24 think, my assessment overall. | 24 may not be possible with this condition. I just can't | 24 Q Okay. That makes sense. I understand that. Well, |
| 25 Q Okay. Now, based on that assessment, would she be -- | 25 safely say and comfortably say, again, to a reasonable | 25 Doctor, do you -- have all the answers that you've |

The record reveals that Dr. Barcel did *not* opine that Claimant had achieved maximum medical improvement. Instead, Dr. Barcel opined that the Claimant's compensable condition was not related to work, and quite frankly, Dr. Barcel's opinion as to compensability is irrelevant. **It is clear that Dr. Barcel conflates the issue of causal relationship to work with the issue of maximum medical improvement.** The Single Commissioner and Full Commission erred in relying on Dr. Barcel's opinion regarding causation to find that the Claimant had achieved maximum medical improvement for her current, compensable condition.

¹⁶ Deposition of Dr. Barcel, p. 14, line 25 through p. 15, line 16.

¹⁷ Deposition of Dr. Barcel, p. 15, line 22 through p. 16, line 23.

The only *other* issue to consider in an attempt to make sense of the Single Commissioner's and Full Commission's glaring error in their Orders is whether the condition that Dr. Barcel is referencing is the only condition that the Claimant has suffered or if there is some other condition that Dr. Barcel might be referencing as the root cause of the Claimant's condition. That issue is resolved rather easily in Dr. Barcel's deposition¹⁸:

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1 A Yeah. So, no evidence of tarsal tunnel syndrome by
2 that test. And that's a pretty -- a pretty sensitive
3 and specific test to get.
4 Q Okay.
5 A So, just kind of moving through the physical exam, we
6 did note that she had flatfoot. There's a lot of fancy
7 words in this note to describe that, but think of it as
8 a flatfoot.
9 Q Is that, when I look at your assessment, and I see, you
10 know, posterior tibial tendon dysfunction, and left
11 flat foot malalignment --
12 A Yes.
13 Q Is that, essentially, all --
14 A All of that, everything that's written there, the left-
15 sided posterior tibial tendon dysfunction goes along
16 with the left flatfoot, a.k.a. pes planovalgus foot
17 deformity. And --
18 Q What about the tenosynovitis?
19 A That's part of the tendon dysfunction. As the tendon
20 becomes dysfunctional, it's -- that's like tendon
21 dysfunction and inflammation.
22 Q Okay.
23 A The same tendon.
24 Q Okay.
25 A Yeah, all that included with that.

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1 some things that you did agree on. It appears that the
2 diagnosis that you highlighted from Dr. Bastian -- I
3 hope I'm pronouncing that correctly --
4 A Uh-huh.
5 Q -- and Dr. Clemow is the same condition that you
6 highlighted in your assessment and plan. Is that --
7 A Yes.
8 Q Is that correct?
9 A That sounds accurate.
10 Q Okay. So, we aren't dealing with --
11 A Different conditions.
12 Q Yeah, we're dealing with the same condition. Correct?
13 A Uh-huh. It sounds like it. Yes, sir.
14 Q Is that a yes?
15 A Yes.
16 Q Okay. And there's just differing opinions about what
17 the causal relationship is between the work condition
18 itself --
19 A Yeah, sure.
20 Q You know, understood. We don't -- we don't have
21 anything right now, absent something that the
22 defendants' counsel might offer, that can give us any
23 more insight into what the work condition was --
24 A Yeah. Yeah, it's tough. You know --
25 MR. RATTRAY: I'm going to make an objection to

Put plainly, *every* physician involved in the Claimant's treatment agreed that the Claimant's current, compensable condition was the root cause of her lower extremity issues. There was no deviation in any of the medical opinions in the record as to the Claimant's history, presentation, and recommendation for continued treatment regarding the Claimant's compensable injury. The only divergence of opinion throughout the medical record is whether the Claimant's compensable condition was causally related to work—an issue that had already been decided by Consent Order. Objectively, there is simply no evidence to support a finding that the Claimant has achieved maximum medical improvement for her compensable injury.

¹⁸ Deposition of Dr. Barcel, p. 13, lines 5 through 25; see p. 24, lines 1 through 19.

IV. THE SINGLE COMMISSIONER AND FULL COMMISSION ISSUED AN ORDER WITH IRRECONCILABLE INCONSISTENCIES THAT BOTH (1) FINDS THAT THE CLAIMANT IS STILL IN NEED OF ADDITIONAL TREATMENT FOR CLAIMANT'S COMPENSABLE, LEFT-FOOT CONDITION YET (2) ALSO CONCLUDES THAT THE CLAIMANT HAS ACHIEVED MAXIMUM MEDICAL IMPROVEMENT (MMI) FOR THAT VERY SAME CONDITION.

Up to this point, Claimant/Appellant has painstakingly argued that the record does not align with the Single Commissioner's and Full Commission's Findings and Conclusions regarding the Claimant's MMI status. In this section, the Claimant/Appellant wishes to highlight how the Single Commissioner's and Full Commission's Findings and Conclusions do not align *with the Single Commissioner's and Full Commission's very own Findings and Conclusions*. As this section's headline suggests, it is respectfully submitted that the Single Commissioner and Full Commission erred in issuing an Order with irreconcilable inconsistencies that on one hand acknowledges that the authorized physician (as well as every other physician) opines that the Claimant is still in need of medical treatment for her compensable, left-foot condition, yet on the other hand finds that the Claimant *has* achieved maximum medical improvement for that same condition.

The Single Commissioner and Full Commission made the following findings regarding compensability of the Claimant's condition:

- **The Single Commissioner and the Full Commission both found that Dr. Barcel (the authorized treating physician) confirmed the diagnosis of left flat foot.¹⁹**
- **The Single Commissioner and the Full Commission both found that the Claimant has a pre-existing condition aggravated by her employment with the Defendant.²⁰**

¹⁹ See Single Commissioner's and Full Commission's Finding of Fact, No. 8.

²⁰ See Single Commissioner's and Full Commission's Finding of Fact, No. 20.

- **The Single Commissioner and the Full Commission both concluded that the Claimant sustained a Compensable injury to the left foot on January 24, 2022, due to repetitive trauma.**²¹

It appearing that the Commission clearly and resoundingly resolves the issue of a compensable, left-foot injury in favor of the Claimant, the Single Commissioner and Full Commission then found the following regarding the Claimant's left-foot injury and the need for additional treatment:

- **The Single Commissioner and the Full Commission both found that Dr. Barcel (the authorized treating physician) opined that the Claimant's flatfoot condition likely warrants more treatment.**²²

It then appearing that the Single Commissioner and Full Commission had clearly found that the Claimant/Appellant has not yet achieved maximum medical improvement for her decidedly compensable left-foot condition, the Single Commissioner and Full Commission inexplicably conclude the following:

- **The Single Commissioner and Full Commission conclude that the Claimant has achieved maximum medical improvement.**²³

Put plainly, *it is not possible* for the Full Commission to find that the Claimant likely needs additional treatment for the condition found to be compensable²⁴ while at the same time concluding

²¹ See Single Commissioner's and Full Commission's Conclusions of Law, No. 2.

²² See Single Commissioner's and Full Commission's Finding of Fact, No. 16.

²³ See Single Commissioner's and Full Commission's Conclusions of Law, No. 5.

²⁴ See Finding of Fact No. 20 and Conclusion of Law No. 2

that the Claimant has achieved maximum medical improvement.²⁵ The finding that Claimant has achieved MMI for her work-related injury is not supported by *any* evidence in the record. The Full Commission disregarded Dr. Barcel's testimony regarding the need for additional treatment, focusing on his causation statement and MMI statement but entirely missing his treatment recommendations for the work-related, compensable, flatfoot condition²⁶—recommendations that clearly demonstrated that the Claimant had not achieved MMI. The Findings and Conclusions made by the Single Commissioner and Full Commission are clearly erroneous in view of the reliable, probative and substantial evidence in the record and the inconsistencies in the Order demonstrate arbitrariness and capriciousness such that the substantial rights of the Claimant/Appellant have been prejudiced.

CONCLUSION

The Finding(s) and Conclusion(s) that Claimant had achieved maximum medical improvement for her work-related injury is not supported by *any* evidence in the record. The Defendant's expert, Dr. Barcel, opined that the Claimant was still in need of treatment for her current condition—the same condition that the Single Commissioner found to be causally related to the Claimant's work condition in the Single Commissioner and Full Commission Order and the same condition that the Parties agreed was causally related in their Consent Order dated December 7, 2022. Respectfully, the Finding(s) that the Claimant has achieved maximum medical improvement for her work-related condition is unsupported by the Record as a

²⁵ See Conclusion of Law No. 3 and No. 5.

²⁶ APA p. 39; *See also* Deposition Transcript of Dr. Barcel, p. 26, line 8 through p. 27, line 13

whole and is clearly arbitrary, capricious and/or an unwarranted exercise of discretion. The Claimant respectfully requests a Finding and Conclusion by this Honorable Court that the Claimant has *not* achieved maximum medical improvement for her compensable injury and that the Claimant is entitled to additional treatment and a continuing award of temporary total disability benefits (as well as backpay of unpaid benefits).

Respectfully submitted,

A handwritten signature in black ink, consisting of the letters 'S' and 'G' in a stylized, cursive font.

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