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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 REPLY BRIEF OF APPELLANTS-RESPONDENTS

CLEMENT RIVERS, LLP
Stephen L. Brown (SC Bar No. 66468)
Robert P. Gruber (SC Bar No. 15581)
Russell G. Hines (SC Bar No. 72100)
Graydon V. Olive, IV (SC Bar No.: 105319)
25 Calhoun Street, Suite 400 (29401)
P.O. Box 993
Charleston, South Carolina 29402
(843) 720-5488
Attorneys for Appellants-Respondents

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ARGUMENT

I. Employer/Carrier are entitled to credit for overpayment of temporary total benefits since January 8, 2020.

A. The law of the case is that Mr. Morales's only compensable injury was the fracture at T12 because Mr. Morales did not appeal the commission's order dated January 11, 2021.

"The commission or any of its members shall hear the parties at issue and their representatives and witnesses and shall determine the dispute in a summary manner." S.C. Code Ann. § 42-17-40(A). "The award, together with a statement of the findings of fact, rulings of law, and other matters pertinent to the questions at issue, must be filed with the record of the proceedings and a copy of the award must immediately be sent to the parties in dispute." *Id.*

"If an application for review is made to the commission within fourteen days from the date when notice of the award shall have been given, the commission shall review the award and, . . . if proper, amend the award." S.C. Code Ann. § 42-17-50. "The award of the commission, as provided in section 42-17-40 [of the South Carolina Code of Laws], *if not reviewed in due time, . . . is conclusive and binding as to all questions of fact.*" S.C. Code Ann. § 42-17-60 (emphasis added).

Here, it is undisputed that on January 11, 2021, the commission made the factual finding that Mr. Morales's only compensable injury was the fracture at his T12 vertebra and denied Mr. Morales's request for additional medical treatment to his neck/cervical spine, shoulders, and lumbar spine. (1/11/21 Order p. 9.) It is

also undisputed that Mr. Morales did not ever appeal this order, let alone within fourteen days. (3/22/22 Order p. 7; 6/21/24 Order p. 5.) Instead of filing an appeal of the commission's January 11, 2021 order, Mr. Morales immediately requested another hearing realleging that the injuries to his neck/cervical spine, shoulders, and lumbar spine were compensable, despite the commission's unappealed factual ruling that they were not causally related to the accident. (6/21/24 Order p. 5; 1/11/21 Form 50; 1/11/21 Order p. 10.) Indeed, Mr. Morales filed the subsequent Form 50 to relitigate the compensability of injuries other than the T12 fracture *on the same day the commission issued its order*. Mr. Morales did not have any new evidence to support his subsequent Form 50 on January 11, 2021, in contrast to Appellants-Respondents. *See* discussion *infra* Section I.B. Mr. Morales was seeking to relitigate the factual issue of compensability for injuries besides the T12 fracture without any new evidence supporting his contention that other injuries were compensable.

Because Mr. Morales did not appeal the commission's January 11, 2021 order, the commissions factual finding that Mr. Morales's only compensable injury was the T12 fracture is the law of the case. *See 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).

B. It is not the law of the case that Mr. Morales did not achieve maximum medical improvement on January 8, 2020.

Employer/Carrier were not required to appeal the commission's initial finding that Mr. Morales had not yet achieved maximum medical improvement ("MMI"). While the commission initially found that Mr. Morales had not yet achieved MMI in its January 11, 2021 order, Dr. Stofko's Form 14B dated January 12, 2021 was not available for its review. Once Employer/Carrier received Dr. Stofko's Form 14B, they timely filed a Form 21 on February 5, 2021 to terminate temporary benefits using the date of MMI Dr. Stofko provided. Because Dr. Stofko's Form 14B was not presented to the single commissioner, a Form 21 request for a new hearing based on the new evidence was appropriate.

In contrast to Respondent-Appellants, Mr. Morales immediately filed a subsequent Form 50 on January 11, 2021—the same day the commission issued its order—without any new evidence instead of filing an appeal. *See* discussion *supra* Section I.A. Mr. Morales did so in an attempt to relitigate the commission's factual finding that his only compensable injury was the T12 fracture. Accordingly, Mr. Morales's contention that it is the law of the case that he did not achieve MMI on January 8, 2020 is without merit.

C. The record contains substantial evidence that supports the commission's finding that Mr. Morales achieved maximum medical improvement on January 8, 2020.

"MMI is a factual determination left to the discretion of the appellate panel." *Gadson v. Mikasa Corp.*, 368 S.C. 214, 224, 628 S.E.2d 262, 268 (Ct. App. 2006).

After considering Dr. Stofko's opinion that Mr. Morales achieved MMI on January 8, 2020 and had a five percent permanent impairment rating to his back, the commission subsequently made the factual finding that Mr. Morales achieved MMI on January 8, 2021. The commission weighed all the evidence presented and did not give any weight to the medical opinions presented besides Dr. Stofko's opinions in his Form 14B. *See* discussion *infra* Section II.A.

Simply put, Dr. Stofko determined on January 8, 2020 that Mr. Morales had reached a plateau such that, in his opinion as the treating physician, no future medical care or treatment would lessen the period of impairment. The commission agreed with Dr. Stofko's MMI opinion and made the factual finding that Mr. Morales achieved MMI on January 8, 2020. MMI is a factual decision left to the discretion of the commission, and Dr. Stofko's opinion is substantial evidence that supports the commission's factual finding that Mr. Morales achieved MMI on January 8, 2020. Accordingly, Employer/Carrier are entitled to credit for overpayment of temporary total benefits since January 8, 2020.

D. Employer/Carrier was not solely responsible for delays in this matter.

The record simply does not support Mr. Morales's contention that Employer/Carrier caused a one-year delay by waiting to file its Form 21 request for a hearing on terminating temporary compensation. Dr. Stofko's Form 14B was dated January 12, 2021, and Employer/Carrier filed its Form 21 on February 5, 2021. *See* discussion *supra* Section I.B. Employer/Carrier could not have filed its Form 21 earlier because Dr. Stofko's determination that Mr. Morales achieved MMI in that Form 14B was the basis for terminating temporary compensation.[1]

Further, Employer/Carrier was not responsible for any delay between Mr. Morales achieving MMI on January 8, 2020 and Dr. Stofko's Form 14B January 12, 2021. On January 8, 2020, Dr. Stofko saw Mr. Morales, prescribed a round of physical therapy that ended in April of 2020, and instructed Mr. Morales that he could return to work. When Mr. Morales finished physical therapy in April of 2020, he still complained of pain. On July 22, 2020, Dr. Stofko saw Mr. Morales again and ordered an MRI and FCE with percentage impairment ratings. After Dr. Stofko reviewed the results of the MRI and FCE, he concluded that Mr. Morales achieved MMI on January 8, 2020.

[1] Mr. Morales has provided no explanation as to why Employer/Carrier would wait to file its Form 21 seeking termination of temporary compensation. Indeed, it defies logic and reason that Employer/Carrier would not seek that determination as soon as possible.

On January 12, 2021, Dr. Stofko issued his opinions in the Form 14B that Mr. Morales achieved MMI on January 8, 2020 and provided a five percent impairment rating to Mr. Morales's back. Employer/Carrier filed its Form 21 on February 5, 2021 based on Dr. Stofko's Form 14B, and the commission held a hearing on the matter on April 16, 2021. Therefore, Employer/Carrier was in no way responsible for any delay between the date of MMI and the Form 21.

Moreover, Employer/Carrier was not solely responsible for any other delays. After considering Dr. Stofko's opinions, the commission ultimately made the factual finding that Mr. Morales achieved MMI on January 8, 2020. Neither party is responsible for the delay between the hearing held on April 26, 2021 and the commission's issuance of the order on that hearing on March 22, 2022. Additionally, the failure to mediate the case is attributable to both parties. Accordingly, Employer/Carrier are entitled to credit for overpayment of temporary total benefits back to the date of MMI, January 8, 2021. *See Sanders v. MeadWestvaco Corp.*, 371 S.C. 284, 294–95, 638 S.E.2d 66, 72 (Ct. App. 2006) (reversing an appellate panel's decision to not allow credit for overpayment of temporary total benefits back to date of MMI when a delay was caused by both parties).

II. The commission's fourty-five percent permanent partial disability award is not supported by substantial evidence in the record.

A. The commission determined that Dr. Stofko's opinions were the only credible medical evidence presented.

"Where there is conflicting medical evidence . . . the findings of fact of the [c]ommission are conclusive." *Provins v. Spirit Constr. Servs., Inc.*, 433 S.C. 17, 27, 855 S.E.2d 318, 323 (Ct. App. 2021) (quoting *Nettles v. Spartanburg Sch. Dist. # 7*, 341 S.C. 580, 592, 535 S.E.2d 146, 152 (Ct. App. 2000)). "The existence of any conflicting opinions between the doctors is a matter left to the [c]ommission." *Harbin v. Owens-Corning Fiberglas*, 316 S.C. 423, 427, 450 S.E.2d 112, 114 (Ct. App. 1994). "[T]he [appellate panel] is the ultimate fact finder. The final determination of witness credibility and the weight to be accorded evidence is reserved to the [appellate panel]. It is not the task of this [C]ourt to weigh the evidence as found by the [appellate panel]." *Provins*, 433 S.C. at 25, 855 S.E.2d at 322 (first alteration in original).

The commission clearly weighed the evidence presented and discounted all medical evidence besides Dr. Stofko's Form 14B. The commission found that the FCE dated October 23, 2020 carried no evidentiary weight. (10/14/24 Order page 13.) The commission also determined the vocational evaluation carried no evidentiary weight because it was based on the FCE dated October 23, 2020, and the commission had additional due process concerns. (10/14/24 Order page 13-

14.) Further, the commission properly found that Dr. Poletti's opinions carried no evidentiary weight.[2] *See* Section II.A. of Employer/Carrier's Appellants' Brief and Section I.A. of Employer/Carrier's Respondents' Brief.

Additionally, the commission gave Dr. Forrest's opinions no evidentiary weight because they were based on injuries that went beyond the T12 fracture and were also based on the FCE dated October 23, 2020 that was not related to the T12 fracture.[3] (10/14/24 Order page 14.) Finally, the commission gave Dr. Buncher's opinions no evidentiary weight because they were based on body parts that were not compensable. (10/14/24 Order page 14.) Accordingly, Dr. Stofko's opinions were the only credible medical evidence related to Mr. Morales's compensable injury presented to the commission.

1. Dr. Stofko was not required to specifically endorse the opinions of P.A. Cole in the Form 14B.

Employer/Carrier could find no authority that supports Mr. Morales's contention that Dr. Stofko as the treating physicians was required to specifically

[2] While the commission supported its finding with a matter outside the record, substantial evidence supports the commission's determination that Dr. Poletti's opinions carried no evidentiary weight because Dr. Poletti's statements regarding Mr. Morales's medical treatment clearly did not reflect a careful reading of the medical records. *See* Section II.A. of Employer/Carrier's Appellants' Brief and section I.A. of Employer/Carrier's Respondents' Brief.

[3] Again, it is the law of the case that Mr. Morales's only compensable injury is the T12 fracture. *See* discussion *supra* Section I.A.

endorse the opinions of his physician's assistant as his own.[4] Indeed, Dr. Stofko testified that P.A. Cole was an "exten[sion] of me. So all her orders, anything that she's doing is acting under me." (10/14/24 Order page 15; Second Stofko Depo lines 1-11, Defendants' APA p. 457 dated February 28, 2024.) Accordingly, the Form 14B was Dr. Stofko's opinion that Mr. Morales achieved MMI on January 8, 2020 and had a five percent impairment rating to his back, and Dr. Stofko's opinions were the only credible medical evidence presented to the commission.

B. Mr. Morales's testimony that he lost eighty-percent of the use of his back is not competent evidence, let alone substantial evidence, that supports the commission's forty-five percent permanent partial disability award.

The South Carolina Administrative Procedures Act [("APA")] establishes the substantial evidence standard for judicial review of decisions by the [c]ommission." *Potter v. Spartanburg Sch. Dist. 7*, 395 S.C. 17, 22, 716 S.E.2d 123, 126 (Ct. App. 2011) (citing S.C. Code Ann. § 1-23-380). "Under the APA, this court can reverse or modify the decision of the Appellate Panel when the substantial rights of the appellant 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 considering the record as a whole." *McMahan v. S.C.*

[4] While it may be best practice to do so, it is not required. *Cf. S.C. Workers' Comp. Comm'n, Advisory Notice: Settlement Conferences* (Aug. 15, 2013) (providing that the commission requires Forms 14B to be signed by the authorized

Dep't of Educ.-Transportation, 417 S.C. 481, 487, 790 S.E.2d 393, 396 (Ct. App. 2016). "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*, 395 S.C. at 22, 716 S.E.2d at 126 (quoting *Broughton v. S. of the Border,* 336 S.C. 488, 495, 520 S.E.2d 634, 637 (Ct. App. 1999)).

Here, while not an explicit finding, it appears that the commission relied on Mr. Morales's self-serving testimony that he lost eight-percent of the use of his back to support its forty-five percent permanent partial disability award, a drastic upward departure from Dr. Stofko's five percent impairment rating. Mr. Morales's testimony was clearly not competent evidence, and therefore it is not substantial evidence that supports the commission's decision.

First, the record shows that *Mr. Morales returned to work after his fall*. Mr. Morales worked for Integrated Site Management from May 2022 until August 2022, and Flores Construction from August 2022 until November 2022. (12/3/24 Order p. 16; 9/25/23 Morales Depo p. 14, 18, 20.) Additionally, Mr. Morales sustained significant injuries due to a car wreck he caused while intoxicated on December 31, 2022. (Defendant's APA pp. 65-157, dated February 28, 2024; 9/25/23 Morales Depo.) Mr. Morales's return to work after his fall and the significant injuries he

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treating physician in reference to settlement conferences and S.C. Reg 67-

sustained in a car wreck he caused while intoxicated *after his fall* prohibit his testimony from being substantial evidence that he has lost eighty percent of the use of his back *as a result of his compensable injury*.

Again, the T12 fracture is the only compensable injury, and the only credible evidence is that Mr. Morales sustained a five percent impairment rating to his back from that injury. Dr. Stofko considered the five percent whole person impairment rating and assigned a five percent impairment to Mr. Morales's back. Contrary to Mr. Morales's assertion, Dr. Stofko was not bound by the FCE's five percent whole person impairment rating.

Additionally, the record reveals issues that bring Mr. Morales's reliability as a witness into question. Mr. Morales admitted to being in the county illegally, using a fake social security number, and he was found at fault for a causing a significant car accident while intoxicated. Accordingly, the commission's forty-five percent permanent partial disability award is not supported by substantial evidence in the record.

CONCLUSION

The commission erred in ruling that Employer/Carrier were not entitled to credit for overpayment of temporary total benefits paid after Mr. Morales achieved MMI on January 8, 2020, and the commission erred in ruling that Mr. Morales

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802A(1)(a), which are not applicable here).

sustained a forty-five percent permanent partial disability rating to his back. South Carolina law entitles Employer/Carrier to reimbursement for overpayments of temporary total benefits back to the date of MMI, and the commission's forty-five percent permanent partial disability rating is not supported by substantial evidence. Accordingly, Employer/Carier ask this Court to rule that they are entitled to credit for overpayments of temporary total benefits back to January 8, 2020, to determine that Mr. Morales sustained a five percent permanent partial disability to his back, and to remand this matter to the commission to award such relief.

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

Respectfully submitted,

CLEMENT RIVERS, LLP

By: s/Stephen L. Brown

Stephen L. Brown (SC Bar No. 66468)
Robert P. Gruber (SC Bar No. 15581)
Russell G. Hines (SC Bar No. 72100)
Graydon V. Olive, IV (SC Bar No.: 105319)
25 Calhoun Street, Suite 400 (29401)
P.O. Box 993
Charleston, South Carolina 29402
(843) 720-5488
Attorneys for Appellants-Respondents

Charleston, South Carolina

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Evaristo Verdugo Morales, Claimant,

Respondent-Appellant,

v.

Insulation by Cohen's, LLC, Employer,
and Builders Premier Insurance Company, Carrier,

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PROOF OF SERVICE

CLEMENT RIVERS, LLP
Stephen L. Brown (SC Bar No. 66468)
Robert P. Gruber (SC Bar No. 15581)
Russell G. Hines (SC Bar No. 72100)
Graydon V. Olive, IV (SC Bar No.: 105319)
25 Calhoun Street, Suite 400 (29401)
P.O. Box 993
Charleston, South Carolina 29402
(843) 720-5488
Attorneys for Appellants-Respondents

I, Stephen L. Brown, of Clement Rivers, LLP, attorneys for Appellants-Respondents, hereby certify the **INITIAL REPLY BRIEF OF APPELLANTS-RESPONDENTS** was served on all other parties to this appeal on February 5, 2026, via email (see attached) to their following counsel of record:

Don C. Gibson, Esquire
Gibson Law Firm, LLC
Post Office Box 60669
North Charleston, SC 29419-0669
dgibson@dgibsonlaw.com
law2@dgibsonlaw.com
Attorneys for Evaristo Verdugo Morales

Preston F. McDaniel, Esquire
McDaniel Law Firm
1315 Elmwood Avenue
Columbia, SC 29201
preston@pfmcdlaw.com
kim@pfmcdlaw.com
Attorneys for Evaristo Verdugo Morales

CLEMENT RIVERS, LLP

By: s/Stephen L. Brown
Stephen L. Brown (SC Bar No. 66468)
Attorney for Appellants-Respondents

Charleston, South Carolina

February 5, 2026

Justman, Aimee

From: Justman, Aimee
Sent: Thursday, February 5, 2026 2:28 PM
To: dgibson@dgibsonlaw.com; preston@pfmcdlaw.com; law2@dgibsonlaw.com; kim@pfmcdlaw.com
Cc: Brown, Stephen L.; Gruber, Robert; Hines, Russell; Olive, IV, Graydon
Subject: Appeal 2025-000026 - Morales v. Insulation by Cohen's - CR200118 - Initial Reply Brief - Service
Attachments: Initial Reply Brief of Appellants-Respondents.pdf

Good afternoon,

Attached for service on you in the above-referenced matter, please find the Initial Reply Brief of Appellants-Respondents.

Thank you,

Aimee Justman
Paralegal and Group Coordinator
Commercial Litigation & Appellate Group
Clement Rivers, LLP
Phone: (843) 720-5460
Fax: (843) 579-1385
MatterId:

CLEMENT RIVERS, LLP
25 Calhoun Street • Suite 400 • Charleston, SC 29401
ycrlaw.com