

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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

**SC Court of Appeals**

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Appellate Case No.: 2013-000931  
W.C.C. File No.: 1106685

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David G. Jones, Employee/Claimant, ..... Appellant,

v.

Warden & Smith Concrete, Employer, and Bridgefield  
Casualty Insurance Company c/o Summit Holdings, Inc.,  
Carrier, ..... Respondents.

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**INITIAL BRIEF OF RESPONDENTS**

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## STATEMENT OF THE CASE

This is a workers' compensation appeal by David G. Jones ("Claimant" or "Appellant") from the Decision and Order of the Full Commission Appellate Panel ("Full Commission"), filed on April 4, 2013, which unanimously affirmed the Decision and Order of the Hearing Commissioner. This brief is submitted by Warden & Smith Concrete and Bridgefield Casualty Insurance Company c/o Summit Holdings, Inc. ("Defendants" or "Respondents") in response to the Claimant's appeal.

This claim was before the South Carolina Workers' Compensation Commission pursuant to the Form 21 filed by the Defendants on May 15, 2012. It is the position of the Defendants that the Claimant reached maximum medical improvement (MMI) with regard to his low back on December 15, 2011 and, therefore, Defendants requested to terminate temporary total disability (TTD) benefits. In addition, Defendants contended the Claimant has not sustained any permanent partial disability with regard to his back under Section 42-9-30; however, if so Defendants requested credit for the extent of pre-existing disability sustained to the Claimant's back. Moreover, Defendants contended the Claimant is not entitled to further medical benefits under Section 42-15-60. The Defendants also requested credit for the payment of TTD benefits after the date of MMI, and requested the Hearing Commissioner make a determination as to the credibility of the Claimant.

Per the Reply to Defendants' Stop Pay Application, it is the position of the Claimant that he has not reached MMI as he has been referred for a neurological opinion which has not been provided by the Defendants. The Claimant also requests a second orthopedic opinion. In the alternative, if the Claimant is found to have reached MMI, the Claimant contends he is permanently and totally disabled under Section 42-9-10 or Section 42-9-30.

The Hearing in this matter was held on June 28, 2012, in Florence, South Carolina, before Commissioner Melody L. James ("Hearing Commissioner"). By way of Decision and Order filed on October 18, 2012, the Hearing Commissioner determined the Claimant reached MMI on June 26, 2012, with seven (7%) percent permanent partial disability to the back. The Hearing Commissioner further determined the Defendants were entitled to a credit for payment of TTD benefits after the date of MMI, June 26, 2012; determined the Claimant was not entitled to further medical benefits under the Act; and did not find the Claimant to be credible based upon a myriad of reasons.

Both parties timely appealed the Decision and Order to the Full Commission. By way of Decision and Order filed on April 4, 2013, the Full Commission unanimously affirmed the Decision and Order of the Hearing Commission. The Claimant has now timely appealed this Order to this Court.

## STANDARD OF REVIEW

The Administrative Procedures Act (“APA”) governs review of decisions of the South Carolina Workers’ Compensation Commission by the Court of Appeals. S.C. CODE ANN. § 1-23-380 (Supp. 2006); *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 136, 276 S.E.2d 304, 307 (1981). Under the APA, the decisions of the South Carolina Workers’ Compensation Commission may be reversed, modified, or remanded if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are affected by error of law. S.C. CODE ANN. § 1-23-380(A)(6)(d)(Supp. 2006).

Furthermore, decisions of the Workers’ Compensation Commission may be reversed, modified or set aside if unsupported by reliable, probative, or substantial evidence on the whole record. *Ellis v. Spartan Mills*, 276 S.C. 216, 218, 277 S.E.2d 590, 591 (1981); *Lark*, supra.; S.C. CODE ANN. § 1-23-380(A)(6)(e). “Substantial evidence is ‘not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the administrative agency reached in order to justify its action.’” *Etheredge v. Monsanto Co.*, 349 S.C. 451, 562 S.E.2d 679 (Ct. App. 2002)(quoting *Miller v. State Roofing Co.*, 312 S.C. 452, 454, 441 S.E.2d 323, 324-25 (1994)); *Broughton v. South of the Border*, 336 S.C. 488, 495, 520 S.E.2d 634, 637 (Ct. App. 1999). As the South Carolina Supreme Court observed,

a decision of the Workers’ Compensation Commission will not be overturned by a reviewing court unless it is clearly unsupported by substantial evidence in the record. Substantial evidence is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached to justify its action. Quantitatively, substantial evidence is something less than the weight of the evidence.

*Howell v. Pac. Columbia Mills*, 291 S.C. 469, 471, 354 S.E.2d 384, 385 (1987)(internal citations omitted). Finally, a decision may be reversed or modified if arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. S.C. CODE ANN. § 1-23-380(A)(6)(f).

## ARGUMENT

### I. CLAIMANT'S LACK OF CREDIBILITY IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

This is an admitted accident involving the Claimant's low back. While medical treatment and indemnity benefits were provided, the seminal issue in this claim became whether the Claimant's testimony and alleged subjective complaints were consistent with the objective findings of his treating physicians. After reviewing the totality of the evidence, including the medical records and testimony of the treating physicians, and testimony of the Claimant himself, the Full Commission found as a fact that the Claimant's testimony and/or complaints lacked credibility. It is well-established that findings of the Full Commission may not be overturned by a reviewing Court unless clearly unsupported by substantial evidence. *Howell*, 291 S.C. 469, 354 S.E.2d 384 (1987). The finding of the Full Commission that the Claimant is not credible is supported by substantial evidence in the record.

The Claimant, however, argues there is "no evidence – none" to support the finding of the Full Commission. The Claimant submits the Full Commission used the *uncontested* evidence to support its ruling in a manner which is "misleading." The Claimant further argues that both treating physicians, Dr. Edwards and Dr. Healy, offered explanations for the Claimant's questionable use of a wheelchair and testified the Claimant was not exaggerating his symptoms. In addition, the Claimant contends the Full Commission's determination on credibility was based upon testimony taken out of context. The Claimant then goes so far as to assert that "[a]t no point did either of these physicians use magnification to suggest that [the Claimant] was not credible or that he was misrepresenting his health (emphasis added)." The Defendants assert these contentions are without merit and predicated upon an incomplete summarization and analysis of the evidence.

A. **DR. EDWARDS AND DR. HEALY TESTIFIED THE CLAIMANT'S BEHAVIOR THROUGHOUT THE CLAIM WAS EXAGGERATED AND INCONSISTENT WITH THEIR OBJECTIVE FINDINGS.**

The Full Commission based its credibility finding in part upon the medical testimony of Dr. Edwards and Dr. Healy, both of whom raise questions as to the veracity of the Claimant's complaints, the extent of his injury, and his unusual behavior during treatment. It is the responsibility of the Full Commission, as the finder of fact, to consider the credibility and weight afforded an expert's opinion during the process of rendering a decision. *Chapman v. Foremost Dairies, Inc.*, 249 S.C. 438, 154 S.E.2d 845 (1967); see also *Tiller v. Nat'l Health Care Ctr. Of Sumter*, 334 S.C. 333, 334, 513 S.E.2d 843, 846 (1999) ("once admitted, expert testimony is to be considered just like any other testimony"). Importantly, the Full Commission also considered the Hearing testimony of the claimant and his wife, which is perhaps the compelling evidence in support of the credibility finding in the record. Interestingly, the Claimant has inexplicably failed to explain or otherwise justify the compelling testimony of the Claimant and his wife, which when considered in combination with the testimony of the treating physicians, constitutes substantial evidence to support the credibility finding of the Full Commission.

i. **The Claimant's use of a wheelchair is unnecessary and questionable.**

The Claimant asserts that his use of a wheelchair, regardless of whether he actually needed one, should not affect his credibility because neither of the treating physicians advised against it. This assertion by the Claimant is nothing more than an attempt at misdirection. The credibility finding of Full Commission was not predicated upon whether the Claimant was advised regarding the use of a wheelchair, but instead because there was no justifiable

explanation for the Claimant's use of a wheelchair. This premise is supported by the testimony of the Dr. Edwards and Dr. Healy. As such, whether his physicians specifically advised against it is irrelevant.

Dr. Edwards initially saw the Claimant on September 22, 2011. The Claimant did not present to this appointment with an assistive device, i.e. a walker or wheelchair. See Deposition of Dr. Edwards, p. 17. Dr. Edwards testified he would not have prescribed a walker or wheelchair and, in fact, noted "I would have considered it a bit more than what typically patients with the back symptoms he presented with." See Deposition of Dr. Edwards, p. 18. Dr. Edwards then commented on the report of Dr. Bruce Johnson, a pain management physician who treated the Claimant at the recommendation of Dr. Edwards and noted the Claimant reported he could not walk. See Defendants' APA #5, p. 81. Dr. Edwards testified there is no reason the Claimant could not walk, and noted the Claimant never reported the inability to walk during his examination in September 2011. See Deposition of Dr. Edwards, pp. 23-24. In other words, Dr. Edwards found the severity of the Claimant's alleged pain response inconsistent with the objective medical findings.

Dr. Healy's testimony supports the testimony of Dr. Edwards. Specifically, Dr. Healy agreed with Dr. Edwards that the Claimant's back problem did not require the use of a wheelchair. See Deposition of Dr. Healy, p. 30. When asked whether the Claimant's use of a wheelchair is evidence of malingering, Dr. Healy testified "I got the feeling all along that this fellow thought he was injured worse than what I could find evidence for." See Deposition of Dr. Healy, pp. 30-31. Dr. Healy subsequently confirmed he could not find any neurological basis for the Claimant's complaints. See Deposition of Dr. Healy, p. 34.

ii. **Dr. Healy provided testimony of other questionable behaviors of the claimant.**

The Claimant's focus regarding the issue of credibility is on the Claimant's use of a wheelchair. However, there is other compelling evidence to support the Full Commission's finding regarding credibility, none of which the Claimant addresses in his Brief to the Court. Specifically, Dr. Healy explained his opinion of the Claimant's problems following his examination in November of 2011, testifying "I thought he had exaggerated or amplified or thought that he was injured worse than what I could find." See Deposition of Dr. Healy, pp. 13-14. Dr. Healy's subsequent testimony provides a more thorough understanding of his opinion regarding possible symptom exaggeration and/or malingering. In fact, Dr. Healy provided a specific example of possible malingering on the part of the claimant, as follows:

A: An example would be that he told me that his grips were weak and when I tested them, they were weak. But, yet, when he stood up, he had to hold onto me and I felt his grip on my arm.

Q: Is that not inconsistent?

A: It's inconsistent.

Q: So it's inconsistent?

A: Yeah. So it makes me think that there is pain behavior present and that's just a phenomena that physicians have to deal with. And it's not the equivalent of faking necessarily, but it's hard to sometimes decide.

Q: Okay. Well, Doctor, I mean, isn't it inconceivable when you asked him to stand up and he grabbed your arm, I mean, he had no idea you were going to be testing his grip strength then, did he?

A: No. And that's part of the reason why you do those things because you try to distract people to see if a reflex movement is the same as their volitional movement.

Q: Okay. So if you ask him to do a grip strength and he couldn't given you the same effort as when he grabbed your arm, wouldn't that lead

you to the conclusion that he's not being accurate with regard to the nature of his symptoms?

A: It can, yes.

See Deposition of Dr. Healy, pp. 60-62. The Defendants believe the old adage – a true test of someone's character is revealed by what they do when no one is looking – is certainly applicable here. The Claimant showed reduced strength when he knew he was being observed, and increased strength during times following the physical examination. This is compelling objective evidence of his lack of credibility. Dr. Healy's opinion regarding the claimant's veracity continued as follows:

Q: If he's not responding to injections, to medications and won't let anyone at physical therapy touch him because he feels like it's making him worse, as you said, but yet his objective findings aren't surgical, what other conclusion is there other than the fact that maybe he's just not being honest with regard to the nature of his pain?

A: Well, I mean, that certainly is a possibility.

See Deposition of Dr. Healy, pp. 62-63.

Finally, Dr. Healy questioned the Claimant's reports on April 5, 2012, of three episodes of allegedly "passing out" in January of 2012. See Deposition of Dr. Healy, p. 24; Defendants' APA #10, p. 95. In fact, Dr. Healy testified that the fact the claimant did not report the alleged falls in January to Dr. Healy or Dr. Edwards until April of 2012 was "unusual." See Deposition of Dr. Healy, p. 24. The testimony continued as follows:

Q: Does that mean you doubt what he's telling you or you just - -

A: Well, you know, some things just don't make sense and it seemed to me that that would be a reason you would contact a doctor.

See Deposition of Dr. Healy, p. 24. Dr. Healy then testified that "I'd be more suspicious about the falls if, in fact, they happened. But, you know, it just seemed unusual. If I was at home

and I fainted, I'd be calling somebody, so - - and he did it three times, supposedly, but didn't notify anybody." See Deposition of Dr. Healy, p. 27.

In sum, the argument that the findings regarding the Claimant's credibility is without evidentiary support is without merit. In fact, the testimony by his treating physicians regarding his use of a wheelchair, his malingering during the grip strength test, and his questionable falls during January 2012 all constitute substantial evidence to support the finding of the Commission.

B. **THE TESTIMONY OF THE CLAIMANT NOT ONLY SUPPORTS THE QUESTIONS RAISED BY HIS TREATING PHYSICIANS, BUT ALSO FULLY SUBSTANTIATES THE FINDING OF THE COMMISSION REGARDING HIS LACK OF CREDIBILITY.**

The testimony of the Claimant provides the most compelling evidence regarding his lack of credibility. The Claimant was provided a prescription for Norflex when he presented to Marlboro Park Hospital in June of 2011; however, the medications were to only last for one week. See H.T., p. 21. Despite allegedly being in severe pain, the Claimant never returned to the hospital or otherwise attempted to obtain additional pain medications during the subsequent three and one-half month period prior to his initial appointment with Dr. Edwards. See H.T., p. 22. This fact is important as the Claimant acknowledged he had group health insurance through his employer. See H.T., p. 22. The Claimant also failed to request pain medications during his initial visit with Dr. Edwards on September 22, 2011. Therefore, he did not receive medications until October 12, 2011, more than four months after his accident, and despite testifying his pain was so severe he was confined to a wheelchair. The Claimant had no explanation for his failure to seek and/or obtain pain relief during this period. See H.T. p. 24, l. 24-p. 25, l. 1.

Additionally, the Claimant testified he recalled informing Dr. Healy in April 2012 that he had not taken any medications in the past three months. See H.T., p. 28. The Claimant did not go back to see Dr. Edwards for additional medications after January 12, 2012, despite being in 10/10 pain, allegedly having three falling episodes, and needing to use a wheelchair. See H.T., pp. 15, 29. Again, the Defendants assert the Claimant's actions or lack thereof are inconsistent with his alleged complaints.

Most outrageous, however, is the Claimant's testimony regarding his activities of daily living. The Claimant testified that his wife is forced to bathe, shave, feed and clothe him due to his back injury. See H.T., p. 17. This testimony was corroborated by his wife. See H.T. p. 48, ll. 22-24. The Defendants submit, and the Full Commission noted, that it is incredible to believe a person with only mechanical low back pain is unable to perform these activities without assistance. The Defendants assert it was the inconceivable nature of this testimony which provided the foundation for the finding regarding his credibility. As this Court will note from the arguments submitted by the Claimant, an explanation for this testimony is not provided.

In sum, the Full Commission properly and accurately considered the testimony of Dr. Edwards, Dr. Healy, the Claimant, and his wife in reaching the conclusion that the Claimant did not present as a credible witness. Dr. Edwards and Dr. Healy both raised questions as to the veracity of the Claimant's complaints after comparing the minor objective findings with the extreme subjective complaints – questions which were answered by the Claimant's unbelievable testimony. As such, the Defendants request this Court to affirm the finding as to the claimant's credibility as supported by substantial evidence.

II. **SUBSTANTIAL EVIDENCE SUPPORTS THE FINDING THAT THE CLAIMANT HAS REACHED MMI WITH NO NEED FOR FURTHER MEDICAL TREATMENT.**

Under well-established South Carolina jurisprudence, “[m]aximum medical improvement (MMI) is a term used to indicate that a person has reached such a plateau that, in the physician’s opinion, there is no further medical care or treatment which will lessen the degree of **impairment**.” *Curiel v. Environmental Management Services*, 376 S.C. 23, 655 S.E.2d 482 (2007); *Dodge v. Brucoli, Clark, Layman, Inc.*, 334 S.C. 574, 514 S.E.2d 593 (Ct. App. 1999) (emphasis added). MMI is a factual determination of the Commission. *Id.* at 29, 655 S.E.2d at 485.

As referenced by the Claimant, “the fact a claimant has reached MMI does not preclude a finding that the claimant still may require additional medical care or treatment.” *Dodge*, 334 S.C. at 581, 514 S.E.2d at 596. However, a Claimant is only entitled to medical treatment post-MMI if “it may tend to lessen the period of **disability**.” *Id.* (see also S.C. Code Ann. § 42-15-60 (Law. Co-op. 1976, Supp. 2007)(emphasis added)). Importantly, in claims arising after July 1, 2007, the Claimant’s entitlement to post-MMI treatment is governed by Section 42-15-60, not the general language in *Dodge*. Pursuant to Section 42-15-60, an employer shall provide medical treatment to a claimant for a period not exceeding ten weeks from the date of the injury unless if “in the judgment of the commission [additional treatment] will tend to lessen the period of disability as evidenced by expert medical evidence stated to a reasonable degree of medical certainty.” See S.C. Code Ann. § 42-15-60 (Co-op 1976, Supp. 2007). “Medical evidence” is statutorily defined as “expert opinion or testimony stated to a reasonable degree of medical certainty . . . offered by a licensed health care provider.” S.C. CODE ANN. § 42-1-160. Accordingly, if the Claimant fails to produce “medical evidence” to

support his alleged need for additional medical treatment under Section 42-15-60, the claim for such benefits must be denied.

A. **FINDING OF MMI IS SUPPORTED BY THE TESTIMONY AND MEDICAL REPORTS OF THE AUTHORIZED TREATING PHYSICIANS.**

The Full Commission made a factual determination that the Claimant reached MMI on June 26, 2012, and based this decision on a complete and critical review of all evidence in the record. To the contrary, the Claimant relies upon only “cherry-picked” deposition testimony of Dr. Edwards and Dr. Healy, both of which appear to indicate MMI had not been achieved. While seemingly equivocal on its face, this testimony requires further examination and clarification, which the Claimant failed to provide to this Court. Specifically, the Claimant fails to compare this testimony to the actual medical records of these physicians, which will paint a different picture with regard to MMI. Moreover, the Claimant fails to provide to the Court the reasons for these opinions, which the Full Commission relied upon to find the Claimant had in fact reached MMI despite the apparent testimony to the contrary.

i. **Medical records support the finding of MMI.**

The Claimant has inexplicably failed to address any of his medical records in arguing against the finding of MMI. Importantly, these medical records support the finding that the Claimant had exhausted all necessary causally-related medical options by January 2012, with the determination of MMI being subject to clarification by Dr. Healy on June 26, 2012.

On October 11, 2011, Dr. Edwards reported the Claimant was not a surgical candidate and instead recommended an epidural steroid injection and a course of physical therapy. See Defendants' APA #4, p. 69; #8, p. 92. The Claimant underwent the injection on October 18, 2011, with Dr. Bruce Johnson. In Dr. Johnson's corresponding report (prior to the injection),

he notes the claimant “states he cannot walk” and uses a walker and/or wheelchair. See Defendants’ APA #5, p. 81. Dr. Johnson further reported that “I think some of his pain is out of proportion to what his MRI shows me. I am not exactly sure what is going on with this patient.” See Defendants’ APA #5, p. 82. The Claimant had an unusual reaction to the injection and was consequently evaluated by Dr. Healy, a neurologist.

On November 10, 2011, Dr. Healy reported “I had him last week with transient alteration in mental status which was of uncertain etiology. I could not find any definite problems.” See Defendants’ APA #10, p. 94. Dr. Healy also noted the claimant could not walk but was able to stand. Dr. Healy then reported “I cannot find any definite neurological problems” and “I really don’t have anything neurologic to recommend.” See Defendants’ APA #10, p. 94; *see also* Deposition of Dr. Healy, p. 14, ll. 21-25; p. 15, ll. 5-12. It is evident from Dr. Healy’s report that he did not anticipate providing further treatment and/or evaluation for the Claimant, which Dr. Healy confirmed in his deposition. See Deposition of Dr. Healy, p. 15.

On December 15, 2011, Dr. Edwards reported the claimant (who presented in a wheelchair) “had in-patient evaluation by Dr. Joe Healy from neurology and he was unable to find any source for the symptoms that he described as weakness in the legs and back pain.” See Defendants’ APA #4, p. 73. He further reported that “there is no evidence of pathology in the lumbar spine that would be amenable to any surgical intervention.” See Defendants’ APA #4, p. 74. Importantly, Dr. Edwards reported the Claimant’s hospital records failed to reveal “any obvious problem that could be dealt with either medically or surgically.” See Defendants’ APA #4, p. 74. Finally, and most importantly, Dr. Edwards reported he had “little else to offer” the Claimant and formally discharged him from care. See Defendants’ APA #4, p. 74.

It is undisputed that Dr. Edwards' report of December 15, 2011, does not reference or recommend any physical therapy for the Claimant, or any other treatment for that matter. The Claimant attempts to explain this omission by asserting that because Dr. Edwards is a back surgeon, and the Claimant is not a surgical candidate, Dr. Edwards would not provide or recommend non-surgical treatment modalities. This assertion that the Claimant would have "no need for Dr. Edwards" is absolutely without merit. Not only can Dr. Edwards recommend and provide non-surgical modalities, he did so in October 2011 in recommending an epidural steroid injection. To submit back surgeons cannot conservatively treat non-surgical candidates is not only without merit but wholly contrary to medical evidence in the record.

Finally, on January 12, 2012, Dr. Edwards reported the claimant "has a minor disc protrusion at L4-5 and there is a 5% impairment of his spine based on this injury." See Defendants' APA #4, p. 75. It is well known and commonly accepted that permanent impairment ratings are not provided until a patient reaches MMI, as was the case here.

The test before this Court is simple – Is there substantial evidence to support the finding of MMI, i.e. that further medical treatment will not lessen the claimant's impairment. *Curiel*, 376 S.C. 23, 655 S.E.2d 482; *Dodge*, 334 S.C. 574, 514 S.E.2d 593. Dr. Edwards released the Claimant on December 15, 2011, without any recommendations for further medical treatment, and subsequently provided a rating of permanent impairment in January 2012. It is more than reasonable to conclude Dr. Edwards would not have provided a permanent impairment rating if he believed there was additional treatment which would lessen the rating, and there is no evidence to the contrary in the record. As such, this constitutes substantial evidence to support the finding that the Claimant reached MMI.

- ii. **Dr. Healy's testimony provides an explanation of the Claimant's treatment history and, therefore, correctly serves as the date of MMI.**

Despite the fact the Claimant no longer required causally-related medical treatment after January 2012, the deposition of Dr. Healy proved necessary to explain and clarify the recommendations resulting from an appointment on April 5, 2012. The testimony provided by Dr. Healy on June 26, 2012, served to confirm that as of the date of the Claimant's release from Dr. Edwards' practice in January 2012, Dr. Healy had nothing to offer the claimant from a neurological standpoint. Moreover, the deposition served to demonstrate that the subsequent treatment recommendations could not be causally-related to the accident. As such, the Full Commission correctly used the date of this deposition as the date of MMI.

On November 10, 2011, Dr. Healy reported the Claimant's problems "seemed to be more of a mechanical low back phenomena rather than any cord involvement or radicular involvement." See Defendants' APA #10, p. 94. Dr. Healy concluded the report by stating "I cannot find any definite neurologic problems" and "I really don't see have anything neurologic to recommend." See Defendants' APA #10, p. 94 (emphasis added). Dr. Healy confirmed his opinions in his June 2012 deposition as follows:

Q: And the next sentence, you said, I've explained to him and his wife that I cannot find any specific neurological problems. Was that your opinion as of 11/5/2011?

A: Yes.

Q: Okay. And were you basically at this point just deferring to Dr. Edwards' treatment of his low back orthopedically?

A: Yes.

Q: You didn't feel like there was anything else that needed to be done from a neurological standpoint; is that fair?

A: That's fair.

Deposition of Dr. Healy, p. 14, ll. 21-25; p. 15, ll. 5-12. In fact, Dr. Healy repeatedly testified he would defer any orthopedic treatment recommendations to Dr. Edwards. See Deposition of Dr. Healy, p. 15, ll. 5-8; p. 20, ll. 14-18; p. 26, ll. 13-16. Interestingly, the Claimant has failed to identify either this report from November of 2011 or Dr. Healy's testimony, as the authorized treating neurologist, unequivocally confirming the Claimant does not have a neurologic condition.

Accordingly, it is indisputable that Dr. Healy did not diagnose the Claimant with a neurological problem or recommend any treatment for same either in November of 2011 or April of 2012. Moreover, Dr. Healy was not authorized to treat the Claimant for his diagnosed mechanical back pain, and intentionally and appropriately deferred any recommendations in this regard to Dr. Edwards. The Claimant's only viable argument to the contrary is predicated solely on the assumption that the three "passing out" events, which he alleged occurred in January 2012, are causally-related to his accident. However, there is absolutely no evidence of a causal relationship, which prevents an award on that basis as a matter of law. *Linen v. Ruscon Constr. Co.*, 286 S.C. 67, 68, 332 S.E.2d 211, 212 (1985) ("An award under the Act must not rest of surmise, conjecture, or speculation; it must be founded on evidence of sufficient substance to afford it a reasonable basis"). There being no evidence of any causal relationship, it was not appropriate for this speculative cause, as admitted by Dr. Healy, to serve to avert the otherwise appropriate finding of MMI. See Deposition of Dr. Healy, p. 24, ll. 3-16; p. 50, ll. 1-16.

In sum, the finding that the Claimant reached MMI on June 26, 2012, is supported by substantial evidence. The Claimant was released without further orthopaedic treatment recommendations by Dr. Edwards, the authorized orthopaedist, in January of 2012, and did not have a detectable condition requiring treatment by a neurologist, per the reports and deposition testimony of Dr. Healy. As the finding of fact is supported by substantial evidence, the Defendants request the finding be affirmed by this Court.

B. **DENIAL OF FUTURE MEDICAL TREATMENT IS APPROPRIATE UNDER SECTION 42-15-60 AND SUPPORTED BY SUBSTANTIAL EVIDENCE.**

The determination of the Full Commission that the Claimant is not entitled to additional medical treatment is both appropriate as a matter of law under Section 42-15-60 and supported by substantial evidence in the record, specifically the medical reports and deposition testimony of Dr. Edwards and Dr. Healy.

Pursuant to Section 42-15-60, the Claimant is faced with the burden of proving additional medical treatment will tend to lessen the period of disability and is supported by expert medical evidence stated to a reasonable degree of medical certainty. S.C. Code Ann. § 42-15-60 (Co-op 1976, Supp. 2007). It is undisputed that the Claimant has not provided any expert medical evidence stated to a reasonable degree of medical certainty to support his alleged need for additional treatment. Such evidence does not exist in the record, and should forbid the need for further analysis of this issue.

Nonetheless, the Defendants assert that a critical review of the evidence in the record reveals substantial evidence to support that additional causally-related medical treatment has not been recommended by the authorized treating physicians. In the interest of judicial economy, the Defendants rely upon the argument presented in Part A above, which supported

the Full Commission's finding of MMI, to also support the position that the Full Commission's denial of additional medical treatment is supported by substantial evidence. To summarize this argument, Dr. Edwards, the authorized treating physician, last evaluated the Claimant on December 15, 2011, and reported the Claimant did not have "any obvious problem that could be dealt with either medically or surgically," and that Dr. Edwards had "little else to offer" the Claimant. See Defendants' APA #4, p. 74. Importantly, there is no evidence in the record from an orthopedic expert recommending further orthopedic treatment for the Claimant.

In fact, the only subsequent recommendations for additional treatment came from Dr. Healy on April 5, 2012. However, Dr. Healy admitted these recommendations were completely contrary his report from November 2011, wherein he reported "I really don't have anything neurologic to recommend." See Defendants' APA #10, p. 94; Deposition of Dr. Healy, p. 14, ll. 21-25; p. 15, ll. 5-12; p. 57, ll. 8-22. In addition, Dr. Healy repeatedly confirmed his deference to Dr. Edwards regarding further orthopedic treatment. See Deposition of Dr. Healy, p. 15, ll. 5-8; p. 20, ll. 14-18; p. 26, ll. 13-16.

Additionally, Dr. Healy testified the only reason for the new recommendations of treatment on April 5, 2012, were the three alleged episodes of "passing out." See Deposition of Dr. Healy, p. 24; Defendants' APA #10, p. 95. Regardless of the falls, however, Dr. Healy confirmed the MRI performed following the visit on April 5, 2012, did not reveal any additional pathology and "was probably very similar to the initial one from the year before." See Deposition of Dr. Healy, p. 45. Dr. Healy also found the claimant's alleged falls questionable. See Deposition of Dr. Healy, p. 27, ll. 16-24; p. 28, l. 8-14; p. 50, ll. 1-16. In fact, Dr. Healy testified that the fact the Claimant did not immediately report the alleged falls to Dr. Healy or

Dr. Edwards until April of 2012 was “unusual.” See Deposition of Dr. Healy, p. 24. The testimony continued as follows:

Q: Does that mean you doubt what he’s telling you or you just - -

A: Well, you know, some things just don’t make sense and it seemed to me that that would be a reason you would contact a doctor.

See Deposition of Dr. Healy, p. 24. Dr. Healy then testified that “I’d be more suspicious about the falls if, in fact, they happened. But, you know, it just seemed unusual. If I was at home and I fainted, I’d be calling somebody, so - - and he did it three times, supposedly, but didn’t notify anybody.” See Deposition of Dr. Healy, p. 27. As such, the only basis for Dr. Healy’s recommendations for additional evaluation was the Claimant’s alleged falls in January of 2012, which Dr. Healy himself questioned. Moreover, Dr. Healy did not provide any opinion or testimony stated to a reasonable degree of medical certainty establishing a causal relationship between the alleged falls and the admitted back injury. In fact, Dr. Healy testified the MRI of April 2012 did not reveal any new pathology, which the Defendants assert further eliminates any possibility of a causal connection.

In addition to this substantial medical evidence supporting the denial of future medical treatment, the Full Commission also considered the lacking credibility in the Claimant’s testimony. Again, the Defendants will consider judicial economy and will rely upon its discussion of the Claimant’s lack of credibility in Section I above. Of note, however, is the fact the Claimant failed to seek any medical treatment during two three-month periods in this claim, despite alleged severe and debilitating back pain. First, the Claimant admittedly failed to seek any medical treatment from June 2011 through September 11, while the Defendants were investigating the compensability of the claim. See H.T. p. 22, ll. 8-12. The failure occurred

despite the Claimant's knowledge of having group health insurance through his employer, insurance he certainly could have used during the continued denial of his workers' compensation claim. See H.T. p. 22, ll. 8-12. In addition, the Claimant admitted failing to seek additional treatment during the three-month period prior to his visit with Dr. Healy on April 5, 2012, despite still being covered by his group health insurance carrier. See H.T. p. 22, ll. 13-14; p. 28, l. 22-p. 29, l. 1.

In sum, the Claimant has failed to produce or identify any expert medical evidence stated to a reasonable degree of medical certainty to support his alleged need for additional medical treatment, as is required by Section 42-15-60 of the Act. In addition, substantial evidence, including the testimony and reports of Dr. Edwards and Dr. Healy, as well as the incredible testimony of the Claimant, support the Full Commission's denial of additional medical treatment. As there is no error of law and or lack of substantial evidence, the denial should be affirmed by this Court.


**CONCLUSION**

Based upon the foregoing, the Defendants respectfully request the Court of Appeals to affirm the Decision and Order of the South Carolina Workers' Compensation Commission.

Respectfully submitted,

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By: \_\_\_\_\_



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