THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

The Honorable Gene McCaskill, Susan S. Barden and Andrea C. Roche

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Case Number 2014-000085

Shane Almquist, Employee, ... Appellant,

v.

Meditam, Employer,
and Guarantee Insurance Company,
c/o Patriot National Insurance Group, Carrier ..... Respondents.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. **THE FINDING THAT DR. MALVERN DEFERRED TO DR. REING FOR CAUSATION IS CLEARLY ERRONEOUS, DIRECTLY CONTRADICTS HER TESTIMONY, AND IS UNSUPPORTED BY THE SUBSTANTIAL EVIDENCE IN THE RECORD AS A WHOLE.**

2. **THE CONCLUSION THAT THE CLAIMANT DID NOT SUSTAIN INJURIES BY AN ACCIDENT ARISING OUT OF AND IN THE COURSE OF HIS EMPLOYMENT IS AN ERROR OF LAW AND IS UNSUPPORTED BY THE SUBSTANTIAL EVIDENCE IN THE RECORD AS A WHOLE.**

3. **THE FINDING THAT DR. REING COULD NO LONGER STATE TO A REASONABLE DEGREE OF MEDICAL CERTAINTY THAT EITHER THE MARCH 12, 2012 OR THE JULY 5, 2012 INJURY AGGRAVATED OR EXACERBATED CLAIMANT'S PRE-EXISTING CONDITION IS CLEARLY ERRONEOUS.**

4. **THE CONCLUSION THAT THE CLAIMANT DID NOT MEET HIS BURDEN OF PROOF THAT THE ALLEGED INJURY AGGRAVATED A PRE-EXISTING CONDITION IS AN ERROR OF LAW AND IS UNSUPPORTED BY THE SUBSTANTIAL EVIDENCE IN THE RECORD AS A WHOLE.**

STATEMENT OF THE CASE

This matter arises from a claim filed by Claimant/Appellant, Shane Almquist, asserting that he suffered two compensable injuries by accident. Claimant was employed by Meditam as a medical transport driver and had worked for the company for approximately one (1) year.

The first accident occurred on March 12, 2012, when the Claimant alleged that he injured his back while lifting a wheelchair. The second accident occurred on July 5, 2012, when Respondent employer's van while being driven by Claimant, was rear ended in a motor vehicle accident. The Employer and Carrier denied both claims. The Claimant seeks payment for past, present and future medical treatment, temporary total

compensation from July 6, 2012, to the present and continuing until he reaches maximum medical improvement.

A hearing was held before a Single Commissioner on April 9, 2013. In addition to the Claimant's testimony, his internist, Dr. Lori Malvern, testified live at the hearing. The Defendants presented no witnesses. On June 18, 2013, the Single Commissioner issued her Order denying benefits to the Claimant for both dates of injury concluding that Claimant did not suffer any injury by accident arising out of and in the course and scope of his employment and that the Claimant had failed to prove by the preponderance of the evidence that he had aggravated a pre-existing condition (R. pp. 17-33).

The Claimant filed a timely appeal and the case was heard before the Appellate Panel on October 15, 2013. On December 12, 2013, the Appellate Panel affirmed the Order of the Single Commissioner, without making any additional Findings of Fact or Conclusions of Law (R. pp. 1-16). This appeal follows.

FACTS

The record shows that in 1993, the Claimant sustained a significant back injury from an automobile wreck (R. p. 93, lines 2-7). It also shows that he received periodic treatment and medication for continued problems with his back. The record also reveals that after the 1993 auto accident, the Claimant was regularly employed and working full time prior to the motor vehicle accident on July 5, 2012 (R. p. 86, lines 1-13; p. 86, line 23 thru p. 87, line 13).

The Claimant was employed by Meditam as a medical transport driver and he regularly worked over 40 hours per week. (R. p. 86, lines 3-13; pp. 165-216). His job

duties were to pick up clients and take them to doctor appointments and then return them to their homes.

The Claimant sustained two injuries by accident while working for the Respondent employer; however, the automobile wreck on July 5, 2012, is the focus of this appeal[1]. On that day, the Claimant was driving a Meditam van and was stopped in traffic for a red light. Suddenly, the van was rear ended by an SUV traveling at 20 M.P.H. (R. pp. 116, 160, 161). The Claimant was carrying four (4) clients from various locations at the time and everyone in the van, including the Claimant, went to the hospital from the accident scene by ambulance. (R. pp. 160, 161). The Claimant described the impact as severe and said that the back of the van was pushed in eight to twelve inches from the impact. (R. p. 91, lines 2-7). He further stated that when the van was struck, he had turned to grab an oxygen tank that belonged to one of his passengers. (R. p. 89, lines 18-24).

A few days after being seen in the ER, the Claimant sought treatment from his internist, Lori Malvern, MD, and was sent for physical therapy (R. pp. 138, 140, 142). He then saw Michael Reing, MD, an orthopaedic surgeon (R. p. 150). The Claimant has not been able to work since the wreck on July 5, 2012, he has consistently been written out of work by his doctors, and he has not reached maximum medical improvement. No medical treatment of any kind whatsoever has been provided by the Defendants (including even the denial of the initial ambulance trip and emergency room visit).

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[1] Claimant's first back injury occurred on March 12, 2012, while lifting a wheelchair. The evidence shows that he reported the injury to the office and his primary care physician wrote him out of work for a few days. (R. pp. 135, 136, 163, 164).

LEGAL ANALYSIS AND ARGUMENT

Standard of Review

The South Carolina Supreme Court has determined that the Administrative Procedures Act governs the standard of judicial review of decisions and awards issued by the Workers' Compensation Commission. Citing the statute, the Court has held that it is empowered on review to reverse or modify a decision only "if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions, are . . . (3) made upon unlawful procedures; (4) affected by other errors of law; (5) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record . . . ." S.C. Code Ann. § 1-23-380. *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 276 S.E.2d 304 (1981). "The Court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact." *Id.* "Substantial evidence," for purposes of judicial review of decision of the Appellate Panel of the Workers' Compensation Commission, 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 Appellate Panel reached in order to justify its action; rather, it is something less than the weight of the evidence. *Hall v. Desert Aire, Inc.*, 376, S.C. 338, 656 S.E.2d 753 (Ct. App. 2007) (*rehearing denied*, 2008). Thus, the award by the Appellate Panel can be set aside if there is an error of law or it is unsupported by substantial evidence.

Pursuant to section 42–1–160(A) of the South Carolina Code, for an injury to be compensable under the Act, it must be "an injury by accident" and "aris[e] out of and in the course of employment." S.C. Code Ann. § 42–1–160(A) (Supp. 2011). To this end,

"[a]n injury arises out of employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal relationship between the conditions under which the work is to be performed and the resulting injury." *Rodney v. Michelin Tire Corp.*, 320 S.C. 515, 518, 466 S.E.2d 357, 358 (1996) (citation omitted). The claimant has the burden of proving facts that will bring the injury within the workers' compensation law. *Crisp v. South Co., Inc.*, 401 S.C. 627, 738 S.E.2d 835, 842 (2013).

Section 42-9-35 of the South Carolina Code sets forth that:

> (A) The employee shall establish by a preponderance of the evidence, including medical evidence, that:
>
> (1) The subsequent injury aggravated the preexisting condition or permanent physical impairment; or
>
> (2) The preexisting condition or the permanent physical impairment aggravates the subsequent injury.
>
> (C) As used in this section, "medical evidence" means expert opinion or testimony stated to a reasonable degree of medical certainty, documents, records, or other material that is offered by a licensed health care provider.

1. THE FINDING THAT DR. MALVERN DEFERRED TO DR. REING FOR CAUSATION IS CLEARLY ERRONEOUS, DIRECTLY CONTRADICTS HER TESTIMONY, AND IS UNSUPPORTED BY THE SUBSTANTIAL EVIDENCE IN THE RECORD AS A WHOLE.

In Finding of Fact No. 3, the Appellate Panel stated that Dr. Malvern admitted that she would have to defer to the orthopedist that treated the Claimant. (R. p. 15, FOF 3). This finding mischaracterizes the evidence in the record.

Dr. Malvern specifically stated that she would defer to an orthopedist with regard to treatment, ***but not as to causation***. (R. p. 82, line 22 thru p. 83, line 17). In fact, this point was specifically clarified on redirect examination by Claimant's counsel, but was apparently ignored by the Single Commissioner and the Appellate Panel (R. p. 82, line 22

thru p. 85, line 22). This shows that decision of the Appellate Panel was based on an erroneous finding and should be overturned.

Accordingly, based on the preponderance of the evidence in the record as a whole, the Appellate Panel erred in its Findings of Fact and the Order should be reversed and the appropriate benefits awarded to the Claimant.

2. THE CONCLUSION THAT THE CLAIMANT DID NOT SUSTAIN INJURIES BY AN ACCIDENT ARISING OUT OF AND IN THE COURSE OF HIS EMPLOYMENT IS AN ERROR OF LAW AND IS UNSUPPORTED BY THE SUBSTANTIAL EVIDENCE IN THE RECORD AS A WHOLE.

The Appellate Panel erroneously concluded that the Claimant did not sustain ***any*** injury by accident arising out of and in the course and scope of his employment. Oftentimes, an injury by accident is in question because there were no witnesses, there is no medical evidence, or there is conflicting testimony as to how the accident happened. That is not the case here. It is uncontroverted that the Claimant was involved in an automobile wreck while operating Respondent employer's van while he was transporting patients from various places. Yet, despite clear evidence that all of the occupants in the Claimant's van were taken to the hospital as a result of the accident, the Commission failed to order that *any* of the medical or temporary total benefits be paid. The Claimant was transported by ambulance to the emergency room where he was treated and released. He should not have to bear that expense when he was injured while clearly in the course and scope of his employment.

In fact, there is no dispute that the Claimant was driving a work van that was involved in the automobile wreck on July 5, 2012. The Employer acknowledges the

injury and even wrote a letter stating that he was on "medical leave until further notice from his physician." (R. p. 162). There is also no dispute that the Claimant was transported to the emergency room by ambulance after the wreck, along with all four (4) of his passengers (R. pp. 160, 161).

The emergency room record substantiates the accident and Claimant's resulting injuries. It states in pertinent part:

> pt here after MVA – rear-ended approx. 25-30 mph. quest LOC, neck pain, upper and lower back pain. Hx of back pain. Also c/o b/l hip pain.
> (R. p. 116)
>
> BACK: There is midline tenderness, in the upper back area. In the middle back area, in the lower back area, There is paraspinal tenderness, in the upper back, There is paraspinal tenderness in the mid-back, There is paraspinal tenderness in the lower back.
> ...
>
> DIAGNOSIS
> *FINAL*: primary: Cervical strain (whiplash), ADDITIONAL: Back strain [NOS].
> (R. p. 117)

The issue here is not simply whether the Claimant sustained an injury in the wreck, but also whether or not the accident aggravated or exacerbated his pre-existing back problems, thus entitling him to medical treatment, weekly benefits and, if applicable, compensation for some level of disability. However, at a minimum, the Claimant is entitled to payment for his medical treatment until he reaches maximum medical improvement and temporary total disability payments for the period of time his doctors have kept him out of work.

There was also no evidence presented to refute the Claimant's assertion that he hurt his back lifting a wheelchair on March 12, 2012. This is corroborated by two letters from the Claimant to his employer notifying them of the injury and asking for medical

treatment (R. pp. 163, 164). The Claimant was written out of work by his family physician and internist, Dr. Lori Malvern. (R. p. 136).

The preponderance of the evidence shows that the Claimant sustained an injury arising out of and in the course and scope of his employment and he should be awarded compensation for his medical expenses and lost time from work. *Even if,* assuming arguendo, his medical condition had returned to its pre-accident state, which it has not, the Claimant is entitled to the most basic compensation pursuant to the South Carolina Workers' Compensation Act.

3. THE FINDING THAT DR. REING COULD NO LONGER STATE TO A REASONABLE DEGREE OF MEDICAL CERTAINTY THAT EITHER THE MARCH 12, 2012 OR THE JULY 5, 2012 INJURY AGGRAVATED OR EXACERBATED CLAIMANT'S PRE-EXISTING CONDITION IS CLEARLY ERRONEOUS.

The Appellate Panel agreed with the Single Commissioner and found that this case mainly turns on the medical records. (R. p. 14; FOF 1). In doing so, they completely disregarded the live testimony and expert opinions of Dr. Malvern or, in the alternative, found her credibility to be in question (for which there was no finding). Yet, they then relied on selective portions of the deposition testimony of Dr. Reing (R. p. 14, 15; FOF 2), who essentially was not able to offer any opinion as to causation. Such reliance is misplaced. Dr. Reing first issued an opinion supporting causation, but later stated that he could no longer do so; thus actually rendering no opinion. When viewing his deposition *as a whole*, Dr. Reing vacillated back and forth about causation, aggravation and exacerbation.

> Q. So can you still state to a reasonable degree of medical certainty based on his less than truthful reporting of his history that his current symptoms and injuries were caused or aggravated by the July or the March accident?

A. I would have to say probably not the cause, but definitely aggravated because he did have spasm and you can't fake spasms, so I would think there would be certainly exacerbation.

(R. p. 66, lines 4-12).

Q. Okay, So even though he was having spasms a month before the March accident, in February of 2012 he was having spasms, but you can still say that his current spasms were caused by the accident?

A. I don't think I could say they were caused by, but I think it exacerbated.

(R. p. 66, line 17 thru p. 67, line 1).

Q. So what would your opinion to a reasonable degree of medical certainty be at this time?

A. I don't think that I could say that this was – I still think that he has spasming that you can't fake, but it leads me to believe that there were other issues going on.

(R. p. 69, lines 8-13).

Q. So is there any way to tell from reviewing the records from New Horizon that the complaints that Mr. Almquist had after the wreck are not an aggravation or more severe than the complaint that he had or different than the complaints that he had in these New Horizon records?

A. I don't think there's any way to tell.

(R. p. 70, lines 16-22).

Q. So do you have an opinion to a reasonable degree of medical certainty as to whether or not Mr. Almquist did or did not suffer any injury as a result of the July 5th, 2012 wreck?

A. I based my initial opinion on the history and physical to be taken and I know that on my physical examination when I first saw him that there was, there were objective findings. But I can't say with a reasonable degree of medical certainty that they were caused by the accident.

Q. And can you say they weren't caused by the accident?

A. I can't say they weren't caused either.

(R. p. 71, line 15 thru p. 72, line 2).

Even though he ultimately determined he couldn't render an opinion as to causation, Dr. Reing was very clear about his opinion that the Claimant had severe back spasms that couldn't be faked and that the Claimant was not malingering (R., p. 51, lines 5-7; p. 66, lines 4-12; p. 69, lines 8-13).

The preponderance of the evidence shows that the Claimant met his burden of proof in showing that his work-related accidents aggravated and/or exacerbated his pre-existing back problems. Accordingly, the Decision and Order of the Appellate Panel should be reversed and the Claimant awarded the appropriate benefits.

4. THE CONCLUSION THAT THE CLAIMANT DID NOT MEET HIS BURDEN OF PROOF THAT THE ALLEGED INJURY AGGRAVATED A PRE-EXISTING CONDITION IS AN ERROR OF LAW AND IS UNSUPPORTED BY THE SUBSTANTIAL EVIDENCE IN THE RECORD AS A WHOLE.

Dr. Reing didn't have the benefit of treating the Claimant before the wreck in July of 2012. However, his family physician, internist Dr. Lori Malvern, did. She was very clear in her opinions and in her support of the Claimant. She was qualified as an expert witness and testified live at the initial hearing. She is board certified in internal medicine, has been in practice for eighteen (18) years and is presently with New Horizon Family Health Services. (R. p. 73, lines 8-11).

The Claimant has been a patient at New Horizon since May of 2010, but Dr. Malvern stated that she only started treating him in May of 2011. She saw him for a variety of medical issues and was well aware of the Claimant's prior medical history as it related to his back problems (R. p. 74, lines 2-3; p. 75, lines 2-14). Dr. Malvern confirmed that the Claimant had been working 40-60 hours per week the entire time she had been treating him and that his back pain had not interfered with his ability to work. (R. p. 75, lines 2-25).

Dr. Malvern acknowledged that the Claimant had complained of back pain prior to the lifting accident and prior to the wreck. She testified that she prescribed medication after the March 2012 accident and that the Claimant got significantly better. (R. p. 77).

Dr. Malvern then stated that after the wreck, the Claimant's level of pain had increased. She testified that her physical examination of his back showed increased spasm and that his mannerisms and ability to get on and off the table were completely different. (R. p. 78, line 5 thru p. 79, line 18). She opined, *to a reasonable degree of medical certainty*, that the July 5, 2012, accident aggravated his pre-existing back condition. (R. p. 79, lines 10-18). This opinion comes from the Claimant's long standing treating physician who has had the benefit of seeing and knowing him since May of 2011, judging his credibility, as well, and who has continued to treat him after both accidents.

The Order states that Dr. Malvern was unable to remember what the Claimant lifted in March of 2012. (R. p. 4, ¶ 2). This is a misstatement of Dr. Malvern's testimony as she actually stated that she couldn't remember if it was a patient or a wheelchair. (R. p. 76, lines 15-17).

The Order also sets forth that the New Horizon medical records after the wreck didn't specify back pain as the chief complaint and this is again a misstatement, incorrect and misleading. (R. p. 5, ¶ 2). The MVA is noted as the chief complaint on the July 11, 2012, record. (R. p. 138). Subsequent records indicate that the Claimant was there for follow up and his back problems or his ongoing treatment were always mentioned (R. pp. 140-148). Dr. Malvern even wrote a letter on the Claimant's behalf describing the exacerbation of his back problem since the wreck. (R. p. 149).

Additionally, Dr. Malvern testified that just because the Claimant had follow up visits at New Horizons without back pain being noted as the chief complaint at every visit (primarily because he was there being seen for other things), those records could not be

used to prove that there was no aggravation from the wreck in July of 2012. (R. p. 84, line 2 thru p. 85, line 22).

The foregoing testimony and medical records are consistent in establishing by the preponderance of the evidence that the Claimant aggravated and/or exacerbated his preexisting back problems when he was in the wreck on July 5, 2012.

The Appellate Panel asked one question at the appeal hearing which was "He [Claimant] was impeached by his deposition testimony, you'll concede that?" (R. p. 112, lines 21-22). The Panel clearly focused on the issue of the Claimant's credibility in rendering its decision rather than reviewing the evidence as a whole as if the only way to carry the burden of proof is through Claimant's testimony which is error. Interestingly, the Appellate Panel issued no findings in the Order even addressing the opinion of Dr. Daniel Lee, an independent medical examiner hired by the Respondent Carrier, who described the Claimant as "pickwickian". Dr. Lee's examination confirmed the Claimant's left-sided muscle spasm (R. p. 158).

Regardless of the existence or nonexistence of permanent impairment to the Claimant's back, at the very minimum an award for payment of his causally related medical expenses and temporary total disability should have been made. Instead, the Appellate Panel denied the Claimant *any* benefits, which is contrary to the purpose of the South Carolina Workers' Compensation Act.

CONCLUSION

The Claimant has proven by the preponderance of the evidence that he suffered two back injuries arising from and in the course and scope of his employment with Respondent employer.

Based on the foregoing, the Claimant respectfully requests that this Court reverse the Order of the Appellate Panel and award the Claimant payment of all past, present and future medical care and treatment, temporary total compensation from July 6, 2012, to the present and continuing until he has reached maximum medical improvement and such other relief as this Court deems just and proper.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

June 23, 2014

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PROOF OF SERVICE

I certify that I have served the Appellant's Final Brief on Meditam and Guarantee Insurance Company, c/o Patriot National Insurance Group by depositing a copy of it in the United States Mail, postage prepaid, on June 23, 2014, addressed to their attorney of record, Weston Adams, III, Esq., McANGUS, GOUDELOCK & COURIE, LLC, PO Box 12519, Columbia, SC 29211-2519.

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