THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Appellate Case No. 2014-001372

WCC Case No. 0726308

Shannon Cook, Claimant, Respondent,

v.

Spartanburg Steel Products, Inc., Defendant, Appellant

INITIAL BRIEF OF APPELLANT

Brad B. Easterling, SC Bar # 70328
McAngus, Goudelock & Courie LLC
Post Office Box 2980
55 East Camperdown Way, Suite 300 (29601)
Greenville, South Carolina 29602
(864) 239-4000

Attorneys for Appellant

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I. Did the Commission err in exercising jurisdiction over Respondent's change of condition claim, where Respondent did not follow the procedural requirements for claiming a change of condition?

II. Did the Commission err in finding that Respondent sustained a change of condition for the worse, thus entitling him to future medical treatment and reimbursement of all expenses associated with such treatment, when the reliable, probative and substantial evidence in the record does not support a change of condition?

STATEMENT OF THE CASE

This is an appeal by Spartanburg Steel Products, Inc. ("Appellant") from a decision of the South Carolina Workers' Compensation Commission finding that Shannon Cook ("Respondent") sustained a change of condition for the worse. Appellant submits the Commission lacked jurisdiction to consider Respondent's change of condition claim. Appellant further submits the Commission's decision is clearly erroneous in light of the reliable, probative, and substantial evidence in the record that indicates Respondent did not sustain a change of condition for the worse.

Respondent sustained a compensable injury by accident to his lumbar spine on September 17, 2007. By Decision and Order dated June 8, 2011, Commissioner Avery B. Wilkerson, Jr., awarded Respondent twenty-five percent (25%) permanent partial disability to the spine. He further ordered that Respondent was entitled to future medical treatment pursuant to Dodge v. Bruccoli as directed by Dr. Phillip LaTourette on his Form 14B dated June 16, 2010. Specifically, Dr. LaTourette noted Respondent would require future medical care related to the work injury in the form of medications for pain, psychological evaluation and treatment, spinal injections and physical therapy.

Appellant paid the twenty-five percent (25%) award on June 27, 2011. Respondent was initially represented by attorney Tom Gagne. On May 9, 2012, Mr. Gagne filed a Form 50 (notice of claim only) on Respondent's behalf, alleging a change of condition for the worse. Attached to this Form 50 was a written medical report and questionnaire from Dr. Yashbir T. Rana.

On May 17, 2013, Respondent retained Ryan Montgomery as counsel and terminated his relationship with Mr. Gagne. Mr. Montgomery filed a Form 50 request for hearing on

Respondent's behalf on May 17, 2013[1]. No mention was made on Mr. Montgomery's May 2013 Form 50 that Respondent was alleging a change of condition. Furthermore, there were no medical reports attached to the May 2013 Form 50. Mr. Montgomery filed an Amended Form 50 request for hearing on August 9, 2013, alleging a change of condition. No medical reports were attached to the August 2013 Form 50.

The parties came before the honorable Susan S. Barden on September 27, 2013. Commissioner Barden issued a Decision and Order on November 25, 2013, finding Respondent had sustained a change of condition for the worse. She further found Respondent had not reached maximum medical improvement and was entitled to ongoing medical treatment with Dr. Charles Kanos. She ordered Appellant to reimburse Respondent for any and all expenses and co-pays associated with Respondent's treatment with Dr. Kanos, in addition to reimbursement of Respondent's $25.00 fee for a Motion to Compel.

Appellant properly filed a Form 30 Request for Commission Review on December 9, 2013. The parties were heard at a hearing before the Full Commission on March 17, 2014. On May 20, 2014, the Commission issued a Decision & Order affirming the Hearing Commissioner's order in full. From this decision, Appellant has appealed to this honorable Court.

[1] The Form 50 is dated May 21, 2013, but the Certificate of Service is dated May 17, 2013.

STATEMENT OF FACTS

As set forth in Commissioner Wilkerson's June 8, 2011 Decision and Order, Respondent underwent extensive medical treatment prior to his initial hearing regarding his September 17, 2007 accident. Although by no means an exhaustive summary, Appellant highlights several aspects of this treatment below.

Following the admitted injury to his spine on September 17, 2007, Respondent underwent conservative treatment with Dr. Robert Flandry which included anti-inflammatory medication and epidural steroid injections for a herniated nucleus pulposus at L5-S1. Respondent continued to undergo conservative treatment (narcotic pain medication and selective nerve root injections) with Dr. Phillip LaTourette at Carolina Center for Advanced Management of Pain. On May 14, 2009, Respondent underwent a hemilaminectomy and discectomy performed by Dr. Philip Hodge. Dr. Hodge performed another re-exploration and discectomy at L5-S1 on May 20, 2009. Dr. Hodge released Respondent at maximum medical improvement on August 9, 2009 with fourteen percent (14%) impairment to the spine. (APA pp. 164-65.)

Respondent continued to receive pain management treatment from Dr. LaTourette. He underwent a spinal cord stimulator trial on April 21, 2010, although it was removed two days later due to ineffectiveness. Respondent was then referred to Dr. Phillip Esce for a second surgical opinion. Dr. Esce noted that Respondent's MRI showed degenerative discs at L4-S1 and L5-S1 with mild to moderate disc herniation on the right side of L4-5. He did not consider the scar tissue from Respondent's prior surgery to be severe. Dr. Esce recommended continued pain management. (APA pp. 165-66.)

Respondent's treating physicians placed him at maximum medical improvement, and Commissioner Wilkerson considered independent medical evaluations of Dr. Randolph Waid,

Dr. Yashbir T. Rana, and Dr. Robert Schwartz prior to issuing his order. Specifically, Dr. Rana evaluated Respondent on July 14, 2010 and assessed twenty-one percent (21%) p ermanent partial disability to Respondent's spine. (APA pp. 166-68.) Commissioner Wilkerson further considered Respondent's subjective complaints. Respondent alleged he was permanently and totally disabled, but Commissioner Wilkerson disagreed, finding Respondent sustained twenty-five percent (25%) permanent partial disability to his spine. (APA pp. 168-69, 173.)

Following Commissioner Wilkerson's order, Respondent treated with Dr. LaTourette for pain management and Dr. Tollison for psychological treatment. (APA pp. 1-128.) Respondent underwent an additional independent medical evaluation with Dr. Yashbir T. Rana on February 16, 2012, in which Dr. Rana assigned the same impairment to Respondent's lumbar spine as he had in a previous evaluation on July 14, 2010. Dr. Rana further opined Respondent sustained a worsening of condition to his spine. (APA p. 129-132.) Respondent's treating physician, Dr. LaTourette, did not believe Respondent had sustained a change of condition. (2012 Deposition of Dr. LaTourette, p. 16, ll. 1-7, p. 22, ll. 21-25-p. 23, l. 1-2.)

Dr. LaTourette referred Respondent to Dr. Marco Rodriguez at Orthopaedic Specialties. Respondent presented to Dr. Rodriguez on August 15, 2012. Dr. Rodriguez recommended an MRI, which was conducted on September 13, 2012. (APA p. 14.) On October 1, 2012, Dr. Rodriguez noted L4-5 and L5-S1 degeneration and recurrent disc herniation on the left side. He recommended a repeat laminectomy and discectomy, in addition to a fusion. (APA p. 143.)

Respondent also presented to Dr. Charles Kanos on December 14, 2012 and again on February 27, 2013. Dr. Kanos recommended a CT myelogram. (APA p. 149, 152-53.) After reviewing the CT myelogram, Dr. Kanos recommended a L5-S1 decompression and left L4-5 foraminotomy. (APA pp. 155c-d.)

Video surveillance of Respondent on November 23, 2012 shows Respondent working under the hood of a vehicle for approximately an hour. During the course of the video, he carried a hydraulic jack, filled a radiator, pulled a jack stand, and used other tools. Other video submitted into evidence shows Respondent jumping after a football. (Surveillance Videos 5/6/2012 and 11/23/2012.) Prior to Respondent's initial hearing, he was offered a light duty position with Spartanburg Steel, but to date he has not contacted Spartanburg Steel with respect to the light duty position. (Hearing Transcript pp. 27-29.)

ARGUMENT

The South Carolina Administrative Procedures Act establishes the standard for judicial review of decisions by the Workers' Compensation Commission. Lark v. Bi-Lo, 276 S.C. 130, 276 S.E.2d 304 (1981). Appellant submits that this case concerns issues of law and of fact; therefore, two separate standards of review are applicable. Under the APA, a reviewing court can reverse or modify the decision of the Commission if the substantial rights of the appellant have been prejudiced because the decision is affected by an error of law or is clearly erroneous in light of the reliable, probative, and substantial evidence in the whole record. S.C. Code Ann. § 1-23-380(5)(d),(e) (Supp. 2013); Transp. Ins. Co. v. S.C. Second Injury Fund, 389 S.C. 422, 427, 699 S.E.2d 687, 689-90 (2010). 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 same conclusion that the administrative agency reached or must have reached in order to justify its action." Lark, 275 S.C. at 135, 276 S.E.2d at 306.

Appellant respectfully submits that the Commission committed an error of law in exercising jurisdiction over Respondent's change of condition claim. Appellant further submits that reasonable minds would not reach the same conclusion that the Commission reached in this case, namely that Respondent sustained a change of condition. In light of these errors, Appellant requests that this honorable Court reverse the decision of the Commission.

I. The Commission erred in concluding it had jurisdiction to consider Respondent's change of condition claim, as Respondent did not meet the procedural requirements for filing an application for review on a change of condition.

The Commission was without jurisdiction to consider the Respondent's claim for a change of condition for the worse. Respondent's application for review on a change of condition

was not made within twelve months of the date of the last payment of compensation. Respondent's May 2012 Form 50 did not request a hearing, nor did it have attached a medical report indicating a change of condition for the worse. Although filed well outside the twelve month review period, Respondent's May 2013 Form 50 requested a hearing but made no mention of a change of condition, and Respondent's August 2013 Form 50 requested a hearing and mentioned a change of condition, but attached no medical report as required by the workers' compensation regulations. Therefore, Respondent's change of condition claim should have been barred based on these procedural deficiencies.

A. Respondent did not timely file an application for review of an award on a change of condition as required by South Carolina Code Section 42-17-90.

Respondent's change of condition claim is barred, as he did not file an application for review within twelve months of the payment of the award under Commissioner Wilkerson's Decision and Order. South Carolina Code Section 42-17-90 provides the Commission may review an award and, where the preponderance of the evidence establishes a change of condition, may make an award increasing the amount compensation previously awarded. However, "review must not be made after twelve months from the date of the last payment of compensation pursuant to an award provided by this title." S.C. Code § 42-17-90(A) (Supp. 2012).

The statute contemplates that a claimant seeking review must file a request for hearing and not only a notice of claim. The Commission has jurisdiction over a change of condition claim where the *application for review* is filed within twelve months after the last payment of compensation. Allen v. Benson Outdoor Advertising Co., 236 S.C. 22, 31, 112 S.E.2d 722, 726 (1960). In Allen, the appellant employer and insurance carrier argued that the application for review must be heard by the Commission within the statutory one year period. They argued the

Commission was without jurisdiction to review the original award where the last payment of compensation on the original award was made on November 7, 1957 and the application for review was filed on September 29, 1958, but there was no hearing until November 19, 1958. Id. at 29-30, 112 S.E.2d at 725. The South Carolina Supreme Court rejected the appellants' argument that Section 72-359, the statute in effect at the time, contemplated that the Commission must hold a hearing within the one year period. The Court noted "[w]e have gone no further than to hold that the *application for review* must be made within one year after the last payment of compensation." Id. at 30, 112 S.E.2d at 725-26 (emphasis added).

In the instant case, the last payment of compensation was made on June 27, 2011. On May 9, 2012, Respondent's counsel filed a Form 50 notice of claim only for a change of condition. He did not request a hearing at that time. A hearing was not requested until May 17, 2013, and, even then, there was no mention of a change of condition. As such, it was nearly two years after Appellant's last payment of compensation to Respondent on June 27, 2011 that a hearing was finally requested on the change of condition.

While Allen reflects the Court's reluctance to allow a claimant's change of condition claim to depend on the schedule of the Commission, Appellant submits that S.C. Code Ann. § 42-17-90 contemplates that a claimant seeking review will have sustained a change of condition such that he or she would be prepared to go to hearing on the issue on or around the twelve month review period.

Because of the decision of the Commission in the instant case, Respondent was allowed to come before the Commission over two years after he received his initial award. The Commission allowed Respondent's filing of a Form 50 notice of claim only on May 9, 2012 to toll the twelve month limitations period. Appellant submits the South Carolina legislature

provided no tolling mechanism in Section 42-17-90 and it was error for the Commission to conclude that Respondent's May 2012 Form 50 tolled the applicable time limits.

Section 42-17-90 sets forth a twelve month limitation period to file an application for review. "The cardinal rule of statutory construction is that words used in a statute should be given their plain and ordinary meaning unless something in the statute requires a different interpretation . . . ." Seckinger v. The Vessel "Excalibur," 326 S.C. 382, 387, 483 S.E.2d 775, 777 (Ct. App. 1997). Appellant submits that the plain meaning of *application for review* does not contemplate an application to toll the statute by filing a notice of claim only. Rather, application *for review* contemplates that some review—or hearing—is being requested such that some decision can be made.

To construe the meaning of the phrase otherwise would result in the unintended consequence of employers and insurance carriers waiting indefinitely for a workers' compensation claimant to bring his change of condition claim to hearing. Claimants seeking an additional award following their initial hearing would need only to file a Form 50 notice of claim in order to toll the limitations period, thereby giving them no time limitation under which to develop their change of condition claims. Although employers and insurance carriers would be put on notice of a potential change of condition by the filing of a claim only, allowing the Form 50 notice of claim to toll the twelve month limitations period would render meaningless the time limitation created by the legislature and designated in Section 42-17-90 for a change of condition.

Because Respondent did not file an application for review within the statutory twelve month period, the Commission did not have jurisdiction over the claim. As such, the Commission erred in considering the merits of Respondent's change of condition claim.

B. The plain language of Regulation 67-602(C) identifies a *hearing request* form.

Appellant contends that the language of Regulation 67-602(C), discussed in more detail below, contemplates a hearing request in a claim involving a change of condition.[6] The regulation sets forth the requirement that a medical report indicating a change of condition must be attached to the *hearing request form*. S.C. Code Ann. Regs. 67-602(C) (1987). The plain meaning of the regulation suggests a request for hearing and not only a notice of claim.

C. Respondent did not follow the procedural requirements of Regulation 67-602(C) in that he did not attach to his hearing request form a medical report indicating a change in his condition.

Regulation 67-602(C) provides that "the moving party *must* attach to the hearing request form a *medical report(s) indicating a change in the claimant's condition.*" S.C. Code Ann. Regs. § 67-602(C) (Supp. 2012) (emphasis added). This rule is mandatory. Along with the claimant's hearing request form, it is imperative that a medical report indicating a change in the claimant's condition be attached.

1. Dr. Rana's report did not indicate a change in Respondent's condition.

With Respondent's May 9, 2012 Form 50 *not* requesting a hearing, Respondent attached a medical report and questionnaire of Dr. Rana. This report did not comply with the requirements of Regulation 67-602(C), as it did not indicate a change in the Respondent's condition. On July 14, 2010, Dr. Rana assessed Respondent as having twenty-one percent (21%) permanent partial impairment to the spine. On February 16, 2012, Dr. Rana assessed Respondent as having twenty-one percent (21%) permanent partial impairment to the spine and five percent (5%) permanent partial impairment to the thoracic spine. (APA pp. 167, 178 and 181.) Because an injury to Respondent's thoracic spine was not at issue in the initial hearing, there could be no change of condition to the thoracic spine based upon the original award.

Moreover, nowhere in his report does Dr. Rana causally relate Respondent's thoracic condition to his September 17, 2007 work accident. Appellant submits that, inherently, there can be no change of condition if Respondent's maximum medical improvement status and impairment rating were unchanged subsequent to the last payment of compensation.

Dr. Rana also completed a medical questionnaire, in which he checked "Yes" to the question of whether Respondent "most probably proximately suffered a worsening of condition to his spine." (APA p. 181.) Nowhere in this questionnaire nor in Dr. Rana's medical report was there a reference to a time period indicating when Respondent suffered a worsening of condition of his spine. (APA pp. 178-181.) Dr. Rana last evaluated Respondent on July 14, 2010. (APA p. 178.) The initial hearing in this case took place on March 17, 2011. (APA p. 160.) It is unclear from Dr. Rana's report whether, in his opinion, Respondent suffered a "worsening of condition to his spine" in the nine months between his initial evaluation and the underlying hearing in March of 2011 or in the time following Commissioner Wilkerson's initial award in June of 2011.

2. Dr. Rana's report was nebulous.

Appellant submits that the factual foundation of Dr. Rana's report is nebulous and is thus inadmissible. An expert opinion "must be based upon facts . . . sufficient to form a basis for an opinion. . . . Expert opinion is inadmissible if its factual foundation is nebulous." Young v. Tide Craft, Inc., 270 S.C. 453, 468, 242 S.E.2d 671, 678 (1978). An opinion lacks probative value if the factual or underlying basis for the expert's opinion is not set forth. Id. In his February 2012 report, Dr. Rana notes that he reviewed records from Carolinas Center for Advanced Management of Pain and David Tollison, Ph.D. He further notes that treatment since Respondent's prior evaluation included psychological counseling and transforaminal epidural

steroid injections. (APA p. 178.) However, he gives no reasoning behind his opinion that Respondent "most probably proximately suffered a worsening of condition." He goes on to assign the exact same impairment rating to the lumbar spine as he did in 2010 and he gives no indication as to what time period he considered when coming to the conclusion Respondent suffered a worsening of his condition. (APA p. 181.)

In Finding of Fact No. 18, the Commission noted it was unwilling to "punish" Respondent for any deficiencies with regard to Dr. Rana's opinion, when the authorized treatment records supported an opinion of a worsened condition. In the same finding, the Commission mentioned that Dr. Rana's findings of MMI were not dispositive and noted that Commission's role was to adjudicate the merits of a claim. (Appellate Panel Decision & Order p. 14.) While Appellant disagrees that the authorized treatment records support an opinion of a worsened condition, even if these records did support such a finding, the records came into existence well after Dr. Rana's opinion. Appellant contends that the regulation requiring supporting medical documentation of a change of condition does not contemplate a report such as Dr. Rana's and that the report did not comply with the Commission's regulations.

D. Neither of Respondent's hearing requests were accompanied by a medical report indicating a change in Respondent's condition.

Following Respondent's filing of the May 9, 2012 Form 50 claim only, he also filed a May 17, 2013 Form 50 requesting a hearing and an August 9, 2013 amended Form 50 requesting a hearing. Respondent did not submit medical reports with either of these requests for hearing. As such, Appellant submits that this claim should be barred due to failure to comply with Regulation 67-602(C), which requires a medical report indicating a change of condition to be attached to the hearing request form.

As set forth above, Section 42-17-90 and Regulation 67-602(C) contemplate a *change* of condition within twelve months of the last payment of compensation. These rules do not suggest that a Respondent can toll the statute by filing a claim only. A claimant further should not be permitted to toll the statute by attaching the medical report of a physician who (1) offers no factual basis for his opinion and (2) indicates no actual *change* in Respondent's condition, with the exception of a "yes" check mark suggesting a worsening of Respondent's condition but with no reference to a time period when that worsening took place.

The Commission's decision to allow Respondent to circumvent these rules is contrary to the intended purpose and application of Section 42-17-90 and Regulation 67-602(C). Therefore, Appellant requests that this honorable Court reverse the decision of the Commission in allowing this claim to go forward.

II. The reliable, probative, and substantial evidence in the record establishes Respondent has not sustained a change of condition for the worse, and the Commission erred in finding otherwise and in ordering additional medical treatment in light of the same.

S.C. Code Ann. § 42-17-90 provides "the commission may review an award and on that review may make an award ending, diminishing, or increasing the compensation previously awarded, on proof by a preponderance of the evidence that *there has been a change of condition caused by the original injury*, after the last payment of compensation." A change in condition means a change in the physical condition of the claimant as a result of the original injury occurring after the first award. Cromer v. Newberry Cotton Mills, 201 S.C. 439, 23 S.E.2d 19 (1943), Causby v. Rock Hill Printing & Finishing Co., 249 S.C. 225, 153 S.E.2d 697 (1967).

A. The substantial evidence in the record does not support Respondent's change of condition claim.

There can be no change of condition where a claimant's complaints and medical findings prior to an initial award are essentially the same as his complaints and medical findings presented in a change of condition action. Robbins v. Walgreens, 375 S.C. 259, 263, 652 S.E.2d 90, 92 (Ct. App. 2007). In Robbins, the claimant injured his back on April 13, 2003. He was diagnosed with degenerative disc disease at levels L1-2 and L2-3, with foraminal compression causing lumbar spine radiculopathy, and lumbar stenosis. Robbins returned to work and settled his workers' compensation claim with Walgreens on March 12, 2004. Id. at 262, 652 S.E.2d at 92. A month later, the claimant continued to complain of back pain that never abated. His authorized treating physician, who had released him at maximum medical improvement prior to settlement, diagnosed decreased lumbar motion and recommended further treatment. He suggested the claimant stop working. Id. at 262-63, 652 S.E.2d at 92. Another physician diagnosed him with disc degeneration at L1-2 and L2-3 with loss of disc height and signal. Id.

The Court of Appeals agreed that the claimant had not suffered a physical change of condition for the worse arising out of the original injury. Although the claimant testified at the hearing that his back pain was "much worse" than it was at the time he settled his original claim, the Court agreed that the claimant's complaints prior to the settlement agreement were essentially the same as they were after the settlement agreement. Id. at 265, 652 S.E.2d at 94. Moreover, the results of the MRIs prior to and after the settlement of his original claim showed degenerative disc disease at L1-2 and L2-3. Id. Therefore, the evidence before and after the settlement of his original claim showed the same condition, not a changed one. Id.

In the instant case, Appellant does not deny that Respondent sustained a serious back injury. Appellant further does not deny that Respondent continues to experience pain due to his 2007 injury. However, Appellant denies that Respondent has sustained a *change* in his physical condition since his initial hearing and payment of the award. Respondent alleged permanent and total disability at the hearing before Commissioner Wilkerson (APA p. 163.) He described his pain as constantly a 7 out of 10, with stabbing pain, tingling, numbness, and radiating pain into his left leg. (APA p. 168) He testified he took a multitude of drugs and could not play with his children or participate in hobbies he once could. He further did not believe he could work. (APA pp. 168-69.)

Respondent's complaints and diagnoses have remained the same since the initial hearing. Dr. LaTourette's diagnosis—post-laminectomy pain syndrome—has been the same for three or four years. (2013 Deposition of Dr. LaTourette, p. 61, ll. 11-14, 22-24.) Dr. LaTourette also stated in August of 2012 – over twelve months after the last payment of compensation on June 27, 2011 pursuant to Commissioner Wilkerson's award – that he did not think Respondent had sustained a change of condition at that time. (2012 Deposition of Dr. LaTourette, p. 16, ll. 1-7, p. 22, ll. 21-25-p. 23, l. 1-2.) He further declined to change his impairment rating that he had assigned in February of 2011 and stated that Respondent had reached maximum medical improvement (Id., p. 16, ll. 16-18, p. 17, ll. 3-5.) He later testified that Respondent may be able to do more physically than the doctor may have previously thought. (2013 Deposition of Dr. LaTourette p. 38, l. 7-16.)

The Commission noted in its eighth finding of fact that Respondent has post-surgical scar tissue formation. However, such scar tissue was present prior to Respondent's initial award, and Dr. Esce commented on the same. (APA p. 166.) On February 27, 2013, Dr. Kanos noted a

moderate bulge at L4-5 worse on the right causing some foraminal stenosis and post-surgical changes at L5-S1. (APA p. 152.) Dr. Esce had essentially the same observations prior to Respondent's first award. (APA p. 166.) Moreover, Dr. LaTourette noted that, with respect to the L4-5 disc bulge, the MRI from April of 2009 and the MRI from September 13, 2012, were essentially identical, notwithstanding an annular tear. (2013 Deposition of Dr. LaTourette, p. 57, l. 13-25 – p. 58, l. 1-12) He further noted the Respondent could have experienced an irritation of a nerve root due to the disc protrusion that was present in April of 2009. As such, the annular tear may have had no effect on Respondent's current symptoms. (Id., p. 59, l. 20-25.)

Finally, similar to the claimant in Robbins, who complained of persistent pain, Dr. LaTourette testified in his deposition that he could not tell if Respondent had a change of condition or a persistence of significant pain. (Id., p. 53, l. 21-25 – p. 54, l. 1.) Respondent had already alleged permanent and total disability at the underlying hearing and he continued to allege the same. Applying the rule in Robbins to the instant case, Appellant respectfully submits that the Commission erred in finding any *change* in Respondent's condition, as the evidence suggests substantially the same condition before and after the initial award.

B. Respondent's current condition is merely a natural progression of his initial injury and accompanying degenerative disease.

"[A] condition due solely to natural progression of a preexisting disease is not compensable." Carter v. Verizon Wireless, 757 S.E.2d 528, 532 (Ct. App. 2014) (citing Brown v. R.L. Jordan Oil Co., 291 S.C. 272, 275, 353 S.E.2d 280, 282 (1987)). In Carter, the claimant alleged a change of condition to her injured knee. Dr. Grady testified that her knee had "materially worsened" due to natural degeneration and agreed that the claimant's worsening condition was "more of a degenerative, insidious, slow problem" rather than "acute in nature." Id. The Commission found the claimant did not sustain a compensable change of condition, and

the Court of Appeals agreed, noting that the claimant's condition was the result of the natural progression of her pre-existing degenerative joint disease and not the result of her original injury. Id.

In the case at hand, Commissioner Wilkerson noted in his June 2011 Decision & Order Respondent's degenerative disc disease at L4-S1 and L5-S1 with mild to moderate disc herniation on the right side of L4-5. (APA p. 166.) Following the initial award, Dr. Rodriguez noted on October 1, 2012, that his overall assessment was L4-L5 and L5-S1 degenerative disc, but recurrent disc herniation on the left side. This constituted a second recurrent herniation and third herniation overall. (APA p. 143.) Dr. Kanos also noted in his recommendation for an additional left L5-S1 decompression and left L4-5 foraminotomy that Respondent could still be hurting even after this surgery. (APA p. 153.)

Appellant submits that the reliable, probative and substantial evidence in the record reveals Respondent's degenerative disc condition and predisposition for recurrent disc herniation. As such, Respondent's current condition is a natural progression of his pre-existing problems and not a change of condition.

C. To the extent the Commission was persuaded by evidence suggesting physical changes to Respondent's spine, such evidence came into being well outside the twelve month limitations period for a change of condition claim.

Appellant does not deny, as the Commission noted in its ninth finding of fact, that Respondent presented questionnaires from Dr. Rodriguez (APA p. 146), Dr. Kanos (APA p. 155A), and Dr. LaTourette (APA p. 128A) in which they checked an option suggesting a change in Respondent's condition. However, these questionnaires were not completed until June 12, 2013, August 8, 2013, and September 13, 2013, respectively. These opinions were rendered well after the twelve month limitations period that is contemplated in S.C. Code § 42-17-90.

Moreover, in Finding of Fact No. 8, the Commission cited several records to support its finding that Respondent's lumbar spine condition worsened. All of the treatment records cited in APA p. 75 onward came into existence after the twelve month limitations period. Respondent's treatment records from August 24, 2011 (APA pp. 5-6) to May 23, 2012 (APA p. 57-59) were the only records cited that existed within the twelve month limitations period. These records noted Respondent's subjective complaints of increased pain, but they did not state Respondent had sustained a change of condition. Dr. LaTourette opined on August 13, 2012 that Respondent had sustained *no* change of condition. (2012 Deposition of Dr. LaTourette, p. 16, ll. 1-7, p. 22, ll. 21-25-p. 23, l. 1-2.) Dr. LaTourette also stated in August of 2012 that Respondent's pain had remained relatively stable and that he was providing basically maintenance/palliative care. (2012 Deposition of Dr. LaTourette, p. 16, ll. 8-9, pp. 23, ll. 1-2.) As such, as of August of 2012, Appellant had no reason to believe Respondent had sustained a change of condition.

Appellant notes also that Respondent testified at the hearing in September of 2013 that his pain had gotten worse "over the last seven, eight, nine months." (Hr'g Tr. p. 22, l. 25-p. 23, l. 1-2.) This time period is irrelevant for the purposes of a change of condition because it was well outside the twelve month limitations period for a change of condition claim.

The Commission placed weight on the fact that Respondent requested a second surgical opinion in December of 2011. However, *after* that date, Respondent saw Dr. Rana, who opined Respondent had reached maximum medical improvement and would need ongoing pain management. (APA p. 131.) No mention was made of surgery at that time. Furthermore, *after* that date, Dr. LaTourette opined Respondent had not sustained a change of condition and that he did not anticipate that Respondent would have surgery, as there was not much that could be done for scar tissue. (2012 Deposition of Dr. LaTourette, p. 23, ll. 1-2, p. 24, ll. 22-25.)

The Commission further highlighted the fact that Respondent had undergone multiple injections since the date of his permanency award. However, such injection treatment was contemplated by Commissioner Wilkerson in his order, and the mere fact that Respondent has undergone such treatment is not persuasive evidence of a change of condition, as it was ordered in the underlying case.

The Commission noted that it considered the video surveillance, but it did not persuade it to deviate from its decision. However, Dr. LaTourette noted "I think that video is significant in that it shows some significant amount of ability to do physical things." (2013 Deposition of Dr. LaTourette, p. 33, l. 11-13.) He further noted there was a good chance that Respondent has some symptom magnification. (Id., p. 34, l. 20-23). The Commission's eleventh finding of fact does not take into account Dr. LaTourette's opinion in this regard.

Given the reasons set out above, Appellant respectfully submits that the Commission erred in its conclusion that Respondent sustained a change of condition. To the extent any persuasive evidence was submitted to suggest a change in Respondent's condition following the last payment of compensation, it came into being well outside the twelve month limitations period for a change of condition claim and should not have been considered.

D. Given that Respondent has not sustained a change of condition for the worse, the Commission erred in finding that Respondent has not reached maximum medical improvement and is entitled to medical treatment from Dr. Kanos, in addition to reimbursement of expenses associated with Dr. Kanos' treatment.

Pursuant to South Carolina Code Annotated Section 42-15-60, medical treatment shall be provided that is medically necessary, causally related and will tend to lessen Respondent's period of disability. S.C. Code Ann. § 42-15-60. Based on Section 42-17-90, Regulation 67-602(C), and the arguments set forth above, Respondent's change of condition claim was barred and,

further, he sustained no change of condition. Therefore, Respondent is only entitled to future medical treatment as set forth in Commissioner Wilkerson's June 8, 2011 Decision & Order.

The Commission correctly stated in Finding of Fact No. 12 that it was unable to order surgery under Commissioner Wilkerson's Order, which limited future medicals to those listed on Dr. LaTourette's Form 14B ("medication for pain, psychological eval and treatment, spinal injections and PT"). Because Respondent's change of condition claim was not properly before the Commission, Commissioner Wilkerson's June 8, 2011 Decision & Order is the law of the case the same is *res judicata*. See generally Johnson v. Greenwood Mills, Inc., 317 S.C. 248, 250-51, 452 S.E.2d 832, 833 (1994) (citing the circumstances under which *res judicata* will be shown, all of which are present in the instant case, as the parties and subject matter are the same as in prior litigation and there was a prior adjudication by the Commission). As such, the Commission erred in finding that Respondent has not reached maximum medical improvement and is entitled to additional medical treatment with Dr. Kanos, including, but not limited to, surgery. The Commission further erred in finding that Respondent is entitled to reimbursement for the CT Myelogram and visits with Dr. Kanos. Respondent is only entitled to medical treatment previously ordered by Commissioner Wilkerson. To the extent Respondent desires medical treatment that was not ordered by Commissioner Wilkerson, he has the means to do receive the same under his own insurance. (Hearing Transcript p. 25, ll. 12-25-p. 26, ll. 1-5.)

CONCLUSION

Based on the arguments set out above, the Commission erred in finding that Respondent sustained a change of condition for the worse. The Commission allowed Respondent to obtain a review of his initial award over two years after he received payment under Commissioner Wilkerson's 2011 order. Such a result is contrary to the requirements set forth in Section 42-17-90 and Regulation 67-602(C). While Appellant does not deny that Respondent has sustained a serious back injury, the Commission inappropriately considered Respondent's application for review to the Commission in 2013. Moreover, the reliable, probative, and substantial evidence in the record does not support the Commission's decision that Respondent sustained a change in his condition following his initial award in 2011. As such, Respondent is not entitled to any further medical treatment or reimbursement for treatment received, with the exception of that treatment which is set forth in Commissioner Wilkerson's 2011 order. Given the reasons cited above, Appellant respectfully requests that this Court reverse the order of the Commission in its entirety.

Respectfully submitted,

McANGUS GOUDELOCK & COURIE, LLC

Brad B. Easterling, SC Bar # 70328
Post Office Box 2980
55 East Camperdown Way, Suite 300 (29601)
Greenville, South Carolina 29602
(864) 239-4000

Attorneys for Appellant

July 17, 2014

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Appellate Case No. 2014-001372

WCC Case No. 0726308

Shannon Cook, Claimant, Respondent,

v.

Spartanburg Steel Products, Inc., Defendant, Appellant

PROOF OF SERVICE

I certify that I have served the Initial Brief and Designation of Matter on the attorney of record for Shannon Cook, by depositing a copy of it in the United States Mail, postage prepaid, on the 17th day of July, 2014 addressed to his attorney of record:

Ryan S. Montgomery
Ryan Montgomery Attorney at Law, LLC
108 Mills Avenue
Greenville, South Carolina 29605

July 17, 2014

Brad B. Easterling, SC Bar #70328
McAngus, Goudelock & Courie LLC
Post Office Box 2980
55 East Camperdown Way, Suite 300 (29601)
Greenville, South Carolina 29602
(864) 239-4000

Attorneys for Appellants

mgc | INSURANCE DEFENSE

Reply To
BRAD B. EASTERLING
Direct Dial: (864) 239-6736
brad.easterling@mgclaw.com

July 17, 2014

The Honorable Jenny Abbott Kitchings
Clerk of Court, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: Shannon W Cook vs. Spartanburg Steel Product and Hartford Insurance Company of the Midwest c/o Sedgwick Claims Management Services, Inc.
Date of Accident: September 17, 2007
WCC File No.: 0726308
Appellate Case No.: 2014-001372
Our File No.: 20194.14124
Claim No.: YDS65635

Dear Ms. Kitchings:

Please find enclosed the original and one copy of Appellant's Initial Brief together with the Designation of Matter in the above-referenced matter. In accordance with the Court Rules, please also find enclosed the Proof of Service.

By copy of this letter, I am serving a copy of the same on Ryan Montgomery, Esquire, attorney for Respondent.

Please return a filed, stamped copy of Appellant's Initial Brief and Designation of Matter in the self-addressed, stamped envelope enclosed.

With kindest regards, I remain

Very truly yours,

Brad B. Easterling

BBE/rhd
Enclosures
cc: Ryan Montgomery
Beth Padgett
John Nelson

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The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, South Carolina 29211