APPELLATE PANEL

DECISION AND ORDER

OF THE

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

WCC FILE NO. 1106833

Timothy McMahan,	RESPONDENT CLAIMANT,
vs.	
SC Department of Education--Transportation,	EMPLOYER,
AND	
State Accident Fund,	CARRIER, DEFENDANTS/APPELLANTS

Appellate Panel Review held in Columbia, South Carolina, on July 22, 2014, per notices timely and properly served upon all parties of interest.

Appellate Panel Decision and Order filed September 30, 2014

APPEARANCES:

Respondent/Claimant, Timothy McMahan, represented by Kevin Smith of the Hoffman Law Firm, North Charleston, South Carolina.

Defendants/Appellants, SC Department of Education and the State Accident Fund, represented by George T. Miars, Jr., Esquire of Willson Jones Carter & Baxley, P.A. in Mount Pleasant, South Carolina.

STATEMENT OF THE CASE

The parties were heard by Commissioner Aisha G. Taylor, on August 15, 2013, in Columbia, South Carolina. On March 25, 2014, she issued the following Order:

> **IT HIS HEREBY ORDERED, ADJUDGED AND DECREED that the claimant sustained a compensable injury-by-accident arising out of and occurring within the course and scope of his employment on June 15, 2011 to his back and left leg, and it is further,**
>
> **ORDERED, ADJUDGED AND DECREED that the Claimant is entitled to receive permanent and total disability benefits due to the fifty (50) percent or greater loss of use to his back under §42-9-30(21), and it is further,**
>
> **ORDERED, ADJUDGED AND DECREED that dependency and lump sum are reserved for a later hearing. The undersigned Commissioner will rule on these issues upon receipt of a qualified dependency investigation.**
>
> **IT IS SO ORDERED.**

Within the statutory period, counsel for Defendants filed a Form 30, Application for Review, appealing the decision of the hearing Commissioner and setting forth alleged errors. Copies of this Form were served on all interested parties, prior to being presented before the Appellate Panel on July 22, 2014. All parties appeared for oral argument before the Appellate Panel of the Commission and presented their case on appeal.

All proffered testimony has been taken. Such, together with all documentary evidence, has been delivered by oral argument to the individual members of the Appellate Panel and has since been under study and consideration.

By appeal, Defendants respectfully submitted that the Hearing Commissioner erred in the following:

1. The Hearing Commissioner erred in finding that the Claimant's estate is entitled to an award of permanent and total disability because the Workers' Compensation Act does not provide for a posthumous determination of Claimant's disability; because Claimant's award for benefits would have abated under S.C. Code § 42-9-280, if Claimant's estate had the legal ability to

posthumously litigate disability; because Claimant failed to reach maximum medical improvement prior to his death; and finally, because the award of disability in the matter violates Defendants' due process rights.

II. The Hearing Commissioner erred in finding that Claimant reached maximum medical improvement as of April 23, 2012, because the evidence shows that the Clamant did not reach maximum medical improvement prior to his death.

III. The Hearing Commissioner erred in failing to find that Claimant suffered from paraplegia as a result of his work accident.

In an Appellate Review, the Appellate Panel shall, pursuant to S.C. Code Ann. Section 42-17-50, review the award, weigh the evidence as presented at the initial hearing, and if good grounds be shown therefore, make its own Findings of Fact and reach its own Conclusions of Law consistent or inconsistent with those of the Hearing Commissioner. (see also McGuffin v. Schlumberger-Sangamo, 307 S.C. 184, 414 S.E.2d 162 (1992)). "In workers' compensation cases, the Appellate Panel is the ultimate fact finder." Shealy v. Aiken County, 314 S.C. 448, 535 S.E.2d 438 (S.C. 2000) (citing Hunter v. Patrick Constr. Co., 289 S.C. 46, 344 S.E.2d 613 (1986)). "The final determination of witness credibility and the weight to be accorded evidence is reserved to the Full Commission." Id. (citing Ford v. Allied Chem. Co., 252 S.C. 561, 167 S.E.2d 564 (1969)). In this case, the preponderance of evidence in the record supports a reversal of the Hearing Commissioner's award.

Claimant filed a Form 50 requesting a hearing on May 23, 2013, alleging injuries by accident to his head, brain, back, internal organs, teeth, legs, mouth, and ribs, arising out of and in the course and scope of his employment with the employer on June 15, 2011. The Defendants filed a Form 51 answer on June 13, 2013, admitting injury to the back only, and denying that Claimant's estate was entitled to any disability benefits. Unfortunately, the Claimant died due to unrelated causes on October 6, 2012. Claimant's estate takes the position that they be allowed to have a posthumous determination of Claimant's disability and that Claimant should be considered

permanently and totally disabled only as a result of having a greater than 50% disability to the spine. Defendants take the position that Claimant's estate is not entitled to posthumously litigate Claimant's disability because the Claimant did not reach maximum medical improvement ("MMI") before his death, and because the Act does not allow for post mortem adjudication of disability. Further, Defendants assert that Claimant suffered from paraplegia as a result of his work related injury, and therefore, pursuant to South Carolina Code § 42-9-280, even if the Act allowed Claimant's estate to a post mortem disability award, such award would abate.

In an Order dated March 24, 2014, the single Commissioner found that the Claimant's estate was entitled to an award of permanent and total disability due to the Claimant having a greater than 50% disability to the spine. It is from this Order that Defendants appealed to the Full Commission Appellate Panel.

DISCUSSION OF APPLICABLE LAW AND EVIDENCE OF THE CASE

The South Carolina Workers' Compensation Act requires a claimant to be at MMI in order to be entitled to an award of permanent disability. As indicated by the South Carolina Supreme Court in Owens v. Herndon, 252 S.C. 166, 167, 165 S.E.2d 696, 697 (1969), "[t]he rights and liability of employee and employer under the Workmen's Compensation Act are purely statutory and are to be judged by the terms of the Act. Policy consideration as to what benefits should be conferred or obligations imposed are strictly for the legislature." Id. Since workers' compensation statutes provide an exclusive compensatory system in derogation of common law rights, courts must strictly construe such statutes, leaving it to the legislature to amend and define any ambiguities. Cox v. BellSouth, 356 S.C. 468, 589 S.E.2d 766 (Ct.App. 2003).

South Carolina Code § 42-9-280 provides the sole basis under the Act for a claimant's estate's or beneficiaries' entitlement to a claimant's disability award after the claimant dies from a

non-work related reason. This Statute, titled "Payment of unpaid balance of compensation when employee dies" states:

> When an employee receives or is entitled to compensation under this Title for an injury covered by the second paragraph of Section 42-9-10 or 42-9-30 and dies from any other cause than the injury for which he was entitled to compensation, payment of the unpaid balance of compensation shall be made to his next of kin dependent upon him for support, in lieu of the compensation the employee would have been entitled to had he lived.

S.C. Code Ann. § 42-9-280 (1976) (emphasis added).

It is well settled in South Carolina that the award of disability benefits is premature prior to the claimant reaching MMI. Curiel v. Environmental Management Services, 376 S.C. 23, 655 S.E.2d 482 (2007) (stating that "workers' compensation benefits accrue along a time continuum: temporary total disability benefits are available from the date of injury through the date of maximum medical improvement; **post-maximum medical improvement benefits may then be awarded either as a permanent total or partial disability, or as a percentage of impairment to a scheduled member**." (emphasis added)). Likewise, in Smith v. S.C. Dep't of Mental Health, 335 S.C. 396, 517 S.E.2d 694 (1999) (citing Hines v. Hendricks Canning Co., 263 S.C. 399, 211 S.E.2d 220 (1975)), the court explained that the rationale for ceasing temporary benefits upon a finding of MMI is to permit entry of a permanent award, and noting that the degree of permanent disability cannot be determined prior to MMI.

It is also well settled that "maximum medical improvement" or "MMI" is the term used to demonstrate that a claimant has reached such a plateau in their treatment and recovery that, in the physician's opinion, there is no further medical care or treatment which will lessen the degree of impairment. Cranford v. Hutchinson Construction, 399 S.C. 65, 731 S.E.2d 303 (Ct. App. 2012) (citing O'Banner v. Westinghouse Elec. Corp., 319 S.C. 24, 28, 459 S.E.2d 324, 327 (Ct. App. 1995)). The court explained this concept in Scruggs v. Tuscarora Yarns, Inc., 294 S.C. 47, 50, 362 S.E.2d 319, 321 (Ct. App. 1987), concluding that a finding of MMI was proper by the single

Commissioner because the evidence supported that additional medication or treatment prescribed for the claimant was intended to help alleviate the claimant's remaining symptoms but *would not improve* the claimant's condition.

Further, the AMA Guides support that a finding of MMI is necessary before the determination of permanent disability, noting:

> Permanency is the condition whereby impairment becomes static or well stabilized with or without medical treatment and is not likely to remit in the future despite medical treatment, within medical probability. This term is usually synonymous with MMI, usually occurring when all reasonable medical treatment expected to improve the condition has been offered or provided. Impairment ratings are to be performed when an individual is at a state of permanency.

Guides to the Evaluation of Permanent Impairment, AMA, 6th Ed., p. 26-27.

In this case, the evidence shows that Claimant was never at MMI prior to his death. Claimant underwent a T12 corpectomy and fusion on June 16, 2011, and he was seen again by his surgeon, Dr. Raymond Turner on October 10, 2011, who opined that Claimant was able to regain some mobilization of his lower extremities, but did have deformity correction which left him with severe back pain. (Claimant's APA p. 26; p. 32). Claimant underwent a second spine surgery on October 10, 2011, and was seen by Dr. Turner on December 6, 2011, with complaints of left leg pain and bilateral foot swelling since his surgery. (Claimant's APA p. 22; p. 32). His last medical report from MUSC is dated two months later, on February 7, 2012, and states that Claimant told his providers he would be moving by the end of the month to Tennessee to take care of his father, and requested transfer of care with enough pain medication to last through his transfer. (Claimant's APA p. 24). Further, these medical reports show that Claimant was directed to "set up with Rehab and Pain Management ASAP in Tennessee for a smooth transfer of care," and recommended that Claimant undergo physical therapy to focus on his lower lumbar paraspinals. (Claimant's APA p. 25). The reports from MUSC do not contain any statement indicating Claimant was being released from care, that he had reached a plateau in his medical condition, or that he was at MMI as a result

of his work related injuries, and it is clear from these reports that his medical treatment needed to continue to improve Claimant's condition. (see Claimant's APA p. 24-25).

After moving to Tennessee, Claimant was seen by Dr. Patrick Bolt for an independent medical evaluation on April 23, 2012. (Claimant's APA p. 2-5). In his report, Dr. Bolt stated Claimant was a relatively poor historian, and Dr. Bolt admitted he had not reviewed the Claimant's medical records from MUSC, or any other provider other than Dr. Brandli at Carolina Family Urology. (Claimant's APA p. 4). Dr. Bolt expressed concern that Claimant may have an indolent infection and recommended lab work. At that time, Dr. Bolt also recommended that Claimant undergo an MRI of both the thoracic and lumbar spine to further delineate the discs and neural structures, and a CT scan of the thoracic and lumbar spine to evaluate the bony fusion, screw placement, and cage position. (Claimant's APA p. 4). Dr. Bolt specifically noted that he was declining to take over the patient's pain management as he was only seeing the Claimant for a surgical opinion, and recommended that Claimant be placed in pain management in the Knoxville area. (Claimant's APA p. 4). Despite not reviewing the Claimant's medical records related to his spine injury, only seeing the claimant for an independent evaluation, and recommending the Claimant for a large amount of diagnostic testing and ongoing medical treatment, Dr. Bolt states in this note that "[a]pparently, the patient is already at maximum medical improvement, **but, again, I have no records to confirm this.**" (Claimant's APA p. 5) (emphasis added).

Claimant underwent the MRI study and CT scan recommended by Dr. Bolt on May 4, 2012, and was seen by Dr. Bolt on May 11, 2012, who ordered EMG testing to be scheduled to rule out any further radiculopathies. (Claimant's APA p. 7). Claimant was advised to return to see Dr. Bolt as soon as the EMG testing was done. (Claimant's APA p. 7). Unfortunately, Claimant passed away on October 6, 2012 due to unrelated causes. (Claimant's APA p. 36). No further reports were produced to show Claimant returned for any further visits with Dr. Bolt after April 23,

2012, or that the EMG studies were actually performed or reviewed as ordered.

It is clear from a reading of the Claimant's medical records that he was never at MMI before his death. He was not placed at MMI by any provider at MUSC before his visit with Dr. Bolt, and Dr. Bolt's statement assuming Claimant was at MMI was therefore incorrect. Dr. Bolt admits as much in his February 27, 2013 note, stating, "I had thought [the claimant] was previously at maximum medical improvement, apparently that was not the case." (Claimant's APA p. 11). Dr. Bolt then, without explanation, summarily states that "I would say that [the Claimant] was at maximum medical improvement when I saw him on April 23, 2012," despite the fact that the Claimant had not undergone the diagnostic studies and medical treatment both Dr. Bolt and MUSC recommended for him, including initiation of therapy, further diagnostic testing, and pain management. (Claimant's APA p. 11).

Based on Dr. Bolt's own statements, there is no medical opinion that Claimant was at maximum medical improvement prior to his death, and we find that his posthumous opinion of MMI by Dr. Bolt is based on surmise and unsupported by the medical evidence. The medical evidence clearly shows that Claimant had not reached maximum medical improvement, but was continuing to improve, and still had a large amount of medical treatment and diagnostic testing being recommended for him at the time of his death.

Defendants alternatively assert that Claimant's award of disability would abate if he was found to be at MMI before his death, as he was a paraplegic. Given that we find that the Claimant was not at MMI at the time of his death, neither he nor his estate are entitled to a disability award, and we do not need to reach this issue.

We find that Claimant's award of permanent and total disability should be reversed, as the Claimant was not at maximum medical improvement prior to his death.

FINDINGS OF FACT

Based upon the documentary evidence submitted by the respective parties, pursuant to the Administrative Procedures Act, and the Commission's file relative to this claim, WE, THE APPELLATE PANEL, FIND THE FOLLOWING AS FACT:

1. That the South Carolina Workers' Compensation Commission has exclusive jurisdiction over this matter.
2. That the Full Commission has reviewed the submitted evidence, including the medical records, the expert opinions of the medical doctors, and the other submitted documents and evidence.
3. That "maximum medical improvement" or "MMI" is the term used to demonstrate that a claimant has reached such a plateau in their treatment and recovery that, in the physician's opinion, there is no further medical care or treatment which will lessen the degree of impairment. Cranford v. Hutchinson Construction, 399 S.C. 65, 731 S.E.2d 303 (Ct. App. 2012) (citing O'Banner v. Westinghouse Elec. Corp., 319 S.C. 24, 28, 459 S.E.2d 324, 327 (Ct. App. 1995)). The court explained this concept in Scruggs v. Tuscarora Yarns, Inc., 294 S.C. 47, 50, 362 S.E.2d 319, 321 (Ct. App. 1987), concluding that a finding of MMI was proper by the single Commissioner because the evidence supported that additional medication or treatment prescribed for the claimant was intended to help alleviate the claimant's remaining symptoms but *would not improve* the claimant's condition.
4. That whether a claimant is at MMI is a factual determination to be made by the Full Commission, and the Full Commission must look at all of the evidence in the record in making this determination.
5. That the Claimant was never found to be at MMI by his treating physicians at MUSC.

The last medical report from MUSC, on February 7, 2012, notes that Claimant was recommended to "set up with Rehab and Pain Management ASAP in Tennessee for a smooth transfer of care." We find that this report supports that the Claimant was not at maximum medical improvement when he was last seen by MUSC, and that his treating physicians believed that Claimant's treatment needed to continue to improve his medical condition and work related injuries before he reached MMI.

6. That Claimant was next seen by Dr. Patrick Bolt for an independent medical evaluation on April 23, 2012, in Knoxville, Tennessee, and that, in his report from this office visit, Dr. Bolt recommended that the Claimant undergo additional diagnostic testing in the form of MRIs and CT scans to his lumbar and thoracic spine, and undergo additional pain management treatment in the Knoxville area.

7. That despite not reviewing the Claimant's medical records related to his spine injury, only seeing the Claimant for one evaluation, and recommending the Claimant for ongoing treatment to include additional diagnostic testing and pain management, Dr. Bolt states in his first report that "[a]pparently, the patient is already at maximum medical improvement, but, again, I have no records to confirm this." We find that it is clear from a reading of the Claimant's medical records that Claimant was never found at MMI before this visit with Dr. Bolt; therefore, we find that Dr. Bolt's statement of MMI was incorrect.

8. That the Claimant passed away from unrelated causes on October 6, 2012.

9. That, in a note dated February 27, 2013, well after Claimant's death, Dr. Bolt was asked by the Claimant's attorney to provide the Claimant with a posthumous impairment rating. In this report, Dr. Bolt admits that he thought the Claimant was previously at MMI, but then admits, "apparently that was not the case." Without

explanation, Dr. Bolt then summarily states "[the Claimant] was at maximum medical improvement when I saw him on April 23, 2014," despite the fact that the Claimant had not undergone the pain management treatment both Dr. Bolt and MUSC recommended for him, nor the diagnostic ENG/Nerve Conduction Studies recommended by Dr. Bolt. We find that this additional treatment and testing was to further diagnosis and improve the Claimant's medical condition, not to merely keep him at his current level of disability, and therefore, Claimant was not at MMI at the time of his death. Further, given that additional diagnostic testing was being recommended at the time of Claimant's death, we can only speculate as to the Claimant's level of disability or severity of his medical condition.

10. That the Claimant was recommended for additional diagnostic studies and ongoing medical treatment at the time of his death is strongly supportive of our finding that the Claimant was not at MMI, and damaging to the credibility of Dr. Bolt's post-mortem option of MMI. Dr. Bolt gives no explanation as to why he found the claimant at MMI, when he never obtained the testing he specifically ordered to determine the extent of the Claimant's neurological/spinal cord condition. Without this additional testing, we find that Dr. Bolt's post-mortem opinion was based on speculation and conjecture.

11. That Dr. Bolt vacillates with regards to whether the Claimant was at MMI or not. He initially states in his first report that the claimant was previously found at MMI, but admits that he had no records to confirm this. He then recommends additional diagnostic testing and treatment, which the Claimant did not undergo prior to his death. Subsequently, Dr. Bolt provides a post-mortem report to Claimant's attorney, stating that he was incorrect when he believed the claimant was found at MMI prior to his first evaluation of the Claimant, but then post-dates MMI back to the date of his first

evaluation. Dr. Bolt's opinions are convoluted at best, and we find they are not sufficient to support a finding that the Claimant was at MMI prior to his death when viewing the evidence in total.

12. That the Claimant did not receive an impairment rating before his death, which we find further evidences that he was not at MMI at the time of his death.

13. That there was no clear opinion of MMI prior to or after the death of the Claimant on October 6, 2012, and the medical evidence instead supports a finding that the Claimant was not at MMI at the time of his death. We find that the preponderance of evidence in the record shows that the Claimant was not at MMI at the time of his death, and therefore not entitled to an award of permanent disability.

14. That, as the Claimant was not at MMI at the time of his death, he was therefore not entitled to any disability award prior to his death, and therefore there is no award to survive the Claimant's death pursuant to S.C. Code § 42-9-280.

CONCLUSIONS OF LAW

In view of those Findings of Fact, and as provided in the South Carolina Code of Laws, WE, THE APPELLATE PANEL, CONCLUDE THE FOLLOWING AS MATTERS OF LAW:

1. We find, as discussed by the Supreme Court, in Stone v. Roadway Express, 367 S.C. 575, 627 S.E.2d 695 (2006), and per the provisions of S.C. Code § 42-9-280, that a compensation award, unlike a tort award, is a personal one based on the employee's need for compensation of lost wages and earning capacity, and in the absence of a special statutory provision, heirs have no claim to un-accrued weekly payments.

2. That "maximum medical improvement" or "MMI" is the term used to demonstrate that a claimant has reached such a plateau in their treatment and recovery that there is no further

medical care or treatment which will lessen the degree of impairment. Cranford v. Hutchinson Construction, 399 S.C. 65, 731 S.E.2d 303 (Ct. App. 2012) (citing O'Banner v. Westinghouse Elec. Corp., 319 S.C. 24, 28, 459 S.E.2d 324, 327 (Ct. App. 1995)). The court explained this concept in Scruggs v. Tuscarora Yarns, Inc., 294 S.C. 47, 50, 362 S.E.2d 319, 321 (Ct. App. 1987), concluding that a finding of MMI was proper by the single Commissioner because the evidence supported that additional medication or treatment prescribed for the claimant was intended to help alleviate the claimant's remaining symptoms but *would not improve* the claimant's condition.

3. Pursuant to Curiel v. Environmental Management Services, 655 S.E.2d 482, 376 S.C. 23 (2007) (explaining that "workers' compensation benefits accrue along a time continuum: temporary total disability benefits are available from the date of injury through the date of maximum medical improvement; post-maximum medical improvement benefits may then be awarded either as a permanent total or partial disability, or as a percentage of impairment to a scheduled member."), we find that an award of permanent disability benefits is premature prior to the Claimant reaching MMI.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law,

IT IS, THEREFORE, ORDERED that the Order of the Hearing Commissioner dated March 24, 2014, be fully reversed, as the preponderance of the evidence shows that the Claimant was not at MMI prior to or at the time of his death.

IT IS FURTHER ORDERED that no benefits are owed by Defendants after Claimant's death.

AND IT IS SO ORDERED.

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

WE CONCUR:

Melody L. James, Commissioner

T. Scott Beck, Commissioner

Avery B. Wilkerson, Jr., Commissioner

CERTIFICATE OF SERVICE

This is to certify that the undersigned has on this date served a copy of this order in the above entitled action upon all parties to this case by sending an electronic copy hereof by electronic mail addressed to the attorneys for said parties; or if there is an unrepresented party(ies), by depositing a copy hereof, postage paid in the United States mail, first class, addressed to the unrepresented party(ies) and to the attorney(s) for the represented party(ies).

By Kim Falls on September 30, 2014