THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Melody L. James, Appellate Panel Chairman, Commissioner

Appellate Case No.: 2014-002294
WCC File No.: 1106833

Timothy McMahan, (Employee/Claimant), ...Appellant/Respondent,

vs.

S.C. Department of Education - Transportation (Employer) and
State Accident Fund (Carrier),..... Respondents/Appellants.

INITIAL RESPONDENT'S BRIEF OF RESPONDENTS/APPELLANTS

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December 22, 2014

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES:

STATEMENT OF ISSUES ON APPEAL

1. Whether the Workers' Compensation Commission Full Appellate Panel correctly found that Appellant/Respondent had not reached maximum medical improvement at the time of his death.

STATEMENT OF THE CASE

Appellant/Respondent was involved in an admitted accident arising out of and in the course of his employment with Respondents/Appellants on June 15, 2011. As a result of his accident, Respondents/Appellants provided Appellant/Respondent with authorized causally related treatment in accordance with S.C. Code Ann. § 42-15-60. Unfortunately, Appellant/Respondent died due to causes unrelated to his work accident on October 6, 2012.

On May 16, 2013, Appellant/Respondent filed a Form 50 Hearing Request, alleging injuries by accident to the head, brain, back, internal organs, teeth, legs, mouth, and ribs, and seeking an award of permanency to be paid to Appellant/Respondent's beneficiaries. Respondents/Appellants filed a Form 51 answer on June 13, 2013, admitting injury to the back only, and denying Appellant/Respondent's entitlement to permanent disability since Appellant/Respondent died from unrelated causes prior to reaching maximum medical improvement ("MMI"). A hearing was held before the Workers' Compensation Commission on August 15, 2013.

At the August 15, 2013 hearing before the Single Commissioner, Appellant/Respondent's estate took the position that they should be allowed to have a posthumous determination of Appellant/Respondent's disability, and the Appellant/Respondent should be deemed permanently and totally disabled as a result of his having a greater than 50% disability to the spine. (Hr. Tr., p. 5). Respondents/Appellants took the following positions: (1) Appellant/Respondent was not at MMI, (2) Appellant/Respondent's estate is not entitled posthumously litigate disability in accordance with S.C. Code Ann. § 42-9-280, and (3) Appellant/Respondent suffered from paraplegia as a result of his work related injury, and therefore, even if an award of post mortem

disability was allowed, it would abate pursuant to South Carolina Code § 42-9-280. (Hr. Tr., p. 6).

On March 24, 2014, the Single Commissioner issued an Order finding Appellant/Respondent's estate was entitled to an award of permanent and total disability due to the Appellant/Respondent having a greater than 50% disability to the spine.[1] On March 27, 2014, Respondents/Appellants filed a Form 30 Request for Full Commission Review. Following oral arguments on July 22, 2014, the Workers' Compensation Full Commission Appellate Panel issued an Appellate Panel Decision and Order on September 30, 2014. In the Order, the Full Commission Appellate Panel reversed the decision of the Single Commissioner and ruled that based on the medical evidence in the record, Appellant/Respondent had not reached MMI prior to his death, and therefore the award of permanent and total disability should be reversed. The Order further states that since the Full Commission Appellate Panel found that Appellant/Respondent was not at MMI at the time of his death, the Appellate Panel did not feel the need to reach the additional issues raised on appeal by Respondents/Appellants.

On October 21, 2014, Appellant/Respondent filed the first Notice of Intent to Appeal. Appellant/Respondent argues that the Workers' Compensation Commission Full Appellate Panel erred in finding Appellant/Respondent was not at MMI. On October 29, 2014, Respondents/Appellants filed a second Notice of Intent to Appeal. In their Notice of Intent to Appeal, Respondents/Appellants agreed that the Full Appellate Panel correctly denied permanent and total disability benefits based on the fact that Appellant/Respondent was not at MMI; however, in an abundance of caution, Respondents/Appellants appealed the Full Appellate Panel's failure to include in their findings of fact and conclusions of law that the South Carolina

[1] The Commissioner, pursuant to stipulations of the parties, held that such award would be held in trust until a good faith dependency investigation was performed to determine beneficiaries of this award.

Workers' Compensation Act does not allow for the posthumous adjudication of permanent disability, and that disability must be determined prior to a claimant's death for benefits to be awarded to beneficiaries.

On November 13, 2014, the Clerk of Court for the South Carolina Court of Appeals sent notice to the parties consolidating the multiple notices of appeal for consideration by the Court. On November 22, 2014, Appellant/Respondent filed an Initial Brief with the Court of Appeals, arguing that the Full Commission Appellate Panel erred in finding that Appellant/Respondent was not at MMI. Pursuant to instructions from the Deputy Clerk, Respondents/Appellants were directed to respond to the issues raised in Appellant/Respondent's Initial Brief within the thirty (30) day period set forth in Rule 208(a)(b), SCACR, and Respondents/Appellants were instructed to file their own Initial Brief on the remaining issues other than whether Appellant/Respondent had reached MMI. Based on these instructions, Respondents/Appellants filed an Initial Brief was filed on November 28. 2014, and the current submission serves as Respondents/Appellants' Response to Appellant/Respondents' Initial Brief filed on November 22, 2014.

STATEMENT OF THE FACTS/EVIDENCE

Appellant/Respondent was injured by accident on June 15, 2011, while a working as a mechanic for Respondents/Appellants. (Hr. Tr., p. 10). Appellant/Respondent jacked up a school bus by the bumper, and he was underneath the axel repairing the vehicle when the bumper broke, causing the school bus to fall on him with the axel crushing his spine. (Hr. Tr., p. 6)

The first medical report from MUSC in evidence is dated June 16, 2011. This was a report from the transfer of the Appellant/Respondent from the ICU floor. Appellant/Respondent was admitted for "status post crush injury with T-12 compression fracture and paraplegia."

(Appellant/Respondent's APA p. 26) (emphasis added). Appellant/Respondent's injury complex was noted to be T-12 compression fracture with retropulsion and paraplegia (Id.). Appellant/Respondent was noted to have previously undergone a T-12 corpectomy and fusion by Dr. Raymond Turner, a neurosurgeon at MUSC, on June 15, 2011. (Id.)

The medical evidence clearly shows that Appellant/Respondent suffered from paraplegia as a result of this accident. Following his first surgery, Appellant/Respondent returned to Dr. Turner on August 2, 2011 with continued complaints of focal low back pain, sexual dysfunction, and improving mobilization with a walker, and Dr. Turner diagnosed him with a T-12 body burst fracture with spinal cord injury. (Appellant/Respondent's APA p.13). On October 11, 2011, Dr. Turner performed a surgical T-11, T-12, and L-1 laminectomy and bilateral foraminotomies, with placement of pedestal screws at T-10 and L-2, and T-12 vertebral corpectomy, and fusion from T-10 to L-2. (Appellant/Respondent's APA p. 32).

Appellant/Respondent returned to MUSC for a urological evaluation on October 13, 2011. (Appellant/Respondent's APA pp. 20-21). This report notes that Appellant/Respondent was experiencing numbness in his bilateral lower extremities, urinary retention, and penile paresthesia. (Id. at 20). Appellant/Respondent was given a voiding trial, which he failed, and Appellant/Respondent noted that his lower extremities felt "numb." (Appellant/Respondent's APA pp. 20-21). Appellant/Respondent's neurological evaluation showed generalized weakness, and that Appellant/Respondent was in a wheelchair, and sensory evaluation showed numbness and tingling in his feet. (Id.). Appellant/Respondent was last seen at MUSC on February 7, 2012, at which time it was again noted that he was in a wheelchair. (Appellant/Respondent's APA p. 24-25). At that time, Appellant/Respondent reported that he moving to Tennessee, so Dr. Turner recommended that he follow up for pain management and further rehab in Tennessee

as soon as possible for a "smooth transition of care." (Id. At 25). Appellant/Respondent was never found to be at MMI by Dr. Turner or any of the other doctors at MUSC. (Appellant/Respondent's APA p. 24-25).

After moving to Tennessee, Appellant/Respondent was seen for an evaluation with Dr. Patrick Bolt on April 23, 2012. (Appellant/Respondent's APA pp. 2-5). Dr. Bolt's records state that he declined to take over Appellant/Respondent's pain management, as this was a stipulation to seeing the patient, and Dr. Bolt was only seeing him for a surgical evaluation. (Id. At 4). Dr. Bolt noted that Appellant/Respondent had already undergone two spine surgeries following his accident, and Appellant/Respondent's left lower extremity was "numb" and had been since his second surgery. (Id. at 2). Dr. Bolt further noted that Appellant/Respondent had been self-catheterizing since October. (Id.). Dr. Bolt's physical exam noted a "markedly pitched forward gait, unable to heel and toe walk or reciprocating heel and toe walk secondary to ataxia." (Id. at 3).

In his initial report on April 23, 2012, Dr. Bolt stated that Appellant/Respondent was a relatively "poor historian" with an "incredibly complex medical history." (Id.) Dr. Bolt admitted that he had not reviewed Appellant/Respondent's previous medical records from MUSC or his neurosurgeon. (Id. at 4). In his discussion and plan, Dr. Bolt noted that Appellant/Respondent had a complication of urinary retention and significant left lower extremity pain following his last surgery. Dr. Bolt stated that it was "unclear if the partial spinal cord injury which he sustained was before or after the surgery. The patient reports that it was after the surgery, however it is unclear if this is the case, as certainly he was quite severely affected before the surgery was performed." (Id. at 4). Dr. Bolt recommended lab testing for a possible infection, an MRI of the thoracic and lumbar spine, and CT scans of the thoracic and lumbar spine. Dr. Bolt

referred Appellant/Respondent out for pain management treatment, and he requested to see Appellant/Respondent after image studies were done to if anything else was recommended from a surgical standpoint. (Id. at 5). Dr. Bolt concluded his note stating, "Apparently, the patient is already at maximum medical improvement, but again, I have no records to confirm this." (Id. at 5). On May 11, 2012, Appellant/Respondent returned to Dr. Bolt's office, with continued complaints of "extreme mid low back pain and also left lower extremity pain. It is very debilitating for him." (Appellant/Respondent's APA p. 7). As a result, Appellant/Respondent was referred for additional EMG testing to rule out any radiculopathies. (Id.) Appellant/Respondent he died from unrelated causes on October 6, 2012, before any EMG testing was able to be performed.

Appellant/Respondent's attorney submitted into evidence a note from Dr. Bolt dated February 27, 2013, over four (4) months after Appellant/Respondent's death, stating that Dr. Bolt had "been asked by Kevin B. Smith of the Hoffman Law Firm, in Charleston, South Carolina to provide Mr. McMahan posthumously with an impairment rating." (Appellant/Respondent's APA, p. 11). Dr. Bolt stated, "I had thought he was previously at maximum medical improvement, apparently that was not the case." (Appellant/Respondent APA p. 11). Without further explanation, Dr. Bolt then goes on to state "I would say that he was at maximum medical improvement when I saw him on 04/23/2012." (Id.). Dr. Bolt notes that "the patient was totally disabled, and every time that I saw him he was confined to a wheelchair." (Id). Dr. Bolt stated that the Appellant/Respondent sustained a "partial spinal cord injury/myelopathy," with station and gait disorders, neurogenic bladder, neurogenic bowel, and dysesthetic pain. (Id.). Dr. Bolt assigned Appellant/Respondent 54% impairment to the whole person as a result of these conditions, noting that Appellant/Respondent's spinal cord injury

alone constituted a 44% whole person impairment. (Id.). Appellant/Respondent's attorney also submitted into evidence a Form 14B Physician's Statement prepared by Dr. Bolt, dated February 27, 2013, which noted that Appellant/Respondent's "nature of injury" was a "T12 burst fracture w[ith] spinal cord injury." In the section designated for the doctor's opinion on future treatment, Dr. Bolt stated "N/A – Claimant deceased." (Appellant/Respondent's APA p. 1).

STANDARD OF REVIEW

In workers' compensation cases, the South Carolina Workers' Compensation Commission is the trier of fact. *Hunter v. Patrick Construction Co.*, 289 S.C. 46, 344 S.E.2d 613 (1986). The South Carolina Administrative Procedures Act, S.C. Code Ann. §1-23-380(A)(6)(1976), establishes the "substantial evidence" rule as the standard for judicial review of a decision of the Commission:

> The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the administrative agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are:
> (d) affected by other error of law; [or]
> (e) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record.

An appellate court, in workers' compensation appeals, may overturn a conclusion of the Workers' Compensation Commission if that conclusion is "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 276 S.E.2d 304 (1981).

> The test is whether the decision of the Commission is supported by substantial evidence. 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 that the administrative agency reached in order to justify its action.

Mullinax v. Winn-Dixie Stores, Inc., 318 S.C. 431, 458 S.E.2d 76 (Ct. App. 1995).

Therefore, an appellate court may only overturn findings of fact of the Commission if there is no reasonable probability that the facts could be as related by the witnesses upon whose testimony the finding was based. *Lowe v. Am-Can Transport Services, Inc.*, 283 S.C. 534, 324 S.E.2d 87 (Ct. App. 1984). Further, an award cannot be based on surmise, conjecture, or speculation. *Tiller v. National Health Care Center of Sumter*, 334 S.C. 333, 339, 513 S.E.2d 843, 845 (1999); *see also*, *McDowell v. Stilley Plywood Co.*, 210 S.C. 173, 41 S.E.2d 872 (1947) (holding testimony that is based on surmise, conjecture, and speculation has no probative value). While a finding of fact of the Commission will normally be upheld, such a finding may not be based upon surmise, conjecture, or speculation; instead, it must be founded on evidence of sufficient substance to afford a reasonable basis for it. *Edwards v. Pettit Constr. Co.*, 273 S.C. 576, 257 S.E.2d 754 (1979).

ARGUMENT

I. THE WORKERS' COMPENSATION COMMISSION FULL APPELLATE PANEL CORRECTLY FOUND THAT APPELLANT/RESPONDENT WAS NOT AT MAXIMUM MEDICAL IMPROVEMENT AT THE TIME OF HIS DEATH.

The South Carolina Supreme Court has described MMI as the point when "a person has reached a plateau that, in the physician's opinion, no further medical care or treatment will lessen the period of impairment." *Curiel v. Environmental Management Services*, 376 S.C. 23, 655 S.E.2d 482 (2007). "Maximum medical improvement is a factual determination by the Commission." *Id.* "Expert medical testimony is intended to aid the Appellate Panel in coming to

the correct conclusion." *Potter v. Spartanburg Sch. Dist. 7*, 395 S.C. 17, 716 S.E.2d 123 (Ct. App. 2010). "[W]hile medical testimony is entitled to great respect, the fact finder may disregard it if there is other competent evidence in the record." *Tiller v. Nat'l Health Care Center*, 334 S.C. 333, 340 (1999).

Appellant/Respondent argues that the Full Commission Appellate Panel's finding that Appellant/Respondent did not reach MMI before the time of his death was an error of law, since it violates the legal standard for determining MMI by failing to cite a physician's statement. Appellant/Respondent classifies the Full Commission Appellate Panel's finding that Appellant/Respondent needed additional treatment as the Full Commission Panel making their own diagnosis and recommendations for treatment. In support of this position, Appellant/Respondent argues that Dr. Bolt's MMI finding was the only medical opinion in evidence addressing MMI.

Appellant/Respondent's argument on this point misses the mark. Appellant/Respondent does correctly assert that the only medical opinion concerning MMI is from Dr. Bolt, but the reason for this is clear. Appellant/Respondent's doctors in South Carolina did not feel he reached MMI when he moved to Tennessee, and after arriving in Tennessee, Appellant/Respondent was receiving recommendations for additional testing and treatment. At his last visit in South Carolina with Dr. Turner on 02/07/12, Dr. Turner directed Appellant/Respondent to "set up with rehab and pain management ASAP in Tennessee for a smooth transfer of care." (Appellant/Respondent APA p. 25). Dr. Turner did not place discuss MMI, since he clearly felt Appellant/Respondent required more medical treatment based on his continued complaints of left leg pain, bilateral foot swelling, and low bilateral paraspinal back pain. (Id.).

After evaluating Appellant/Respondent for the first time on April 23, 2012, Dr. Bolt recommended additional testing on the form of lab work for infections, thoracic and lumbar MRI's, and CT scans of the thoracic and lumbar spine. Dr. Bolt recommended that the Claimant be set for pain management in Knoxville, since he refused to provide pain management as a stipulation to seeing Appellant/Respondent for an evaluation, and he agreed to see Appellant/Respondent after image studies were done to if anything else was recommended from a surgical standpoint. (Appellant/Respondent's APA, p.5). When Appellant/Respondent did return on 05/11/12, Dr. Bolt noted Appellant/Respondent's continuing complaints of "extreme" mid low back pain and left lower extremity pain. (Appellant/Respondent APA, p.7). Although the MRI scans didn't show any new neural pinches, Dr. Bolt requested EMG testing to rule out further radiculopathies, and stated "we will need to see him back following the EMG testing." Appellant/Respondent died before any EMG testing was performed. (Id.).

Clearly, when reviewed as a whole, the medical evidence unquestionably shows Appellant/Respondent was continuing to have significant issues with his back and left leg at his final appointment with Dr. Bolt, and Dr. Bolt was continuing to recommend pain management treatment for his symptoms and additional diagnostics to determine their cause and whether additional interventional treatment was necessary. (Appellant/Respondent APA, p.4).

Further, Dr. Bolt's statements regarding MMI are based on surmise and unsupported by the medical evidence. At the conclusion of Appellant/Respondent's first visit with Dr. Bolt on 04/23/14, Dr. Bolt admits to never reviewing any of the previous medical records and describes the Appellant/Respondent as a "poor historian," but regardless he goes on to state "Apparently, the patient is already at maximum medical improvement but, again, I have no records to confirm this." (Appellant/Respondent APA, p.5). Appellant/Respondent states that it is "clear" that Dr.

Bolt was told Appellant/Respondent was at MMI, "presumably" by the nurse case manager, but Appellant'/Respondent has no evidence to rely on in making this speculative argument. There is no evidence in the record that Dr. Bolt was ever advised by the nurse case manager or anyone else that Appellant/Respondent was at MMI at the first appointment, and any argument to such effect is inappropriate since it is based on surmise and speculation.

Dr. Bolt admits that his 04/23/12 statement regarding MMI was in fact a mistake in his 02/27/13 note, two months after Appellant/Respondent's death, stating, "I had thought he was previously at maximum medical improvement, apparently that was not the case." (Appellant/Respondent APA, p.11). Dr. Bolt then goes on without explanation to state "I would say that he was at maximum medical improvement when I saw him on 04/23/12." Based on Dr. Bolt's own statements, there was no medical opinion that Appellant/Respondent was at MMI prior to his death, and a posthumous opinion regarding MMI would be based on surmise.

Appellant/Respondent further argues that the Full Commission Appellate Panel fails to identify the "large amount of medical care" being recommended at the time of Appellant/Respondents' death, and therefore the Commission is making their own recommendation for medical treatment. This argument ignores the fact that Dr. Bolt recommended pain management treatment in Knoxville (since he was only being seen for a surgical evaluation) and recommended CT scans, MRI's, and lab work. Further, when Appellant/Respondent returned on 05/11/12, Dr. Bolt recommended more testing in the form of an EMG to rule out further radiculopathies, and advised that he would need to see Appellant/Respondent again after the testing. Even if Appellant/Respondent's MRI, lab work, and MRI's were unremarkable, Appellant/Respondent never received the recommended EMG test.

Appellant/Respondent argues that Dr. Bolt's evaluation was not an independent medical evaluation, and this was not a finding by the Commission. A review of the medical evidence again shows that Dr. Bolt himself stated that he refused to provide Claimant with pain management treatment, since he was only seeing Appellant/Respondent for a surgical opinion. The fact that Dr. Bolt would not provide pain management treatment, but he wanted to see Appellant/Respondent again after the EMG testing, is more evidence that Appellant/Respondent had not reached MMI at the time of his death, and Dr. Bolt was continuing to investigate whether additional treatment was necessary for possible radiculopathy.

Finally, Appellant/Respondent states that "the Commission's finding that 'he [Dr. Bolt] never obtained the testing he specifically ordered' totally ignores the facts in the records and is patently untrue." This argument again ignores the fact that Dr. Bolt requested an EMG test with a return appointment, and the test was not performed prior to Appellant/Respondents' death.

Based on the combination of Appellant/Respondent's ongoing complaints of pain related to his accident, the pain management treatment that was recommended but never performed, the diagnostic testing that never took place, and the opinion of Dr... Bolt that was based on surmise and unsupported by the medical evidence, the Full Commission Appellate Panel correctly found Appellant/Respondent did not reach MMI prior to the time of his death.

CONCLUSION

The substantial evidence in the record leads to the conclusion that the South Carolina Workers' Compensation Full Appellate Panel correctly found that Appellant/Respondent was not at maximum medical improvement at this time of his death, and Respondents/Appellants request an Order affirming this decision. Further, Respondents/Appellants specific findings of fact and

conclusions of law in the Order stating that the South Carolina Workers' Compensation Act does not provide for a posthumous determination of disability, as argued in Respondents/Appellants Initial Brief filed November 28, 2014. In the alternative, if the Court determines that the Appellant/Respondent was at maximum medical improvement at the time of his death, and the Workers' Compensation Act allows for posthumous determination of permanent disability, Respondents/Appellants request an Order stating that Appellant/Respondent's award would abate as a result of him being paraplegic in accordance with S.C. Code § 42-9-10(C), as argued in Respondents/Appellant's Initial Brief filed November 28, 2014.

Respectfully Submitted,

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State Accident Fund (Carrier),..... Respondents/Appellants.

PROOF OF SERVICE

The undersigned certifies that on the date indicated below, he served counsel for Appellant/Respondent with a copy of the Respondents/Appellants Initial Respondent's Brief by mailing copies of the same by United States Mail postage prepaid to the following addresses:

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December 22, 2014

(Via Hand Delivery)
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Re: Timothy McMahan vs. S.C. Dept. of Education
Appellate Case No.: 2014-002294
WCC File No.: 1106833
DOI: 6/15/2011

Dear Ms. Kitchings:

Pursuant to Rule 208(a)(2), SCACR, please find enclosed for filing one copy of the Respondents/Appellants' Initial Respondent's Brief, along with Proof of Service for the same.

By copy of this letter I am also serving a copy of the Respondents/Appellants' Initial Respondents' Brief to Kevin Smith, attorney for the Appellant/Respondent.

With kindest regards,

WILLSON JONES CARTER & BAXLEY, P.A.

John Gabriel Coggiola

JGC/jgc

Enclosure(s)

cc: Mr. Kevin Smith (via U.S. Mail)