THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

WCC File No. 1217409

Reginald Warner, Employee/Claimant, ... Appellant,

v.

Gallman Personnel Services, Inc. and Zurich American Insurance Company, c/o Gallagher Bassett Services, Inc., ... Respondents.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

This workers' compensation appeal arises out of work-related injuries sustained by the Appellant, Reginald Warner, on November 29, 2012. The Employer and Carrier accepted the claim and began providing various benefits under Title 42, the Workers' Compensation Act.

As the case progressed, Respondents provided treatment through Dr. Baker, a neurologist, for Warner's "head injury." Respondent contended he had injured additional body parts in the accident, specifically his neck and back. Respondents refused to provide this treatment, despite prescriptions being written for medication and a cane by Dr. Baker.

Warner filed a Form 50 (Request for Hearing) on April 27, 2013. [Form 50]. Respondents timely filed a Form 51 (Employer's Response to Request for Hearing). [Form 51]. The hearing was set before Commissioner Avery Wilkerson on July 22, 2013. [Hearing Notice].

At the pre-trial conference on July 22, 2013, Respondents moved for a continuance to obtain a medical evaluation from Dr. Raymond Sweet, and to take the depositions of Dr. Steven Poletti and Dr. David Rogers.[1] Commissioner Wilkerson granted a continuance, "provided all discovery was complete by August 27, 2013. Commissioner Wilkerson further required, [a]s a condition of granting the continuance, Defendants were to authorize all medications prescribed by Dr. Baker – specifically including medication prescribed for the back and neck – until a final resolution of the back and neck injuries had been made by the Commission." [SC Order, page 4].

The case was tried on August 27, 2013. At the hearing, counsel for Respondents "advised

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[1]Dr. Sweet is a spine surgeon retained by Defendants. He performed an IME on August 13, 2013. [APA pages 93-95]. Dr. Rogers is a neurologist; Dr. Poletti is a spine surgeon. Both were retained by Claimant. Dr. Rogers evaluated Warner on February 22, 2013. [APA pages 65-71]. Dr. Poletti evaluated Warner on July 1, 2013. [APA pages 74-75].

that Dr. Rogers was not available to be deposed until November and that Dr. Poletti was unavailable until January 2014." Respondents renewed their motion for a continuance. Commissioner Wilkerson denied the motion for a further continuance, holding:

> No attempt had been made to schedule these depositions until after the originally set hearing date of July 22, 2013. Defendants have failed to demonstrate prejudice due to the continuance, whereas the continuing denial of medical treatment is harmful to Warner. [SC Order, pages 4-5].

Appellant objected to Dr. Sweet's report as untimely and not stated to a reasonable degree of medical certainty. The objection was overruled and Dr Sweet's report was entered into evidence. [SC Order, page 5].

The hearing went forward on Warner's request for treatment, specifically "treatment for the neck and back requesting that Dr. Poletti be named the authorized treating physician [and] treatment for his traumatic brain injury, specifically through the brain injury program as recommended by Dr. Rogers, and continue with Dr. Baker for his brain/head injury." [SC Order, page 5].

Respondents initially contended Warner was at MMI, but ultimately conceded Warner was not at MMI based on Dr. Baker still having him out of work. Respondents further denied that the neck and spine were injured in the accident. [SC Order, page 5].

On September 6, 2013, Commissioner Wilkerson issued a "request for a proposed Decision and Order." The request directed Appellant's attorney to draft the proposed Order, listing various findings to be included. [Order instructions].

The proposed Order was submitted to Commissioner Wilkerson via e-mail on December 23, 2013. Respondents objected to certain findings in the original draft. Commissioner Wilkerson held a conference call with the attorneys on January 6, 2014. Changes were made to the original draft,

with the amended proposed Order submitted to the Commission by Appellant's counsel. Respondents were given leave to submit their own proposed Order, which was submitted on January 8, 2014. [Respondents' proposed Order].

Commissioner Wilkerson signed the amended Decision and Order drafted by Appellant's counsel on January 17, 2014. The Order required Respondents to designate a treating physician to provide treatment for "claimant's back, neck and closed head injuries." [SC Order, pages 20-21].

Respondents timely filed a Form 30 (Notice of Appeal) to the Full Commission. [form 30]

Respondents raised numerous issues on appeal, both on the original order instructions and on the actual Decision and Order. The two primary issues were (1) whether the Single Commissioner's Decision and Order exceeded the scope of issues raised at the hearing; and (2) whether the Single Commissioner erred in denying Respondents' second Motion for Continuance.

Oral arguments were heard before the Appellate Panel on July 21, 2014. The Appellate Panel issued an Appellate Panel Decision and Order on September 26, 2014. The Appellate Panel ordered:

> IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Hearing Commissioner's Decision and Order is VACATED in its entirety.
>
> IT IS FURTHER ORDERED THAT this matter shall be REMANDED to Commission for a *de novo* hearing on the evidence.
>
> IT SI FURTHER ORDERED that Defendants are permitted, and the Commission must allow, cross-examination of Claimant's witnesses either through deposition or live testimony.
>
> IT IS FURTHER ORDERED THAT, following the de novo hearing, the Commission must issue a Decision and Order that is (1) consistent with the evidence presented at the hearing and (2) consistent with the scope of the hearing as set out by the parties.

[FC Order, page 13].

This appeal followed.

STATEMENT OF THE FACTS

Appellant Reggie Warner was employed with the Employer, Gallman Personnel. Employer placed Warner at a temp-to-perm job at Wire and Steel in Fairfield County as a machine operator.

On November 29, 2012, Warner slipped on the oily floor and fell, knocking himself unconscious. He was found lying on the floor and EMS was called. Fairfield County EMS records dated November 29, 2012, report:

> patient found lying supine on cement floor of industrial plant. Upon arrival patint [sic] was responsive to staff and ems on scene but slow to respond. Patient state that he was working on a machine, slipped and fell in some oil and did not know if he hit his head.

[APA pages 1-2].

Providence Hospital Emergency Department records state patient "reportedly slipped on some oil at work and fell from standing height. He reports right hip and knee pain." [APA page 3]. A CT scan showed an "acute subdural hematoma." Warner was admitted to the hospital in guarded condition. [APA page 8]. Dr. Rambo made diagnoses of "Closed head injury, with possible intracranial blood," and "Axial spine pain." [APA page 21]. Warner was discharged on December 2, 2012.

Warner returned to Providence on December 5, 2012 "because he is still having severe headaches and tightness throughout his low back and into his legs." [APA page 9]. He was referred "to neuro for diagnosis of continuing headaches." [APA page 12]. A follow-up CT scan showed mild cortical volume loss and no subdural hematoma. [APA page 15].

Warner was seen by Dr. Rambo on December 10, 2012. Dr. Rambo discussed the initial CT showing some subdural blood at the frontal pole, but noted a repeat CT was read as showing no blood. He documented complaints of constant headache. The impression was "Possible concussion

after a fall at work on approximately 11/29/12." He recommended Warner be evaluated by a neurologist if the headache persists. The report concluded "This was discussed with his case manager." [APA page 83].

On that same visit of December 10, 2012, Warner completed a medical questionnaire documenting pain at the "Back of Head & Below Buttocks - Headache." He also reported pain in the neck and both arms, along with headaches and blurred vision." A pain diagram noted pain from the back of the head, down the back into the buttocks and thighs. [APA pages 84-86].

Warner never returned to Dr. Rambo. A 14B with Dr. Rambo's stamped signature was completed on April 16, 2013 assigning a 2% medical impairment to "head" and stating Warner "will not need future medical care." [APA page 88].

On December 30, 2012, Warner presented to Kershaw Health Urgent Care at Elgin with complaints of "Headache, back ache." The history stated "At work, doesn't remember company name and working on punching machine, reloading it and doesn't remember what happened about 1 month ago, 11/29/12 . . . Still has headaches and some back pain." [APA page 46].

On January 24, 2013, Warner began treating with a neurologist, Dr. John Baker "at the request of Dr. Rambo for loss of consciousness." The history reports:

> He reports on 11/29/12 going around a turn at work, and the next thing he knew he saw people around him when he was laying on the ground with people calling his name. Records report he slipped on oil, but he reports no known details of what happened. He reports striking the back of his head, neck, and low back on the cement floor. He was seen that day in ER, admitted due to being on Coumadin, question of head CT of SDH, which on f/u scans was not there. He since has had constant posterior neck pain, headaches radiating up from skull to frontal region, down neck, daily, moderate to severe, associated lt/sd sensitivity, no nausea, worse moving head quick, some pain killers with no significant relief, released by Dr. Rambo. He does have significant law back and neck pain independent of headaches, memory difficulty (mild short term memory difficulties) and moodiness.

Warner was diagnosed with occipital neuralgia, low back pain, neck pain, and acute post-traumatic headache. Dr. Baker performed injections, prescribed nortriptyline and ordered cervical and lumbar MRI scans. He wrote Warner out of work until seen 6 weeks later in follow-up. [APA pages 52-56].

MRI scans were performed on February 15, 2013. The lumbar MRI showed "degenerative disc disease and retrolisthesis with central annular tear L5-S1. The cervical MRI showed "Mild disc bulges C4-5 and C5-6 with central annular tear C5-6." [APA pages 63-64].

Warner returned to Dr. Baker on February 21, 2013. He had not improved with the injections and nortriptyline. He reported ongoing neck pain radiating into the shoulders along with back pain. His wife reported "ongoing short term memory trouble and irritability." Dr. Baker diagnosed:

- Acute post-traumatic headache
- Occipital neuralgia
- Displacement of cervical intervertebral disc without myelopathy
- Lumbar disc disease
- Post-concussion syndrome.

Dr. Baker kept Warner out of work, increased the nortriptyline dosage, and prescribed a cane. He referred Warner back to Dr. Rambo for evaluation of the central annular tears in the lumbar and cervical discs. [APA pages 57-59].

An appointment was scheduled with Dr. Rambo, but Dr. Rambo refused to see Warner for his neck and back.

Warner returned to Dr. Baker on April 17, 2013. "His headaches, neck pain, back pain, and memory are unchanged." A trial of tizanidine was added for muscles spasms. Warner was kept out of work. [APA pages 60-63].

On February 22, 2013, Warner was evaluated by a neurologist, Dr. David Rogers. Warner presented with complaints of "persistent headache and posterior neck region pain . . . pain in the lumbar area, bilateral posterior hips, both shoulders, right wrist, and right heel." He also reported headaches "associated with a pulsatile quality, incapacitation, photophobia, and sonophobia." There were also reports of "dizziness with vertiginous qualities," and "blurred vision, monotoanl bilateral tinnitus, insomnia, fatigability, noise sensitivity, impaired taste perception, and occasional vertical diplopia." Cognitive impairment included "decreased concentration, alteration of recent memory, thinking, and planning." Affective symptomatology included "irritability, anxiety, insomnia, and depression."

Significant findings on physical exam were limited flexion and extension of the neck; tenderness to palpation at C5-T1; tenderness to palpation at the bilateral occipital nerves at the nuchal ridge; and increased tone and tenderness in the bilateral upper trapezious and supraspinatus muscles. There was tenderness to palpation of the bilateral sacroiliac joints. The patient ambulated with an antalgic gait and a "rather pronounced lordotic posture." He uses a cane for ambulation; showed some mild balance difficulty performing tiptoe walk and heel walk produce bilateral SI joint discomfort.

Neurological mental status showed Warner alert and oriented to person, day, and purpose. He scored 19/30 on the Folstein mini-mental status examination. He showed difficulty with repetition, although was able to replicate interlocking pentagons.

Dr. Rogers diagnosed Warner with "a work-related fall injury occurring November 29, 2012 resulting in traumatic brain injury (i.e. closed head injury with resulting post-concussive syndrome). Mr. Warner demonstrates significant cognitive, affective, and somatic symptomatology consistent

with this diagnostic." Dr. Rogers assigned various impairment ratings for cognitive impairment status post closed head injury (14% whole person); behavioral/emotional dysfunction (29% whole person); annular tear in cervical spine (8% whole person); annular tear in lumbar spine (8% whole person); and bilateral sacroiliac dysfunction (5% lower extremity impairment secondary to antalgic gait).

Dr. Rogers recommended enrollment in a traumatic brain injury program and a chronic pain management program. He further opined that Warner is "incapable of performing any gainful activity at this time." He stated it is "certainly possible that Mr. Warner's level of dysfunction can improve in the future with appropriate therapy to the point that he could perform some type of modified labor; however, it is my medical opinion beyond a reasonable degree of medical certainty that Mr. Warner is incapable of returning to his previous level of employment performing heavy labor." [APA pages 65-71].

On April 27, 2013, Appellant filed a Form 50 (Request for Hearing), primarily on the issue of medical treatment, in that Respondents were not approving Dr. Baker's recommendations for treatment, nor providing treatment for Warner's neck and back injuries. [Form 50]. Respondents timely filed a Form 51 (Employer's Response to Request for Hearing) on . [Form 51]. Respondents admitted a "minor head injury" but denied all other injuries. The case was set for a hearing before Commissioner Avery Wilkerson on July 22, 2013. [Hearing Notice].

Warner was evaluated by Dr. Steven Poletti, an orthopaedic spine surgeon, on July 1, 2013. Physical exam revealed "limited motion in his neck . . . pain with extension and forward flexion. His reflexes are decreased throughout. He does have positive straight leg raising. He has dysesthesia in the posterolateral aspect of his buttocks, hip, and leg."

MRI studies showed "a central disc protrusion at the C5-6 level with what is described as annular tearing and posterior disc bulging, which is in contact with the spinal cord. This is a central protrusion. In the lumbar spine there is a disc herniation at the L5-S1 level with retrolisthesis or spinal instability consistent with greater than 5 mm of sagittal plane translation."

Dr. Poletti stated he agreed with Dr. Rogers' "assessment of cognitive impairment status post closed-head injury and taken no issue with any impairment that he has as a consequence of this."

Dr. Poletti assigned a "28-percent impairment rating based on instability at the L5-S1 level and disc protrusion at the C5-6 level." He opined injections could be considered in the future, "but certainly some type of non-operative care should be considered for this difficult problem." [Claimant's Supplemental APA pages 74-75].

The parties appeared before Commissioner Wilkerson for the first hearing on July 22, 2013. In a pre-trial conference, Respondents moved for a continuance to (1) obtain an IME from Dr. Raymond Sweet; and (2) take the depositions of Dr. Rogers and Dr. Poletti. The IME with Dr. Sweet had already been scheduled. However, Respondents had made no effort to schedule the depositions prior to the hearing.

Commissioner Wilkerson granted the continuance, "provided all discovery was complete by August 27, 2013." Commissioner Wilkerson further required, "[a]s a condition of granting the continuance, Defendants were to authorize all medications prescribed by Dr. Baker – specifically including medication prescribed for the back and neck – until a final resolution of the back and neck injuries had been made by the Commission." [SC Order, page 4].

On August 13, 2013, Warner was evaluated by Dr. Raymond Sweet, a neurosurgeon retained by Respondents pursuant to section 42-15-80. The review of systems noted "depression, dizziness,

fatigue, sleep loss, weight gain, nervousness, ringing in the ears, visual changes, blurred vision [and] double vision . . . Also positive for numbness and tingling pain neck, shoulders, hips, legs, feet, lower back. He has weakness in the legs, memory problems, balance difficulties, back problems and dizziness."

Warner stated "the light bothers his eyes and complains of back pain, neck pain, as well as anxiety." Dr. Sweet noted "He had sunglasses on, which he did not want to remove, and kept his head forward, looking down." He "walked with a cane slowly and would not walk without a cane. . . . His gait was very antalgic. He was awake, as noted a little slow, but oriented x3.

Dr. Sweet stated "Cervical MRI and lumbar MRI were reviewed and showed mild degenerative changes without any evidence of a surgical lesion."

Dr. Sweet concluded:

> In my opinion, his complaints and pain behavior are far out of proportion to the injury he appears to have sustained at work on 11/29/12. I would feel that he is either deliberately exhibiting pain behavior and/or he has a previous psychiatric history. I feel his medical records should be explored further to see if there is a psychiatric history in the past. At this point, I think that he needs a thorough neuropsychological, psychiatric evaluation outside of what he has already had done. Based on his physical examination, he should be able to do some type of light work with retraining.

Dr. Sweet did not state his opinions to a reasonable degree of medical certainty. [Defendants' Supplemental APA pages 93-95].

At the time of the second hearing on August 27, 2013, Warner continues to treat with Dr. Baker. Updated medical records were not available, but Dr. Baker saw Warner on August 21, 2013. Dr. Baker kept Warner out of work and wrote an updated prescription for the cane. [Exhibits C2, C3]. As of the hearing date, Respondents' counsel confirmed, "Baker is only authorized for the

head." [Tr. Page 28, lines 18-19]. No treatment is being provided for Warner's neck and back injuries – despite provision of treatment being a condition for granting the continuance.

The hearing went forward on August 27, 2013. Respondents moved for another continuance on the grounds that "that Dr. Rogers was not available to be deposed until November and that Dr. Poletti was unavailable until January 2014." Commissioner Wilkerson denied the motion for a further continuance, holding:

> No attempt had been made to schedule these depositions until after the originally set hearing date of July 22, 2013. Defendants have failed to demonstrate prejudice due to the continuance, whereas the continuing denial of medical treatment is harmful to Warner. [SC Order, pages 4-5].

Warner remains disabled and has not received the treatment ordered by his doctors.

STANDARD OF REVIEW

A hearing commissioner has the authority to postpone a scheduled hearing in a workers' compensation matter for "good cause," which includes such reasons as the need for additional discovery. 25A S.C.Code Ann. Regs. 67–613(B) (2007). Trotter v. Trane Coil Facility, 393 S.C. 637, 714 S.E.2d 289 (2011). The granting or refusal of a request for a continuance rests in the sound discretion of the hearing commissioner, whose ruling will not be disturbed unless a clear abuse of discretion is shown. Gurley v. Mills Mill, 225 S.C. 46, 80 S.E.2d 745 (1954); see also Williams v. Bordon's, Inc., 274 S.C. 275, 279, 262 S.E.2d 881, 883 (1980) ("It has long been the rule in this State that motions for a continuance are addressed to the sound discretion of the trial judge, and his ruling will not be upset unless it clearly appears that there was an abuse of discretion to the prejudice of appellant.").

For appellate purposes, an abuse of discretion occurs where the ruling is based on an error of law or, where the ruling is grounded upon factual findings, is without evidentiary support. Trotter v. Trane Coil Facility, 393 S.C. 637, 714 S.E.2d 289 (2011)

"Of necessity it must be left to the commission to determine whether or not a case shall proceed to trial or be continued." Gurley, 225 S.C. at 51–52, 80 S.E.2d at 747. Where a party is not prejudiced by the denial of a motion for a continuance, reversal is not required. Wright v. Hiester Constr. Co., 389 S.C. 504, 698 S.E.2d 822 (Ct.App.2010). See 17 C.J.S. Continuances § 4 (2011) (observing continuances are not favored and "[a] party has no absolute right to a continuance as a matter of law"

ARGUMENT

1. The Appellate Panel erred in vacating the Single Commissioner's Order.

The Appellate Panel made no findings of fact or conclusions of law on the merits of the case before it. Instead, the Appellate Panel took the unprecedented step of vacating the Single Commissioner's order and ordering that "this matter shall be REMANDED to Commission for a *de novo* hearing on the evidence." [FC order, page 13]. There is simply no authority for the Appellate Panel to give "second bites of the apple" nor was there any legal basis for taking this drastic action. Furthermore, the Commission cannot remand a case to itself.

The Appellate Panel gave two reasons for granting a new trial *de novo*: (1) the Single Commissioner denied Respondents' second motion for a continuance; and (2) the order contained findings which "exceed the limited scope of the hearing and evidence before the Hearing Commissioner." [FC Order]. In neither instance was there any reversible procedural error by the Hearing Commission, nor any legal grounds to grant an entirely new trial to Respondents.

A. The Hearing Commissioner acted within his discretion in denying Respondents' second motion for a continuance.

Commissioner Wilkerson granted Respondents' first motion for a continuance on July 22, 2013. He allowed until the rescheduled hearing on August 27, 2013 for Respondents to procure an IME with Dr. Raymond Sweet in response to the opinions of Dr. Baker, Dr. Rogers, and Dr. Poletti. This motion was properly granted as the evaluation with Dr. Sweet had already been scheduled for August 13, 2013. See Morgan v. JPS Automotives, 467 S.E.2d 457, 321 S.C. 201 (Ct. App. 1996)(commission required to leave record open to admit critical evidence of disability where party makes timely motion under the regulations and the evidence is already in existence but not available

for the hearing).

Commissioner Wilkerson also allowed Respondents to depose Dr. Poletti and Dr. Rogers, provided all discovery was complete as of August 27, 2013. As of July 22, 2013, Respondents had made no effort to schedule the depositions of the two doctors.

The case was tried on August 27, 2013. Respondents renewed their motion for a continuance to depose the two doctors. In the pre-trial conference, Respondents' counsel had advised Commissioner Wilkerson that the depositions could not be completed until January 2014.[2] No specific argument was made on the record as to what critical evidence would be adduced in the depositions nor what prejudice might inure to Respondents if the depositions were not taken. Conversely, Appellants' counsel stated: " . . . we need to go forward because Mr. Warner desperately needs the treatment." [Tr. Page 24, lines 18-20].

Commissioners are vested with the same authority given to trial judges to control their courtrooms. Holcombe v. Dan River Mills/Woodside Div., 286 S.C. 223, 225-26, 333 S.E.2d 338, 340 (Ct.App.1985). This includes discretionary authority to admit evidence, postpone hearings, and leave the record open for additional evidence to be produced. The discretion of a commissioner exists within a framework of regulations that require the commissioner to make appropriate factual findings to support the exercise of discretion, with the understanding that evidence is to be liberally admitted. 25A S.C.Code Ann.Regs. 67-613 (2007); 25A S.C.Code Ann.Regs. 67-707 (2007)(establishing procedures for adjourning and postponing hearings and for admission of after-

[2]As of the July 21, 2014 oral argument before the Appellate Panel, neither doctor had been deposed. Had the depositions been *that* essential, Respondents could have deposed the doctors and then moved to introduce the depositions under the regulation providing for "additional evidence . . . necessary for the completion of the record in a case on review . . ." 25A S.C. Code Ann. Regs. 67-707 (2007).

discovered evidence). "Of necessity it must be left to the commission to determine whether or not a case shall proceed to trial or be continued." Trotter v. Trane Coil Facility, 393 S.C. 637, 714 S.E.2d 289 (2011)

This Court (and the Appellate Panel) reviews a commissioner's decisions on the conduct of a trial according to an abuse of discretion standard. The manner in which a trial is conducted is within the trial judge's discretion. See, e.g., Baber v. Greenville County, 327 S.C. 31, 41, 488 S.E.2d 314, 319 (1997) (holding that the conduct of a trial is largely within the trial judge's sound discretion, the exercise of which will not be disturbed on appeal absent an abuse of that discretion or the commission of a legal error that results in prejudice for appellant). A workers' compensation commissioner, like a trial judge, "enjoys considerable latitude and discretion in" admitting evidence and closing the record. Brown v. LaFrance Indus., 286 S.C. 319, 333 S.E.2d 348 (Ct.App.1985).

The admission or exclusion of evidence is within the sound discretion of the Commission. Holcombe v. Dan River Mills/Woodside Div., 286 S.C. 223, 225-26, 333 S.E.2d 338, 340 (Ct.App.1985). An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion that is without evidentiary support. Carlyle v. Tuomey Hosp., 305 S.C. 187, 193, 407 S.E.2d 630, 633 (1991). The regulations provide "Each party shall arrange and present all evidence at the hearing." 25A S.C.Code Ann.Regs. 67-613 (2007).

There is no evidence Respondents made any effort to notice the depositions of either doctor until after the July 22, 2013 hearing. A party must exercise due diligence in preparing his case. Here, because of Respondents lack of due diligence, the Commissioner did not learn until August 27, 2013 that the depositions could not be completed until the next year.

Commissioner Wilkerson found:

> No attempt had been made to schedule these depositions until after the originally set hearing date of July 22, 2013. Defendants have failed to demonstrate prejudice due to the continuance, whereas the continuing denial of medical treatment is harmful to Warner. [SC Order, pages 4-5].

The Hearing Commissioner effectively found that Respondents failed to exercise due diligence and failed to demonstrate prejudice; while also finding prejudice to Warner by delaying the hearing another 4-5 months. Such a ruling is well within a commissioner's discretion. "Where a party is not prejudiced by the denial of a motion for a continuance, reversal is not required." Trotter v. Trane Coil Facility, 393 S.C. 637, 714 S.E.2d 289 (2011). See Holcombe, 286 S.C. 223, 333 S.E.2d 338 (Ct.App.1985)(no abuse of discretion by the single Commissioner in refusing to allow the post-hearing deposition of expert). Cf. Slaughter v Southern Talc Co., 919 F.2d 304 (5th Cir.1990)(tactical decision not to introduce affidavits at summary judgment motion did not constitute excusable neglect justifying late filing of affidavits); Hundley ex rel. Hundley v. Rite Aid of South Carolina, Inc., 339 S.C. 285, 529 S.E.2d 45 (Ct. App. 2000)(trial court properly denied continuance where "record amply demonstrates that any surprise on the part of the defendants is of their own making").

Rather than review the denial of the continuance under the proper abuse of discretion standard, the Appellate Panel held "Defendants have an absolute due process right to examine adverse witnesses." [FC Order, page 11, Finding of Fact 11]. The Panel went on to hold "Defendants were unequivocally denied the opportunity to cross-examine Drs. Rogers and Poletti about their medical records and opinions because *Claimant did not bring them to the hearing* and neither doctor made themselves available for a deposition." [FC Order, page 12, Finding of Fact 14 (emphasis added)].

These findings are unsupported by the evidence in the record nor do they find any support in the law. In workers' compensation hearings, expert testimony is introduced through the written record. The idea that a party to a workers' compensation case is required to bring his examining doctors to a hearing so opposing counsel can exercise his "absolute due process right to examine adverse witnesses" is anathema to established law, practice and procedure. Respondents could have subpoenaed the doctors themselves, had cross-examination been that critical.

More importantly, Respondents have shown no prejudice. Respondents argue for an absolute right to an indefinite continuance, yet never once do they articulate any specific prejudice from the two doctor's opinions – nor how it could be cured by deposing them. An expert opinion adverse to a party's interests is not in and of itself prejudicial - particularly when, as here, the party was granted a continuance to obtain its own expert opinion.

As the Supreme Court held in Trotter, "[the doctor's] medical notes were submitted to the commissioner and considered as part of the record, and on appeal [employer] has shown no material information that [the doctor] would have provided that is not already included in the record." Trotter v. Trane Coil Facility, 393 S.C. 637, 714 S.E.2d 289 (2011)(holding the "commissioner did not abuse her discretion in denying the requests for a continuance or to hold the record open for the deposition of [the doctor] to be taken.").

The Appellate Panel erred in vacating Commissioner Wilkerson's Decision and Order. As in Trotter, the hearing Commissioner acted within his discretion in denying the continuance. Therefore, the Appellate Panel should be reversed and the Hearing Commissioner's Decision and Order should be reinstated.

B. There is no basis for granting a trial *de novo* because the Hearing Commissioner's order did not exceed the scope of the issues raised by the parties.

The Appellate Panel vacated the Hearing Commissioner's Order because the Order itself contained more findings than Commissioner Wilkerson made in his informal order instructions to the attorneys. This is fundamentally erroneous – both procedurally and factually.

Proposed orders are almost universally used in judicial and quasi-judicial proceedings at the trial level. The Administrative Procedures Act explicitly contemplates the adoption of proposed orders. See S.C. Code Ann. § 1-23-350 (2007) ("If, in accordance with agency rules, a party submitted proposed findings of fact, the decision shall include a ruling upon each proposed finding."). Requesting the prevailing attorneys (or both attorneys) to submit proposed orders promotes judicial economy.

In this case, Commissioner Wilkerson requested a proposed order from Appellant's attorney. [order notes]. The proposed order was drafted as requested, with a copy of the draft provided to Respondents' attorney. As the parties were unable to agree on the order, the Commissioner held a telephone conference with the attorneys. Following the conference, both sides submitted proposed Orders. Commissioner Wilkerson ultimately signed the Order proposed by Appellant – with changes requested by the Commissioner. In short, there were no procedural or due process errors in the promulgation of Commissioner Wilkerson's order.

A commissioner's (or judge's) request for a proposed order is not appealable – nor, for that matter, does it even constitute an order. See Spruill v. Richland County School Dist. 2, 363 S.C. 61, 609 S.E.2d 524 (2005)(Toal, C.J., dissenting)("letter [from commissioner] asking the attorneys to draft an order . . . and its accompanying notes do not constitute an order . . ."). "Until written and

entered, the trial judge retains discretion to change his mind and amend his oral ruling accordingly. The written order is the trial judge's final order and as such constitutes the final judgment of the court." Ford v. State Ethics Comm'n, 344 S.C. 642, 646, 545 S.E.2d 821, 823 (2001).

Despite this well-established principle of law, the Appellate Panel vacated Commissioner Wilkerson's Decision and Order in large part because "The hearing Commissioner made no findings in his request [for a proposed order] related to compensability, especially for the neck, back, or brain." [FC order, Page 11, Finding of Fact 4]. Vacating an order on this basis is an abuse of discretion and error of law by the Appellate Panel.

The Appellate Panel went on to state that the Single Commissioner's specific findings "exceed the limited scope of the hearing and the evidence before the Hearing Commissioner." [FC order, Page 11, Finding of Fact 6]. This appears to follow from two earlier findings by the Appellate Panel, to wit:

1. "Claimant stated at the hearing that the specific purpose of the hearing was '. . . we are specifically asking for treatment for his neck and back . . ."

2 Claimant further indicated that the issue of physical brain injury was not before the hearing Commissioner at that time. [FC order, Page 11, Finding of Fact 4].

As part of their argument against providing treatment for Warner, Respondents stated: "Claimant further indicated that the issue of physical brain injury was not before the Commissioner at that time because he did not believe he was at maximum medical improvement." [Brief of Defendants, page 14]. Respondents missed the point – no permanency findings were requested on any injuries because Warner is not at MMI for any of his injuries.

The issues were treatment for the admitted head/brain injury and denied back/neck injuries.

Regarding those issues, Claimant's counsel stated:

> **Mr. Samuels:**
>
> It is our understanding that the – we consider it a – a brain injury but I understand the defense is referring to it as a head injury. We're – we are not contending that physical brain injury is before Your Honor since he is not at MMI –
>
> **Commissioner Wilkerson:**
>
> That's right.
>
> **Ms. Samuels:**
>
> – and that would be an issue that would have to be decided down the road but under Crisp and Sparks it's not ripe for determination at this point in time. We do note that he has been referred for further treatment by Dr. Rogers in a brain injury program and we ask that that treatment be authorized.

[Tr. Page 11, lines 7-20].

Warner specifically requested to "receive authorized treatment form Dr. Poletti for his neck and back, that he receive treatment through the brain injury program and continue with Dr. Baker for his brain/head injury."[3] [Tr. Page 16, lines 1-7].

To order treatment for the post-concussive syndrome, the Commissioner would necessarily have to find that the closed-head injury had occurred and that treatment would tend to lessen the period of disability. Doing so does not make this a physical brain damage lifetime benefits case – it

[3]Respondents repeatedly stated throughout their brief to the Appellate Panel: "Claimant limited the purpose of the hearing for a determination of whether or not Claimant received an *evaluation* of the neck and back . . ." [Defendants FC Brief (emphasis added). This is simply not true. In fact, Respondents' counsel even stated at the hearing "as far as the neck and the back, Stephen wants *treatment* issued with Dr. Poletti, we would object to that." [Tr. Page 27, line25-page 28, line 2 (emphasis added)]. Respondents' counsel further stated "we still think that the crux of this hearing today is the compensability of other body parts." [Tr Page 19, lines11-13].

merely allows treatment – treatment designed to avoid total disability.[4] The Supreme Court established in Crisp that the determination of whether a brain injury is severe enough to be deemed physical brain damage is made at MMI. See Crisp v. SouthCo., Inc., 401 S.C. 627, 738 S.E.2d 835 (2013)(determination of permanency was premature because employee was not at MMI even though he "sustained a traumatic closed head injury as a result of an injury by accident and that the head injury caused compensable neuropsychological injuries and cognitive disorders . . ."). Both Warner's attorney and Commissioner Wilkerson recognized this.

The Appellate Panel specifically vacated all the findings necessary to ensure Warner receives treatment for his compensable injuries. The Panel asserted "the findings contained therein exceed the limited scope of the hearing and the evidence before the Hearing Commissioner." [FC Order, Findings of Fact 6-7, page 11]. As noted above, the scope of the hearing was all about treatment for the "back, neck and closed head injuries" – which was *exactly* what Commissioner Wilkerson ordered. [SC Order, pages 20-21].

This is an *admitted* accident. In fact, it is an *admitted head injury*. On appeal to the Appellate Panel, Respondents contended it was error for the Hearing Commissioner to include "findings that Claimant has sustained a compensable injury to his head and brain, to include post-concussive syndrome, photophobia, memory problems and dizziness."[5] [Brief of Defendants, page 14]. This

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[4]The Order states "closed-head injury" – which is both admitted by Defendants and overwhelmingly supported by the evidence. The Commissioner did not reach the issue of physical brain damage – even cautioning Respondents' Counsel during his cross-examination: "Because you've got to be careful here. If you prove something you don't want to prove, you might buy a brain damage case here this afternoon." [Tr. Page 52, lines 19-23].

[5]Following the conference call discussing the proposed orders, the original references to the word "brain" were removed from the proposed order. The actual signed order made no findings specifically regarding the "brain."

argument is *not* based on the evidence – which overwhelmingly supports the findings – nor does it make any logical sense. Respondents even admit the current treating neurologist is "authorized for the head." [Tr. Page 28, lines 13-19]. They further conceded Warner is not at MMI and "what we would suggest is to let him continue to treat with Dr. Baker." [Tr. Page 20, line 25-page 21, line 2].

It is undisputed that Warner slipped on an oily factory floor and fell – hitting the floor and knocking himself out for several minutes. He was found unconscious on the floor. The CT scan at the emergency room showed an "acute subdural hematoma." Warner was admitted to the hospital in guarded condition. [APA page 8].

The Hearing Commissioner made a very cautious, very conservative finding regarding this injury, specifically finding "a closed head injury with resulting post-concussive syndrome." The neurologist authorized to treat the head injury, Dr. Baker, explicitly diagnosed Warner with "Post-concussion syndrome." [APA page 57-59]. A second neurologist, Dr. Rogers, made the same diagnosis. [APA pages 65-71]. Dr. Poletti made similar observations and concurred in the diagnosis of "cognitive impairment status post closed-head injury." [APA pages 74-75]. Even Respondents' IME physician, Dr. Sweet, noted "depression, dizziness, fatigue, sleep loss, weight gain, nervousness, ringing in the ears, visual changes, blurred vision [and] double vision . . . memory problems, balance difficulties, back problems and dizziness." [Defendants' Supplemental APA pages 93-95].

Regarding the neck and back injuries, these are also amply documented – with specific references to the record by Commissioner Wilkerson. For the Appellate Panel to suggest the findings "exceed . . . the evidence before the Hearing Commissioner" is simply absurd. As Commissioner Wilkerson found, "The medical records consistently show evidence of neck and back injuries affecting the legs, and of a closed head injury with resulting post-concussive syndrome. Warner's

complaints and symptoms have been consistent throughout his treatment and mirror his testimony at the hearing." [SC Order, pages 17-18, Finding of Fact 10]. The Commissioner also found "Based on the totality of the evidence, with the greatest weight being given to Dr. Baker's reports, Claimant sustained work-related injuries to his head, neck and back with an affect on his buttocks and legs." [Order, Findings of Fact 10, 12, page 18]. Dr. Baker referred Warner for treatment and evaluation of herniated discs (annular tears) in his neck and back, which were shown on the MRI scans.

The real problem in this case is Respondents' refusal to provide any real treatment – despite admitting the head injury, despite admitting Warner is not at MMI, despite paying temporary total disability compensation, and despite designating Dr. Baker as the treating neurologist.[6] Defendants persistent in "the position of the Employer that Mr. Warner suffered a minor head injury." [Tr. Page 17, lines 1-3; Defendants' Form 58]. Commissioner Wilkerson tellingly found: "This is not a minor head injury case as noted in Form 58 filed by Defendants." [Order, Findings of Fact 16, page 19].

The point is that there is no defect in Commissioner Wilkerson's order that would justify granting a trial *de novo*. His Decision and Order exactly comported with the issues brought before him by the parties. His findings are amply supported by substantial evidence in the record.

The Appellate Panel exceeded its authority and standard of review in ordering a trial *de novo*. Therefore, the Order of the Appellate Panel should be reversed and the Decision and Order of the Single Commissioner should be reinstated.

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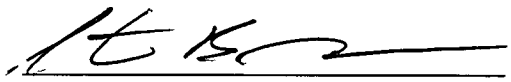
[6]Respondents even refused to authorize Dr. Baker's prescription for a cane. [Tr. Page 38, lines 1-24; Exhibit C-2].

CONCLUSION

For the foregoing reasons, the Decision and Order of the Appellate Panel vacating the order below ordering a trial *de novo* should be reversed. The Decision and Order of the Single Commissioner should be reinstated.



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