THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM THE
SOUTH CAROLINA WORKERS'
COMPENSATION COMMISSION
Appellate Panel

Aisha Taylor, Chair

Case No.: 2015-000691

Terrance Satterwhite, Respondent.

v.

Palmetto State Transportation, Employer,
Cherokee Insurance Company, Carrier, Appellants.

FINAL BRIEF OF APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

I. THE COMMISSION ERRED IN FINDING AS AN ISSUE OF FACT, AND/OR CONCLUDING AS A MATTER OF LAW, THAT THE APPELLANTS WERE ONLY ENTITLED TO NINE WEEKS OF CREDIT FOR OVERPAYMENT OF TEMPORARY TOTAL DISABILITY FROM JULY 17, 2013 THROUGH SEPTEMBER 10, 2013, WHEN THE RESPONDENT WAS DEEMED AT MMI BY THE TREATING PHYSICIAN IN JANUARY OF 2013, AND RETURNED TO WORK CONTINUOUSLY EARNING WAGES WITH THE COVERED EMPLOYER AS OF FEBRUARY 2013 THROUGH SEPTEMBER 10, 2013 AND ONGOING

A. BECAUSE RESPONDENT WAS PLACED AT MMI AS OF JANUARY 28, 2013, THE APPELLANTS ARE ENTITLED TO A CREDIT FOR OVERPAYMENT OF TTD FROM THIS DATE

B. BECAUSE CLAIMANT SIGNED A FORM 17 AGREEING HE COULD RETURN TO WORK WITHOUT RESTRICTIONS AS OF JANUARY 28, 2013, DEFENDANTS ARE ENTITLED TO A CREDIT FOR THE OVERPAYMENT OF TTD PAID SINCE THAT DATE

C. BECAUSE RESPONDENT RETURNED TO WORK FULL DUTY WITHOUT RESTRICTIONS, DEFENDANTS ARE ENTITLED TO CREDIT FOR OVERPAYMENT OF TTD PAID SINCE THE DATE OF CLAIMANT'S RETURN

II. THE COMMISSION ERRED IN FINDING AS AN ISSUE OF FACT, AND/OR CONCLUDING AS A MATTER OF LAW, THAT THE RESPONDENT HAD NOT ATTAINED MAXIMUM MEDICAL IMPROVEMENT WHEN SUCH A FINDING WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE AND/OR CONTRARY TO SOUTH CAROLINA L

II. THE COMMISSION ERRED IN FINDING AS AN ISSUE OF FACT, AND/OR CONCLUDING AS A MATTER OF LAW, THAT THE CLAIMANT IS ENTITLED TO TWO SEPARATE MRI'S OF HIS BACK, AS WELL AS AN INDEPENDENT MEDICAL EVALUATION, WHEN SUCH FINDINGS WERE AGAINST THE GREATER WEIGHT OF THE EVIDENCE AND/OR CONTRARY TO SOUTH CAROLINA LAW

STATEMENT OF THE CASE

This matter comes before the Court of Appeals from an appeal of the decision of the Appellate Panel of the South Carolina Workers' Compensation Commission, who had affirmed a prior Order by the Single Commissioner awarding additional treatment (to include MRI testing) and addressing credit issues for overpayment of temporary total disability benefits (TTD). Appellants assert that the Commission incorrectly applied the law as it relates to credit for overpayment of TTD following Respondent's release to MMI and return to work at full duty without restrictions, that the Commission inappropriately awarded MRI testing where none had been recommended by a physician, and that the Commission incorrectly determined Respondent was not at maximum medical improvement (MMI) and was entitled to additional treatment.

The Appellants are represented by Peter P. Leventis, IV, Esquire of The McKay Firm (McKay, Cauthen, Settana, & Stubley, P.A.). The Respondent, Terrance Satterwhite, is *pro se*.

Before the single Commissioner, the Appellants requested: (a) A determination of permanent partial disability for the Respondent's low back based on the ratings of the treating physician; and (b) The Employer/Carrier also requested a credit for overpayment of temporary indemnity benefits paid since the Respondent was found to be at maximum medical improvement by Dr. Hodge, per the reasoning of the Supreme Court in Curiel v. Environmental Management Services, Inc., 655 S.E.2d 482, 376 S.C. 23 (2007) until the date of the signing of the Form 17; and, (c) Alternatively, the Appellants requested a credit for overpayment of temporary benefits in the amount of two thirds of the actual wages earned by the Respondent since he returned to full duty work without restriction from the treating physician as of the first week of February 2013 until the date the Form 17 was signed on September 12, 2013, per S.C. Code Ann. §42-9-210 et. seq.

Also at the Form 21 hearing, the Respondent contended he had not reached maximum medical improvement for his low back, and wanted additional treatment and evaluation. While Mr. Satterwhite had returned to Dr. Hodge after the January 28, 2013 medical release, Mr. Satterwhite testified at the February 7, 2014 hearing, that he felt Dr. Hodge did not fully consider his complaints in evaluating him, and only provided follow up x-rays, instead of an MRI when he returned for a follow up visit after previously being declared at maximum medical improvement by Dr. Hodge. The Respondent requested a second opinion from another qualified specialist, and specifically for an MRI of his lumbar spine.

The single Commissioner ultimately determined that the Respondent was not at MMI, and was entitled to a second opinion for his back. The single Commissioner also determined that the Appellants were to provide two MRI's of the Respondent's lumbar spine, one with and without contrast, and that the results of such MRI's should be provided to both the IME physician and the original treating physician in order for them to opine on the diagnostic testing. The Single Commissioner further found that the Appellants were not entitled to any credit for overpayment of TTD benefits from date of MMI prescribed by the treating physician, nor from the date on which the Respondent actually returned back to work, nor for the actual wages the Respondent was earning from the Appellant Employer, working without restriction – while getting full TTD benefits simultaneously – nor from the date on which the first Form 21 hearing request (to terminate TTD benefits) was filed.

Within the applicable time period, Appellants/Appellants Cherokee Insurance Company and Palmetto State Transportation filed a Form 30 appeal citing six (6) grounds for exception and judicial review to the Appellate Panel of the single Commissioner's Order dated April 29, 2014.

FACTS

The Respondent sustained a work related injury to his low back only on January 5, 2012 when Mr. Satterwhite was getting out of his truck and twisted his lower back the wrong way. (R. p. 104). Mr. Satterwhite only asserted injury to his low back, and this is an admitted claim for benefits by the Appellants. Per his testimony at the hearing, the Respondent returned back to work in the first week of February of 2013. (R. p. 89, lines 14-16).

The Respondent did not sign a Form 17 to voluntarily terminate his ongoing weekly temporary total disability benefits until September 12, 2013; Respondent agreed he could return to work without restriction as of January 28, 2013. (R. p. 201). The Respondent had been declared at maximum medical improvement by the treating physician on January 28, 2013, and released to return to full duty at that time by the treating physician, Dr. Phillip Hodge. (R. p. 127). Per his own testimony in the record, and the employment documents submitted by the Appellants in their trial exhibits, the Respondent did return to full duty as of February of 2013 and was being paid at the same rate by the Appellant Employer upon his return to work.

STANDARD OF REVIEW

"The Administrative Procedures Act (APA) provides the standard for judicial review of decisions by the [Appellate Panel]." Pierre v. Seaside Farms, Inc., 386 S.C. 534, 540, 689 S.E.2d 615, 618 (2010); *accord* Lark v. Bi–Lo, Inc., 276 S.C. 130, 133–34, 276 S.E.2d 304, 306 (1981). Under the APA, this court can reverse or modify a decision of the Appellate Panel if the substantial rights of the appellant "have been prejudiced because the decision is affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." Transp. Ins. Co. v. S.C. Second Injury Fund, 389 S.C. 422, 427, 699 S.E.2d 687, 689–90 (2010); S.C.Code Ann. § 1–23–380(5)(d), (e) (Supp.2012).

"Substantial evidence is that evidence which, in considering the record as a whole, would allow reasonable minds to reach the conclusion the [Appellate Panel] reached." Hill v. Eagle Motor Lines, 373 S.C. 422, 436, 645 S.E.2d 424, 431 (2007). "The possibility of drawing two inconsistent conclusions from the evidence does not prevent the [Appellate Panel's] finding from being supported by substantial evidence." Id.

The principle of reliance on lay testimony and administrative expertise is not justified when the medical question becomes a complicated one and carries fact finders into realms which are properly within the province of medical experts. Wynn v. Peoples Natural Gas Co. of S.C., 238 S.C. 1, 118 S.E.2d 812 (1961). Where medical testimony is not solely relied upon to establish causal connection, presence or absence of such medical testimony may be conclusive depending upon the particular facts of the case. Kennedy v. Williamsburg County, 242 S.C. 477, 131 S.E.2d 512 (1963). "Here, we are concerned with the back, a much more complicated area of the body." McLeod v. Piggly Wiggly Carolina Co., 280 S.C. 466, 471, 313 S.E.2d 38, 41 (Ct. App. 1984).

"[A]n award may not rest on "surmise, conjecture, or speculation...." McLeod v. Piggly Wiggly Carolina Co., 280 S.C. 466, 313 S.E.2d 38, 40 (Ct.App.1984). This is particularly true when the injury is to the back; a complicated part of the body requiring evidence of a higher degree of expertise. McLeod, 313 S.E.2d at 41." Cropf v. Pantry, Inc., 289 S.C. 106, 111, 344 S.E.2d 879, 882 (Ct. App. 1986).

ARGUMENTS

I. THE COMMISSION ERRED IN FINDING AS AN ISSUE OF FACT, AND/OR CONCLUDING AS A MATTER OF LAW, THAT THE APPELLANTS WERE ONLY ENTITLED TO NINE WEEKS OF CREDIT FOR OVERPAYMENT OF TEMPORARY TOTAL DISABILITY FROM JULY 17, 2013 THROUGH SEPTEMBER 10, 2013, WHEN THE RESPONDENT WAS DEEMED AT MMI BY THE TREATING PHYSICIAN IN JANUARY OF 2013, AND RETURNED TO WORK CONTINUOUSLY EARNING WAGES WITH THE COVERED EMPLOYER AS OF FEBRUARY 2013 THROUGH SEPTEMBER 10, 2013 AND ONGOING

It is uncontested that the Respondent was released to return to regular duty with no restrictions by the treating physician as of January 28, 2013. (R. p. 127). The Respondent was also found to be at MMI by the treating physician, Dr. Philip Hodge, as of January 28, 2013. At that time Dr. Hodge assigned a 7% impairment rating to the lumbar spine, cited a return to work "without restrictions," and indicated that the Respondent "will not" need any future medical care related to this injury. (R. p. 130). It is also uncontested by the Respondent that he returned to full duty work with the Appellant Employer as of the first week of February 2013. (R. p. 89, lines 14-16). The Respondent worked continuously for the Appellant Employer from the date of his return to work in February of 2013 until the date of the hearing, February 7, 2014. The Respondent was working without restriction at the same job, making full wages after his return to work in February 2013. (R. pp. 162-200). The Respondent did ultimately sign a Form 17 voluntary termination on September 12, 2013, but not until after the Appellants filed for a previous Form 21 hearing to terminate such benefits. (R. p. 201). However, during such time the Respondent was being paid his wages, working without restriction, and being paid full TTD benefits by the Appellants between the first week of February and his signing of the Form 17 on September 12, 2013. (R. p. 202-208; showing TTD payments made). This was also after a time period when the Respondent had been declared at MMI by the treating physician.

The Appellants assert they should have been granted a credit for overpayment of TTD benefits from the date of the Respondent's MMI (January 28, 2013 – and as argued herein below), or either his return to work full duty, no later than February 7, 2013, up through the date that TTD benefits were terminated upon the Respondent's signing of the Form 17 on September 12, 2013. Holding otherwise grants a significantly unfair and unintended benefit to Respondent which is not only contrary to the Act, but also an additional indemnity benefits to which the Respondent is not entitled from his workers' compensation injury.

A. BECAUSE RESPONDENT WAS PLACED AT MMI AS OF JANUARY 28, 2013, THE APPELLANTS ARE ENTITLED TO A CREDIT FOR OVERPAYMENT OF TTD FROM THIS DATE

First, the Appellants contend the Respondent had reached MMI as of January 28, 2013, per the assignment of the treating physician, and such finding is not contested by any medical evidence in the record. If indeed the Respondent was at MMI as of January 28, 2013, these Appellants assert that the law is clear and unequivocal, and that any temporary indemnity benefits paid after such date, would accrue as a credit to the Appellants against any ultimate award of permanent indemnity – whether such award is ultimately for partial or total wage loss, or a scheduled member injury under S.C. Code Ann. §42-9-30. The Supreme Court has previously ruled that:

> [e]ssentially, 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-MMI benefits may then be awarded either as a permanent total or partial disability, or as a percentage of impairment to a scheduled member. Accordingly, the date of maximum medical improvement signals the end of entitlement to temporary total benefits.

Curiel v. Environmental Management Services 376 S.C. 23, 29, 655 S.E.2d 482, __ (2007) (internal citations omitted).

Similarly, South Carolina Courts have also held:

> [b]ecause equity follows the law, XTRA is entitled to credit for any TTD compensation payments it made to Watson after the date of MMI. See Curiel v. Envtl. Mgmt. Servs. (MS), 376 S.C. 23, 29, 655 S.E.2d 482, 485 (2007) ("[T]he date of maximum medical improvement signals the end of entitlement to temporary total disability benefits.")

Watson v. Xtra, 399 S.C. 455, 465, 732 S.E.2d 190, __ (Ct. App. 2012).

While the Commission Ordered additional treatment (which is disputed by the Appellants below), the fact a claimant has reached maximum medical improvement (MMI) does not preclude a finding the claimant may still require additional medical care or treatment. Hall v. United Rentals, Inc., 371 S.C. 69, 639 S.E.2d 876 (Ct. App. 2006).

As held in Curiel, temporary total benefits are paid only through the date of MMI and post-MMI benefits are payable as permanent total disability, wage loss, or as a percentage loss of a scheduled member. Therefore, benefits paid to the Respondent beyond the date of MMI (January 28, 2013) were paid when not due as temporary total disability benefits. Pursuant to S.C. Code Ann. §42-9-210, the Appellants assert that these payments should be viewed as advanced payment toward an award for permanent disability, wage loss, or percentage disability to a scheduled member.

B. BECAUSE CLAIMANT SIGNED A FORM 17 AGREEING HE COULD RETURN TO WORK WITHOUT RESTRICTIONS AS OF JANUARY 28, 2013, DEFENDANTS ARE ENTITLED TO A CREDIT FOR THE OVERPAYMENT OF TTD PAID SINCE THAT DATE

The Respondent did sign a Form 17 indicating that he could return to work as of January 28, 2013 without restriction. This was based on and confirmed by the Form 14B and final medical notes of Dr. Philip Hodge dated January 28, 2013. Dr. Hodge found Respondent was

able to return to work and was able to do so without restriction based on a functional capacity evaluation. (R. pp. 127, 130). Claimant's signature on the Form 17 is prima facie evidence that Respondent agreed he could return to work as of the date listed on the form.

In the case of Cranford v. Hutchinson Const., the Court of Appeals addressed a period of entitlement to temporary total disability payments issue and placed weight on when a claimant was "return[ed] to work without restriction." Although Cranford had not signed a Form 17, he had been released to MMI and the Court found he was entitled to payments from the date of his termination until his release to MMI and release without restrictions. Cranford, 399 S.C. 65, 77, 731 S.E.2d 303, 309 (Ct. App. 2012).

Furthermore, "to require an employer to prove a claimant's disability ended before terminating TTD benefits dilutes the distinction between temporary and permanent disability payments, and it dilutes MMI as the definitive moment when a transition between the two different types of payments is accomplished." Hendricks v. Pickens Cnty., 335 S.C. 405, 415, 517 S.E.2d 698, 704 (Ct. App. 1999) (clarification noted in Footnote 2 of the opinion).

In the instant case, the Respondent was released to MMI without work restrictions as of January 28, 2013; however, Mr. Satterwhite did eventually sign a Form 17 agreeing that he was able to return to work without restrictions as of January 28, 2013. (R. p. 201). Therefore, Respondents assert that the Employer/Carrier are entitled to a credit for benefits paid beyond January 28, 2013.

C. BECAUSE RESPONDENT RETURNED TO WORK FULL DUTY WITHOUT RESTRICTIONS, DEFENDANTS ARE ENTITLED TO CREDIT FOR OVERPAYMENT OF TTD PAID SINCE THE DATE OF CLAIMANT'S RETURN

Even if the Respondent is deemed not to have been at MMI as of January 28, 2013, the Appellants alternatively contend they would still be entitled to a credit for over payment of TTD

benefits paid after the Respondent returned to work full duty, at the same rate of pay in February of 2013 [As per the Order of the Full Commission, "return to full duty the first week of February 2013" (R. p. 15)]. (R. p. 162). Not only would it be highly prejudicial to the Appellants to pay the Respondent simultaneously full wages for his work, **and** full TTD benefits, but the Act itself provides for such a credit for overpayment under S.C. Code Ann. §42-9-210:

> Any payments made by an employer to an injured employee during the period of his disability, or to his dependents, which by the terms of this Title were not due and payable when made may, subject to the approval of the Commission, be deducted from the amount to be paid as compensation; provided, that in the case of disability such deductions shall be made by shortening the period during which compensation must be paid and not by reducing the amount of the weekly payment.

During a time period when an employee is working, without restriction, for the Appellant Employer after being released by the treating physician, per the terms of the Act, he or she would not be entitled to ongoing TTD benefits. Therefore, pursuant to S.C. Code Ann. §42-9-210, these Appellants would be entitled to a credit for overpayment from the date of Respondent's return to work on or about February 9, 2013, until the date of his voluntary termination of TTD benefits in September of 2013, for not less than two thirds of the actual wages he earned, while still receiving full TTD benefits. (Also See, S.C. Code Ann. §42-9-20).

II. THE COMMISSION ERRED IN FINDING AS AN ISSUE OF FACT, AND/OR CONCLUDING AS A MATTER OF LAW, THAT THE RESPONDENT HAD NOT ATTAINED MAXIMUM MEDICAL IMPROVEMENT WHEN SUCH A FINDING WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE AND/OR CONTRARY TO SOUTH CAROLINA LAW

The Appellants contend that the Respondent has attained MMI for his injuries, and that such findings by the treating physician, Dr. Hodge, are uncontroverted by any medical evidence

in the record. Therefore the single Commissioner was in error to find otherwise. As such, this finding was against the greater weight of the medical evidence in the record.

The principle of reliance on lay testimony and administrative expertise is not justified when the medical question becomes a complicated one and carries fact finders into realms which are properly within the province of medical experts. Wynn v. Peoples Natural Gas Co. of S.C., 238 S.C. 1, 118 S.E.2d 812 (1961). Where medical testimony is not solely relied upon to establish causal connection, presence or absence of such medical testimony may be conclusive depending upon the particular facts of the case. Kennedy v. Williamsburg County, 242 S.C. 477, 131 S.E.2d 512 (1963). "Here, we are concerned with the back, a much more complicated area of the body." McLeod v. Piggly Wiggly Carolina Co., 280 S.C. 466, 471, 313 S.E.2d 38, 41 (Ct. App. 1984)

"[A]n award may not rest on "surmise, conjecture, or speculation...." McLeod v. Piggly Wiggly Carolina Co., 280 S.C. 466, 313 S.E.2d 38, 40 (Ct.App.1984). This is particularly true when the injury is to the back; a complicated part of the body requiring evidence of a higher degree of expertise. McLeod, 313 S.E.2d at 41." Cropf v. Pantry, Inc., 289 S.C. 106, 111, 344 S.E.2d 879, 882 (Ct. App. 1986)

Here, Claimant was released by Dr. Hodge on January 28, 2013. (R. pp. 127, 130). Claimant continued to complain of pain complaints and Dr. Hodge saw him on April 15, 2013 and May 20, 2013, providing additional medications. (R. pp. 131-133).

The fact a claimant has reached maximum medical improvement (MMI) does not preclude a finding the claimant may still require additional medical care or treatment. Hall v. United Rentals, Inc., 371 S.C. 69, 639 S.E.2d 876 (Ct. App. 2006).

Dr. Hodge's additional treatment is not inconsistent with a finding of MMI. However, an Order using an award for additional MRI's and evaluation as a basis not to find MMI is speculative in this case. Claimant did already receive an MRI on January 12, 2012. (R. p. 107). He subsequently went through a course of treatment that included a right L5-S1 hemilaminectomy and discectomy on May 18, 2012 by Dr. Hodge. (R. p. 140). Dr. Hodge continued to see Claimant through his recovery and subsequent release to MMI. (R. pp. 110-133). At no point did Dr. Hodge find it necessary to Order another MRI (much less two additional MRIs as Ordered by the Commission). If a subsequent MRI reveals new changes that require further medical treatment and may serve to increase Claimant's disability, a change of condition may be filed within one year of an Award pursuant to S.C. Code Ann. §42-17-90.

If the Respondent is indeed at MMI, as reflected by the opinion of the treating physician, (See for example, R. pp. 127, 130), then a determination of permanent disability was indeed ripe for consideration and justiciable at that time. The Appellants would respectfully request the Court to find Claimant has reached MMI and remand the issue to the Commission for a determination of permanent disability.

If the Court agrees that Claimant cannot be placed at MMI until the further evaluation and MRIs Ordered by the Commission are completed, the Appellants would request that the Commission's finding on MMI be reversed and remanded to be held in abeyance should the further testing serve to confirm Dr. Hodge's finding of MMI as of January 28, 2013.

III. THE COMMISSION ERRED IN FINDING AS AN ISSUE OF FACT, AND/OR CONCLUDING AS A MATTER OF LAW, THAT THE CLAIMANT IS ENTITLED TO TWO SEPARATE MRI'S OF HIS BACK, AS WELL AS AN INDEPENDENT MEDICAL EVALUATION, WHEN SUCH FINDINGS WERE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE AND/OR CONTRARY TO SOUTH CAROLINA LAW

In the April 29, 2014, Order the single Commissioner held in part that:

> Dr. Hodge only performed follow up x-rays when the Respondent saw him in the spring of 2013, despite the Respondent's request for a follow up MRI at that time. I am ordering the Respondent be provided an MRI both with and without contrast by the Appellants, and that the results of such tests be provided to both doctors, (the second opinion physician, and Dr. Hodge) for their consideration and determination of any disability and/or necessary additional treatment.
>
> See Wilkerson Order at Finding of Fact No. 20, (R. pp. 24-25) and Full Commission Order at Finding of Fact 20 (R. pp. 13-14).

While, it is well settled that "Where the medical evidence conflicts, the findings of fact of the [Appellate Panel] are conclusive." Mullinax v. Winn–Dixie Stores, Inc., 318 S.C. 431, 435, 458 S.E.2d 76, 78 (Ct.App.1995). In the instant case, there is not a conflict in the medical evidence as to whether the Respondent is entitled to MRI studies because no doctor has recommended such testing.

These Appellants contend that such finding by the trial Commissioner, that an MRI is necessary and that the Appellant are obligated to provide such, is without medical support. Despite the fact that the Respondent has requested an MRI, the treating physician did not choose to obtain or prescribe one, though he did perform an updated x-ray of the Respondent's lumbar spine. Nevertheless, the diagnostic of a follow up MRI – either with or without contrast – has not been recommended nor prescribed to the Respondent by the treating physician ***nor any other*** medical provider or physician. While the Respondent may desire or want an MRI follow up for his back, the bequest of the Respondent is not the standard for specific treatment modalities or evaluations under the Act.

As stated previously, the principle of reliance on lay testimony and administrative expertise **is not justified** when the medical question becomes a complicated one and carries fact finders into realms which are properly within the province of medical experts. [Emphasis added]. Wynn v. Peoples Natural Gas Co. of S.C., 238 S.C. 1, 118 S.E.2d 812 (1961). Where medical

testimony is not solely relied upon to establish causal connection, presence or absence of such medical testimony may be conclusive depending upon the particular facts of the case. Kennedy v. Williamsburg County, 242 S.C. 477, 131 S.E.2d 512 (1963). "Here, we are concerned with the back, a much more complicated area of the body." McLeod v. Piggly Wiggly Carolina Co., 280 S.C. 466, 471, 313 S.E.2d 38, 41 (Ct. App. 1984)

"[A]n award may not rest on "surmise, conjecture, or speculation...." McLeod v. Piggly Wiggly Carolina Co., 280 S.C. 466, 313 S.E.2d 38, 40 (Ct.App.1984). This is particularly true when the injury is to the back; a complicated part of the body requiring evidence of a higher degree of expertise. McLeod, 313 S.E.2d at 41." Cropf v. Pantry, Inc., 289 S.C. 106, 111, 344 S.E.2d 879, 882 (Ct. App. 1986)

While the Appellants do contend that a follow up IME is not warranted under the evidence of the case (as argued above) and request the Court reverse the Commission's finding awarding an additional independent evaluation; these Appellants do not contest the Commission's authority and ability to Order such IME be provided, if the Court of Appeals deems it appropriate and supported by the evidence. These Appellants do, *however*, contend that the Order of the full Commission commanding the Appellants to provide two separate MRI's, both with and without contrast, is beyond the scope of the authority of the Commission when such modalities have not been recommended, nor prescribed by anyone. (See Generally S.C. Code Ann. §§42-15-60 and 42-15-80).

Furthermore, the Appellants have no ability to create or obtain a prescription for an MRI, with or without contrast, unless and until such is prescribed by a physician or other qualified medical provider. That is, if neither the treating physician nor an IME physician were to

prescribe a follow up MRI, there is no mechanism for the Appellants to obtain such diagnostic testing.

Similarly, while a Commissioner may Order a carrier provide treatment and evaluations for an injured body part, (e.g. a broken leg), or even with a specific doctor or treatment provider, (e.g. Dr. Smith), or the treatment recommendations of a doctor, (e.g. "the fusion recommended by Dr. Jones," or as might be applicable to this case "an MRI **if** recommended by the IME physician"); nevertheless, the Act does not imbue the Commission with the authority to mandate specified treatment and testing be provided when such has not even been ordered or requested by any treatment provider, and when such has not even been recommended by any treatment provider.

The Commission may weight medical evidence and Order certain treatments when prescribed by a qualified physician, but they have not had the proper medical training or qualifications to unilaterally award or prescribe treatment or medical interventions without supporting medical evidence. To interpret the Act in such a way creates a clear quandary. That being, if a Commissioner Ordered a certain type of surgery or test be performed, but neither the treating physician, nor any IME, nor other evaluating medical care provider was recommending such type of testing and/or surgical treatment, the Defendant carrier would be wholly unable to comply with such an Order, and without recourse. It would also create a medical conundrum in that the directive for medical treatment or diagnostics, such as in the instant case, may be completely medically unnecessary or even detrimental to the treatment of the patient/Respondent, and is also completely unsupported by the medical evidence in the record of the case. The Appellants argue that is the case in the instance of the Ordered MRI's for Mr. Satterwhite under these circumstances.

In the instant case the Commission has Ordered the Appellants to provide an MRI of the lumbar spine without contrast and an MRI of the lumbar spine with contrast. Dr. Hodge has already declined Claimant's request for an MRI; therefore, should the IME doctor also find an MRI unnecessary, the Defendants would be forced into a situation of "doctor shopping" in order to find a physician willing to order the testing. This is in conflict with the spirit of Risinger v. Knight Textiles, 353 S.C. 69, 577 S.E.2d 222 (Ct. App. 2002). In Risinger, the Court found that Knight Textiles was not entitled to obtain a third opinion where it had received a second opinion on a medical issue and was not satisfied with the result. The Court found that to allow Knight to do so would "lead to a result so plainly absurd that it could not possibly have been intended by the Legislature." Risinger v. Knight Textiles, 353 S.C. 69, 73, 577 S.E.2d 222, 224 (Ct. App. 2002). The Order of the full Commission, as written, could produce a result of forcing the Appellants to violate the holdings of Risinger in order to comply with the Order. Therefore, the Appellants would respectfully request the Court of Appeals reverse this finding.

Furthermore, allowing the Commission to Order medical procedures and treatment may be dangerous to a Claimant. The full Commission questioned the Appellants and appeared to operate under a belief that the Commission Order could serve essentially as a prescription and act as a medical referral without the need for a physician recommendation. (R. p. 66, line 20-p. 68, line 6). Although it may seem innocuous, or even safe, to provide an MRI without the order of a qualified physician certain dangers may arise. For example, it is well known that it is dangerous for patients with metal implants to undergo MRI scans and the Commission is not qualified to screen for these or other potential issues that could affect the reading of the MRI and/or present a danger to the patient. Further, with particular application to an MRI with contrast, a patient may be allergic or otherwise sensitive to the contrast dye or agents used in the

procedure, rendering it unsafe to proceed with this type of testing. For example, iodine is a common contrasting agents and the Commission is not qualified to determine whether it is safe for a patient to proceed with an MRI utilizing these agents. (See "The use of gadolinium in patients with contrast allergy or renal failure requiring coronary angiography, coronary intervention, or vascular procedure." Catheter Cardiovasc Interv. 2011 Nov 1;78(5):747-54. doi: 10.1002/ccd.22907. Epub 2011 Jul 21. http://www.ncbi.nlm.nih.gov/pubmed/21780275). Given these potential dangers, interpreting the Workers' Compensation Act in such a way as to allow the Commission to unilaterally order/prescribe treatment and other medical interventions "would lead to a result so plainly absurd that it could not possibly have been intended by the Legislature or would defeat the plain legislative intention." Risinger v. Knight Textiles, 353 S.C. 69, 73, 577 S.E.2d 222, 224 (Ct. App. 2002). Therefore, the Appellants respectfully request the Court of Appeals reverse the findings of the full Commission as to the provision of MRI testing.

CONCLUSION

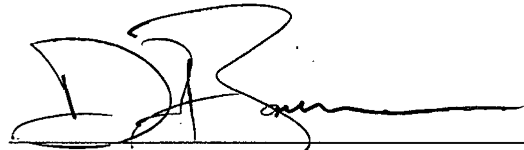
BASED ON THE FORGOING, these Appellants, Palmetto State Transportation and Cherokee Insurance Company, request that the Court of Appeals reverse and modify the findings and conclusions of the full Commission as outlined herein above, by:

(a) Finding that the Employer/Carrier is entitled a credit for overpayment of all TTD payments made after the Respondent was determined to be at MMI, and/or in the amount of 2/3rds of all wages earned by the Respondent after his full duty return to work, while he was still receiving indemnity benefits;

(b) Finding that the Respondent is at MMI according to the findings of Dr. Hodge and remanding the claim to the Commission for a finding on permanency, based on the ratings of the treating physician; and

(c) Reversing the full Commission's ruling that the Appellants must provide two separate MRI's for the Respondent's spine, when no such testing has ever been denied by the carrier, nor requested, prescribed or recommended by any physician, and is wholly unsupported by any medical evidence in the record, and reversing the full Commission's award of an IME with a new physician.

Respectfully Submitted



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September 14, 2015

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SOUTH CAROLINA WORKERS'
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Appellate Panel

Aisha Taylor, Chair

Case No.: 2015-000691

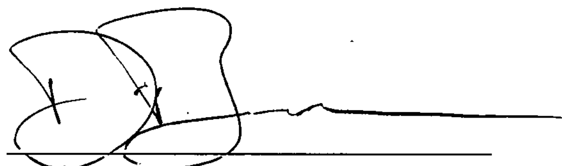
Terrance Satterwhite, Respondent.

v.

Palmetto State Transportation, Employer,
Cherokee Insurance Company, Carrier, Appellants.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Brief complies with Rule 211(b) SCACR.



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PROOF OF SERVICE

I certify that I have served the **Final Brief** on the *pro se* Respondent **Terrance Satterwhite** by certified mail, return receipt requested, on **September 14, 2015**, addressed as follows:

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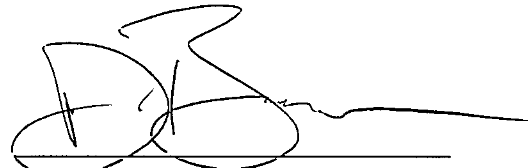

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