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

Case No. 2014-002294
WCC File No. 1106833

TIMOTHY MCMAHAN, APPELLANT/RESPONDENT,

V.

SC DEPARTMENT OF EDUCATION – TRANSPORTATION, EMPLOYER, AND STATE ACCIDENT FUND, CARRIER, RESPONDENTS/APPELLANTS.

FINAL APPELLANT'S BRIEF OF THE APPELLANT/RESPONDENT

Kevin B. Smith
Hoffman Law Firm
7087 Rivers Avenue
N. Charleston, SC 29406
(843) 769-7077
ksmith@hoffmanlaw.net
Attorney for the Appellant/Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

STATEMENT OF ISSUES ON APPEAL

STATEMENT OF THE CASE

The Appellant filed a WCC Form No. 50 on May 16, 2013 alleging he sustained injuries by accident to his head, brain, back, internal organs, teeth, legs, mouth and ribs arising out of and occurring within the course and scope of his employment on June 15, 2011. (R. p. 30). The Respondents filed a WCC Form No. 51 on June 13, 2013 admitting the injury to his back, but denying all others. (R. p. 31). A Hearing was set for August 15, 2013.

A hearing was held before Commissioner Aisha Taylor on August 15, 2013. Commissioner Taylor found the Appellant to have reached maximum medical improvement prior to his death and awarded total disability benefits due to the fifty (50) percent or greater loss of use to his back under §42-9-30(21) based upon a fifty-four percent (54%) impairment rating from the authorized treating physician. (R. p. 2).

Within the statutory period, the Respondents filed a WCC Form 30 appealing her decision to the Appellate Panel. (R. p. 36). A review hearing was held on July 22, 2014. By Order dated September 30, 2014, the Appellate Panel reversed the decision of Commissioner Taylor, found the Claimant not to be at maximum medical improvement prior to his death, and found the claim abated with his widow receiving nothing. (R. p. 15). The Appellant was the first to file his appeal with the Court, followed by the Respondents' appeal.

FACTS

The Appellant was sixty-one (61) years old at the time of his death. His wife and Personal Representative of his Estate, Dorothy McMahan, was married to the Appellant for thirty-three (33) years. They had two (2) children. The Appellant had a high school education and served in the US Army as a mechanic. After discharge, he went to work as a mechanic. The last job he had was as a bus mechanic for the Respondent. All of the work he had done required heavy lifting, being on his feet, bending, stooping, and squatting. He had never in his life worked behind a desk. (R. pp. 73-74).

On June 15, 2011, the Appellant had a horrible accident. A bus he was working on fell on top of him. He was admitted to MUSC in Charleston and underwent a three (3) level fusion surgery from T11-L1 with placement of plates and pedicle screws. (R. p. 107-110). He underwent a second surgery on October 9, 2011, to remove some of the screws and revise the previous surgery. (R. pp. 111-112). The last time the Appellant was seen at MUSC, the authorized treating physician conducted a physical examination which revealed "left leg 4/5 strength, right 3/5, tight bilateral lumbar paraspinal muscles to palpation, kyphosis." (R. pp. 103-104). He was given pain medications and a recommendation was made that be set up with pain management in Tennessee. (R. pp. 103-104).

The Appellant moved to Tennessee to be with his elderly parents who were on their last days. The Respondents sent him to Dr. Patrick Bolt, who became his authorized treating physician in Tennessee. On April 23, 2012, the Appellant saw Dr. Bolt and underwent another physical examination and evaluation. Dr. Bolt noted his prior surgeries in Charleston and stated, "...he is able to flex 80% of normal...His quadriceps

are 3/10 on the left, hip flexors are 3/10 on the left, otherwise full strength in the lower extremities." Dr. Bolt ordered an updated MRI to make sure nothing else could be offered by way of treatment. (R. pp. 86-89). The MRI showed no "new neural pinches" and "no pseudoarthroses." (R. pp. 90-91). Dr. Bolt also ordered at CT, a Duplex scan of his left lower extremity, and an EMG. (R. pp. 86-89). All of the tests except the EMG were done. (R. pp. 90-94). Dr. Bolt commented that he thought the Appellant was at maximum medical improvement (MMI). (R. p. 89). He referred the Appellant to pain management. (R. p. 88). No other medical treatment was ordered.

On October 6, 2012, the Appellant died of unrelated causes. (R. p. 120).

On February 27, 2013, Dr. Bolt issued his opinions regarding MMI and impairments. Dr. Bolt stated, "I would say that he was at maximum medical improvement when I saw him on 4/23/2012." Dr. Bolt commented that the Claimant was "totally disabled" and assigned a fifty-four percent (54%) impairment for his work-related injury. He completed a WCC Form 14B indicating the date of MMI to be April 23, 2013. (R. pp. 85, 95-96). This would be nearly six months prior to his death.

A hearing was set to determine of the Claimant had reached MMI prior to his death, and if so, to determine if the Respondents could rebut the presumption that he was totally disabled. The Respondents set the deposition of Dr. Bolt, but chose to cancel it. (R. p. 84). No depositions were taken of anyone except for the Appellant's wife. No medical opinions were submitted to refute the authorized treating physician's diagnosis that the Appellant was at MMI prior to his death.

At the hearing, the Appellant's wife testified that the second surgery helped his pain and that she noticed an improvement. She testified that the Appellant's back

condition did not change once they got to Tennessee. She testified that by the time he got to see Dr. Bolt, the Appellant had gotten about as good as he was going to get. He was not making any major improvements, "He stayed the same." No attempt was made to cross-examine her. (R. pp. 73-74).

The Respondents made multiple arguments in an attempt to have the claim abated. First, even though they denied his legs were compensable body parts and no doctor ever diagnosed him as paraplegic, the Defendants contended the Appellant was paraplegic under §42-9-10(C), therefore contended his claim should abate. Second, they stated that it is illegal for the Commission to even consider a WCC Form 14B completed after any Claimant has passed. Third, the Defendants asserted that the Appellant had not reached maximum medical improvement before his death. Fourth, the Defendants asserted that it is illegal for the Commission to rule on permanent disability after a person has died. The Defendants chose not to present any evidence to rebut the presumption that the Appellant was totally disabled in the event the Commissioner found his claim would not abate. (R. p. 73).

The hearing commissioner weighed the evidence and agreed with the only medical opinion in evidence concerning MMI, that the Appellant had reached MMI nearly six (6) months prior to his death. She rejected all of the Respondents' arguments, and since they offered no evidence to rebut the presumption that he sustained a fifty (50) percent or greater disability to his back, she awarded total disability benefits to the Appellant's wife. (R. pp. 2-12).

Upon application for review to the Appellate Panel, a review hearing was held where the Respondent renewed all of the same arguments they made to the hearing

commissioner. (R. pp. 38-51). By its Order, the Appellate Panel denied all but one (1) of the Respondents' issues on appeal. They found the Appellant had not reached MMI prior to his death and stated no benefits were due to his widow. (R. pp. 15-28).

ARGUMENT

I. THE COMMISSION ERRED IN FINDING THE CLAIMANT NOT TO BE AT MAXIMUM MEDICAL IMPROVEMENT.

The Administrative Procedures Act ("APA") provides the standard for judicial review of decisions by the Commission. Pierre v. Seaside Farms, Inc., 386 S.C. 534, 540, 689 S.E.2d 615, 618 (2010); 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 the decision of the Commission if the substantial rights of the Appellant have been prejudiced because the decision is affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. S.C. Code Ann. §1–23–380(5)(d), (e) (Supp.2011); Transp. Ins. Co. v. S.C. Second Injury Fund, 389 S.C. 422, 427, 699 S.E.2d 687, 689–90 (2010). The Appellant contends the Commission's Order is affected by an error of law and is not based upon the substantial evidence when considering the record as a whole.

A. Error of Law: The Commission ignored a key part of the legal standard and is not allowed to make its own medical diagnosis as a matter of law.

As stated verbatim from the Appellate Panel's Order, "[i]t is...well settled that 'maximum medical improvement' is the term used to demonstrate that a claimant has reached such a plateau in their treatment and recovery that, ***in the physician's opinion***, there is no further medical care or treatment which will lessen the degree of impairment."

(Emphasis added). (R. p. 19) (citing Cranford v. Hutchinson Construction, 399 S.C. 24, 28, 459 S.E.2d 324, 327 (Ct. App. 1995)).

The Defendants should concede the ONLY medical opinion in evidence concerning MMI is from Dr. Patrick Bolt, the authorized treating physician they chose. Dr. Bolt stated, "I would say that he was at maximum medical improvement when I saw him on 4/23/2012." Dr. Bolt commented that the Claimant was "totally disabled" and assigned a fifty-four percent (54%) permanent impairment for his work-related injury. (R. pp. 85, 95-96). Upon review of the Appellate Panel's decision, they do not identify any physician who is of the opinion that there is further medical care or treatment that would tend to lessen his degree of impairment. The reason a physician's opinion regarding further medical treatment that would tend to lessen his disability is not present is because it doesn't exist. The ONLY medical opinion in evidence concerning MMI is from Dr. Patrick Bolt, the authorized treating physician.

The Commission's Order violates the legal standard for determining MMI because not only do they fail to cite a physician's opinion, but they simply ignore this requirement under the law. For them to say he needs additional medical treatment that would tend to lessen his disability, the Commission would be making their own medical diagnosis and recommendations for treatment, as no physician has said anything close to that.

B. Substantial Evidence: The Commission's finding that the Appellant was not at MMI ignores the only medical opinion in evidence and is based upon surmise, conjecture or speculation.

"Substantial evidence is that evidence which, in considering the record as a whole, would allow reasonable minds to reach the conclusion the Commission reached."

Hill v. Eagle Motor Lines, 373 S.C. 422, 436, 645 S.E.2d 424, 431 (2007). "While a finding of fact of the [C]ommission will normally be upheld, such a finding may not be based upon surmise, conjecture, or speculation, but must be founded on evidence of sufficient substance to afford a reasonable basis for it." Edwards v. Pettit Constr. Co., Inc., 273 S.C. 576, 579, 257 S.E.2d 754, 755 (1979); see also Grayson v. Carter Rhoad Furniture, 317 S.C. 306, 309–10, 454 S.E.2d 320, 322 (1995).

The Appellant reached MMI on April 23, 2012, nearly six (6) months prior to his death. This is supported by the opinion of the authorized treating physician stating he was at MMI and referring him to long-term pain management. (R. pp. 85, 86-89, 95-96). No medical opinions were submitted to the contrary. To find he was not at MMI without any physician stating there is further medical care or treatment that would tend to lessen his degree of impairment would not only be an error of law, but it would also be based solely upon surmise, conjecture, or speculation.

The testimony without cross-examination of the Appellant's wife was that by the time he got to see Dr. Bolt on April 23, 2012, the Appellant had gotten about as good as he was going to get. (R. pp. 73-74). Her testimony is supported by the fact the Dr. Bolt placed him at MMI and sent him out for long term pain management before he died. (R. p. 88). The sole opinion that the Appellant was at MMI prior to his death and the issuance of a **permanent** impairment rating by Dr. Bolt establishes his impairment was permanent prior to his death and that no further treatment beyond the date of MMI would tend to lessen his degree of impairment. (*see AMA Guides*, stating "[i]mpairment ratings are to be performed when an individual is at a state pf permanency." *Guides to the Evaluation of Permanent Impairment*, AMA, 6th Ed., pp. 26-27) (R. pp. 121-122).

Again, no doctor has ever stated this opinion was incorrect or insufficient in any way. The Respondents had Dr. Bolt's deposition set, but chose to cancel it.

Instead, the Commission's Order states that since the last doctor he saw in South Carolina prior to leaving didn't comment on MMI, then one has to assume he was specifically stating that the opinion concerning MMI by Dr. Bolt several months later is incorrect. (*see* Commission's Order stating, "[t]he reports from MUSC do not contain any statement indicating [Appellant] was being released from care, that he had reached a plateau in his medical condition, or that he was at MMI as a result of his work related injuries, and it is clear from these reports that his medical treatment needed to continue to improve [the Appellant's] condition." WCC Order, pp. 6-7). (R. pp. 20-21). In other words, the absence of an opinion from MUSC is therefore a "clear" opinion to the contrary. It was arguments like this that the original hearing commissioner found senseless and unpersuasive. And of course this begs the question, what is the medical care the Commission says he needed to improve his compensable condition?

Taking this line of reasoning even further, the Commission states, "there is **no** medical opinion that [the Appellant] was at maximum medical improvement prior to his death..." (Emphasis added). (WCC Order, p. 8). (R. p. 22). The only way for this statement to be true is if Dr. Bolt's opinion is removed from the record in its entirety. Despite the absence of any medical opinions controverting Dr. Bolt's opinion that the Appellant was at MMI nearly six (6) months prior to his death, the Commission attempts to explain in stating, "[t]he medical evidence clearly shows that [the Appellant] had not reached maximum medical improvement, but was continuing to improve, and still had a large amount of medical treatment and diagnostic testing being recommended for him at

the time of his death." (WCC Order, p. 8). (R. p. 22). Again, the Order fails to identify the "**large amount of medical care**...being recommended at the time of his death." The reason it's not listed is because it doesn't appear in the records and wasn't being recommended. To say he still needed "large amounts of medical care" without a single doctor saying so means the Commission is at best, simply ignoring or misreading the medical evidence. At worst, they are making their own medical diagnosis and recommending their own treatment. Either way, these statements are not based upon the substantial evidence in the record, but instead based upon surmise, conjecture, or speculation.

The Commission tries to downplay the significance of Dr. Bolt's opinions by saying he saw the Appellant as an "independent medical evaluation." (R. pp. 20-21, 24). It is important to understand that this was not a finding made by the hearing commissioner. It is for the first time inserted into the Appellate Panel's Order. This was not the subject of anyone's appeal, and wasn't mentioned in the process at all. In fact, in reviewing the entire record on appeal, the words "independent medical evaluation" do not appear even once. This was not requested in any of the instructions given to Respondents' counsel for drawing the Order by the Appellate Panel. (R. pp. 13-14). Instead, Respondents' counsel simply threw it in, regardless of any evidence at all to support or any instructions to do so.

On the WCC Form 14B signed by Dr. Bolt, it says at the beginning, "[t]he undersigned physician has been authorized by the Employer/Carrier **to treat** this Claimant for his or her injury by accident pursuant to §§42-15-60, 42-1-172 or 42-11-10." (Emphasis added). (R. p. 85). And, in the Respondents' own From 58 (Pre-Hearing

Brief) dated August 15, 2013, **they** list Dr. Bolt as the "treating physician." (R. p. 22). Not that it matters much whether Dr. Bolt was just an examiner or a treating physician, the point is to highlight yet another example of the Appellate Panel's willingness to substitute the evidence with facts not even in the record.

Lastly, the Appellate Panel apparently got confused by Dr. Bolt's notes. On April 23, 2012, Dr. Bolt conducted his examination which included conducting a history, performing a physician examination, taking diagnostic scans and reviewing those diagnostic scans. He then says, "[a]pparently, the patient is already at maximum medical improvement but, again, I have no records to confirm this." (R. p. 89). It is clear what happened was that he was told the Appellant has reached MMI, presumably by the nurse case manager hired by the Respondents who attended the appointment, but he didn't see that in writing and therefore had no medical records to confirm this. From there, he orders an updated MRI and a few other scans to make sure there is nothing else he needs. Dr. Bolt refers the Appellant out for long term pain management. (R. pp. 86-89).

Then, on the next visit of May 11, 2012, Dr. Bolt reviews the MRI and states, "I did not see any new neural pinches on his MRI today. There are no pseudarthroses noted either." The other scans he ordered were negative as well. (R. pp. 90-91). The referral to pain management was still in place. The Appellant was subsequently hospitalized for unrelated causes and passed away on October 6, 2012. (R. p. 120).

Dr. Bolt then clarifies his opinions in a note dated February 27, 2013. (R. pp. 95-96). He acknowledges his prior statement concerning MMI by stating, "I had thought he was previously at maximum medical improvement, apparently this was not the case." In other words, he knows now after reviewing the records that no other doctor had given

that opinion prior to his first visit on April 23, 2012. Dr. Bolt then gives his opinion concerning maximum medical improvement. "I would say that he was at maximum medical improvement when I saw him on 4/23/12." He also completed a WCC Form 14B stating the Appellant reached MMI on April 23, 2012, with a permanent impairment of fifty-four percent (54%). (R. p. 85). This puts the Appellant at MMI nearly six (6) months prior to his death.

The Commission uses this exchange to discredit Dr. Bolt and read things into the record that simply are not there. All this shows is that at first, he was told the Appellant was already at MMI, but he didn't see that in writing. When asked to give his opinion, he unequivocally states the Appellant was at MMI nearly six (6) months prior to his death. There was no back and forth and no changing of opinions.

The Commission states, "Dr. Bolt gives no explanation as to why he found the [Appellant] at MMI, when he never obtained the testing he specifically ordered to determine the extent of the [Appellant's] neurological/spinal cord condition. Without this additional testing, we find that Dr. Bolt's post-mortem opinion was based on speculation and conjecture." (R. p. 25). Going back to Dr. Bolt's records, there were five (5) diagnostic tests that he ordered. They were x-rays, an MRI, a CT, a Duplex scan of his extremities, and an EMG. The x-rays were completed at the initial examination. (R. p. 88). The MRI was completed and reviewed by Dr. Bolt, who commented that there were "no new neural pinches," "no pseudoarthroses," and the report shows "minimal degenerative endplate changes at T5 but no fracture or thoracic compression present either centrally or foraminally." (R. pp. 90-91, 92). The CT was completed and reviewed by Dr. Bolt showing "laminectomy changes but no acute impingement noted."

(R. pp. 90-91, 93). The Duplex scan showed "no evidence of deep vein thrombosis. The veins of the left lower extremity are compressible and spontaneous flow is demonstrated with Doppler technique." (R. p. 94).

When Dr. Bolt placed the Appellant at MMI, the records reflect that he had seen the Appellant twice, conducted a history, performed physical examinations, taken and reviewed x-rays, taken and reviewed an updated MRI, taken and reviewed at CT, and taken and reviewed a Duplex scan of his left lower extremity. The Commission's finding that "he never obtained the testing he specifically ordered" totally ignores the facts in the record and is patently untrue.

This case is similar to the recent case of Burnette v. City of Greenville, 401, S.C. 417, 737 S.E. 2d 200 (Ct. App. 2012). In Burnette, this Court stated:

> We find the circuit court erred in affirming findings of fact that were unsupported by substantial evidence in the record. Particularly disturbing is the finding that the 2008 MRI showed "only a 'minimal' protrusion with no nerve root displacement or impingement, and comparatively, no greater pathology of any significance (if any) than the MRI of 2004...." Because no evidence indicates this opinion originated from a medical provider, yet it appears in the single commissioner's order, we are forced to conclude it is the medical opinion of the single commissioner, adopted by the Commission.

Burnette v. City of Greenville, 401 S.C. 417, 428, 737 S.E.2d 200, 206 (Ct. App. 2012), reh'g denied (Jan. 25, 2013), cert. denied (May 8, 2014).

It's hard to imagine the Commission, or any court for that matter, would need someone to tell them not to read medical opinions into the record that aren't there. Sadly, the case at hand illustrates that not only has the message has still not been received, they are actually taking it even further by saying the Appellant needs treatment no doctor has

ordered AND making statements about the evidence that are patently untrue. South Carolina's working men, women and their families deserve better.

CONCLUSION

The Appellant requests an Order reversing that of the Appellate Panel and reinstating the terms of the hearing commissioner's Order in its entirety.

Respectfully Submitted

Kevin B. Smith
Hoffman Law Firm
7087 Rivers Avenue
North Charleston, SC 29406
(843) 769-7077
Attorney for the Appellant/Respondent

North Charleston, South Carolina

27 day of February, 2015

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

App. Case No. 2014-002294
WCC File No. 1106833

TIMOTHY MCMAHAN, APPELLANT/RESPONDENT,

V.

SC DEPARTMENT OF EDUCATION – TRANSPORTATION, EMPLOYER, AND STATE ACCIDENT FUND, CARRIER, RESPONDENTS/APPELLANTS.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that the Final Appellant's Brief of the Appellant/Respondent complies with Rule 211(b) SCACR. The undersigned further certifies that the Final Appellant's Brief of the Appellant/Respondent complies with the South Carolina Supreme Court's August 13, 2007 Order regarding Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Findings.

February 27, 2015

Kevin B. Smith
Hoffman Law Firm
7087 Rivers Avenue
N. Charleston, SC 29406
(843) 769-7077
Attorney for the Appellant/Respondent

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
MAR 0 4 2015
SC Court of Appeals

APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Melody L. James, Appellate Panel Chairman, Commissioner

App. Case No. 2014-002294
WCC File No. 1106833

TIMOTHY MCMAHAN, APPELLANT/RESPONDENT,

V.

SC DEPARTMENT OF EDUCATION – TRANSPORTATION, EMPLOYER, AND STATE ACCIDENT FUND, CARRIER, RESPONDENTS/APPELLANTS.

PROOF OF SERVICE

I certify that I have served the Final Appellant's Brief of the Appellant/Respondent by depositing a copy of it in the United States Mail, postage prepaid, on February 26, 2015, addressed to the attorneys of record, George T. Miars, Jr., Esquire, Willson Jones Carter & Baxley, P.A., 421 Wando Park Boulevard, Suite 100, Mt. Pleasant, SC, 29464 and John Gabriel Coggiola, Esquire, Willson, Jones, Carter & Baxley, 4500 Fort Jackson Blvd., Columbia SC 29209.

February 27, 2015

Kevin B. Smith
Hoffman Law Firm
7087 Rivers Avenue
N. Charleston, SC 29406
(843) 769-7077
ksmith@hoffmanlaw.net
Attorney for Appellant/Respondent