

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION S.C. SUPREME COURT

Opinion No. 5415 (S.C.Ct. App. filed March 30, 2016)

Timothy McMahan, (Employee/Claimant), Respondent,

vs.

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

PETITION FOR A WRIT OF CERTIORARI

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Index

Certificate of Counsel.....1

Questions Presented.....1

Statement of the Case.....1

Arguments.....7

 I. The Petition should be granted because the Court of Appeals erred in finding that S.C. Code Ann. §42-9-280 allows for a posthumous award of permanent disability, and such a posthumous award violates Petitioner’s rights to due process.....7

 II. The Petition should be granted because the court of appeals erred in awarding Appellant/Respondents Estate benefits pursuant to §42-9-280 and by holding finding that MMI is not dispositive to the question of whether Estate is entitled to a posthumous award of disability pursuant to §42-9-280.....10

 III. The Petition should be granted because the Court of Appeals erred in reversing the Full Commission Appellate Panel’s decision that the substantial evidence did not support a finding that Appellant/Respondent reached MMI at the time of his death.....15

Conclusion.....17

CERTIFICATE OF COUNSEL

Pursuant to Rule 242(d) (1), SCACR, Counsel for Petitioner certifies that a Petition for Rehearing was made to the Court of Appeals on June 30, 2016 and denied by the Court of Appeals on September 23, 2016. (Appendix, p.24)

QUESTIONS PRESENTED

1. Did the Court of Appeals err in reversing the decision of the Workers Compensation Appellate Panel by finding that S.C. Code Ann. §42-9-280 allows for a posthumous award of permanent disability, and by finding that such an award did not violate Petitioner's rights to due process?
2. Did the Court of Appeals err in reversing the decision of the Workers Compensation Appellate Panel by making the erroneous conclusion that the question of whether an injured worker reached maximum medical improvement prior to his death from unrelated causes is not a dispositive question in the analysis of the injured workers' estate's entitlement to benefits?
3. Did the Court of Appeals err in reversing the decision of the Workers' Compensation Commission Appellate Panel that Appellant/Respondent was not at maximum medical improvement at the time of his death from unrelated causes, when such a decision was supported by the substantial evidence in the record?

STATEMENT OF THE CASE

Appellant/Respondent was involved in an admitted work accident on June 15, 2011 while working underneath a school bus repairing the axel when the bumper broke, causing the school bus to fall on him with the axel crushing his spine. (Appendix, p.77, p.5, lines 10-17). As a result of the accident, Appellant/Respondent alleged injuries to the head, brain, back, internal organs, teeth, legs, mouth, and ribs. On June 16, 2011, Appellant/Respondent was admitted to MUSC for "status post crush injury with T-12 compression fracture and paraplegia." (Appendix, p.128) As a result of his injuries, Appellant/Respondent underwent a T-12 corpectomy and fusion by Dr. Raymond Turner, a neurosurgeon at MUSC, on June 15, 2011. (Appendix, pp.134-135).

Following his first surgery, Appellant/Respondent returned to Dr. Turner on August 2, 2011 with continued complaints of focal low back pain, sexual dysfunction, and improving mobilization with a walker, and Dr. Turner diagnosed him with a T-12 body burst fracture with spinal cord injury. (Appendix, p.120). On October 10, 2011, Dr. Turner performed a surgical T-11, T-12, and L-1 laminectomy and bilateral foraminotomies, with placement of pedestal screws at T-10 and L-2, and T-12 vertebral corpectomy, and fusion from T-10 to L-2. (Appendix, pp.134-135).

Appellant/Respondent returned to MUSC for a urological evaluation on October 13, 2011, complaining of numbness in his bilateral lower extremities, urinary retention, and penile paresthesia. (Appendix, pp. 137-138). Appellant/Respondent was given a voiding trial, which he failed, and Appellant/Respondent noted that his lower extremities felt “numb.” (Appendix, p. 139). Appellant/Respondent’s neurological evaluation showed generalized weakness, and that Appellant/Respondent was in a wheelchair, and sensory evaluation showed numbness and tingling in his feet. (Appendix, p.139). Appellant/Respondent was last seen at MUSC on February 7, 2012, at which time it was again noted that he was in a wheelchair. Appellant/Respondent informed his doctors that he was moving to Tennessee to care for his parents, so Dr. Turner recommended that he follow up for pain management and further rehab in Tennessee as soon as possible for a “smooth transition of care.” (Id. At 25). Appellant/Respondent was never found to be at MMI by Dr. Turner or any of the other doctors at MUSC. (Appendix, p.127).

After moving to Tennessee, Appellant/Respondent was seen for an evaluation with Dr. Patrick Bolt on April 23, 2012. (Appendix, pp.109-112). Dr. Bolt’s records state that he declined to take over Appellant/Respondent’s pain management, as it was a stipulation to seeing the patient that Dr. Bolt would see him for a surgical evaluation only. (Appendix, p.111). Dr. Bolt noted that Appellant/Respondent’s left lower extremity was “numb” and had been since his second surgery.

(Appendix, p.109). Dr. Bolt further noted that Appellant/Respondent had been self-catheterizing since October. (Appendix, p.109).

Dr. Bolt described Appellant/Respondent as a relatively “poor historian” with an “incredibly complex medical history.” (Appendix, p.111). Dr. Bolt stated that he had not reviewed Appellant/Respondent’s previous medical records from MUSC or his neurosurgeon. (Appendix, p.111). In his discussion and plan, Dr. Bolt noted that Appellant/Respondent had a complication of urinary retention and significant left lower extremity pain following his last surgery. Dr. Bolt stated that it was “unclear if the partial spinal cord injury which he sustained was before or after the surgery. The patient reports that it was after the surgery, however it is unclear if this is the case, as certainly he was quite severely affected before the surgery was performed.” (Appendix, p.111). Dr. Bolt recommended lab testing for a possible infection, an MRI of the thoracic and lumbar spine, and CT scans of the thoracic and lumbar spine. Dr. Bolt referred Appellant/Respondent to pain management treatment, and he requested to see Appellant/Respondent after diagnostic studies were done to see if anything else was recommended from a surgical standpoint. (Appendix, p.112). Dr. Bolt concluded his note stating, “Apparently, the patient is already at maximum medical improvement, but again, I have no records to confirm this.” (Appendix, p.112).

On May 11, 2012, Appellant/Respondent returned to Dr. Bolt. Dr. Bolt’s records state that Appellant/Respondent presented with continued complaints of “extreme mid low back pain and also left lower extremity pain. It is very debilitating for him.” ((Appendix, p.114). As a result, Appellant/Respondent was referred for EMG/Nerve Conduction Studies to rule out any radiculopathies. (Appendix, p.114). Prior to the completion of the recommended EMG/NCS testing, Appellant/Respondent died on October 6, 2012, from causes unrelated to his work accident.

Following Appellant/Respondent's death, counsel for Appellant/Respondent obtained a note from Dr. Bolt, dated February 27, 2013, over four (4) months after Appellant/Respondent's death, stating that he had been asked by Kevin B. Smith of the Hoffman Law Firm, in Charleston, South Carolina to provide Appellant/Respondent posthumously with an impairment rating. (Appendix, pp. 118-119). Dr. Bolt's note states, "I had thought he was previously at maximum medical improvement, apparently that was not the case." (Appendix, p.118). Without further explanation, Dr. Bolt then goes on to state "I would say that he was at maximum medical improvement when I saw him on 04/23/2012." (Appendix, p.118). Dr. Bolt notes that "the patient was totally disabled, and every time that I saw him he was confined to a wheelchair." (Appendix, p.118). Dr. Bolt stated that the Appellant/Respondent sustained a "partial spinal cord injury/myelopathy," with station and gait disorders, neurogenic bladder, neurogenic bowel, and dysesthetic pain. (Appendix, p.118). Dr. Bolt assigned Appellant/Respondent a 54% impairment to the whole person as a result of these conditions, noting that Appellant/Respondent's spinal cord injury alone constituted a 44% whole person impairment. (Appendix, p.118). Appellant/Respondent's attorney obtained a Form 14B Physician's Statement from Dr. Bolt, dated February 27, 2013, which noted that Appellant/Respondent's nature of injury to be a "T12 burst fracture w[ith] spinal cord injury." In the section designated for the doctor's opinion on future treatment, Dr. Bolt stated "N/A – Claimant deceased." (Appendix, p.108).

On May 16, 2013, counsel for Appellant/Respondent filed a Form 50 Hearing Request on behalf of Appellant/Respondent's Estate ("Estate"), seeking award of permanent and total disability benefits to be paid to the Estate. (Appendix, p.57). Petitioner timely responded, admitting injury to the back only, and denying the Estate's entitlement to permanent disability since Appellant/Respondent died from unrelated causes prior to reaching MMI (Appendix, p.58).

A hearing was held before the Workers' Compensation Commission on August 15, 2013. Appellant/Respondent's Estate took the position that they were entitled to a posthumous determination of Appellant/Respondent's disability, and the Appellant/Respondent should be deemed permanently and totally disabled as a result of his having a greater than 50% disability to the spine. (Appendix, p.96). Petitioner took the positions that (1) Appellant/Respondent was not at MMI, (2) Appellant/Respondent's Estate is not entitled to posthumously litigate disability in accordance with S.C. Code Ann. § 42-9-280, and (3) Appellant/Respondent suffered from paraplegia as a result of his work related injury, and therefore, even if a posthumous award of disability was allowed, it would abate pursuant to South Carolina Code Ann. § 42-9-280. (Appendix, p.96).

On March 24, 2014, the Single Commissioner issued an Order awarding Appellant/Respondent's Estate an award of permanent and total disability due to the Appellant/Respondent having greater than 50% disability to the spine.¹ (Appendix, pp. 29-39).

On March 27, 2014, Petitioner appealed to the Full Commission Appellate Panel. Following oral arguments, the Full Commission Appellate Panel issued a Decision and Order on September 30, 2014, reversing the decision of the Single Commissioner. (Appendix, pp. 42-55). The Full Commission Appellate Panel ruled that based on the medical evidence in the record, Appellant/Respondent had not reached MMI prior to his death, and therefore his Estate was not entitled to permanent disability benefits on his behalf. (Appendix, p.49). The Full Commission Appellate Panel went on to state that since Appellant/Respondent was not at MMI at the time of his death, the Appellate Panel did not feel the need to reach the additional issues raised by Petitioner. (R. p. 22).

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

On October 21, 2014, Appellant/Respondent filed the Notice of Intent to Appeal, arguing that the Full Commission Appellate Panel erred in finding that Appellant/Respondent was not at MMI. On October 29, 2014, Petitioner filed a Notice of Intent to Appeal, agreeing with the Full Commission Appellate Panel's finding that Appellant/Respondent was not at MMI at the time of his death, and therefore his Estate was not entitled to benefits, but Petitioner also cross-appealed the Full Commission Appellate Panel's failure to include findings of fact and conclusions of law stating that the South Carolina Workers' Compensation Act does not allow for the posthumous adjudication of permanent disability, and that disability must be determined per a commission award or settlement agreement prior to a claimant's death for payment of an unpaid balance of benefits be awarded to his Estate.

On November 13, 2014, the Clerk of Court for the South Carolina Court of Appeals sent notice to the parties consolidating the multiple notices of appeal for consideration by the Court. Following briefing of all issues by the parties, oral arguments were held before the Court of Appeals on March 15, 2016. On June 15, 2016, the Court of Appeals issued a public opinion reversing the decision of the Full Commission Appellate Panel. McMahan v. S.C. Dept. of Transportation, (Opinion No. 5415 – filed June 15, 2016). (Appendix, pp.1-13).

In their opinion, the Court of Appeals states, “[a]s an initial matter, we disagree that the dispositive question for purposes of the Estate’s entitlement to compensation under §42-9-280 is whether McMahan reached MMI prior to his death. Although the parties, the Single Commissioner, and the Appellate Panel focus on MMI as the lynchpin in the Estate’s ability to recover benefits pursuant to §42-9-280, we find this focus misplaced.” (Appendix, p.5). The Court of Appeals found that (1) even if an injured work has not reached MMI prior to the time of his death from unrelated causes, his Estate is entitled to benefits under §42-9-280 as long as his injury

was “covered by” §42-9-10(B) or §42-9-30; (2) even if it was determined that the Estate’s entitlement to benefits hinged on MMI, the Full Commission Appellate Panel committed legal error reversing the Single commissioner based on the medical evidence in the record; and finally (3) a posthumous award of disability to the Estate in this case is appropriate under the Workers Compensation Act and does not violate an employer’s rights to due process. (Appendix, p.8).

Petitioner filed a Petition for Rehearing, which was denied by the Court of Appeals on September 23, 2016. 24). This Petition for Writ of Certiorari follows:

ARGUMENT

- I. **The Petition should be granted because the Court of Appeals erred in finding that S.C. Code Ann. §42-9-280 allows for a posthumous award of permanent disability, and such a posthumous award an award violates Petitioner’s rights to due process.**
 - A. **The plain language of the title and content of S.C. Code Ann. §42-9-280 deals only with the payment of an “unpaid balance” of permanent disability and not the adjudication of a posthumous award of permanent disability.**

The South Carolina Workers’ Compensation Act has a specific statute dealing with an injured worker’s estate’s entitlement to benefits when an injured worker dies from reasons unrelated to his work accident.

§42-9-280: “Payment of an *Unpaid Balance* of Compensation when Employee Dies”

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

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

The plain language of both the title and content of §42-9-280 clearly deals with payment of an “unpaid balance” of compensation due at the time of the claimant’s death. There is nothing

in §42-9-280 or the Act allows a claimant's estate to posthumously litigate the extent of a deceased claimant's permanent disability if he dies from causes unrelated to his work accident. As the Court of Appeals stated in the Stone v. Roadway Express, "[p]rofessor Larson notes that since a compensation award, unlike a tort award, is a personal one based on the employee's need for a substitute for lost wages and earning capacity, *in the absence of a specific statutory provision, heirs have no claim to unaccrued weekly payments.*" 367 S.C. 575, 627 S.E.2d 695 (S.C. 2006).

The justification for South Carolina's specific statute dealing with the payment of "an unpaid balance" of an award is clear when viewed in its historical context. S.C. Code Ann. § 42-9-280 was originally created in 1936 (§1231), and codified as written in 1976. At that time, the previous lump sum Statute, S.C. Code § 42-9-300 (1976) was in effect, and provided:

Whenever any weekly payment has been continued for not less than six weeks, the liability therefor may, in unusual cases, be redeemed, in whole or in part, by the payment by the employer of a lump sum which shall be fixed by the Commission.... S.C. Code § 42-9-300 (1976) (emphasis added).

Thus, at the time § 42-9-280 was written into law, the usual and customary practice for payment of a permanent disability awards to be paid on weekly basis, and lump sum payments were only issued in "unusual cases." With the creation of § 42-9-280, the Legislature addressed what to do with the "*unpaid* balance" of benefits if a claimant died after the initiation of payments awarded in an order or agreed upon by settlement. It is clear from § 42-9-280's title and language that the General Assembly was directing what to do with the remainder of an unpaid award of permanent disability awarded by the Commission or agreed upon by the parties prior the claimant's death, and they did not intend for §42-9-280 to apply to a posthumous permanent disability award that was yet to be adjudicated.

Petitioner would assert that since there is no controlling law on this specific question, this is a novel question of law sufficient for this Court's review, and Petitioner respectfully requests that this Court grant the Petition for Writ of Certiorari.

B. A posthumous adjudication of permanent disability pursuant to S.C. Code Ann. §42-9-280 violates an employer's rights to due process.

The Court of Appeals further held that a posthumous award of permanent disability did not violate Petitioner's rights to due process to conduct full discovery, to present and cross examine witnesses, and to introduce evidence. In support of their position, the Court of Appeals stated that, based on a review of the record, Petitioner never deposed any witnesses who would have had knowledge of the Appellant/Respondent's condition, and the only witness the Petitioners were unable to depose or require to testify prior to the hearing before the Single Commissioner was the deceased worker himself. (Appendix, p.10). The Court of Appeals went on to state that if even if Appellant/Respondent was living at the time of his hearing, his testimony would not be dispositive on the contested medial issues presented to the Single Commissioner. (Appendix, p.10).

Petitioner argues that the Court of Appeals erred in finding that Petitioner's due process rights were limited to their procedural rights at a hearing before the Single Commissioner only, and ignores the pre-hearing discovery Petitioner was deprived of. In cases where important decisions turn on questions of fact, due process **at least** requires an opportunity to present favorable witnesses and evidence. See, e.g., Brown v. South Carolina State Bd. of Educ., 301 S.C. 326, 391 S.E.2d 866 (1990); Tall Tower, Inc. v. South Carolina Procurement Review Panel, 294 S.C. 225, 363 S.E.2d 683 (1987).

In the practice of workers compensation law in South Carolina, before any a hearing on permanent disability, it is not only common, but almost standard practice for both claimants and

defendants alike to obtain independent expert medical evaluations of an injured worker after the worker has been released at MMI by their authorized treating physician. This is especially true in medically complex cases, such as this one. The South Carolina Workers Compensation Act even provides a statute separate from the statute dealing with the requirement that an injured worker to submit himself to an independent examination at the request of the employer, so long as he claims compensation. (S.C. Code Ann. §42-15-80). In addition, depending on whether there is more than one body part involved, and the seriousness of the injuries, both claimant's and defendants often obtain vocational evaluations with experts to evaluate and give an expert opinion on a claimant's ability to return to earning wages in any capacity.

Petitioner argues that the Court of Appeals' reversal of the Full Commission Appellate Panel violated its rights to due process, including but not limited to, the rights (1) to obtain favorable expert medical evidence pursuant to S.C. Code § 42-15-80; (2) to depose the Appellant/Respondent to investigate his education, work history, and post-accident subjective limitations; (3) to have the a Commissioner hear and weigh the credibility of the Appellant/Respondent's testimony along with a review of the complete medical records, and (3) to obtain vocational expert opinions.

In this case, Petitioner was never able to obtain an independent medical expert, never able to obtain expert vocational evidence, and never able to depose the Appellant/Respondent. As a result, Petitioner respectfully requests that this Court grant the Petition for Writ of Certiorari.

II. The petition should be granted because the Court of Appeals erred in awarding Appellant/Respondents Estate benefits pursuant to §42-9-280 and by holding that MMI is not dispositive to the question of whether the Estate is entitled to a posthumous award of disability pursuant to §42-9-280.

In its opinion, the Court of Appeals states “as an initial matter” that they do not agree with the Commission that the question of whether or not Appellant/Respondent had reached MMI prior to his death was a dispositive question of whether the Estate was entitled compensation under §42-9-280. (Appendix, p.5). The question of whether MMI was a dispositive question was never briefed by the parties, because as the Court of Appeals points out, this position was never argued by the Appellant/Respondent, the Petitioner, or focused on by the Single Commissioner or the Full Commission Appellate Panel. (Appendix, p.5).

Petitioner argues that the Court of Appeals erred as a matter of law in coming to its own conclusion, which is not supported by case law, and would create an entirely new class of workers’ compensation cases that will require Commissioners to make impossible decisions regarding permanent disability based on speculation and surmise, if the injured worker was not even deemed to be at MMI at the time of his death. The Court of Appeal’s erroneous interpretation of the law would force Commissioners into making decisions on permanent disability awards without the knowledge of what, if any, additional medical treatment would improve the claimant’s condition and reduce the his final impairment, as opposed to future treatment recommended at MMI to “tend to lessen his period if disability.” Dodge v. Brucoli, Clark, Layman, Inc., 334 S.C. 574, 514 S.E.2nd 593 (1999).

Petitioner respectfully disagrees with the Court of Appeals interpretation of §42-9-280 and argues that the Court of Appeals erred in finding that “as long as an employee who suffers an injury that is ‘covered by’ §42-9-10(B) or §42-9-30, their Estate is entitled to recover the balance of the employee’s unpaid compensation.” (Appendix, pp.5-6). Accepting this interpretation as controlling law would require accepting the argument that the estate of an employee who suffers any injury to a single body part, therefore suffering an injury “covered by” §42-9-30, who dies after

the injury but before he reaches MMI, is entitled to pursue permanent disability benefits through the Commission. The Court of Appeals decision on this point is not only illogical in the practice of South Carolina Workers' Compensation law, but it also contradicts the language of the statute and the accompanying case law.

From a practice standpoint, the Court of Appeals' interpretation would allow situations such as an employee who is involved in a work accident, causing injury to his cervical spine and shoulder, and he presents to the Emergency Room where he is diagnosed with a strain of the cervical spine and shoulder and referred for an MRI and orthopedic evaluation. If the injured worker then dies in a car accident prior to his MRI or orthopedic evaluation, his estate would now be permitted to argue for permanent and total disability without ever even allowing medical providers to give an opinion on the extent of the employee's injuries and provide an accurate diagnosis and treatment plan.

As the Full commission Appellate Panel accurately stated in its Order, "[i]t is well settled in South Carolina that an award of disability benefits is premature prior to the claimant reaching MMI." (Appendix, p. 46) This Court has described MMI as the point when "a person has reached a plateau that, in the physician's opinion, no further medical care or treatment will lessen the period of impairment." Curiel v. Environmental Management Services, 376 S.C. 23, 655 S.E.2d 482 (2007). Further, the AMA Guides to Permanent Disability support the position that a finding of MMI is necessary before the determination of permanent disability, noting:

Permanency is the condition whereby impairment becomes static or well stabilized with or without medical treatment and is not likely to remit in the future despite medical treatment, within medical probability. The term is usually synonymous with MMI, usually occurring when all reasonable medical treatment expected to improve the condition has been offered or provided. Impairment ratings are to be performed when an individual is at a state of permanency. (Appendix, p.121).

“Maximum medical improvement is a factual determination by the Commission.” (Id.)
“Expert medical testimony is intended to aid the Appellate Panel in coming to the correct conclusion.” Potter v. Spartanburg Sch. Dist. 7, 395 S.C. 17, 716 S.E.2d 123 (Ct. App. 2010).
“[W]hile medical testimony is entitled to great respect, the fact finder may disregard it if there is other competent evidence in the record.” Tiller v. Nat’l Health Care Center, 334 S.C. 333, 340 (1999).

This is precisely what happened in this case. Although Dr. Bolt’s posthumous opinion on impairment and disability was part of the record, the Full commission Appellate Panel reviewed the evidence as a whole and concluded found, “the posthumous opinion of MMI by Dr. Bolt is based on surmise and unsupported by the medical evidence. The medical evidence clearly shows the claimant had not reached maximum medical improvement, but was continuing to improve, and still had a large amount of medical treatment and diagnostic testing being recommended for him at the time of his death.” (Appendix, p.49)

In Curiel v. Environmental Sciences, this Court reiterated the controlling law on the issue of MMI and when an injured worker is entitled to permanent disability benefits. This Court states the fundamental principle of workers compensation benefits as follows:

Essentially, workers’ compensation benefits accrue along a time continuum: temporary total disability benefits are available from the date of injury through the date of MMI; post-MMI benefits may then be awarded either as permanent and total or partial disability, or as a percentage of impairment to a scheduled member.
655 S.E.2nd 482, 376 S.C. 23 (S.C. 2007).

While the Court in Curiel was specifically addressing termination of temporary benefits in favor of permanent benefits, the holding also makes clear that *permanent benefits do not accrue until the time a claimant reaches MMI.* (Emphasis added)

In support of their position, the Court of Appeals relies on their own 2005 holding in Bass v. Kenco, wherein they found that “it is true that when a claimant receiving temporary total disability benefits reaches MMI and is still disabled, temporary benefits are terminated and the claimant is awarded permanent benefits...but it does not follow however, that a claimant who has not reached MMI is precluded from an award of permanent benefits.” 366 S.C. 450, 622 S.E.2nd 277 (Ct. App. 2005). Petitioner argues that the holding in Bass was fact specific and distinct from the present case. The decision in Bass was intended to prevent an employer at a permanency hearing from using the award of treatment to a newly deemed compensable body part (in this case, psychological overlay) to unnecessarily postpone an award of permanent disability to a claimant who was at MMI for his accepted injuries and had vocational evidence supporting a wage loss award of permanent disability.

The Court of Appeals goes on to state that their opinion is buttressed by the statement in Dodge v. Brucoli, Clark, Layman, Inc., that MMI and disability are not always inextricably intertwined. 334 S.C. 574, 514 S.E.2nd 593 (1999). (“MMI is a distinctly different concept from disability.”) Again, the holding in Dodge is distinctly different than the situation in this case. The holding in Dodge and law set forth in S.C. Code Ann. §42-15-60, stand for the principle that a claimant reaching MMI does not preclude a finding that the claimant still may require additional medical care or treatment, and although the care or treatment may not reduce the claimant’s degree of physical impairment, it may “tend to lessen the period of disability.” (Id.) The Court further explained this concept in Scruggs v. Tuscorora, wherein they concluded that a finding of MMI was proper by a Single Commissioner because the evidence supported that additional medication or treatment prescribed for the claimant was intended to help alleviate the claimant’s remaining

symptoms but *would not improve* the claimant's condition. 294 S.C. 47, 50, 362 S.E.2nd 319, 321 (Ct. App. 1987).

There is no question that the established law of workers compensation in South Carolina allows for ongoing medical treatment after MMI, but nothing in the Dodge opinion supports an argument that an injured worker is entitled to an adjudication of a permanent disability award prior to reaching MMI. Requiring the Commission to make a rulings on permanent disability prior to reaching MMI would again require the Commissioner to make a decision based on speculation or surmise, which is prohibited by law.

For the reasons set forth above, Petitioner respectfully submits that the court of Appeals decision is in conflict with decisions of the Supreme Court, and presents sufficient issues of legal importance to warrant this Court's granting of the Petition Writ of Certiorari.

III. The Petition should be granted because the Court of Appeals erred in reversing the Full Commission Appellate Panel's decision that the substantial evidence did not support a finding that Appellant/Respondent reached MMI at the time of his death.

As stated in the argument above, "maximum medical improvement is a factual determination by the Commission." Id. "Expert medical testimony is intended to aid the Appellate Panel in coming to the correct conclusion." Potter v. Spartanburg Sch. Dist. 7, 395 S.C. 17, 716 S.E.2d 123 (Ct. App. 2010). "[W]hile medical testimony is entitled to great respect, the fact finder may disregard it if there is other competent evidence in the record." Tiller v. Nat'l Health Care Center, 334 S.C. 333, 340 (1999). Further, an award cannot be based on surmise, conjecture, or speculation. Tiller v. National Health Care Center of Sumter, 334 S.C. 333, 339, 513 S.E.2d 843, 845 (1999); *see also*, McDowell v. Stilley Plywood Co., 210 S.C. 173, 41 S.E.2d 872 (1947) (holding testimony that is based on surmise, conjecture, and speculation has no probative value).

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

Based on Dr. Bolt's own statements, there is no medical opinion the claimant was a maximum medical improvement prior to his death, and we find that his posthumous opinion of MMI by Dr. Bolt is based on surmise and unsupported by the medical evidence. The medical evidence clearly shows that the claimant had not reached maximum medical improvement, but he 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. (Appendix, p.49).

Despite this finding by the Full Commission Appellate Panel, the Court of Appeals reversed the Commission's well supported finding, stating:

The only medical evidence in the record regarding the extent of McMahan's injury and ensuing disability is that of SCDOE's authorized treating physician, Dr. Bolt. After Dr. Bolt examined McMahan ordered x-rays, an MRI, a CT scan, a duplex scan, and an EMG, and reviewed *all these scans* - with the exception of the EMG, which was not administered before McMahan passed away - he concluded McMahan was totally disabled and assigned 54% impairment rating to his whole person pursuant to the AMA guidelines. Considering the severity of McMahan's accident, his two back surgeries, and his general prognosis, we agree with Dr. Bolt's conclusion that McMahan was totally and permanently disabled. (Appendix, p.7)

Petitioner argues there are several problems with the Court of Appeals statement above. First, it ignores the fact that the diagnostic tests recommended by Dr. Bolt were never completed. Dr. Bolt recommended an EMG/nerve conduction study, which he deemed necessary to make any final statement on the claimant's condition or prognosis without speculation. (Appendix, p.114). Further, the fact that Appellant/Respondent was referred to pain management, since Dr. Bolt agreed to see him for a surgical evaluation only, is additional evidence that Appellant/Respondent required additional medical treatment that could improve his condition, as opposed to simply

helping to alleviate his residual symptoms, and, therefore, Appellant/Respondent was not at maximum medical improvement.

Pursuant to S.C. Code Ann. §42-15-60 and the Dodge case, the South Carolina workers compensation system allows for a claimant to receive ongoing future medical treatment after an award of permanent disability as long as the treatment “tends to lessen the claimant’s period of disability,” but this has been distinguished from treatment that will improve the claimant’s condition prior to determining his level of impairment and disability. Unless a claimant is deemed to be permanently and totally disabled, the parties are unable to determine what specific treatment the injured worker would be entitled to under §42-15-60 and the Dodge case until the claimant has reached maximum medical improvement, and the parties obtain a final statement from the authorized treating physician outlining what treatment is required in the future.

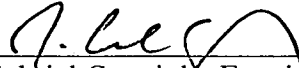
The Court of Appeals opinion that a recommendation for further pain management would not negate Dr. Bolt MMI statement would permanently alter the handling of medical treatment in the workers compensation system. Until Appellant/Respondent was actually seen by a pain management doctor who could make a determination of whether he was MMI, other than from just a surgical standpoint, and whether additional treatment modalities could impact his ultimate improvement and ultimate level of impairment and disability, any finding that Appellant/Respondent was at MMI or was permanently and totally disabled would be based on speculation or surmise.

CONCLUSION

For the reasons set forth above, Petitioner respectfully requests that this Court grant the Petition for Writ of Certiorari and allow further briefing on the issues.

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Respectfully submitted,



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October 24, 2016

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION S.C. SUPREME COURT

Opinion No. 5415 (S.C.Ct. App. filed March 30, 2016)

Timothy McMahan, (Employee/Claimant), Respondent,

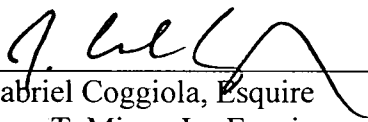
vs.

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

PROOF OF SERVICE

Petitioner, by and through their undersigned counsel, certify that on the date indicated below, he served counsel of record with a copy of the **Petition for Writ of Certiorari** and **Appendix** by mailing copies of the same by United States Mail with first class postage prepaid the following addresses:

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October 24, 2016
Columbia, South Carolina