THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Opinion No. 5415 (S.C.Ct. App. Filed March 30, 2016)
Supreme Court Case No.: 2016-002164

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

vs.

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

RETURN TO PETITION

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CONSIDERATIONS GOVERNING REVIEW

I. There are no novel questions of law.

The Court of Appeals applied established statutory law with a record of supporting case law to the facts of the case. No novel questions have been raised.

II. There is no dissent in the decision of the Court of Appeals.

The Honorable Judge H. Bruce Williams wrote the opinion for the Court of Appeals and Chief Judge James E. Lockemy and Judge Stephanie P. McDonald concurred.

III. The decision of the Court of Appeals is not in conflict with a prior decision of the Supreme Court.

No conflicts with prior decisions have been argued.

IV. There are no substantial constitutional issues involved.

Although the Petitioner claims due process violations, the Court of Appeals was correct in stating this is not the case. Basically, Petitioner's argument is that no one should be able to litigate any death case because if the Defendant cannot take the decedent's deposition or have him examined by their experts, then by their logic, their due process rights would be violated by simply allowing a hearing or trial to even go forward. Additionally, as the Court of Appeals noted, the Petitioner had several opportunities to conduct discovery in this case, but repeatedly chose not to. Therefore, due process is neither a genuine nor substantial constitutional issue in this case.

V. There is no federal question.

The issues in the case are based purely on South Carolina state law and specifically involve S.C. Code Ann. § 42-9-280, § 42-9-10 and § 42-9-30.

QUESTIONS PRESENTED

I. 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?

II. 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?

III. 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

I. Procedural History:

The Appellant/Respondent 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. 57). The Petitioner filed a WCC Form No. 51 on June 13, 2013 admitting the injury to his back, but denying all others. (R. p. 58). 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/Respondent 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. 29).

Within the statutory period, the Petitioner filed a WCC Form 30 appealing her decision to the Appellate Panel. (R. p. 63). 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. 42).

On October 21, 2014, the Appellant/Respondent filed his appeal with the Court arguing that the Full Commission Appellate Panel erred in finding that Appellant/Respondent was not at MMI. On October 29, 2014, Petitioner also filed an appeal with the Court agreeing with the Full Commission Appellate Panel that Appellant/Respondent was not at MMI at the time of death, but cross-appealed the Full Commission Appellate Panel's failure to include findings of fact and conclusions of law regarding the South Carolina Workers' Compensation Act and posthumous adjudication of permanent disability.

On March 15, 2016, oral arguments were held before the Court of Appeals. The Court of Appeals issued a public opinion reversing the decision of the full Commission Appellate Panel on June 15, 2016. McMahan v. S.C. Dept. of Transportation, (Opinion No. 5415 – filed June 15, 2016).

II. Material Facts:

The Appellant/Respondent 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/Respondent for thirty-three (33) years. They had two (2) children. The Appellant/Respondent 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 Petitioner. 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. 96-97).

On June 15, 2011, the Appellant/Respondent 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. 130-133). He underwent a second surgery on October 9, 2011, to remove some of the screws and revise the previous surgery. (R. pp. 134-135). The last time the Appellant/Respondent 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. 126-127). He was given pain medications and a recommendation was made that he be set up with pain management in Tennessee. (R. pp. 126-127).

The Appellant/Respondent moved to Tennessee to be with his elderly parents who were on their last days. The Petitioner sent him to Dr. Patrick Bolt, who became his authorized treating physician in Tennessee. On April 23, 2012, the Appellant/Respondent 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. 109-112). The MRI showed no "new neural pinches" and "no pseudoarthroses." (R. pp. 113-114). Dr. Bolt also ordered a CT, a Duplex scan of his left lower extremity, and an EMG. (R. pp. 109-112). All of the tests except the EMG were done. (R. pp. 113-117). Dr. Bolt commented that he thought the Appellant/Respondent was at maximum medical improvement

(MMI). (R. p. 112). He referred the Appellant/Respondent to pain management. (R. p. 111). No other medical treatment was ordered.

On October 6, 2012, the Appellant/Respondent died of unrelated causes. (R. p. 143).

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. 108, 118-119). This would be nearly six months prior to his death.

A hearing was set to determine if the Appellant/Respondent had reached MMI prior to his death and if so, to determine if the Petitioner could rebut the presumption that he was totally disabled. The Petitioner set the deposition of Dr. Bolt, but chose to cancel it. (R. p. 107). No depositions were taken of anyone except for the Appellant/Respondent's wife. No medical opinions were submitted to refute the authorized treating physician's diagnosis that the Appellant/Respondent was at MMI prior to his death.

At the hearing, the Appellant/Respondent's wife testified that the second surgery helped his pain and that she noticed an improvement. She testified that the Appellant/Respondent'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/Respondent 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. 96-97).

The Petitioner 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 Petitioner contended the Appellant/Respondent 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 Petitioner asserted that the Appellant/Respondent had not reached maximum medical improvement before his death. Fourth, the Petitioner asserted that it is illegal for the Commission to rule on permanent disability after a person has died. The Petitioner chose not to present any evidence to rebut the presumption that the Appellant/Respondent was totally disabled in the event the Commissioner found his claim would not abate. (R. p. 96).

The hearing commissioner weighed the evidence and agreed with the only medical opinion in evidence concerning MMI, that the Appellant/Respondent had reached MMI nearly six (6) months prior to his death. She rejected all of the Petitioner's 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/Respondent's wife. (R. pp. 29-39).

Upon application for review to the Appellate Panel, a review hearing was held where the Petitioner renewed all of the same arguments they made to the hearing commissioner. (R. pp. 65-78). By its Order, the Appellate Panel denied all but one (1) of the Petitioner's issues on appeal. They found the Appellant/Respondent had not reached MMI prior to his death and stated no benefits were due to his widow. (R. pp. 42-55).

ARGUMENTS

I. THE COURT OF APPEALS WAS CORRECT IN RULING S.C. CODE ANN. § 42-9-280 ALLOWS FOR A POSTHUMOUS AWARD OF PERMENANENT DISABILITY.

A. When a person dies from unrelated causes, the statute requires the Commission to determine what compensations, if any, his family is owed.

S.C. Code Ann. § 42-9-280 provides, "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." (Emphasis added).

The statute above envisions two situations where the claim would not abate following a death from unrelated causes. The first is when an award has already been given ("when an employee receives...compensation) and the second is when the employee "is entitled to compensation..." (Emphasis added).

This is an accepted claim and the Appellant/Respondent was deemed to be at maximum medical improvement by the authorized treating physician before his death. (R. pp. 60, 108, 118-119). The authorized treating physician has issued his impairment rating. (R. pp. 108, 118-119). Therefore, the Commission has the right to determine if he was entitled to compensation, just as it does in nearly every other claim. This has been the Commission's long-standing interpretation of the statute and usually results in an award identical to the impairment rating, sometimes higher.

The Petitioner takes the position that the only way for the next of kin to receive compensation is if the Appellant/Respondent had already been before the Commission and given award before his death. Of course, this completely ignores the second class of people specifically mentioned in the statute. Please notice the statute only states, "When an employee...is entitled to compensation under this Title...and dies from any other cause than the injury for which he was entitled to compensation, payment...shall be made to his next of kin..."

(Emphasis added). If the legislature intended to only compensate a deceased Claimant's family when an award has already been given as the Petitioner suggest, they would have left out the second class for those who are "entitled to compensation," and inserted the term, "and dies after an award has been issued." The language of the statute explicitly states those who have already received an award of compensation AND those who are entitled to compensation are both entitled to their awards so long as they are based upon the second paragraph of Section 42-9-10 or 42-9-30.

"The Court generally gives deference to an administrative agency's interpretation of an applicable statute or its own regulation." Brown v. S.C. Dep't of Health and Envtl. Ctrl., 348 S.C. 507, 560 S.E.2d 410 (2002). Below is a list of claims decided by the Commission demonstrating their interpretation and practical application of the statute.

Wright v. All My Sons, WCC 0524754 (2008). This was an admitted leg claim. The Claimant died of unrelated causes. No award had been given at the time of death. The authorized treating physician assigned his impairment rating after he died. The full commission's unanimous award was identical to the impairment rating.

Bourne v. USC, WCC 0414625 (2011). This was an accepted back claim. The Claimant died of unrelated causes. No award had been given at the time of death. The full commission's unanimous award was identical to the impairment rating.

Cumbee v. C of C, WCC 9523133 (2002). This was an accepted back and psychological claim. The authorized treating physician assigned a twenty percent (20%) impairment rating for the back injury before his death. The Claimant died of unrelated causes. No award had been given at the time of his death. He was declared at MMI for the psychological injury after his death. The Claimant's widow testified regarding his age, education, work history and

transferable skills. The award was permanent and total disability for a fifty percent (50%) or greater disability to his back.

Faulkenberry v. Springs Industries, WCC 0118462 (2002). This was an admitted back and leg claim. The Claimant died of unrelated causes. No award had been given at the time of death. The Claimant's widow testified regarding his pain, limitations and ability to work. The award was permanent and total disability for a fifty percent (50%) or greater disability to his back.

Heimerl v. Pelham Fire Dept., WCC 0414792 (2012). This was an admitted right hip and psychological claim. The Claimant died of unrelated causes. No award had been given at the time of death. The authorized treating physician assigned at forty percent (40%) impairment for the hip injury. The Claimant was still treating at time of death for the psychological injury. The Claimant was found not to be at MMI for the psychological injury at the time of death. The full commission's unanimous award was identical to the impairment rating for the hip.

Henry v. Gold Mechanical, WCC 0417344 (2007). This was an admitted carpal tunnel claim. The Claimant died of unrelated causes. No award had been given at the time of death. The full commission's unanimous award was identical to the impairment rating.

Johnson v. Efco Corp., WCC 9917051 (2002). This was an admitted claim. The Claimant died of unrelated causes. No award had been given at the time of death. The Claimant's widow testified regarding his pain, limitations and ability to work. The award was permanent and total disability.

The Commission's long-standing interpretation is supported by the law. In construing a workers' compensation statute, "the words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation." Adkins

v. Comcar Industries, Inc., 323 S.C. 409, 475 S.E.2d 762 (1996). The clear words of the statute provide a person who has already received an award of compensation AND a person who is entitled to compensation are both entitled to their awards so long as they are based upon the second paragraph of Section 42-9-10 or 42-9-30. The purpose of the statute is to provide the next of kin with "the compensation the employee would have been entitled to had he lived." A sixty (60) year old veteran who has always done heavy manual labor with a fifty-four percent (54%) impairment rating to the back would clearly be entitled to total disability benefits for a fifty percent (50%) or greater disability had he lived.

B. The Petitioner's due process rights were not violated by the hearing commissioner following the law.

The Petitioner claims their due process rights were violated by the hearing commissioner in awarding benefits after the Appellant/Respondent had passed. The reasoning is that they lost the ability to cross-examine the witnesses and present witnesses of their own. Basically, Petitioner's argument is that no one should be able to litigate any death case because if the Defendant cannot take the decedent's deposition or have him examined by their experts, then by their logic, their due process rights would be violated by simply allowing a hearing or trial to even go forward.

Here, the authorized treating physician laid out an extremely detailed rationale for the impairment rating, all with references to the *AMA Guides*. (R. pp. 108, 118-119). The Petitioner had his deposition scheduled before the hearing, but decided not to go forward, **so they cancelled it.** (R. p. 107). Therefore, it was the Petitioner themselves who CHOSE not to cross-examine the authorized treating physician about MMI, the impairment rating, paraplegia, or anything concerning the Appellant/Respondent's condition. After the Appellant/Respondent's widow testified regarding his age, education, work history and transferable skills, it was the

Petitioner, who CHOSE not to ask her a single question or cross-examine her in any way. (R. pp. 97-98). As the Court of Appeals noted, "[i]n sum, we find SCDOE had the opportunity to present evidence and to examine and cross-examine the necessary witnesses but chose not to prior to the hearing before the single commissioner." (R. p. 11).

II. 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.

Based on case law and the plain reading of the applicable statutes, so long as McMahan sustained an injury covered by the second paragraph of Section 42-9-10 or 42-9-30 and died from causes unrelated to the injury, the Estate is entitled to recover the unpaid balance of McMahan's compensation. The Court of Appeals concluded that MMI and disability are not always inextricably intertwined. Specifically, the court wrote, "'[m]aximum medical improvement' is a distinctly different concept from 'disability'." Dodge v. Bruccoli, Clark, Layman, Inc., 334 S.C. 574, 581; 514 S.E.2d 593, 596 (Ct. App. 1999). An individual can be permanently disabled and still have yet to achieve MMI. While the Court of Appeals and Appellant/Respondent agree and maintain McMahan did reach MMI prior to his death, the Court of Appeals also holds that even if McMahan had not reached MMI by the time of his death, he would still be permanently and totally disabled for purposes of Section 42-9-30 or 42-9-280.

This is not a novel issue. In Bass v. Kenco Group, the Supreme Court held:

> A declaration of [MMI] is irrelevant to the award of permanent partial disability in this case. "[MMI]" is a distinctly different concept from "disability."... It is true that when a claimant receiving temporary benefits reaches [MMI] and is disabled, temporary benefits are terminated and the claimant is awarded permanent benefits... It does not follow, however, that a claimant who has not reached [MMI] is precluded from an award of permanent benefits."

336 S.C. 450, 466-67, 622 S.E.2d 577, 585-86 (Ct. App. 2005) (internal citations omitted).

III. THE ONLY MEDICAL EVIDENCE IN THE RECORD CONCLUDES APPELLANT/RESPONDENT WAS PERMANENTLY AND TOTALLY DISABLED AND HAD REACHED MAXIMUM MEDICAL IMPROVEMENT

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 Court of Appeals concluded 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. 108, 118-119). 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. While Petitioner would like to claim that no evidence of MMI from McMahan's previous physicians is conclusive evidence that McMahan has not obtained MMI is unsound logic and not supported by our judicial system. The absence of an opinion is not an opinion.

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/Respondent 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/Respondent 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. 108, 109-112, 118-119). 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/Respondent's wife was that by the time he got to see Dr. Bolt on April 23, 2012, the Appellant/Respondent had gotten about as good as he was going to get. (R. pp. 96-97). 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. 111). The sole opinion that the Appellant/Respondent 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 of permanency." *Guides to the Evaluation of Permanent Impairment*, AMA, 6th Ed., pp. 26-27) (R. pp. 144-145). Again, no doctor has ever stated this opinion was incorrect or insufficient in any way. The Petitioner 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 did not comment on MMI, 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/Respondent] 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 [Appellant/Respondent's] condition." (WCC Order, pp. 6-7). (R. pp. 47-48). 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/Respondent] was at maximum medical improvement prior to his death..." (Emphasis added). (WCC Order, p. 8). (R. p. 49). 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/Respondent 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/Respondent] 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. 49). 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 does not appear in the records and was not 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/Respondent as an "independent medical evaluation." (R. pp. 47-48, 51). 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 was not 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 Petitioner's counsel for drawing the Order by the Appellate Panel. (R. pp. 40-41). Instead, Petitioner's 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. 108). And, in the Petitioner's own From 58 (Pre-Hearing Brief) dated August 15, 2013, **they** list Dr. Bolt as the "treating physician." (R. p. 61). 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. 112). It is clear what happened was that he was told the Appellant/Respondent has reached MMI, presumably by the nurse case manager hired by the Petitioner who attended the appointment, but he did not 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/Respondent out for long term pain management. (R. pp. 109-112).

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. 113-114). The referral to pain management was still in place. The Appellant/Respondent was subsequently hospitalized for unrelated causes and passed away on October 6, 2012. (R. p. 143).

Dr. Bolt then clarifies his opinions in a note dated February 27, 2013. (R. pp. 118-119). 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/Respondent reached MMI on April 23, 2012, with a permanent impairment of fifty-four percent (54%). (R. p. 108). This puts the Appellant/Respondent 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/Respondent was already at MMI, but he did not see that in writing. When asked to give his opinion, he unequivocally states the Appellant/Respondent 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/Respondent] at MMI, when he never obtained the testing he specifically ordered to determine the extent of the [Appellant/Respondent'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. There 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. 111). 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. 113-114, 115). The CT was completed and reviewed by Dr. Bolt showing "laminectomy changes but no acute impingement noted." (R. pp. 113-114, 116). 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. 117). The results of the EMG were not in the record, but Dr. Bolt mentions his "workup included [an] EMG."

When Dr. Bolt placed the Appellant/Respondent at MMI, the records reflect that he had seen the Appellant/Respondent twice, conducted a history, performed physical examinations, taken and reviewed x-rays, taken and reviewed an updated MRI, taken and reviewed the CT, taken and review the EMG, 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 is 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 are not there. Sadly, the case at hand illustrates that not only has the message still not been received, they are actually taking it even further by saying the Appellant/Respondent 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

Clearly, this man would have been entitled to total disability benefits had he lived. It is only fair that his wife, as his next of kin, receives that compensation. That is the purpose of the statute and exactly what our legislature intended to happen.

For the reasons foregoing, the Appellant/Respondent respectfully requests that this Court DENY the Petitioner's Writ of Certiorari.

Respectfully Submitted,

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15 day of November, 2016

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Opinion No. 5415 (S.C.Ct. App. Filed March 30, 2016)
Supreme Court Case No.: 2016-002164

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

vs.

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

PROOF OF SERVICE

Appellant/Respondent, by and through their undersigned counsel, certify that on the date indicated below, he served counsel of record with a copy of the Return to Petition by mailing copies of the same by Unites States Mail with first class postage prepaid the following addresses:

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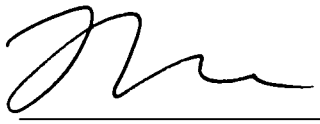
November 15, 2016



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