THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA WORKERS COMPENSATION COMMISSION

Full Commission

WCC File Number 1401730
Appellate Case No. 2018-001553

Carl E. Lucas, Employee ..... Respondent,

v.

RNDC, Employer
and Hartford Accident & Indemnity Co., Carrier, ... Appellants.

APPELLANTS' INITIAL BRIEF

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II. Did the Full Commission err in affirming the finding of the Single Commissioner that the claimant was totally and permanently disabled and in ordering benefits paid in a lump sum.

III. Did the Full Commission err in ordering medical care which exceeded the scope of the medical care provided under the terms of the workers compensation act.

STATEMENT OF THE CASE

The claimant, Carl E. Lucas, was born March 28, 1967. He has a high school education and has worked in a variety of capacities including as an owner of a tow truck business, as a truck driver and as a store manager. He began work at Republic National Distributing on October 1, 2012 as a delivery driver. He had a work related injury which was a hernia which resulted in time out of work beginning in March 2013. He returned to work and claimed that he aggravated this injury on January 17, 2014 while in the course and scope of his usual job duties of moving boxes to make deliveries. This case was accepted as a new accident, and he was seen by a number of physicians and health care providers. The issues in the case were joined for a hearing. A hearing was held before the Single Commissioner on June 13, 2017 and an order was issued on December 6, 2017. At that hearing the claimant contended that he reached Maximum Medical Improvement on October 16, 2015 and contended that he was totally and permanently disabled. The employer carrier contended that he had a substantial impairment to his back and was not totally and permanently disabled. This was appealed to the Full Commission, and following the submission of briefs and a hearing, an Order was issued on July 23, 2018 which affirmed the finding of total disability and ordered the payment of certain medical bills. This is an appeal from that order.

ARGUMENT

The standard of review for this case as set forth in *Hutson v. S.C. State Ports Auth.*, 390 S.C. 108, 700 S.E.2d 462, (S. Ct. of Appeals 2010) is:

"In workers' compensation cases, the Full Commission is the ultimate fact finder." *DeBruhl v. Kershaw County Sheriff's Dep't*, 303 S.C. 20, 24, 397 S.E.2d 782, 785 (Ct. App. 1990). "Our standard of review requires that we determine whether the circuit court properly found the Commission's findings of fact are not supported by substantial evidence in the record." *Doe v. S.C. Dep't of Disabilities and Special Needs*, 377 S.C. 346, 349, 660 S.E.2d 260, 262 (2008). "While a finding of fact of the commission 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 [***7] for it." *Edwards v. Pettit Constr. Co.*, 273 S.C. 576, 579, 257 S.E.2d 754, 755 (1979). "Under the scope of review established in the APA, this Court may not substitute its judgment for that of the Appellate Panel as to the weight of the evidence on questions of fact, but may reverse where the decision is affected by an error of law." *Bass v. Isochem*, 365 S.C. 454, 467, 617 S.E.2d 369, 376 (Ct. App. 2005). *Hutson v. S.C. State Ports Authority*.

The South Carolina Administrative Procedures Act governs judicial review of decisions by the Workers' Compensation Commission S.C. Code Ann. § 1-23-380 (Supp. 2015). An appellate court's review is limited to the determination of whether the Commission's decision is supported by substantial evidence or is controlled by an error of law. *Grant v. Grant Textiles,* 372 S.C. 196, 201, 641 S.E.2d 869, 871 (2007).

The Court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact; however, the Court may reverse or modify a decision of the

Commission if it is affected by an error of law or is clearly erroneous in view of the substantial evidence on the record as a whole. S.C. Code Ann. § 1-23-380(5). While the findings of an administrative agency are presumed correct, they may be set aside if they are unsupported by substantial evidence. *Rodney v. Michelin Tire Corp.*, 320 S.C. 515, 519, 466 S.E.2d 357, 359 (1996) (citing *Kearse v. State Health & Hum. Servs. Fin. Comm'n*, 318 S.C. 198, 200, 456 S.E.2d 892, 893 (1995)) "'Substantial evidence is not a mere scintilla of evidence nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached or must have reached in order to justify its action." *Adams v. Texfi Indus.*, 341 S.C. 401, 404, 535 S.E.2d 124, 125 (2000) (quoting *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981)). *Clemmons v. Lowe's Home Ctrs., Inc.*, 2017 S.C. LEXIS 55, 2017 WL 920730.

1. **THE FULL COMMISSION ERRED IN FAILING TO MAKE A SPECIFIC FINDING OF FACT OF THE DATE WHEN THE CLAIMANT REACHED MAXIMUM MEDICAL IMPROVEMENT AND IN THEN IN DETERMINING HIS DEGREE OF DISABILITY AT THE TIME OF HIS MAXIMUM MEDICAL IMPROVEMENT.**

The statutory scheme of workers compensation has as a fundamental basis the concept of maximum medical improvement. It is at that point that the Commission must determine the existence and extent of permanent impairment and the entitlement of the claimant to any future medical care. Maximum medical improvement is defined as plateau such that no further medical care will lessen the degree of impairment. *Gadson v. Mikasa Corp.*, 368 S.C. 214, 222, 628 S.E.2d 262, 267 (Ct. App. 2006).

Neither the order of the Single Commissioner nor the order of the Full Commission contain any finding of fact of when this claimant reached MMI. The lack of this critical finding

impacts the ability of this court to review the extent of permanent impairment and to view the subsequent medical care in the proper legal framework.

In the very limited circumstances present in the case of *Timothy McMahan, Appellant/Respondent, v. S.C. Department of Education-Transportation, Employer, and State Accident Fund, Carrier, Respondents/Appellants,* 417 S.C. 481 | 790 S.E.2d 393 the Court determined that a claimant who was deceased was permanently and totally disabled where there had been finding of maximum medical improvement. None of the circumstances present in that case are present here. In this case, the physicians did all believe that the claimant was at MMI but the dates were not uniform. The finding of MMI is critical to the determination of the issues in this case.

II. THE FULL COMMISSION ERRED IN AFFIRMING THE FINDING OF THE SINGLE COMMISSIONER THAT THE CLAIMANT WAS TOTALLY AND PERMANENTLY DISABLED AND IN ORDERING BENEFITS PAID IN A LUMP SUM.

In this case, unlike Clemmons v. Lowe's Home Ctrs., Inc., 2017 S.C. LEXIS 55, 2017 WL 920730, no physician who has seen the claimant has opined that he is totally and permanently disabled. He has been seen by two orthopedists, a neurosurgeon and a pain specialist.

The accident in this case was moving boxes which was part of the daily job tasks of the claimant's employment.

The initial treating physician was Dr. Armsey of Midlands Orthopeadics and his opinion is contained in the medical report dated June 9, 2014. In that report he indicated that the claimant was not interested in any aggressive treatment options. (APA ARMSEY, medical reports).

The claimant was then seen by Dr. Felmly. Dr. Felmly, in his report, found that his MRI was unremarkable with an open canal and some minimal degenerative changes and no compelling injury to the soft tissue and no evidence of an acute injury. Dr. Felmly remarked that this was a difficult case because of the contrast of objective versus subjective complaints and advised that the Claimant could return to his normal activities. (APA FELMLY medical report dated October 20, 2014).

The Claimant has undergone extensive physical therapy and treatment by a pain management physician, and with all of that, the fundamental objective evidence of injury remains unchanged from the evaluation by Dr. Felmly. This view of his injury is consistent with the report of Dr. Armsey. (APA ARMSEY, medical report dated June 9, 2014) The treatment notes from the pain management physician Dr. Kraft also clearly demonstrate the lack of a significant injury. (APA KRAFT visit note of 11/24/2014) where Dr. Kraft notes: "I have reviewed his multiple different notes from different providers, and all of them seemed to lack any significant findings which would account for this patient's pain. Based on my review he does have some degree of facet arthropathy noted on his MRI." At his deposition, Dr. Kraft testified:

> "I have reviewed his multiple different notes from different providers, and all of them seem to lack any significant objective findings which would account for his pain."
>
> A: Correct.
>
> Q: Is that still your opinion?
>
> A: That there is a lack of pathology which would account for his pain?
>
> Q: Yes, sir.

A: I would say that from imaging or other testing standpoint that, yes.

Q: That is correct? Deposition Dr. Ryan Kraft taken March 18, 2016. Page ___.

Dr. Kraft offered facet joint injections which the claimant rejected preferring his friends hot tub and narcotics as treatment.

The lack of significant pathology was confirmed by Dr. Scott Boyd (APA BOYD visit of 3/10/2016) who opined that he was at MMI and had an impairment rating of 8% of the whole person.

The failure of the Full Commission to make a finding of maximum medical improvement makes the review of their decision difficult, but at the date maintained by the claimant it is clear that no physician assigned to him a finding of totally and permanently disabled and each reflected an opinion that his complaints were not supported by objective facts.

Following the date of maximum medical improvement, the claimant returned to work at school bus driving and had an episode of syncope. He was seen at the Lexington Hospital Emergency Room. Following a number of tests to rule out a cardiac etiology, which included a heart catherization, Dr. Jacocks has opined that the syncope episode was related to his pain. This is in contrast to the history that was given to the providers at the Lexington Emergency Room.

It is appreciated that ("South Carolina recognizes that a claimant may be totally disabled even though he is not altogether incapacitated if such an injury prevents him from obtaining regular employment in the labor market."); *Coleman v. Quality Concrete Prods., Inc.*, 245 S.C. 625, 628-29, 142 S.E.2d 43, 44 (1965) (finding total disability does not require complete helplessness; rather, it is an inability to perform services other than those that are so limited in quality, dependability, or quantity that no reasonably stable market exists for them); *id.* at 630, 142 S.E.2d at 45 (explaining the burden is on the claimant to prove total disability); *id.* at 630-

31, 142 S.E.2d at 45 ("[Such] [a]n award . . . may not rest on surmise, conjecture or speculation and must be founded on evidence of sufficient substance to afford a reasonable basis for it."); *Gattis v. Murrells Inlet VFW No. 10420*, 353 S.C. 100, 107, 576 S.E.2d 191, 195 (Ct. App. 2003) ("The Administrative Procedures Act establishes the substantial evidence standard of review for factual findings made by the commission."); *Laws v. Richland Cnty. Sch. Dist. No. 1*, 270 S.C. 492, 495-96, 243 S.E.2d 192, 193 (1978) ("'Substantial evidence' is not a mere scintilla of evidence nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached or must have reached in order to justify its action."); *Hargrove v. Titan Textile Co.*, 360 S.C. 276, 290, 599 S.E.2d 604, 611 (Ct. App. 2004) ("The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence."); *Corbin v. Kohler Co.*, 351 S.C. 613, 624, 571 S.E.2d 92, 98 (Ct. App. 2002) ("[T]he [c]ommission determines the weight and credit to be given to the expert testimony."); *Nettles v. Spartanburg Sch. Dist. #7*, 341 S.C. 580, 592, 535 S.E.2d 146, 152 (Ct. App. 2000) [*3] ("Where there is conflicting medical evidence, . . . the findings of fact of the commission are conclusive.").

In this case the uniform opinion of the medical providers fails to support a significant injury and given the testimony the Commission finding lacks evidentiary support necessary to sustain this finding.

III. THE FULL COMMISSION ERRED IN FINDING THAT THE CARRIER BORE THE EXPENSE OF THE TREATMENT BY DR. JACOCKS AND THAT THE SYNCOPE WAS CAUSALLY RELATED TO THE BACK STRAIN SUFFERED BY THE CLAIMANT. (QUESTIONS PRESENT 1 AND 2)

The medical care must tend to lessen disability which is defined as effecting a cure or giving relief.

Prior to the obtainment of MMI, the criteria for medical care is statutorily defined by section 42-15-60(A) as follows:

The employer shall provide medical, surgical, hospital, and other treatment, including medical and surgical supplies as reasonably may be required, for a period not exceeding ten weeks from the date of an injury, to effect a cure or give relief and for an additional time as in the judgment of the Commission will tend to lessen the period of disability as evidenced by expert medical evidence stated to a reasonable degree of medical certainty. During any period of disability resulting from the injury, the employer, at his own option, may continue to furnish or cause to be furnished, free of charge to the employee, and the employee shall accept, an attending physician and any medical care or treatment that is considered necessary by the attending physician, unless otherwise ordered by the Commission for good cause shown. The refusal of an employee to accept any medical, hospital, surgical, or other treatment or evaluation compensation until the refusal ceases and compensation is not paid for the period of refusal unless in the opinion of the commission the circumstances justified the refusal, in which case the Commission may order a change in the medical or hospital service. If in an emergency, on account of the employer's failure to provide the medical care as specified in this section, a physician other than provided by the employer is called to treat the employee, the reasonable cost of the service must be paid by the employer if ordered by the Commission.

The criteria for medical care once a Claimant is found to be totally and permanently disabled is set for in section 42-15-60(c) as reasonable and necessary and causally connected to the injury. The case law interpreted this to require that the treatment lessen the disability.

The continuing medical obligation set in *Dodge v. Bruccoli, Clark, Layman, Inc.* requires that the treatment tend to lessen degree of impairment. To determine continuing medical a baseline date must be established.

The Claimant began work as a school bus driver in 2016 and on December 5, 2016 he presented to the emergency room with a complaint of syncope. The Emergency Room record gave no history of this being associated with pain and he was noted to be hypotensive. The ER work up was negative. (APA Lexington Hospital December 5, 2016). In his written record, Dr. Jacocks opined that he had multiple cardiac risk factors and an abnormal stress test. A cardiac catherization was performed which did not show significant blockages. In the absence of a finding of MMI, it is not possible to determine the basis for the Commission finding the care of Dr. Jacocks and the workup to compensable.

CONCLUSION

The finding that the Claimant is totally disabled and the ordering of medical care of Dr. Jacocks should be reversed and the case remanded for a finding of MMI and the determination based on that date of impairment and future medical entitlement.

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October 29, 2018

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PROOF OF SERVICE

I, the undersigned employee of Barnes, Alford, Stork & Johnson, LLP, do hereby state that I have on October 29, 2018 served copies of **APPELLANTS' INITIAL BRIEF** and **APPELLANTS' DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL** by depositing copies of the documents in the United States Mail, sufficient postage prepaid, with the return address clearly noted, addressed as follows:

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October 29, 2018

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Re: Carl E. Lucas v. RNDC of South Carolina and Hartford Indemnity
Appellate Case No. 2018-001553
BASJ File No. 102.20196
Client File No. 30141636734-0001

Dear Ms. Kitchings:

Enclosed are the original and one copy of Appellants' Initial Brief and Designation of Matter which we are filing on behalf of the Appellants RNDC and Hartford Accident & Indemnity Co. Please file the original and return a clocked-in copy to me in the self-addressed stamped envelope enclosed for your convenience.

By copy of this letter, I am serving a copy of Appellants' Initial Brief and Designation of Matter on opposing counsel of record. A Proof of Service is also enclosed for filing at this time to verify this action.

Very truly yours,

Kay Gaffney Crowe

KGC/djr
Enclosures

cc: Eugenia Hollmon/SCWCC (w/encl.)
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