THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM THE APPELLATE PANEL OF THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Appellate Case No.: 2018-001516
W.C.C. File No.: 14211397

Johnnie Bias, Employee/Claimant, ... Appellant,

v.

SCANA Corporation, Self-Insured Employer, ...Respondent.

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STATEMENT OF THE CASE

This is a workers' compensation appeal by Johnnie Bias ("Claimant" or "Appellant") from the Decision and Order of the Full Commission Appellate Panel ("Full Commission" or "Commission"), filed on July 19, 2018, which unanimously affirmed the Decision and Order of the Hearing Commissioner. This brief is submitted by SCANA Corporation ("Defendant" or "Respondent") in response to Claimant's appeal.

This claim was before the South Carolina Workers' Compensation Commission pursuant to Claimant's Form 50, Request for a Hearing, filed on January 24, 2017, and Respondent's Form 51, filed on February 23, 2017. Claimant contends he sustained a compensable injury by accident involving his back, left leg, right leg, urological system, bladder, penis, and resultant psychological, that he is not at maximum medical improvement (MMI) and that if he is, he is permanently and totally disabled pursuant to Section 42-9-10 of the South Carolina Code. Respondent maintains Claimant's condition is the natural progression of a preexisting condition, and that he failed to meet his burden of proving a compensable injury by accident under Section 42-1-160 and Section 42-9-35 of the South Carolina Code. Commissioner Avery B. Wilkerson, Jr. (Single Commissioner) conducted the Hearing on the Forms 50 and 51 on September 19, 2017. He issued his Order on January 18, 2018, finding Claimant did not sustain a compensable injury by accident on October 14, 2014, nor did he sustain a compensable aggravation of a pre-existing condition on October 14, 2014. Accordingly, the single commissioner found Claimant was not entitled to any benefits under the South Carolina Workers' Compensation Act.

Claimant timely filed a Form 30, Request for Commission Review and oral arguments were held before a panel of three commissioners on April 16, 2018. The full commission affirmed the

order of the single commissioner in its entirety on July 19, 2018. Claimant then timely filed his Notice of Appeal with the South Carolina Court of Appeals on August 13, 2018.

STATEMENT OF THE FACTS

This matter involves an alleged accident on October 14, 2014, while the claimant was under the employ of Respondent. See H.T., p. 64. The claimant alleges he fell down a flight of concrete steps when he slipped on some rocks, purportedly injuring his back and numerous other body parts. See H.T., p. 64. The claimant has an extensive history of back issues and medical treatment for his back including surgery in the 1980's and more recently in 2014, performed by Dr. Steven Poletti, with whom he began treating for his back in 2001. See H.T., p. 65. He confirmed at the Hearing he has treated for back pain consistently since the 1980's and has treated specifically for lower back problems, left leg problems, and radicular issues for over thirty (30) years. See H.T., p. 64. At the time of the Hearing, the claimant testified he has left foot drop and numbness in his left foot and calf, left side pain that goes across his buttocks, right side lower back pain across his hip and down his right leg and foot, and numbness in his right foot which he related to his alleged accident. See H.T., pp. 76-77. He also complained of urinary incontinence and erectile issues, but conceded he had prior erectile dysfunction. See H.T., p. 77.

At the time of his surgery in March 2014, the claimant stated he began having pain in his back with left leg and right leg symptomology in 2010. See H.T., pp. 65-66. The claimant's surgery in March 2014 was necessitated by an increase in the herniation of his disc and foot drop. See H.T., p. 132. Since the March 2014 surgery, he has been wearing a brace prescribed by Dr. Poletti for his left foot drop. See H.T., p.135.

According to the claimant, while his back condition had improved since his surgery in March 2014, he admitted experiencing pain in his back the morning of his alleged fall and taking

medication for back pain that day. See H.T., p. 142. The claimant's fall was unwitnessed, but he reported his accident to his supervisor, Anthony Miles, the day it happened, yet did not go to a doctor because the claimant did not think it was warranted at that time. See H.T., p. 71. In fact, he had a previously scheduled appointment at Southeastern Spine the following day, October 15, 2014, at which time he made no mention of the purported fall, and in fact, reported doing well. See H.T., pp. 71-72; Claimant's APA #7, p. 125. He returned to Southeastern Spine on October 22, 2014 and at that time reported the alleged accident, complaining of a cold sensation on his left side. See H.T., p. 74; Claimant's APA #7, p.127. The claimant conceded at the Hearing that he has had this cold sensation prior to his alleged fall. See H.T., pp. 123-24. He continued to treat with Dr. Polletti who opined he had a recurrent herniation lateralizing to the left at 4-5. See Claimant's APA #7, p. 129. Dr. Poletti performed an L3-4 lumbar epidural steroid injection and diagnosed the claimant with lumbar radiculitis. See Claimant's APA #7, p. 132.

Notably, around the time of his alleged accident, claimant treated with Dr. Dan Love on October 17, 2014, for bronchitis, shortness of breath, persistent coughing and chronic obstructive pulmonary disease and had been treating for a persistent cough since September 2014. See H.T., pp. 147-48. According to an in-take questionnaire with Dr. Poletti's office, the claimant indicated that excessive coughing/sneezing sometimes aggravated his back. See Claimant's APA #7, p. 70.

The claimant obtained multiple independent medical examinations (IME) for this claim, and each of Claimant's IME doctors—Dr. Justin Hutcheson, Dr. Nicholas Lind, and Dr. Ivan LaMotta—were provided with an extensive letter from the claimant's attorney explaining the claimant's alleged accident and symptoms. See Each letter outlines all of the medical treatment the claimant received from August 2014, through December 2015, but inexplicably omits the appointment the claimant had the day following his accident with Southeastern Spine on October

15, 2014 at which he made no mention of a work-related fall. See Defendant's Hearing Exhibits 5, 6 and Deposition of Dr. Lind Exhibit 1.

He treated with Dr. Lind for an independent psychological evaluation who related the claimant's psychological issues to his alleged work accident. See Claimant's APA #6, p. 56. However, during Dr. Lind's deposition, he confirmed the claimant withheld material information from him at his appointment, namely his preexisting sleep problems and history of sexual disfunction. See Deposition of Nicholas Lind, Ph.D., pp. 27, 33.

Dr. Hutcheson evaluated the claimant on March 22, 2016 and opined the claimant had been doing well in his recovery from his March 2014 surgery until he fell at work. See Claimant's APA #4, p. 22. He noted the claimant began wearing a foot brace following the fall and began suffering from left leg numbness and a re-herniated disc which were new since the fall. See Claimant's APA #4, p. 24. He opined the claimant would need medication, a foot brace, injections, physical therapy, x-rays, and MRI's of his back for the rest of his life due to his alleged work injury. See Claimant's APA #4, p. 22.

However, during his deposition and after being shown multiple preexisting medical records, Dr. Hutcheson admitted his questionnaire and IME report were "inaccurate" and "inconsistent." See Deposition of Justin Hutcheson, M.D., pp. 33-35, 38. This was based partially upon the claimant's withholding of the fact that he had used the foot brace for foot drop intermittently prior to his alleged fall. See Deposition of Justin Hutcheson, M.D., p. 31. In fact, the claimant confirmed at the Hearing he had been receiving all of the forms of treatment Dr. Hutcheson opined were necessary, for the last thirty years. See H.T., p. 173. Dr. Hutcheson confirmed the letter he received from claimant's counsel prior to conducting his IME omitted the claimant's appointment with Dr. Poletti's office the day following his alleged fall. See Deposition

of Dr. Justin Hutcheson, pp. 15-17; Defendant's Hearing Exhibit 6. He said he found it "strange" that appointment was omitted and agreed it does not make sense that in a report the day after the alleged accident the claimant reported he was slightly improved and made no mention of a fall. See Deposition of Justin Hutcheson, M.D., pp. 18, 21. Dr. Hutcheson testified the report from October 15, 2014, would be important in a causation analysis. See Deposition of Justin Hutcheson, M.D., p. 21.

The claimant was also evaluated by a urologist, Dr. Ross Rames, on May 27, 2016, who opined the claimant's problems, including erectile dysfunction, urinary urgency, and fecal urgency "appeared and worsened following his back injury." See Claimant's APA #3, p. 18. However, at an appointment with Dr. Poletti one month prior to his appointment with Dr. Rames, the claimant reported no bowel or bladder issues. See Claimant's APA, p. 148. In fact, all of the claimant's medical records from a year prior to his appointment with Dr. Rames fail to mention any such issues. This was in direct conflict to the claimant's report to Dr. Rames that he began experiencing incontinence issues in the spring of 2015. During the course of his treatment with Dr. Poletti, the claimant denied any bowel or incontinence issues. See Claimant's APA, pp. 142-45.

Dr. LaMotta conducted an IME at the request of the claimant's attorney on September 8, 2016. He opined the claimant sustained an aggravation of his pre-existing condition due to his alleged accident. See Claimant's APA #2, p. 15. During his deposition, however, Dr. LaMotta reviewed multiple preexisting medical records that contradicted what the claimant said at his IME and testified he would have a difficult time believing the claimant if he was one of his patients due to the inconsistency between the records and what the claimant told him. See Deposition of Ivan LaMotta, M.D., p. 43. When asked about the omission of the report from Dr. Poletti's office from

October 15, 2014, the day following the purported accident when the claimant failed to even mention a fall to his doctor, Dr. LaMotta's testimony was as follows:

Q: Doctor, does it concern you when you are asking to give an IME and you are not given all the medical records that may be relevant to what you are evaluating?

A: Well, it – it obviously puts me in an awkward position because my IME is not conclusive enough since you've presented so many other medical records that point in a different direction.

See Deposition of Ivan LaMotta, M.D., p. 53.

Ultimately, Dr. LaMotta confirmed his testimony to a reasonable degree of medical certainty was that he could not say whether the claimant's symptoms were the natural progression of his preexisting condition, caused by coughing, or by an alleged fall at work. See Deposition of Ivan LaMotta, M.D., p. 66. Furthermore, when questioned about the necessity of continued medical treatment in the form of medication, a foot brace, injections, physical therapy, x-rays, and MRI's of his back for the rest of his life, Dr. LaMotta opined the claimant would need the aforementioned continued treatment regardless of whether he fell in October 2014. See Deposition of Ivan LaMotta, M.D., p. 54.

Per the Full Commission Decision and Order dated July 19, 2018, the Commission determined the greater weight of the evidence indicated the claimant had a longstanding history of back problems, including two surgeries, multiple injections, physical therapy, and medication managements from 1988 through March 2014. The Commission found the claimant received prior impairment ratings to his low back, including a 20% impairment to his low back in 1993 from Dr. Epstein, 10% impairment to his back from Dr. Poletti in 2004, and 15% impairment to the back from Dr. Poletti as a result of the March 2014 surgery. The Commission found the claimant's prior medical problems included longstanding low back pain, bilateral radiculopathy, impotence, and sleep apnea. The Commission further found the claimant's complaints of back, right leg, and

left leg issues since his alleged injury on October 14, 2014, are similar to those he experienced prior to the alleged date of injury and are the natural progression of his pre-existing symptomology. The Commission found the claimant's urological issues also naturally progressed from his pre-existing symptoms. The Commission found the claimant's psychological issues were the result of the claimant's ongoing symptoms over the last several decades. The Commission did make findings regarding the claimant's receipt of long-term disability and Social Security Disability benefits and that his medical treatment has been paid by his group health insurance carrier. Furthermore, the Commission found the claimant was not entitled to benefits under the Act, as he failed to meet his burden of proving he sustained a compensable injury or aggravation of his longstanding and significant pre-existing back condition on October 14, 2014. Finally, the Commission found the alleged injuries to the claimant's right leg, left leg, left hip, left ankle, buttocks, right hip, right ankle, right foot, nervous system, bladder, urological system, penis, and psyche were not compensable.

STANDARD OF REVIEW

The Administrative Procedures Act ("APA") governs review of decisions of the South Carolina Workers' Compensation Commission by the Court of Appeals. S.C. CODE ANN. § 1-23-380 (Supp. 2006); Lark v. Bi-Lo, Inc., 276 S.C. 130, 136, 276 S.E.2d 304, 307 (1981). Under the APA, the decisions of the South Carolina Workers' Compensation Commission may be reversed, modified, or remanded if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are affected by error of law. S.C. CODE ANN. § 1-23-380(A)(6)(d)(Supp. 2006).

Furthermore, decisions of the Workers' Compensation Commission may be reversed, modified or set aside if unsupported by reliable, probative, or substantial evidence on the whole

record. Ellis v. Spartan Mills, 276 S.C. 216, 218, 277 S.E.2d 590, 591 (1981); Lark, supra.; S.C. CODE ANN. § 1-23-380(A)(6)(e). "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 the administrative agency reached in order to justify its action.'" Etheredge v. Monsanto Co., 349 S.C. 451, 562 S.E.2d 679 (Ct. App. 2002)(quoting Miller v. State Roofing Co., 312 S.C. 452, 454, 441 S.E.2d 323, 324-25 (1994)); Broughton v. South of the Border, 336 S.C. 488, 495, 520 S.E.2d 634, 637 (Ct. App. 1999). As the South Carolina Supreme Court observed,

> a decision of the Workers' Compensation Commission will not be overturned by a reviewing court unless it is clearly unsupported by substantial evidence in the record. Substantial evidence is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached to justify its action. Quantitatively, substantial evidence is something less than the weight of the evidence.

Howell v. Pac. Columbia Mills, 291 S.C. 469, 471, 354 S.E.2d 384, 385 (1987)(internal citations omitted). Finally, a decision may be reversed or modified if arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. S.C. CODE ANN. § 1-23-380(A)(6)(f).

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE COMMISSION'S FINDING CLAIMANT FAILED TO MEET HIS BURDEN OF PROVING HE SUSTAINED A COMPENSABLE INJURY BY ACCIDENT OR AGGRAVATION OF HIS LONGSTANDING AND SIGNIFICANT PREEXISTING BACK CONDITION

Substantial evidence in the record supports the Commission's denial of this claim, finding the claimant failed to meet his burden of proving a compensable injury by accident or aggravation of a preexisting condition.

A. The IME's on which the claimant relies to support his claim were conducted following the review of incomplete evidence.

As an initial matter, each of the IME's the claimant secured were properly discounted by the Commission as they were conducted following the review of incomplete evidence. Each of the claimant's IME doctors – Dr. LaMotta, Dr. Hutcheson, and Dr. Lind – received a letter which purported to summarize the voluminous medical records that were submitted in preparation for the IME. See Defendant's Hearing Exhibits 5, 6 and Deposition of Dr. Lind Exhibit 1. The letter, which framed these doctors' understanding of the claimant's medical background and course of treatment from the alleged injury, omitted an appointment with Southeastern Spine the day after the claimant's alleged fall. See Defendant's Hearing Exhibits 5, 6 and Deposition of Dr. Lind Exhibit 1. It is an obviously troublesome report for the claimant, as he failed to mention *the day after* his alleged fall any such event, and furthermore reported his back was doing well. This was a clear attempt by the claimant's counsel to veil pertinent evidence which supports the respondent's position that there was no compensable injury. Dr. Lind and Dr. Hutcheson noted it was "strange," and "odd," that the summary of the October 15, 2014 report was omitted from the letter. See Deposition of Justin Hutcheson, M.D., p. 18; Deposition of Nicolas Lind, Ph.D., p. 22. However, the respondent does not find it odd or strange – rather they find it to be a clear attempt

to blunt the force of bad evidence for the claimant. If the IME doctors cannot rely upon the claimant's counsel to provide them with an unedited version of the claimant's treatment, then certainly the Commission cannot expect those doctors to provide an accurate and complete evaluation upon which it can base a compensability determination.

B. Substantial evidence supports the Commission's conclusion that Claimant failed to meet his burden of proof.

Even if the claimant's condition has worsened since mid-October 2014, substantial evidence supports the Commission's conclusion that the worsening was not necessarily caused by the claimant's alleged fall and that the claimant failed to meet his burden of proof. According to South Carolina law, "[t]he claimant has the burden of proving facts that will bring the injury within the workers' compensation law, and such award must not be based on surmise, conjecture or speculation." Crisp v. SouthCo., 401 S.C. 627, 641, 738 S.E.2d 835, 842 (2013). The respondent maintains the worsening of the claimant's state was likely caused by the continued deterioration of the claimant's long-standing back condition. See Deposition of Ivan LaMotta, M.D., p. 54. The claimant's complaints at the time of the hearing were of left foot drop and numbness in his left foot and calf, left-side pain that goes across his buttocks, right side lower back pain across his hip and down his right leg and foot, and numbness in his right foot. See H.T. pp. 76-77. He also complained of urinary incontinence and erectile issues. See H.T. p. 77. According to relevant caselaw, "the right of a claimant to compensation for exacerbation of a pre-existing condition arises only where there is a dormant condition which has produced no disability but which becomes disabling by reason of the aggravating injury." Hargrove v. Titan Textile Co., 360 S.C. 276, 295, 599 S.E.2d 604, 614 (2004). Under these circumstances, it would be a gross mischaracterization of the evidence to describe the claimant's underlying condition as "dormant."

Under the claimant's own admission, he has treated for back pain for the last thirty years, including a surgery in March 2014, just seven months prior to his purported fall. See H.T. p. 65. At the time of that procedure, the claimant was suffering from pain in his back, left leg, and right leg symptomology, beginning in 2010. See H.T. pp. 65-66. Since the 1980's, the claimant has treated with Dr. Jones, Dr. Poletti, and other physicians, receiving treatment in the form of injections, medication, at least two operations, and the use of a TENS unit. See H.T. p. 100. The medical records indicate, and the claimant admitted he complained of right side low back, buttock, and right lower extremity pain in 2010, and pain radiating down both legs as a result of a motor vehicle accident in 1992. See H.T. pp. 110-112. He confirmed during the Hearing this evidence conflicts with his deposition testimony in which he claimed he had no prior issues with his right leg. See H.T. pp. 110-112. He admitted to taking medication for his back the very morning of his fall and said he was experiencing some back issues around that time. See H.T. p. 142

Dr. Epstein treated the claimant in 1993 and assigned him 20% impairment to his lumbar spine and opined his condition would worsen in the future and he would require one or more disc surgeries. See Defendants APA #1 p. 26. He treated with Denmark Medical Center from 2001 to 2005 for pain radiating down his left leg, neuropathy and chronic back pain, and treating with pain medication. See H.T. p. 117. He began treating with Dr. Jones in 2006 who continued to prescribe him the same medications until he returned to Dr. Poletti in 2010. See H.T. p. 117.

After the back surgery with Dr. Poletti in 2014, the claimant wore a brace for his left foot drop. See H.T. p. 135. Despite this use of the brace following the surgery, the claimant told Dr. Hutcheson he began wearing the brace only after his fall in October 2014, an inconsistency which led Dr. Hutcheson to withdraw his questionnaire in which he opined the claimant's foot drop was caused by his alleged fall in October 2014. See Deposition of Justin Hutcheson, M.D., pp. 33-35,

38. Dr. LaMotta was shown the statement from Dr. Hutcheson's IME, that the claimant "now wears AFO brace, left foot, due to foot drop, left leg numbness is new since . . . fall, has four out of five at L4-5, recurrent pain since fall," and confirmed the statement was inaccurate. See Deposition of Ivan LaMotta, M.D., p. 54.

The claimant's complaints of impotence and urinary incontinence are also suspect in that they are either inconsistent with contemporaneous medical records, or a continuation of prior issues. In considering the impotence issues the claimant alleges were caused by his fall, he admitted at the hearing he has treated for similar issues since 1992 that came and went. See H.T., p. 78, 119; Defendants' APA #1, p. 13. He was even offered a prescription for Viagra in 2006, which he declined. He took Levitra or Cialis periodically from 2008 to 2012. See H.T., p. 120; Defendants' APA # 1, p. 37. The claimant's complaints of urinary incontinence are called into question by the lack of any mention of same in any of Dr. Poletti's records from May of 2015 to May of 2016, the period of time during which the claimant told Dr. Rames he was suffering from incontinence. See H.T., p.162; Claimant's APA # 4, p.18.

Dr. LaMotta performed an IME of the claimant in September 2016 and opined the claimant's problems were casually-related to his alleged fall by way of an aggravation of a pre-existing condition. See Claimant's APA #2, p. 15. However, during his deposition, Dr. LaMotta confirmed he was not sure if he was provided the report from Dr. Poletti's office from the day following the claimant's alleged fall, and that it was not in the letter summarizing all of the claimant's prior treatment. See Deposition of Ivan LaMotta, M.D., pp. 9-10; Defendant's Hearing Exhibit 5. It became apparent during Dr. LaMotta's deposition that he was unaware of the claimant's many back issues between his back herniation in 1983 and re-herniation and surgery in 2014. Dr. LaMotta's understanding of the 31-year-period between 1983 and 2014 was that the claimant was

doing better until he re-herniated in March 2014 and needed surgery. See Deposition of Ivan LaMotta, M.D., p. 12. However, he was presented with multiple medical records disproving that assumption.[1] Dr. LaMotta stated during his deposition that according to the records he received, the claimant's issues were predominantly on his left side before October 2014, an opinion which he admitted was based upon the claimant's own statements rather than a review of the records from 1983. See Deposition of Ivan LaMotta, M.D., p. 13.

He confirmed during his deposition that the claimant has had a long history of continuous lumbar spine problems including multiple herniations over time, of which he was not aware prior to the deposition. See Deposition of Ivan LaMotta, M.D., p. 24. He also confirmed the claimant was having right-sided symptoms during that time. See Deposition of Ivan LaMotta, M.D., p. 25. He concluded that given the years of recurrent herniations, two back surgeries, multiple injections and use of medication, the claimant was extremely prone to redeveloping and worsening of symptoms leading up to his accident in 2014. See Deposition of Ivan LaMotta, M.D., p. 26. Importantly, he also noted back herniations can be caused by things such as a simple twist while sleeping, sneezing, or coughing. See Deposition of Ivan LaMotta, M.D., p. 30. When reviewing the report from Dr. Poletti's office from the day following the claimant's alleged fall, which stated he was in no acute distress and was greatly improved since surgery, he stated that he would have expected someone with the claimant's pre-existing condition, if aggravated, to have experienced immediate pain following a fall. See Deposition of Ivan LaMotta, M.D., p. 34. Finally, Dr. LaMotta, one of the claimant's chosen independent medical examiners, opined that the symptoms the claimant was experiencing were more likely than not just continuing deterioration of his lumbar

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[1] Specifically, Dr. LaMotta was shown a report of a re-herniation in 1992, a 20% impairment rating to the lumbar spine in 1993, back pain radiating to the right leg from 2010, record of a disc hearniation in 2010, and the assignment of a 10% impairment rating in 2004.

spine and a worsening of his lumbar spine condition based upon the natural history of his pathology and not necessarily the alleged fall. See Deposition of Ivan LaMotta, M.D., pp. 44-45. He noted this "may be necessarily why he doesn't complain of pain right after his fall on 10-15, but he alleges that he's doing fine perhaps that particular day." See Deposition of Ivan LaMotta, M.D., pp. 44-45. According to Dr. LaMotta, it was not unexpected that the claimant be in his present condition regardless of an accident. See Deposition of Ivan LaMotta, M.D., pp. 44-45.

In reviewing the MRI's from February 2014 and October 2014, Dr. LaMotta opined they were very similar and stated he could not say to within a reasonable degree of medical certainty that a fall in October 2014 caused a worsening of the claimant's symptoms "because there is ample medical evidence of the claimant's back pain waxing and waning, alternating leg pain with intermittent symptoms of both lower extremities in addition to sexual dysfunction as early as 2008." See Deposition of Ivan LaMotta, M.D., p. 66. Dr. LaMotta also opined the claimant "could have used psychiatric help long ago because of the chronicity of his symptoms" and that his psychological issues were likely the result of his longstanding spine condition rather than any type of injury. See Deposition of Ivan LaMotta, M.D., p. 67. Dr. LaMotta's deposition occurred just days prior to the initially scheduled Hearing in June 2017, making his the only medical deposition where the IME doctor had the benefit of viewing *all* of the claimant's relevant medical records.

Dr. Poletti, the claimant's long-time treating physician, confirmed the claimant's leg pain alternated from side to side and that on at least one occasion he treated him for right leg pain. See Deposition of Steven Poletti, M.D., p. 12. He confirmed in his deposition that given the claimant's pre-existing condition, he could develop new symptoms without a trauma or accident and that his opinion casually relating the claimant's symptoms to his alleged work accident was based only upon the claimant's statements. See Deposition of Steven Poletti, M.D., pp. 19-20. He opined

that the disc herniation in the claimant's MRI from October 29, 2014 could have been caused by trauma or by "activities of daily living." See Deposition of Steven Poletti, M.D., p. 21. Dr. Poletti agreed it was unusual that in the report from his office from October 15, 2014, there was no documentation of a fall from the day before. See Deposition of Steven Poletti, M.D., p. 39. Furthermore, of note in Dr. Poletti's deposition testimony, was his insistence that he is a "patient advocate." See Deposition of Dr. Steven Poletti, M.D., pp. 22, 37. If Dr. Poletti is an advocate for the claimant, he cannot also profess to provide an impartial medical opinion regarding causation.

Based upon the evidence including medical records, deposition testimony, and the claimant's own Hearing testimony, the claimant's symptomology was not dormant and was continuously waxing and waning for the last thirty years. The claimant contends Dr. Poletti, Dr. Hutcheson, Dr. Rames and Dr. Lind support his allegation of an injury or aggravation of a pre-existing condition due to an October 14, 2014 accident. However, Dr. Poletti admitted his opinion was based only upon the claimant's own statements. See Deposition of Steven Poletti, M.D., p. 19-20. Dr. Hutcheson completely withdrew his opinion regarding the claimant's left foot drop based upon the fact that the claimant withheld his prior use of the foot brace. See Deposition of Justin Hutcheson, M.D., pp. 33-35, 38. Dr. Rames's opinion was contradicted by the records from Dr. Poletti's office in which the claimant made no claim of incontinence, and Dr. Lind was unaware of the claimant's prior use of sleep aids or his years of issues with impotence. See Deposition of Nicholas Lind, Ph.D., pp. 27, 33. Additionally, Dr. LaMotta completely reversed his opinion that the claimant's symptomology was casually related to a fall at work. Furthermore, Dr. Hutcheson and Dr. Lind's IME's were both based upon manipulated evidence in that they were given an inaccurate summary of the claimant's course of treatment. Accordingly, substantial evidence in this case supports the

Commission's finding that the claimant failed to meet his burden of establishing an exacerbation of a pre-existing condition.

II. THERE IS NO EVIDENCE TO SUPPORT THE CLAIMANT'S CONTENTION THAT THE COMMISSION IMPROPERLY RELIED UPON THE CLAIMANT'S RECEIPT OF SOCIAL SECURITY DISABILITY, LONG TERM DISABILITY, AND USE OF MEDICAL INSURANCE TO COVER HIS TREATMENT IN DETERMINING THE CLAIMANT DID NOT SUSTAIN A COMPENSABLE WORK-RELATED INJURY

The claimant attempts to create an appealable issue by arguing the Commission "erred in considering [Claimant's] receipt of Social Security Disability and Long Term disability benefits as well as his medical insurance payments when rendering the decision that [Claimant] did not sustain a compensable injury." However, while it is indisputable that the Commission found the claimant received long-term disability and Social Security Disability benefits, there is no evidence the Commission "relied" on these findings of fact as the claimant suggests.

The claimant cites to Solomon v. W.B. Easton, Inc., 307 S.C. 518, 415 S.E.2d 841 (1992), in making his argument that the Commission cannot consider a claimant's receipt of Social Security Disability in determining issues of compensability. In Solomon, the claimant wanted the Commission to consider his disability rating from the Social Security Administration. Id. at 521, 415 S.E.2d at 843. While the Court of Appeals found this argument unpreserved, it noted such records "ordinarily cannot be relied upon to support or deny a workers' compensation claim." Id. Here, there is no evidence that the Commission relied upon any records from the Social Security Administration in determining the claimant failed to meet his burden of proof.

The claimant quotes a section from the Hearing transcript during which the Single Commissioner questioned the claimant about his receipt of these benefits following his testimony. However, the colloquy quoted was merely the Single Commissioner making sure the claimant was aware of his inability to collect both workers' compensation and disability benefits. As Claimant's

brief notes, whether the claimant would have to reimburse benefits he received for disability has no bearing on his workers' compensation claim, and there is no evidence indicating the Hearing Commissioner felt otherwise. Claimant contends the Commission improperly relied upon Claimant's receipt of disability benefits by noting the Commission listed the claimant's receipt of Social Security Disability and long-term disability benefits in the Findings of Fact. However, there is no mention of either in the Conclusions of Law, nor has the claimant shown any nexus between those Findings of Fact and the Commission's decision.

The claimant mentions the Commission also noted the claimant's health insurance carrier paid for his medical treatment. However, as there is no citation to any legal authority that such a consideration constitutes reversible error, Respondent considers this argument to be abandoned. See Glasscock, Inc. v. U.S. Fidelity and Guar. Co., 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001) ("South Carolina law clearly states that short, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review.")

As the claimant has presented no evidence the Commission improperly *relied* upon his receipt of disability benefits and abandoned his argument regarding his private health insurance, there is no reversible error.

CONCLUSION

Based upon the foregoing, the Respondent respectfully requests the Court of Appeals to affirm the Decision and Order of the South Carolina Workers' Compensation Commission.

Respectfully submitted,

ROBINSON GRAY STEPP & LAFFITTE, L.L.C.

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November 16, 2018

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED
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SC Court of Appeals

APPEAL FROM THE APPELLATE PANEL OF THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Appellate Case No.: 2018-001516
W.C.C. File No.: 14211397

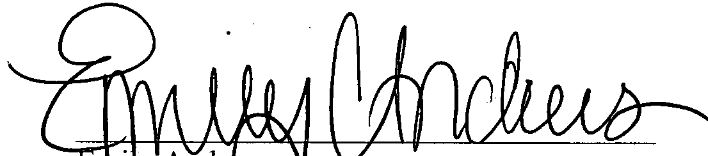
Johnnie Bias, Employee/Claimant, ... Appellant,

v.

SCANA Corporation, Self-Insured Employer, ...Respondent.

CERTIFICATION OF SERVICE

I certify that I have served a copy of the Respondent's Initial Brief and Designation of Matter on Appeal, on the following: Jacob M. Smith, Esquire, Smith & Jones Law, LLC, 945 East Main Street, Suite B, Lexington, SC 29072 (via U.S. Mail), and Honorable Jenny Abbott Kitchings, Judicial Director, South Carolina Court of Appeals, 1015 Sumter Street, Columbia, SC 29201 (via hand-delivery), on November 16, 2018.



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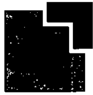

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November 16, 2018

VIA HAND DELIVERY
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1015 Sumter Street
Columbia, SC 29201

RECEIVED
NOV 16 2018
SC Court of Appeals

RE: Johnnie T. Bias v. SCANA Corporation
WCC File No.: 1421397
Appellate Case No.: 2018-001516
Date of Accident: 10/14/14
Claim No.: 780020000
Our File No.: 6569/8009

Dear Ms. Kitchings:

Please find enclosed herewith the original and one (1) copy of the Respondent's Initial Brief and an original and one (1) copy of the Respondent's Designation of Matter to be Included in the Record on Appeal in the above-referenced matter. We would appreciate your filing the original Brief and Designation of Matter and returning a clocked-in copy of the same to us via our courier.

By copy of this letter and aforementioned documents to the claimant's attorney, we are serving him with a copy of the Appellant's Initial Brief and Designation of Matter.

Very truly yours,

Grady L. Beard

GLB:esa
Enclosures
cc: Jacob M. Smith, Esquire (via U.S. Mail)
Ms. Kimberly Sims (via e-mail)
Ms. Sara Delk (via email)