THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
South Carolina Workers' Compensation Commission

R. Michael Campbell, Commissioner; T. Scott Beck, Commissioner; Susan S. Barden, Commissioner

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W.C.C. File No.: 1401730
Appellate Case No.: 2018-001553

Carl E. Lucas, Employee, Respondent,

v.

RNDC of South Carolina, Employer, and Hartford Indemnity, Carrier, Appellants.

INITIAL BRIEF OF RESPONDENT CARL E. LUCAS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

STATEMENT OF ISSUES ON APPEAL

I. A. Whether the Full Commission erred in failing to make a specific finding of fact of the date when Respondent reached maximum medical improvement and then in determining the degree of disability at the time of maximum medical improvement when the Appellants failed to raise the issue below.
B. Alternatively, whether the Full Commission erred in failing to make a specific finding of fact of the date when Respondent reached maximum medical improvement and then in determining the degree of disability at the time of maximum medical improvement as the finding was supported by

II. Whether the Full Commission erred when it upheld the Single Commissioner's permanently and totally disability finding and lump sum award.

III. Whether the Full Commission erred in ordering medical treatment supported by Respondent's medical causation.

STATEMENT OF THE CASE

This is an appeal from an Order of the Appellate Panel of the South Carolina Workers' Compensation Full Appellate Panel by Order dated July 23, 2018. This case originally came before the Single Commissioner June 13, 2017. This was an accepted case (back, depression, insomnia). Before the Single Commissioner, were disability, syncope episode compensability, past unauthorized treatment, and future medical treatment determinations. The Appellants' appealed the Decision and Order from Single Commissioner Aisha Taylor, Commissioner dated December 7, 2017. Commissioner Taylor determined that the Claimant was permanently and totally disabled, suffered causally related syncope episodes, was entitled to past unauthorized medical treatment and future causally related medical treatment. Further, the Single Commissioner ordered the disability award paid in a lump sum.

STATEMENT OF THE FACTS

As the Appellant pointed out in its brief to the Full Commission, the facts of the January 17, 2014, admitted work incident cannot be overemphasized. Appellants' Initial Brief to this Court noted that the Claimant had an admitted on the job accident resulting in a hernia, which was on April 30, 2013, not March 2013 as the Appellants cited in the Initial Brief.[The Claimant had a

May 29, 2013, hernia surgery; was out of work for nine (9) weeks; returned to work light duty until September 5, 2013; returned to light duty October 10, 2013; and eventually full duty November 19, 2013.]. The Claimant was working full duty when the January 17, 2014, on the job accident occurred and he suffered the admitted back injury. Full duty required the Claimant to drive, stoop, stand, and lift repeatedly. The January 17, 2014, back injury occurred as Claimant performed assigned job duties lifting full wine and liquor boxes. This was not an aggravation of the April 30, 2013, hernia claim. The January 17, 2014 was a new accident.

Appellants' Statement of the Case asserted that "The issues in the case were joined for a hearing." For clarity, the 2013 and 2014 cases were neither combined at the June 13, 2017, Single Commissioner hearing nor were any findings or conclusions rendered regarding the 2013 accident.

At the June 13, 2017, hearing, the Claimant argued: a. maximum medial improvement on October 16, 2015, pursuant to authorized treating physician Ryan Krafft, M.D., Pain Center of Irmo, March 18, 2016, deposition; b. a subsequent causally related syncope episode; c. authorized physician ordered medical treatment not previously approved should be ordered; d. he was permanently and totally disabled; and e. alternatively suffered a wage loss. During the entire claim, the Claimant continued to receive authorized medical treatment in the form of pain management and medications for depression and insomnia.

Appellants' Statement of the Case further maintained that "The employer carrier contended that he had a substantial impairment to his back and was not totally and permanently disabled." The Appellants' actually maintained that Scott B. Boyd's, M.D., March 10, 2016, report placed the Claimant at maximum medical improvement and an 8% whole person DRE category #2 "reflecte[d] his disability." The Appellant's denied all other assertions.

STANDARD OF REVIEW

The S.C. Administrative Procedures Act ("APA") provides the standard for judicial review of decisions by the administrative Commission. S.C. Code Ann. §1-23-380; Pierre v. Seaside Farms, Inc., 386 S.C. 534, 540, 689 S.E.2d 615, 618 (2010); Lark v. Bi-Lo, Inc., 276 S.C. 130, 133-34, 276 S.E.2d 304, 306 (1981). "The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact." S.C. Code Ann. § 1-23-380(5) (2011). "The findings of an administrative agency are presumed correct and will be set aside only if unsupported by substantial evidence. Gadson v. Mikasa Corp., 368 S.C. 214, 222, 628 S.E.2d 262, 266 (Ct.App.2006). The appellate court "may reverse or modify the [Commission's] decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are [a]ffected by other error of law [or are] clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." S.C. Code Ann. § 1-23-380(5)(d), € (Supp. 2011). "The Court of Appeals must affirm the Workers' Compensation Commission's decision unless it is clearly erroneous in view of the substantial evidence on the whole record." Nettles v. Spartanburg School District #7, 341 S.C. 580, 535 S.E.2d 146 (Ct. App. 2000).

"[G]uiding [o]ur workers' compensation system [is] that the Act is to be liberally construed in favor of the claimant. The second is the equally compelling evidentiary principle that an award may not rest upon surmise, conjecture, or speculation." Hutson v. S.C. State Ports Authority, 399 S.C. 381, 732 S.E.2d 500 (2012). The Commission's decision "must be founded on evidence of sufficient substance to afford a reasonable basis for it." Wynn v. People's Natural Gas Co. of S. C., 238 S.C. 1, 12, 118 S.E.2d 812, 818 (1961).

"The Appellate Panel is given discretion to weigh and consider all the evidence, both lay and expert, when deciding whether causation has been established." Potter v. Spartanburg Sch. Dist. 7, 395 S.C. 17, 23, 716 S.E.2d 123, 126 (Ct. App. 2011). "[T]he fact finder may disregard" medical evidence only if there is other competent evidence in the record to support their conclusion. Id.

ARGUMENT

I. A. THE APPELLANTS CANNOT RAISE NEW ISSUES NOT PRESERVED BELOW.

The Appellants are precluded from arguing that the Full Commission failed to make a maximum medical improvement finding. The Appellants' Initial Brief purported further that "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 Appellants cannot reach back in this appeal to challenge the Single Commissioner's decision.

"When a trial court does not explicitly rule on an argument raised, and the appellant makes no Rule 59(e), SCRCP, motion to obtain a ruling, the appellate court may not address the issue." Smith v. NCCI, Inc., 369 S.C. 236, 247-248 631 S.E.2d 268, 274 (Ct. App. 2006). "Arguments not raised to the workers' compensation commission[n].....are not preserved for appeal." Rodney v. Michelin Tire Corp., 320 S.C. 515, 517, 466 S.E.2d. 357,358 (S.C. 1996).

The Respondents failed to file a Motion under S.C. Rule of Civil Procedure 59 (e) with the Single Commissioner. Therefore, the failure to argue below now prohibits appellate review.

B. ALTERNATIVELY, THE FULL COMMISSION WAS NOT REQUIRED TO MAKE A SPECIFIC MAXIMUM MEDICAL IMPROVEMENT FINDING.

First, the lack of a maximum medical improvement finding does not "impact the ability of this court to review the extent of permanent impairment and to view the subsequent medical care in the proper legal framework." Respondents' Initial Brief, pg. 8-9. As set out in the above

Standard of Review, "The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact." S.C. Code Ann. § 1-23-380(5) (2011). The Appellate Court reviews permanent impairment and medical care only in the context of substantial evidence.

The Single Commissioner may not conduct a permanency hearing unless a Claimant is at maximum medical improvement. The Appellate Panel has the discretion to make a maximum medical improvement determination. Cranford v. Hutchinson Construction, 399 S.C. 65, 731 S.E.2d 303 (Ct. App. 2012); Gadson. However, implicit in any disability award is that the Claimant reached maximum medical improvement. Halks v. Rust Eng'g Co., 208 S.C. 39, 36 S.E.2d 852 (1946); *See* Gadson.

In Cranford, the Single Commissioner did not specify a maximum medical improvement date but awarded permanent partial disability to the Claimant's back based upon medical evidence in the record which the Appellate Panel affirmed. The South Carolina Court of Appeals found that "the Single commissioner, and ultimately the Appellate Panel, implicitly held that Cranford had achieved MMI for his back." Id. at 76, 309.

Similarly, in the case at bar, the Single Commissioner found "Based on a review of the evidence presented, as well as a personal observation of the Claimant's demeanor and the entire record, there is substantial and reliable probative evidence to support the that the Claimant was permanently and totally disabled pursuant to Section 42-9-10 as a result of his injuries to his back, psyche, and syncope episodes.

This finding is based on the preponderance of the evidence as a whole including the unrefuted vocational analysis of J. Adger Brown, Jr., MA, CDMS who initially opined this was a wage loss claim but changed his opinion to permanent and total disability after Claimant's onset

of syncope episodes." The Single Commissioner and Full Appellate Panel implicitly determined that the Claimant reached maximum medical improvement.

Respondents present McMahan v. S.C. Department of Education-Transportation, 417 S.C. 481, 790 S.E.2 393 (2016). The McMahan Court stated that the focus on maximum medical improvement was erroneous. "[W]e find this focus is misplaced. Based upon our review of case law and a 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" the Claimant's estate was entitled to benefits. Id. at 488, 397. MMI and disability are different concepts and total disability is possible without MMI. Id.

Therefore, a maximum medical improvement finding below was unnecessary to award permanent and total disability benefits and the Appellate Pane's findings should be upheld.

II. SUBSTANTIAL EVIDENCE, INCLUDING UNREFUTED MEDICAL AND VOCATIONAL EVIDENCE, SUPPORTED THE FULL COMMISSION'S AFFIRMATION OF THE SINGLE COMMISSIONER'S PERMANENT AND TOTAL DISABILITY FINDING AND LUMP SUM AWARD.

The below record as a whole substantially supports the Appellate Panel's finding that the Respondent was permanently and totally disabled due to his back, subsequent depression, insomnia, and syncope episodes. Further, the Single Commissioner and Appellate Panel properly ordered that the award be paid in a lump sum. The Respondent notes Appellants' reference to Clemmons v. Lowe's, 420 S.C. 282, 803 S.E.2d 268 (2017). Clemmons involved S.C. Code Ann. §42-9-30. The Respondent's case was asserted under S.C. Code Ann. §42-9-10

Total and permanent disability begins with impairment ratings from a treating or evaluating physicians but are never dispositive of disability. An impairment rating is not a strong, sole, or accurate indicator of a Claimant's residual condition.

This Commission is not bound by the medical records nor the medical opinions when determining the degree of disability.

> Moreover, the determination of an injured employee's impairment rating is more art than science, involving the consideration of evidence that Commission may gather from the injured employee, medical and vocational experts, and lay witnesses; while an impairment rating may not rest on surmise, speculation or conjecture ... it is not necessary that the percentage of disability or loss of use be shown with mathematical exactness ... further, the {Commission} is not bound by the opinion of medical experts and may find a degree of disability different from that suggestion by expert testimony. Expert medical testimony is merely intended to aid the {Commission} is coming to the correct conclusion. Unless the question of the extent of partial loss of use under {Section} 42-9-30 is so technically complicated as to require exclusively expert testimony, lay testimony is admissible.

Burnette v. City of Greenville, 401S.C.417,429,737S.E.2d200,206-7(Ct.App.2012) (citing Sanders v. MeadWestvaco Corp., 371S.C.284,291-92,638S.E.2d66,70(Ct.App.2006).

William T. Felmly, M.D.; Thomas D. Armsey, II, M.D.; and Ryan Krafft were all authorized treating physicians. As of Dr. Armsey's last report June 9, 2014, the Claimant was on light duty restrictions because of low back pain. His report noted the January 17, 2014, work related injury and subsequent MRI abnormalities including an annular tear, facet arthropathy, and edema. Dr. Armsey recommended pain management. On September 18, 2014, Dr. Armsey opined that pain management was medically necessary. However, four (4) months later, Dr. Felmly's report was not consistent, as Appellants argued, as Dr. Armsey's assessment.

The authorized treating pain management physician, Ryan Krafft, M.D. supported the Claimant's future medical treatment for his admitted causally related low back condition, including medications, a tens unit, physical therapy, and aquatic therapy. Dr. Krafft was queried in his deposition regarding hot tubs, massage therapy, and aquatic therapy as modes of pain control. The Respondent does not recognize the Appellants' reference in its Initial Brief, page 11 "preferring his friends hot tub" and is unable to formulate any response.

Authorized treating physician Michael P. Harris, M.D., opined on January 15, 2015, "To a reasonable degree of medical certainty, [*that*] Carl Edward Lucas' depression, insomnia, and erectile dysfunction [*were*] most probably a result of reoccurring pain and problems with January 17, 2014, back injury?". By a May 6, 2015, Consent Order the Defendants reiterated the admitted low back injury and agreed to accept depression and insomnia conditions. The Defendants never complied with the May 6, 2015, Consent Order and authorized an orthopaedic appointment when Dr. Armsey would not evaluate the Claimant. Therefore, the Claimant sought an unrefuted evaluation with the only neurosurgeon that treated Claimant, Scott B. Boyd, M.D. He determined that "based on his history I believe his symptoms are causally related to his reported accident." Dr. Boyd assigned an 8% whole person impairment, DRE Category 2 and specifically stated "I believe he is going to need future medical care with his pain management physicia[n]." *Id.*

It is worth noting that the Appellants never challenged at the Commission the causal relationships of the Claimant's back injury, back pain, back treatment, depression or insomnia.

The July 29, 2016, Functional Capacity Evaluation determined the Claimant fell within limited light to limited medium duty.

The Claimant receives ongoing medical treatment with authorized treating physician, Michael P. Harris MD; and pain Management Associates of Irmo as well as Mitchell W. Jacocks, M.D.

The Claimant testified to his extensive back injury and workers' compensation medical treatment. Subsequent conditions included depression and insomnia.

Unlike many, the Claimant returned to work as a school bus driver in August 2016 prior to any disability determination. However, the Claimant's back pain eventually led him to experience

syncope episodes beginning December 5, 2017. On February 17, 2017, Dr. Jacocks' uncontested, affirmative opinion stated: "To a reasonable degree of medical certainty, [C]arl Edward Lucas' blood pressure and chest pain [*were*] most probably caused or aggravated by his back pain from the original January 17, 2014 on the job accident" requiring 'cardiac treatment' and 'standard of care medication' for his blood pressure. Further, as of January 5, 2017, Dr. Jacocks placed the Claimant out of work with a restriction of no driving. On February 1, 2017, Dr. Jacocks stated "I do not believe that he shouldn't [*sic*] operate any vehicle at this point.

The Claimant initially consulted with Mr. Brown for a vocational assessment May 30, 2016. On August 16, 2016, Mr. Brown issued a vocational report based upon his evaluation, review of the medical records, and a July 29, 2016, updated Functional Capacity Evaluation that the Claimant could return to work using some transferrable skills earning approximately $12.00, but would suffer a wage loss. *Id.* The Claimant did return to work earning $10.00-11.00 August 2016, until December 5, 2017, his first syncope episode. Subsequently, Mr. Brown issued a second and third report March 4, 2017, taking Dr. Jacocks' opinion and records into consideration. Mr. Brown determined that the Claimant's "[a]ddition [*sic*] syncopal episodes stemming from his accident, as outlined by Dr. Jacocks' interrogatories, now raises the possibility that he may be unable to work safely in any capacity rendering him totally disabled pending receipt of objective documentation to the contrary." *Id.* Additionally, pursuant to the South Carolina Vocational Rehabilitation Department's May 3, 2017, correspondence, they closed the Claimant's case due to his "inability to drive, sit/stand for long periods of time, bend, stoop, or twist."

The Claimant made a clear and concerted attempt at working for four (4) months as a school bus driver.

As previously noted, and the Claimant testified, he was unable to maintain that job. In addition to the medical impairments and assigned restrictions, Claimant testified to his ongoing problems. Claimant has continued problems with erectile dysfunction, depression, sleeping and low back pain. He had continued difficulty cleaning, vacuuming, doing dishes, standing and mowing the Claimant testified that "All I want to do is sleep because I'm in pain.

There no requirement that a medical physician "assigned to him" find Claimant totally and permanently disabled. Again, the record as a whole must be considered for the Single Commissioner and Appellate Panel to make such a finding.

As the Potter court explored, the Appellate Panel can certainly disregard medical evidence if other evidence supports an alternate conclusion. First, the medical evidence presented was unchallenged. Additionally, the vocational reports were unchallenged.

Second, the Appellants present no competing medical or other evidence to counter the below record. The record clearly demonstrated that the Respondent was incapacitated from performing gainful suitable work.

Therefore, the Respondent submits that substantial evidence clearly supports the Appellate Panel's appropriate findings of fact and conclusions of law. Thus, the Respondent respectfully requests this Court affirm the Full Commission Panel's Decision and Order.

III. SUBSTANTIAL EVIDENCE, INCLUDING UNREFUTED MEDICAL CAUSATION, SUPPORTED THE FULL COMMISSION'S ORDER THAT MICHAEL W. JACOCKS', M.D. TREATMENT AND SPECIFICALLY RESPONDENT'S SYNCOPE EPISODES WERE CAUSALLY RELATED. APPELLANT'S CHALLENGE TO FUTURE MEDICAL TREATMENT IS NOT PRESERVED FOR REVIEW.

First, the Claimant asserts he carried his burden of proof as required by S.C. §42-1-160 (E) and prevailing caselaw. He testified that he passed out on December 5, 2016 and treated at Lexington Medical Center. had several repeat episodes; and treated with Dr. Jacocks on a

continuing basis. As discussed above, Dr. Jacocks provided statutory medical causation that the syncope episodes were as a result of the Claimant's original January 17, 2014, back injury.

"While **medical** testimony is entitled to great respect, the fact finder may disregard it if there is other competent evidence in the record." Tiller v. National Health Care Center of Sumter, 334 S.C. 333, 513 S.E.2d 843 (1999) (citing Ballenger v. Southern Worsted Corp., 209 S.C. 463, 40 S.E.2d 681 (1946)). The Defendants issued no evidentiary rebuttal to this or any other evidence presented by the Claimant. Thus, neither the Single Commissioner nor the Full Appellate Panel could ignore Dr. Jacocks' medical causation or other medical and lay testimony.

Second, as to the Appellants' challenge to Dr. Jacocks' future medical treatment, the Appellants failed to raise this issue below and it is not preserved for review. Rodney *supra.*

Therefore, the Respondent submits that substantial evidence clearly supports the Appellate Panel's appropriate findings of fact and conclusions of law. Thus, the Respondent respectfully requests this Court affirm the Full Commission Panel's Decision and Order.

CONCLUSION

For the foregoing reasons, this Court should Affirm the Appellate Panel's findings and order.

Respectfully Submitted,

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December 3, 2018

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
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R. Michael Campbell, Commissioner; T. Scott Beck, Commissioner; Susan S. Barden, Commissioner

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v.

RNDC of South Carolina, Employer, and Hartford Indemnity, Carrier, Appellants.

PROOF OF SERVICE

Counsel for the Respondent certifies that she served Respondent's Initial Brief and Designation of Matter by depositing a copy of the same into the United States Postal Service with sufficient postage affixed on December 3, 2018, addressed to the following attorney of record:

[SIGNATURE PAGE FOLLOWS]

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Respectfully submitted,

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December 3, 2018

VIA HAND DELIVERY:
The Honorable Jenny Abbott Kitchings
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RE: Carl E. Lucas, Employee, Respondent, v. RNDC of South Carolina, Employer, and Hartford Indemnity, Carrier, Appellants.
Appellate Case No.: 2018-001553

Dear Ms. Kitchings:

Enclosed are the original and two copies of Appellants' Initial Brief and Designation of Matter which we are filing on behalf of the Respondent, Carl E. Lucas with Proof of Service copied to opposing counsel. Please file the original and return two clocked copies to our office.

Thanking you in advance, I am

Sincerely yours,

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