

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION
COMMISSION

Appellate Case No. 2018-001416

Michael A. Repshas,
Employee,

Respondent,

v.

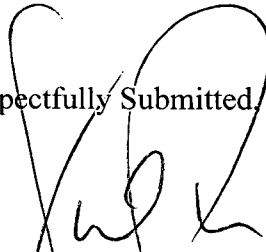
BB&T Corporation, Inc.,
Employer, and Hartford
Accident and Indemnity
Company, Carrier.

Appellants.

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DEC 13 2018
SC Court of Appeals

Initial Brief of Appellant

Respectfully Submitted,



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December 10, 2018

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STATEMENT OF ISSUE ON APPEAL

DID THE APPELLANT PANEL ERR AS A MATTER OF LAW AND FACT IN RULING RESPONDENT MET HIS BURDEN OF PROOF THAT HE SUSTAINED A COMPENSABLE INJURY BY ACCIDENT OR AGGRAVATION OF PREEXISTING CONDITION FOR WHICH HE IS ENTITLED TO BENEFITS UNDER THE ACT?

STATEMENT OF THE CASE

Respondent contended he suffered a compensable injury to his back on July 11, 2016, while helping other coworkers move a large desk for a supervisor. Respondent alleged his July 11, 2016 accident aggravated a preexisting back condition causing additional impairment based upon the opinion of Dr. David Mitchell, an orthopaedic surgeon with Carolina Orthopaedic & Neurosurgical Associates. Respondent sought a ruling on the compensability of this claim and requested he be awarded additional medical treatment. Respondent contended that the opinion of Dr. Mitchell should be given greater weight than those of both Dr. Scott Boyd and Dr. Charles Kanos because both were predisposed to render an opinion for the Appellants.

Appellants asserted Respondent failed to satisfy his burden of proving he suffered a compensable injury arising out of and in the course of his employment on July 11, 2016, therefore precluding any entitlement to workers' compensation benefits. Specifically, Appellants contended Respondent was in a workers' compensation accident in 2010 which resulted in the recommendation for a 3-level fusion and issuance of permanent work restrictions of no lifting over 20 pounds which was never rescinded. Furthermore, the medical evidence following said 2010 workers' compensation injury indicated Respondent continued

suffering from, and receiving treatment for, persistent back and bilateral lower extremity pain and symptoms, with such treatment most recently taking place approximately 14 days prior to his alleged accident. Appellants contended the expert medical opinions of Dr. Boyd and Dr. Kanos, both of whom concluded Respondent's condition was not the result of lifting a desk on July 11, 2016, and was instead a natural progression of his preexisting spine condition, should be given greater weight than the opinion of Dr. Mitchell, who was unaware of the Respondent's treatment following his 2010 workers' compensation injury. Appellants called into question Respondent's credibility, as he repeatedly testified under oath during his deposition that he had not sought any medical treatment for back or left legs symptoms subsequent to 2010 which directly contradicted the medical evidence submitted into the record. Lastly, Appellants contended they should not be held responsible for any unauthorized medical treatment Respondent accrued following his accident should the claim be found compensable.

On October 4, 2017, this matter was heard by the Single Commissioner in Greenville, South Carolina, to determine whether Respondent suffered a compensable injury by accident to his low back and therefore entitled to benefits under the South Carolina Workers' Compensation Act. Pursuant to the Decision and Order filed January 7, 2018, the Single Commissioner found the following: It was without dispute that Respondent had a history of preexisting back problems dating back to 2010 and occasionally received treatment for persistent back and left leg symptoms between 2010 and June 2016; on July 11, 2016, Respondent

reported he possibly injured himself moving a desk as noted in the Form 12A; Respondent's July 23, 2016 motor vehicle accident did not exacerbate or change his condition following his July 11, 2016 alleged work accident; the opinions of Dr. Mitchell were given greater weight than those of Dr. Boyd and Dr. Kanos because Dr. Mitchell treated the patient and it was uncertain what medical evidence Dr. Boyd and Dr. Kanos reviewed in basing their opinions; Respondent suffered a compensable injury to his back and left leg on July 11, 2016; Appellants are responsible for all causally-related prior medical expenses; Respondent is entitled to continuing care as recommended by Dr. Mitchell but Appellants are entitled to send Respondent to a physician of their choosing for ongoing medical treatment aside from Dr. Boyd or Dr. Kanos or any physicians in their respective practices.

Within the statutory period, counsel for Respondent filed an Application for review asserting, among other things, that the Single Commissioner had erred as a matter of law and fact in his ruling. This matter was then heard before the Appellate Panel on April 16, 2018. In an Order dated June 27, 2018, the Appellate Panel affirmed the Single Commissioner's Order with one amendment. Specifically, the Appellate Panel found as a matter of law and fact that Respondent suffered a permanent aggravation of his preexisting back condition pursuant to section 42-9-35.

STANDARD OF REVIEW

"The Administrative Procedures Act (APA) provides the standard for

judicial review of decisions by the [Appellate Panel].” *Pierre v. Seaside Farms, Inc.*, 386 S.C. 534, 540, 689 S.E.2d 615, 618 (2010). “An appellate court can reverse or modify the [Full] Commission's decision if it is affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence in the whole record.” *Id.* “Substantial evidence is not a mere scintilla of evidence, but evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the agency reached.” *Id.* (internal quotation marks omitted). The possibility of drawing two different conclusions from the evidence does not prevent a finding from being supported by substantial evidence. *Hall v. Desert Aire, Inc.*, 376 S.C. 338, 348, 656 S.E.2d 753, 758 (Ct. App. 2007).

FACTS

Respondent has a storied history of low back pain dating back to 2008. Specifically, on November 3, 2008, Respondent’s evaluation at Pro Physical Therapy indicated left rotation and left sidebending provoked pain and numbness in his spine and right rotation and right sidebending relieved the numbness. (Order p. 17; App. APA 8, pp. 258-259). Subsequently, Respondent began specifically seeking treatment for low back pain following a work-related accident on July 2, 2010. (Resp. Ex. C). A lumbar MRI dated July 13, 2010 indicated severe L3-4 and L4-5 disc degeneration with moderate caliber disc bulges and endplate osteophytes, mild L3-4 and moderate L4-5 central canal stenosis, and moderate L3-4 and severe L4-5 and L5-S1 facet arthropathy. (Resp. APA 1, p. 1).

Respondent was then referred to Dr. Gerald Rollins with Orthopaedic Associates to whom he first presented on July 22, 2010. On his intake form, Respondent indicated his onset of low back and left leg pain began July 2, 2010, and clarified that it was not caused by an accident “per se” but instead the incident had aggravated his preexisting symptoms. (Resp. APA 2, p. 3). Following evaluation, Dr. Rollins recommended he undergo a 3-level fusion at L3-4, L4-5, and L5-S1, and issued work restrictions of no lifting greater than 20 pounds; importantly, this work restriction was never revised or lifted prior to Respondent’s July 11, 2016 accident. (App. APA 4; p. 112; Resp. APA 2, pp. 6-8). On August 18, 2010, Respondent saw Dr. McCorkle with the Spartanburg Neurosurgical Institute for a second opinion at which time he was diagnosed with lumbago, left L4-5 radiculitis/radiculopathy, and lumbar degenerative spondylosis most pronounced at bilateral L3-4. (App. APA 7, p. 256).

On October 10, 2010, Respondent presented to Dr. Glenn Scott for an independent medical evaluation. (App. APA 12, pp. 382-389). Dr. Scott diagnosed Respondent with multilevel degenerative lumbar spine and disc disease with associated spinal stenosis as well as probable L4 radiculopathy and opined his current problems were most likely due to progression of a pre-existing lumbar condition. (App. APA 12, pp. 386-389). Interestingly, Dr. Scott’s opinion compares to those opinions rendered by Dr. Boyd and Dr. Kanos following Respondent’s alleged July 11, 2016 accident. Subsequently, Respondent continued performing physical therapy throughout 2011, continuing to report severe back pain radiating into his left leg. (App. APA 8, pp. 308, 322, 328).

Then, in January 2014, Respondent's primary care physician, Dr. Steven Hess with Westgate Family Physicians, noted Respondent was to continue taking diclofenac sodium for back pain and Neurontin for associated neuropathy. (App. APA 4, p. 171). Furthermore, Respondent's nephrologist, Dr. Appiah, noted he continued to suffer from persistent back pain on July 1, 2014. (App. APA 14, p. 419). In 2015, Respondent was in an automobile accident for which he performed physical therapy for ongoing back pain before being discharged due to non-compliance after only attending six (6) visits. (App. APA 15, p. 435-437). Upon discharge, it was noted that Respondent ambulated with an antalgic gait and displayed symptoms of thoracic outlet syndrome. More recently, Respondent presented to Dr. Hess on March 8, 2016, complaining of back and bilateral leg pain for which Dr. Hess prescribed pain medication and recommended home exercises. (App. APA 4, p. 217). On June 28, 2016, a mere two weeks prior to his alleged accident, Respondent presented to Dr. Hess complaining of a left hip problem and pain in other joints over the preceding weeks and Dr. Hess noted that associated symptoms included low back pain. (App. APA 4, pp. 225-227).

Keeping the foregoing medical evidence in mind, Respondent was asked the following question during his November 2, 2016 deposition:

“Prior to this accident, and you know, we've kind of talked about some treatment you received for your 2010 claim, but before or after the 2010 claim and before this accident, have you received treatment for your back and/or your left leg?”

(Resp. Nov. Depo P. 32 ll. 2-7). Under oath and in contradiction to the medical evidence outlined above, Respondent provided the following answer, “No,

ma'am." (Resp. Nov. Depo P. 32 l. 8). Respondent was then asked, "Had you ever had any pain or symptoms in your low back or left leg that you hadn't treated for, just maybe had symptoms." (Resp. Nov. Depo P. 32 ll. 9-11). Under oath, Respondent again testified, "No ma'am." (Resp. Nov. Depo P. 32 ll. 9-11). Incredibly, Respondent specifically denied suffering from any back pain after last receiving treatment for his previous workers' compensation claim in 2010 prior to his alleged July 11, 2016 accident. (Resp. Nov. Depo P. 41 ll. 6-9). Although Respondent asserts he was "confused" during this line of questioning, Appellants' find it imperative note that when questioned by his own attorney during his November deposition, Respondent specifically responded that he did not suffer from increasing symptoms, or seek treatment for, low back or left leg pain in the six (6) years between his 2010 accident and his alleged July 11, 2016 accident. (Resp. Nov. Depo. P. 45 ll. 8-15).

In addition to the above testimony, during his November deposition, Respondent also denied receiving steroid injections prior to his July 11, 2016 accident, which he conceded was inaccurate while testifying at the hearing. (Hearing Trans. P. 70, ll. 14-23). Lastly, and very importantly, Respondent conceded during the hearing he had been suffering from low back, left hip, and left knee pain since 2010, and explained that, aside from his unsubstantiated allegation of increased pain following his alleged July 11, 2016 accident, his symptoms then are identical to those he is suffering from now. (Hearing Tran. P. 90, ll. 24-25, P. 91, ll. 1-8). Respondent's deposition testimony was untruthful, as it is refuted by multiple medical records documenting chronic back pain, bilateral

leg pain, and neuropathy in the years leading up to his alleged July 11, 2016 accident. In addition, Respondent himself testified during the hearing that his deposition testimony was inaccurate.

Following his accident, Respondent received treatment from Dr. Kaysi Kaysi with AFC Urgent Care on July 12, 2016, reporting he had been suffering from back pain for one day. (Resp. APA 3 pp. 30-33). X-rays performed of Respondent's lumbar spine indicated degenerative spondylosis with disc space narrowing at multiple levels but no evidence of a compression fracture or spondylolisthesis. (Resp. APA 3 pp. 30-33). Dr. Kaysi diagnosed Respondent with Dorsalgia before releasing him from care and instructing him to resume work immediately. (Resp. APA 3 pp. 30-33). Subsequently, on July 19, 2016, Respondent presented to Dr. Hess, his primary care physician, complaining of hip and back pain. (App. APA 4 p. 228-235). Importantly, Dr. Hess's July 19, 2016 medical narrative indicates Respondent had been receiving treatment for this condition for "months" and fails to indicate he suffered a work accident. (App. APA 4 p. 228-235). As such, Dr. Hess referred Respondent to Dr. David Mitchell but failed to indicate whether the basis of the referral was due to Respondent's persistent symptoms that predated his accident or as a direct result of his accident. (App. APA 4 p. 228-235).

After sustaining an automobile accident on July 23, 2016, Respondent presented to Dr. Mitchell on July 29, 2016, reporting increased pain symptoms in his left hip, left leg, left back, and left pelvis, resulting from his car accident. (Resp. APA 2 pp. 3-4). Of note, Respondent testified during the hearing that his

condition returned to baseline shortly after his car accident and only experienced soreness in his neck and upper back, which directly contradicts the medical evidence. (Hearing Tr. P. 30 ll. 3-13). Regarding Respondent's medical history, Dr. Mitchell indicated Respondent had only sought treatment for back pain with Dr. Rollins six (6) years prior, which conflicts with the Respondent's medical history. (Resp. APA 2 pp. 3-4). Subsequently, Respondent underwent an MRI which indicated significant spinal stenosis in addition to a herniated nucleus pulposus with a large extruded disc fragment pressing on his L2 nerve root. (Resp. APA 2 pp. 21-22). Dr. Mitchell opined the only "new" development in six (6) years indicated in the MRI was the herniated disc. (Resp. APA 2 pp. 21-26). Unsurprisingly, Dr. Mitchell opined such findings were consistent with his symptoms and recommended Respondent undergo injections which were subsequently performed. (Resp. APA 2 pp. 21-26). Surprisingly, Dr. Mitchell never inquired further regarding Respondent's medical history or whether he suffered from any back pain prior to his alleged July 11, 2016 accident. (Resp. APA 2 pp. 21-26).

At the hearing before the Appellate Panel, Respondent testified he reported his incident the day on which it occurred, July 11, 2016, to his Unit Leader, David Lanihan, approximately 15 minutes after it occurred. (Hearing Tran. P. 23, ll. 17-23; P. 38 ll. 21-25). However, during his November 2, 2016 deposition, Respondent denied reporting his accident the day on which it occurred. (Resp. Nov. Depo. p. 25, ll. 18-22). In attempting to clarify his

conflicting testimony, Respondent then testified he remembered reporting his accident following his deposition. (Hearing Tran. P. 45 ll. 17-20).

ARGUMENT

I. THE APPELLATE PANEL ERRED IN RULING RESPONDENT MET HIS BURDEN OF PROOF THAT HE SUSTAINED A COMPENSABLE INJURY BY ACCIDENT OR AGGRAVATION OF A PREEXISTING CONDITION FOR WHICH HE IS ENTITLED TO ONGOING BENEFITS UNDER THE ACT.

Notably, the “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.” *Clade v. Champion Labs.*, 330 S.C. 8, 11, 496 S.E.2d 856, 857 (1998). Appellants contend Respondent failed to meet his burden of proving entitlement to any benefits under the Act and the Appellate Panel’s award of further benefits was based on error of law and fact.

First, the Appellate Panel failed to consider the record as a whole when determining whether Respondent had sustained a compensable injury and improperly supported such a finding on an inadequate expert medical opinion. Specifically, the Appellate Panel improperly gave greater weight to Dr. Mitchell’s opinion, an opinion based on an incomplete account of Respondent’s medical history and Respondent’s non-credible testimony, which stated Respondent most likely aggravated/exacerbated his preexisting back condition resulting from his alleged July 11, 2016 work accident and most probably caused a new injury. (Findings of Fact Nos. 12 and 14). As such, the Appellate Panel improperly gave less weight to the expert medical opinions of Dr. Boyd and Dr. Kanos, whose opinions were based upon medical evidence both preceding and subsequent to

Respondent's accident, which stated Respondents low back and left lower extremity problems were not caused or aggravated by his alleged July 11, 2016 work accident. (Findings of Fact Nos. 13 and 14).

Causation is a crucial issue from a proximate cause standpoint since entitlement to benefits under the Act must stem from a compensable work accident. Here, Appellants contend Dr. Boyd's and Dr. Kanos's opinions demand greater weight than Dr. Mitchell's because Dr. Mitchell's opinion, and the Appellate Panel's reliance thereon, fails to properly consider Respondent was complaining of, and seeking treatment for, identical symptoms in the years and months leading up to his alleged accident. Conversely, Dr. Boyd and Dr. Kanos, who are both well respected neurosurgeons in the state of South Carolina, were afforded the opportunity to review the medical record as a whole before determining Respondent's low back pain and left lower extremity condition were simply a progression of his preexisting condition.

- A. The medical evidence clearly establishes Respondent's condition following his alleged accident was a natural progression of his preexisting condition and the Appellate Panel Erred in Weighing the Medical Evidence and Failing to take into account the entire Medical Record

Although the Appellate Panel has broad discretion in weighing medical evidence, Respondents contend the Appellate Panel committed an error of law and abused his discretion in giving greater weight to evidence presented from Dr. Mitchell as opposed to the evidence presented from both Dr. Boyd and Dr. Kanos, as it fails to meet the standard set forth in *Young v. Tide Craft, Inc.*, for expert medical opinions. Because Respondent has the burden of proving facts sufficient

to establish entitlement to benefits under the Act and causation and/or aggravation is at issue in this case, it is imperative that he submit sufficient expert medical evidence to prove his case. Simply put, the claimant's expert medical evidence falls entirely short of the expert medical opinion standard.

In *Young v. Tide Craft, Inc.*, 270 S.C. 453, 242 S.E.2d 671 (1978) the South Carolina Supreme Court held that an expert opinion relating to causation “stands or falls upon an evidentiary showing of the facts upon which the opinion is, or must logically be, predicated.” *Young*, 270 S.C. at 468. The opinion must be based upon facts sufficient to form a basis for an opinion. *Id.* The court went on to state that “[h]owever complex or esoteric the specialized knowledge an expert witness draws upon, he must show that in formulating his opinion he has taken into consideration the material facts of the case being tried which are necessary to the formation of an intelligent opinion.” *Id.* at 469 (emphasis added).

When determining Respondent “most probably” aggravated or exacerbated his preexisting back condition and “most probably” suffered new injuries to his back, Dr. Mitchell was only asked to consider a very small portion of Respondent's medical history. (Resp. APA 2, pp. 27-29). Specifically, the only evidence Dr. Mitchell considered when forming his opinion was: (1) an excerpt of Dr. Rollins's July 22, 2010 medical narrative interpreting his July 13, 2010 lumbar MRI; (2) an excerpt from Dr. Kaysi's medical narrative dated July 12, 2016, which notes Respondent had only been experiencing back pain for one (1) day, which conflicts with the medical evidence outlined above; (3) an excerpt of Dr. Mitchell's August 3, 2016 medical narrative interpreting Respondent's July

29, 2016 lumbar MRI, at which point outlined Respondent's "new" back issue without any further investigation other than Respondent's subjective reports; and (4) excerpts of Respondent's flawed deposition testimony. (Resp. APA 2, pp. 27-29).

Although Dr. Mitchell stated his opinions were also based upon his own history taken from Respondent as well as medical examination, Dr. Mitchell's medical narratives fall woefully short of adequately detailing Respondent's medical condition and treatment received prior to his alleged July 11, 2016 accident. Based on claimant's deposition testimony, not surprisingly, Dr. Mitchell's July 29, 2016 medical narrative, and all thereafter, are devoid of reference to Respondent seeking treatment for low back, left hip, and left knee symptoms in the years and months leading up to his alleged July 11, 2016 accident. (Resp. APA 2, pp. 17-29). Furthermore, at least in part, Respondent's medical history was based on his intake sheet, in which he marked "no" when asked if he had ever received injections for his condition, which is patently false. (Resp. APA 2, p. 13; App. APA 4, p. 300). Lastly, Dr. Mitchell's July 29, 2016, medical narrative fails to indicate Respondent was seeking treatment for low back, left hip, and left knee prior to his accident and that Dr. Hess had specifically prescribed Diclofenac Sodium on March 8, 2016 to treat his low back and bilateral leg pain. (App. APA 4, pp. 225-227). In light of Respondent's hearing testimony stating the only change in symptoms following his alleged accident was increased pain, Appellants contend Dr. Mitchell's July 29, 2016 medical narrative

fails to properly align with both his testimony and the medical evidence outlined above.

The only medical evidence Dr. Mitchell reviewed when forming his causation opinion that predated Respondent's July 11, 2016 accident was Dr. Rollins's July 22, 2010 medical narrative and his July 13, 2010 MRI. Furthermore, any reliance on Respondent's subjective account of the accident, his symptoms or any treatment received would have been misplaced as Respondent has shown that he is not forthcoming with such information even when examined under oath. Stated simply, Dr. Mitchell was completely unaware Respondent was seeking treatment for identical symptoms in the years and months leading up to his alleged accident. Accordingly, Dr. Mitchell's opinion was not based on the totality of the evidence and thus falls short of the standard set forth in *Young*. See *Young*, 270 S.C. at 468 242 S.E.2d at 678 ("The opinion of the expert 'must be based upon facts . . . sufficient to form a basis for an opinion.'"). Therefore, Dr. Mitchell's opinion has little, if any, probative value and the Appellate Panel erred in relying upon such an opinion. See *id.* ("The probative value of expert testimony stands or falls upon an evidentiary showing of the facts upon which the opinion is, or must logically be, predicated.").

In turn, the Appellate Panel improperly gave greater weight to Dr. Mitchell's opinion because Dr. Mitchell had actually treated Respondent. (Finding of Fact No. 14). As indicated hereinabove, it is clear that Dr. Mitchell did not consider the totality of the evidence so his actual treatment of Respondent is inconsequential as it pertains to his opinion regarding causation. On the other

hand, both Dr. Boyd and Dr. Kanos specifically identified on which medical records they relied to formulate their opinions. Accordingly, the Appellate Panel's finding that it is unclear on which documents both Dr. Boyd and Dr. Kanos relied is inconsistent with what the evidence actually indicates. (Finding of Fact No. 14).

In contrast to Dr. Mitchell's opinion, the opinions of both Dr. Boyd and Dr. Kanos properly considered Respondent's treatment of identical symptoms in the years and months preceding his accident. Importantly, Dr. Boyd specifically noted that according to the records he reviewed, Respondent had been undergoing treatment for back, left hip, left leg, and left knee pain at the direction of Dr. Hess as late as June 28, 2016. (App. APA 16, p. 454). Dr. Boyd believed the findings of Respondent's July 29, 2016 MRI scan were consistent with the symptoms he reported to Dr. Hess in June 2016 and it was more likely that his chronic lumbar spine condition was evolving and progressing even before his accident. (App. APA 16, p. 454). Therefore, Dr. Boyd opined, to a reasonable degree of medical certainty, that Respondent's accident did not cause his current symptoms or the findings on his July 29, 2016 MRI. (App. APA 16, p. 454).

Similarly, Dr. Kanos reviewed a litany of records from multiple medical providers who were very clearly listed on his completed medical questionnaire. (App. APA 17, p. 458). Dr. Kanos further confirmed that he had reviewed several specific medical records from Dr. Hess, Dr. Rollins, Dr. Scott, as well as diagnostic images dating from 2009 through 2016. (App. APA 17, pp. 459-460). Dr. Kanos confirmed Respondent presented to Dr. Hess on March 8, 2016,

approximately four (4) months prior to his alleged accident, complaining of back and bilateral leg pain for which he requested a refill of pain medications in addition to Neurontin. (App. APA 17, p. 460). Additionally, Dr. Kanos confirmed Respondent presented to Dr. Hess on June 28, 2016, approximately two (2) weeks prior to his alleged accident, continuing to complain of back and left lower extremity pain. (App. APA 17, p. 460) Ultimately, Dr. Kanos opined to a reasonable degree of medical certainty that it was unnecessary to conduct an in-person physical examination of Respondent and unequivocally opined Respondent's low back and left lower extremity condition was more likely than not a natural progression of his preexisting lumbar spine condition rather than a direct result of his alleged July 11, 2016 work accident.

Furthermore, the Appellate Panel's reliance upon the fact Dr. Boyd and Dr. Kanos never evaluated Respondent is misplaced. Not only were they afforded the opportunity to review Respondent's medical history in greater detail than Dr. Mitchell, but Dr. Kanos specifically stated it was unnecessary to evaluate Respondent based upon his medical records.

With the foregoing in mind, the Appellate Panel erred in giving greater weight to Dr. Mitchell's opinion as opposed to Dr. Boyd and Dr. Kanos because Dr. Mitchell's opinion fails to meet the standard set forth in *Young* as it was based on an incomplete account Respondent's medical history as well as Respondent's flawed testimony. Not only did Dr. Boyd and Dr. Kanos review medical evidence in its entirety, both predating and subsequent to Respondent's accident, both of their opinions were rendered to a reasonable degree of medical certainty.

Therefore, the Appellate Panel erred in finding Respondent met his burden of proving he suffered an injury by accident or aggravation of his preexisting back condition and should be reversed.

B. The Appellate Panel Erred in Awarding Respondent entitlement to additional medical care including, but not limited to, back surgery pursuant to S.C. Code Ann. § 42-15-60.

As explained above and herein, Appellants first contend the Appellate Panel improperly gave more weight to Dr. Mitchell's opinion as it failed to meet the standard set forth in *Young*. For the sake of brevity, Appellants will not rehash why Dr. Boyd's and Dr. Kanos's opinions should be given greater weight.

With that said, the Appellate Panel also erred in awarding Respondent ongoing medical benefits because the record is absent of any expert medical opinion stating to a reasonable degree of certainty that such treatment will effectuate a cure or give relief and tend to lessen Respondent's period of disability. Pursuant to S.C. Code Ann. § 42-15-60(A) (2015), "The employer shall provide medical . . . treatment[] 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.*" (emphasis added). Recently, the South Carolina Court of Appeals interpreted section 42-15-60(A) in *Hartzell v. Palmetto Collision, LLC*, 419 S.C. 87, 796 S.E.2d 145 (Ct. App. 2016). In *Hartzell*, this Court held that because more than ten weeks had elapsed since the claimant's alleged injury and the Appellate Panel did not support its decision to award medical benefits with

expert medical evidence stated to a reasonable degree of medical certainty, the claimant had not met her burden of establishing entitlement to the same under section 42-15-60(A).

In the present case, the Appellate Panel awarded Respondent additional medical treatment, including but not limited to, back surgery pursuant to section 42-15-60. However, the record is entirely void of any expert medical opinions stated to a reasonable degree of medical certainty outlining treatment that will tend to lessen Respondent's period of disability. As outlined above, although Dr. Mitchell recommended Respondent undergo back surgery in his medical narratives, he did not state to a reasonable degree of medical certainty this treatment would more likely than not effectuate a cure or lessen Respondent's period of disability, which is required since more than 10 weeks have passed since the accident. Additionally, Dr. Mitchell's questionnaire fails to state ongoing treatment or surgery would effectuate a cure or lessen Respondent's period of disability. And while Dr. Mitchell indicated Respondent's symptoms were related to his July 11th accident, as noted above, since he failed to take into account the material facts regarding Respondent's progression of symptoms prior to his July 11th accident and the specific details surrounding Respondent's preexisting medical condition, his opinion is not supported by the greater weight of the evidence.

The Appellate Panel also erred in awarding medical benefits based upon Respondent's sworn testimony and further failed to issue a specific ruling on Respondent's credibility despite the issue being specifically raised at the hearing.

(Hearing Trans. P. 10 ll. 3-5). Respondent's credibility is a crucial issue in such a factually-detailed case involving his preexisting condition. In addition to the credibility concerns outlined above, at the hearing, Respondent testified he reported his incident the day on which it occurred, July 11, 2016, to his Unit Leader, David Lanihan, approximately 15 minutes after it occurred. (Hearing Tran. P. 23, ll. 17-23; P. 38 ll. 21-25). However, during his November 2, 2016 deposition, Respondent denied reporting his accident the day on which it occurred. (Resp. Nov. Depo. p. 25, ll. 18-22). In attempting to clarify his conflicting testimony, Respondent then testified he remembered reporting his accident following his deposition. (Hearing Tran. P. 45 ll. 17-20).

In summary, it is imperative to note that neither Dr. Mitchell, nor any other physician, has stated to a reasonable degree of medical certainty that ongoing medical treatment would tend to effectuate a cure or tend to lessen Respondent's period of disability as required by section 42-15-60(A). Conversely, both Dr. Boyd and Dr. Kanos have offered opinions to a reasonable degree of medical certainty that Respondent does not require any ongoing treatment as it relates to his July 11, 2016 work accident, as his symptoms are a natural progression of his preexisting condition. Accordingly, the Appellate Panel erred as a matter of fact and law in awarding Respondent causally-related future medical treatment because such a finding is arbitrary and capricious, not based on the greater weight of the evidence, and not based on medical evidence stated to a reasonable degree of medical certainty pursuant to section 42-15-60(A) or credible testimony.

- C. Respondent failed to prove his injuries are causally-related to his July 11, 2016 accident, as his July 23, 2016 motor vehicle accident was a subsequent intervening accident sufficient to break the chain of causation.

The Appellate Panel erred in finding as fact that Respondent's July 23, 2016 motor vehicle accident did not appear change his back and left leg condition in any significant way. (Finding of Fact No. 11). The Appellate Panel based his finding on Respondent's hearing testimony regarding his motor vehicle accident, the fact he had already been referred to Dr. Mitchell at the time of his accident, and Dr. Mitchell's opinion stating Respondent's motor vehicle accident was unlikely to have exacerbated or changed his condition following his July 11th work accident. (Finding of Fact No. 11).

Causation is a crucial issue from a proximate cause standpoint since entitlement to benefits under the Act must stem from a compensable work accident. Here, Appellants contend Respondent's July 23, 2016 motor vehicle accident was a break in the chain of causation as it relates to his July 11, 2016, accident. It is well established that under the Act, every natural consequence which flows from a compensable injury, unless the result of an independent intervening cause sufficient to break the chain of causation, is compensable. *Whitfield v. Daniel Constr. Co.*, 226 S.C. 37, 40-41 (1954).

First, the Appellate Panel incorrectly relied upon Respondent's hearing testimony regarding his July 23rd accident because Respondent's testimony was not credible. During the hearing, Respondent testified he started driving away from a stoplight and the next thing he knew he had bumped into the vehicle in

front of him. (Hearing Tr. P. 29 ll. 1-4). Respondent also testified his condition returned to baseline shortly after his accident and only experienced soreness in his neck and upper back. (Hearing Tr. P. 30 ll. 3-13).

Unsurprisingly, Respondent's hearing testimony fails to align with the evidence when viewing the record as a whole. First, the accident report generated following indicates Respondent reported to police he had "blacked out." (App. Ex. A p. 462). Additionally, Respondent was traveling approximately 55 MPH when he rear-ended the other vehicle, which Appellants would contend is much more than a "bump," and the impact was of such severity that Respondent's vehicle was towed from the scene and considered "totaled." (App. Ex. A p. 462).

Approximately six (6) days later, Respondent presented to Dr. David Mitchell and attributed his accident to falling asleep after taking Flexeril which again clearly conflicts with his hearing testimony as outlined above. (Resp. APA 2 pp. 3-4). Going further, Respondent has a history of daytime fatigue and sleepiness, yet he reported to Dr. Mitchell he fell asleep due to the Flexeril. (App. APA 5 p. 243-244). Dr. Mitchell's July 29, 2016 medical narrative also indicates his car accident increased the pain symptoms in his left hip, left leg, left back, and left pelvis, which again is inconsistent with his hearing testimony. (Resp. APA 2 pp. 3-4).

Not only did the Appellate Panel err in relying upon Respondent's hearing testimony, he also erred in his reliance upon the fact Dr. Hess had already referred him to Dr. Mitchell at the time of his accident. Appellants contend such a fact, especially in light of Respondent's preexisting condition, is irrelevant and has no

bearing on the issue of whether his July 23rd accident severed the causal chain. Additionally, Dr. Hess's July 19, 2017 medical narrative indicates Respondent had been receiving treatment for his condition for "months" and fails to even indicate he suffered a work accident. (Resp. APA 3 pp. 30-33). Furthermore, Respondent had only received medical treatment on three (3) occasions subsequent to his alleged July 11th accident and prior to his July 23rd accident, during which Respondent was not only released to return to work without restrictions on July 12th, but had diagnostic images performed that were consistent with his reported symptoms preceding his July 11th accident. (Resp. APA 3 pp. 30-33). Accordingly, Appellants contend any treatment Respondent received subsequent to his July 23rd motor vehicle accident was either the result of his intervening accident, which worsened his symptoms as reported, or caused by a natural progression of his preexisting condition as outlined above, and not his alleged July 11th work accident.

Lastly, the Appellate Panel erred in relying upon Dr. Mitchell's opinion stating that it was unlikely Respondent's July 23rd accident exacerbated or changed his condition from his July 11th accident. For the reasons outlined above, Dr. Mitchell's expert medical opinions should be given little, if any, weight as they fail to adhere to the standard set forth in *Young*. Dr. Mitchell was unaware of Respondent's condition prior to his July 11th accident, making it medically impossible for him to opine to a reasonable degree of certainty whether Respondent's July 23rd accident failed to exacerbate or aggravate his symptoms. Put simply, Respondent was complaining of near identical symptoms in the

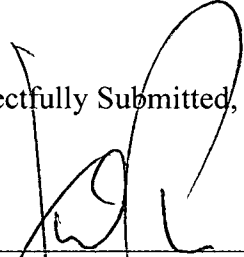
months leading up to his alleged July 11th accident, without this knowledge, it is not only impossible for him to opine to a reasonable degree of medical certainty whether his July 11th accident aggravated his condition, but also whether those symptoms were further aggravated by his July 23rd accident.

With the foregoing in mind, the Appellate Panel erred in finding as fact Respondent's July 23rd accident was not a subsequent intervening event that severed the causal chain. Moreover, because Respondent solely argued he was alleging his July 11th accident permanently aggravated his condition, the Appellate Panel erred as a matter of law and abused its discretion in simply concluding he suffered an injury by accident pursuant to section 42-1-160 and a permanent aggravation of his preexisting condition. Therefore, the Appellate Panel erred in concluding as law that Respondent suffered a compensable injury by accident or permanent aggravation of his preexisting back condition.

CONCLUSION

For the reasons stated hereinabove, the greater weight of the evidence does not support Respondent suffered an injury by accident pursuant to section 42-1-160, a permanent aggravation pursuant to section 42-9-35, or is entitled to ongoing medical treatment pursuant to section 42-15-60. Accordingly, Appellants request this Court to reverse in full the Appellate Panel's Decision and Order dated June 27, 2018.

Respectfully Submitted,



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December 10, 2018

Attorney for Appellants

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION
COMMISSION

Appellate Case No. 2018-001416

Michael A. Repshas,
Employee,

Respondent,

v.

BB&T Corporation, Inc.,
Employer, and Hartford
Accident and Indemnity
Company, Carrier.

Appellants.

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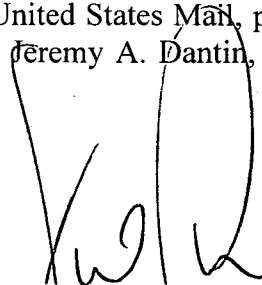
DEC 13 2018

SC Court of Appeals

PROOF OF SERVICE

I certify that I have served the Designation of Matter to be Included in the Record on Appeal on Respondent by depositing a copy of it in the United States Mail, postage prepaid, on December 10, 2018, addressed to his attorney of record, Jeremy A. Dantin, Esquire, P.O. Box 3547, Spartanburg, South Carolina 29304.

December 10, 2018



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December 10, 2018

The Honorable Jenny Abbott Kitchings
Clerk of Court of the South Carolina Court of Appeals
P.O. Box 11629
Columbia, South Carolina 29211

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DEC 13 2018
SC Court of Appeals

Re: Michael Repshas v. BB&T Corporation
Claim No: 0452-WC-16-0000400
W.C.C. File No.: 1611132
Date of Injury: 7/11/2016
Our File No.: 8259-83

Dear Ms. Kitchings:

Please find enclosed for filing in the above-referenced matter the original and one (1) copy of the Appellants' Initial Brief, Designation of Matter to be Included in the Record on Appeal, and a Proof of Service for each pleading. Please return a clocked-in copy of each pleading to me in the self-addressed, stamped envelope that is provided. By copy of this letter, I am serving the same on counsel of record, Jeremy A. Dantin.

Thank you for your assistance in this matter. Please contact our office if you have any questions.

Sincerely,

Jared M. Pretulak
Direct Dial No.: (864) 271-5354
Email address: jpretulak@gwblawfirm.com

JMP/smg
cc: Jeremy A. Dantin, Esquire (w/encl.)

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SC Court of Appeals

GWB

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TO:

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Clerk of Court of the S.C. Court of Appeals
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