IN THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

APPELLATE PANEL

Case No. 2012-210487

Emma Hamilton

Appellant,

v.

Martin Color-Fi, Inc., Employer, and
Liberty Mutual Insurance Company, Carrier,

Respondents.

BRIEF OF APPELLANT

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Statement of the Case and Facts

This is an appeal from an Appellate Panel of the South Carolina Workers' Compensation Commission (WCC). The Appellant, Emma Hamilton (Emma), was injured while working for the Employer, Martin Color-Fi (employer), which was insured at the time of injury by Liberty Mutual Insurance Company (carrier).

On July 22, 2008, Emma was injured in the course and scope of her employment when her right arm was pulled into a roller on the machine she was operating. This accident caused a "roller-crush injury". Emma had worked for the employer for almost seven years at the time of her injury. She received treatment, authorized by the carrier, with Dr. Gee at Industrial Wellness and Medicine in Sumter. She resumed work, limited to use of the left hand only, on July 28, 2012. In December, 2008, Emma was told that she would lose her job in January, 2009, if she could not return to work full duty by then. She hired an attorney on December 8, 2008. A Form 15, Temporary Compensation Report, dated January 28, 2009, documents that temporary total disability compensation (TTD) commenced for the first time on January 16, 2009, the date Emma was not allowed to work any longer.

The average weekly wage is $516.51 and the compensation rate is $344.35.

The Respondents first filed a Form 21, Employer's Request for Hearing, on April 20, 2009, requesting to "pay compensation". Emma filed an Answer. The Form 21 was then amended on April 30, 2009, to request authorization to stop payment of TTD and credit for overpayment of TTD. This hearing request was withdrawn by letter from Respondents' attorney.

Another Form 21 was filed on October 12, 2010, requesting stop payment, payment of compensation and credit for overpayment. Emma filed a Form 50, Claimant's Request for Hearing, on November 22, 2010, asking for additional treatment for her arm (wrist and hand). The Respondents filed a Form 51, Employer's Answer to Request for Hearing, in which they denied Emma's request.

The parties filed respective Forms 58, Pre-Hearing Briefs, and experts' reports and evidence pursuant to Regulation 67-612 of the South Carolina Workers' Compensation Commission and the Administrative Procedures Act, S.C. CODE ANN., §1-23-310 et seq. (1976, as amended). A hearing was held on December 15, 2010, before a single Commissioner, and an order was filed on February 25, 2011.

Emma timely filed a Form 30, Request for Commission Review, on March 9, 2011. The matter was referred to an Appellate Panel and an order rendered by the panel on January 23, 2012.

It is from the order of the Appellate Panel that Emma has appealed, filing her Notice of Appeal on February 22, 2012.

Argument

I. The Respondents did not follow the applicable law and regulations in requesting "stop payment" with their Form 21.

The determination of whether a claimant has reached maximum medical improvement (MMI) is actually a "mixed" determination. It requires findings of fact; but such a determination also requires satisfaction of certain procedural, legal requirements, which

must be met if one is to be allowed to stop payment of TTD. The Defendants failed to meet these requirements as a matter of law by failing to follow the statutory scheme established by the South Carolina statutes and regulations governing proceedings under the Workers' Compensation Act. See S.C. CODE ANN. §1-23-380(5)(a) (1976, as amended).

Section 42-9-260 says that the Workers' Compensation Commission will enact regulations fixing the method and procedure for termination of benefits. Regulation 67-506B applies in this case, and the Defendants have not complied with its requirements. The Regulation says that the authorized health care provider must report that a claimant has reached MMI before a carrier or employer can seek termination of benefits. We must assume that the Commission and the General Assembly meant what they said when they respectively promulgated and ratified regulations saying that the authorized health care provider, and not an independent medical examiner chosen by either the claimant or the carrier or employer, must make the finding of MMI.

To clarify the difference between an independent medical examiner and an authorized health care provider, attention is invited to the Medical Services Provider Manual of the Commission, which says that an IME doctor cannot be an authorized treating doctor for treatment or follow-up care unless the carrier and the claimant agree. Medical Services Provider Manual, Part II, Section 1, "Evaluation and Management", p. 34. The General Assembly acknowledged the distinction between treatment and IMEs by having one statute, Section 42-15-60, for care by an authorized provider, and another statute, Section 42-15-80, for IMEs. The IME doctor does not form a physician-patient relationship and "owes his or her allegiance to the hiring entity, and not the examinee." L. Postol, Disability Evaluation, 2nd Ed., Chapter 7, "The Medical-Legal Interface", p. 64, 66

(Mosby, 2003). There is no evidence that Dr. Green or Dr. Fulton provided treatment. Panel Order p. 21, l. 15. As will be discussed in more detail later in this Brief, Dr. Gee, the authorized health care provider, did not find the Claimant to be at MMI.

Therefore, the Defendants did not satisfy the requirements of the applicable statute and regulation in moving to terminate compensation and benefits, as the authorized health care provider has never found that Emma reached MMI. This is an error of law, in that the Respondents have not followed the applicable procedures. The Form 21 should have been dismissed or stop payment denied, because the requirements of the Regulation were not met. The requirement that the process of stop payment must begin with a finding of MMI by the authorized health care provider is based upon a regulation approved by the Commission and the General Assembly. The dictates of the Workers' Compensation Act and Regulations must be followed. See Wigfall v. Tideland Utilities, Inc., 580 S.E.2d 100, 354 S.C. 100 (S.C. 2003); Brown v. Bi-Lo, Inc., 581 S.E.2d 836, 354 S.C. 436 (S.C. 2003).

II. No evidence supports the contention of the Respondents that the Claimant has reached maximum medial improvement.

The Appellate Panel found that Emma reached MMI on June 30, 2010. Emma contends that there is no evidence to support this finding.

"Maximum medical improvement is a term used to indicate that a person has reached such a plateau that in the physician's opinion there is no further medical care or treatment which will lessen the degree of impairment." O'Banner v. Westinghouse Elec. Corp., 319 S.C. 24, 28, 459 S.E.2d 324, 327 (Ct. App. 1995). "MMI is a factual

determination left to the discretion of the [Appellate] [P]anel." Gadson v. Mikasa Corp., 368 S.C. 214, 224, 628 S.E.2d 262, 268 (Ct. App. 2006).

In order for an appellate court in South Carolina to reverse a factual determination of an Appellate Panel of the South Carolina Workers' Compensation Commission, such determination must not be supported by substantial, competent evidence. Such is not the case here. In fact, the findings concerning MMI are clearly erroneous in view of the reliable, probative and substantial evidence on the whole record. See S.C. CODE ANN. §1-23-380(5)(e) (1976, as amended).

Dr. Green conducted an independent medical examination (IME) on February 11, 2009. The finding of the Panel that Dr. Green assessed MMI is not supported by any evidence. p. 21, para. 14. Dr. Green said Emma had "some strengthening issues that may respond to a supervised work-hardening/BTE program."[1] p. 89. This is a request for additional treatment, which is inconsistent with MMI. Emma actually received work hardening after the one-time appointment with Dr. Green, and continued treatment with Dr. Gee, the authorized health care provider. Dr. Green's report and what followed it (more treatment from the authorized health care provider) refute any finding of MMI based on his report.

Dr. Fulton conducted an IME on June 30, 2010. p. 93. Dr. Fulton did not use the term "maximum medical improvement" in his report. Additionally, Dr. Fulton's statements are very indefinite. He does not say that they are made "to a reasonable degree of medical certainty". His findings are stated in terms of what he did not "see": He "sees no

[1] The Panel Order designates everything called a "finding" in this Brief as a "Finding of Fact" and prefaces the findings with this phrase: "IT IS FOUND AS A FACT:". p. 20.

signs of ... loss of mobility"; he doesn't "see any evidence of permanent partial impairment... ." The inadequacy of Dr. Fulton's report as evidence of MMI is even more obvious when he says that he "saw no contraindication to return to work without restriction". This is a meaningless statement. It certainly is not the same as saying she can return to work. Dr. Fulton obviously did not review the functional capacity evaluation (FCE), which was completed on January 26, 2010. pp. 178-258. The FCE mentions quite a few restrictions, one of which is that the Emma cannot return to her former job, which certainly means she cannot work without restriction.

The Panel's (and the hearing Commissioner's) findings concerning Dr. Fulton and the FCE cannot be reconciled, as they are mutually exclusive. The Panel said that the FCE was "valid and indicated that she could not return to her former duties", p. 21, para. 12, but also favorably cites Dr. Fulton as saying that he "gave the Claimant no work restrictions". p. 21, para. 15. By comparison, Dr. Moore, who did an IME at the Claimant's request, was emphatic that Emma was not at MMI, stating it more than once. p. 263-264. Dr. Fulton's report clearly is not evidence of MMI.

The Panel says that the authorized health care provider, Dr. Gee, found the Claimant at MMI on May 27, 2009. p. 15, para. 20. This is not accurate. He wrote on that date that he "felt" Emma reached "maximum medical benefits as far as active orthopedic care was concerned[2] [a]t some point between February 25, 2009 and March 25, 2010". (Emphasis added.) Later in the same report, he concurred with Dr. Green that work-hardening was needed. He "did feel and still feel that this type of problem can improve for up to one year [July, 2009]." He mentioned that he had "made referral", but does not say

[2] Dr. Gee was not providing "orthopedic care".

for what. Treatment was continued after the May 27, 2009, report. This report is not evidence of MMI. p. 85.

The Panel (and the hearing Commissioner) "found the aforementioned May 27, 2009, report of Dr. Gee "very persuasive" for some reason. One is hard-pressed to understand why. Emma had subsequent appointments on July 1, 2009, August 12, 2009, October 14, 2009, December 2, 2009, December 23, 2009, February 18, 2010 (Emma had a "bad attitude"), and February 25, 2010. On a Form 14B, Physician's Statement, dated November 11, 2009, Dr. Gee wrote that Emma was not at MMI, further establishing that there is no evidence of MMI. p. 122.

On February 25, 2010, in his last report, Dr. Gee wrote that Emma should be referred to a hand specialist and "may need another MRI, etc." p. 133. He also mentioned another MRI on February 18, 2010, along with a "referral". Dr. Gee gave more treatment for months after he made any statement that could be even loosely interpreted as a finding of MMI. His records provide no evidence of MMI.

In paragraph 21 of the Panel Order (p.22), the Panel says that MMI was reached on June 30, 2010, the date of the IME report from Dr. Fulton, a flawed report, as outlined above, from a doctor who saw Emma one time for an IME. Factually, no evidence was presented that Emma had reached that "plateau" in healing which justifies a finding of MMI.

Drs. Green and Fulton performed IMEs at the request of the Defendants. Dr. Moore performed an IME at the request of the Claimant. The Claimant disputes the finding which says that Dr. Moore's opinion should be given less weight that the opinions of Drs. Green and Fulton, because the latter two are "hand specialists". All three opinions are in evidence as "experts' reports" under Regulation 67-612. Nothing in any report establishes

that any one of the three limits his practice to any area of specialty, and no rule of evidence says that an IME doctor employed by a claimant is less believable than one employed by the carrier. If you read the three reports, Dr. Moore's is by far the most thorough.

In point of fact, the only competent and timely statement on MMI comes from Dr. Moore, who says Emma is not at MMI. The medical evidence the Panel used to support its findings of MMI simply does not say what the Panel claims, especially when that evidence is viewed as a totality. This is similar to the case of Grayson v. Carter Rhoad Furniture, 317 S.C. 306, 454 S.E.2d 320 (1995), where the Supreme Court said "there is, in reality, **no** [sic] evidence that Grayson's period of temporary total disability ever ended." 317 S.C. at 310.

III. The Claimant did not receive the necessary medical treatment tending to lessen her period of disability as required by S.C. CODE ANN. § 42-15-60.

As submitted above, Emma received medical treatment only from Dr. Gee, not from Dr. Green, Dr. Fulton, or Dr. Moore. A reading of Dr. Gee's treatment could be a lesson in minimalism in medical practice; or perhaps it is a lesson by the Defendants on how to avoid providing treatment ordered by an authorized health care provider. Dr. Gee constantly exhorts Emma to give her healing "time", e.g. p. 58, 73, 76, and 85, and asks the Employer to "bear with us". p. 77. When Dr. Gee did order diagnostic tests or treatments, either delays ensued or the treatment was never provided. Nothing can be done about the delays now; but Emma can be given the treatment that was ordered and

never allowed. Also, those diagnoses that were not eliminated should be evaluated before this matter is closed.

The work injury occurred on July 22, 2008. At times between the date of injury and September 10, 2008, Dr. Gee did almost nothing but observe the Claimant at appointments. On the above date he stated earlier concerns about tendon injury and, more specifically, failure to regain strength. He ordered occupational therapy for Emma's "very significant roller type (crush) injury." p. 66.

Dr. Gee ordered a nerve conduction study on October 22, 2008 and it was completed on November 3, 2008. p. 152. The neurologist said the test was "essentially normal", which is not really the same as "normal"; but look what he was asked to do: "The workers compensation insurance would like to have a nerve conduction study/electromyography (NCS/EMG) performed on both hands to rule out other potential contributing factors to her symptoms, i.e. peripheral neuropathy, etc." Emphasis added. This language is not found on the referral note from Dr. Gee, p. 72; and it is not usually found in an NCS/EMG report. The Defendants restricted the NCS/EMG without apparent medical authorization.[3] The Defendants were trying to find some other reason for Emma's problem through the NCS/EMG, not to find out what was wrong with her.

This writer does not know how to read an NCS/EMG; but it does not take an expert to see very real problems. The report shows what is "normal"; and Emma's readings are not within "normal" limits, especially at the elbow. Dr. Moore confirmed that the "nerve conduction studies reveal different conduction velocities in the contralateral hands." p.

[3] See p. 327, l.9-p. 328, l. 4, where Emma testifies without objection to what the neurologist, Dr. White, told her he was employed "to check to see if I had a pre-existing condition or a family history of any nerve problem or nerve damage. And he told me no, I do not."

265. Comparatively speaking, in other words, the left (non-dominant) arm is much more "normal" than the right, which should indicate something is wrong.

Dr. Gee apparently had concerns about the NCS/EMG, because on December 3, 2008, he requested a second NCS/EMG. On the referral note, Dr. Gee wrote: "Still painful, etc. Don't believe this is true reflex dystrophy but would like your opinion. Would neurotor [?] or similar be of any value?" This second test was not allowed by the Defendants and reflex sympathetic dystrophy was never eliminated as a diagnosis. p. 107. (On September 3, 2008, Dr. Gee noted that the hand was "feeling cold and feels like tight glove. p. 100). An MRI of the right wrist was ordered on November 12, 2008, p. 75.

The MRI showed "subtle sclerosis along the ulnar aspect of the lunate bone" which "could reflect changes related to previous direct trauma with healing versus ulnar abutment syndrome". "Small subchondral cystic degenerative changes along the lunate" were detected. p. 87. Dr. Gee said the MRI "seems to be normal except for the fact that she has had some trauma". p. 76. One is hard-pressed to gather anything meaningful from such a comment Dr. Gee never mentioned the specific findings of the MRI.

Dr. Moore wrote in his initial report on June 9, 2009, about one year after the initial injury:

> I am also concerned that her MRI has largely been ignored. I reviewed these images and note subchondral cystic degeneration along the lunate bone. Two diagnoses are suggested including the "ulnar abutment syndrome" or evolving "avascular necrosis". Her ongoing localizing tenderness at the anatomic snuffbox confirms clinically this radiographic finding. With an extensive period of conservative care resulting in unsatisfactory results, potential surgical care is not unreasonable. Once again, she is clearly NOT [sic] at MMI. p. 263.

On September 4, 2010, Dr. Moore wrote that a repeat MRI[4] or a triple phase bone scan "should evaluate the progressive nature of her wrist discomfort and can either confirm or exclude ulnar abutment and/or avascular necrosis (Kienbock's Syndrome)":

> Her prior cystic degeneration strongly suggests this as the etiologic factor in her ongoing pain. It is comparatively likely that she will eventually require surgical repair. For the purposes of any non-doctor reviewing this letter, the issue in Kienbock's is the situation where trauma to the wrist disrupts the blood supply to the lunate bone resulting in slow gangrenous destruction of this wrist bone and functionally results in a chronic non-healing fracture of the wrist with intense pain. pp. 265-266.

This very thorough IME report was totally ignored by the Panel in favor of the very spare reports of the other physicians.

Dr. Fulton "did not believe the cystic changes in her lunate were likely related to the injury but rather represent likely pre-existing chronic changes, as she is not painful in this area of her wrist." p. 93. These comments about pain are not stated to a reasonable degree of medical certainty and are inconsistent with those of every other doctor who has seen Emma. If there is any doubt about Emma's wrist pain, reference is invited to the occupational therapy notes from late 2009 through January, 2010. Emma, who worked light duty for about seven months after her injury and who wanted to get totally better so that she would not be fired for not being "100%", understated her pain to the physical therapists, because she wanted so badly to return to work. p. 178. The FCE further documents constant pain. Look at all of the demands of her former job that she cannot perform. pp. 180-181, 185. Note how many times Emma had to stop certain activities during the FCE because of right wrist pain. Emma's dominant hand is weaker than a

[4] Even Dr. Gee suggested a repeat MRI (and another opinion) on February 18, 2010, to see "if anything has changed since the previous MRI." This MRI was not allowed. p. 105.

normative group, whereas her non-dominant hand is stronger than a normative group. Time and again in the physical therapists' reports Emma's problems are proven to be real and significant. Did any physician read these notes of services that were ordered by the authorized health care provider? Pg. 178.[5]

Emma respectfully submits that a totality the evidence shows that she did not receive the medical treatment anticipated by Section 42-15-60. In a state where the carrier and employer get to choose the treating doctor, the carrier and employer should at least follow the directives of the doctor they chose. As discussed above, no evidence exists that Emma has reached that level of recovery where she does not need more medical treatment or that more treatment will not tend to reduce her disability. No one has diagnosed what her problem is.

The Panel Order says that the Defendants "made a good faith effort" to provide necessary medical treatment; but this cannot be true, because so much care that was ordered by an authorized provider was not provided. Emma urgently asks that she receive treatment that will find what her problem is and help lessen her disability. At this point, all we know is that she had a "very significant roller type (crush) injury". We do not know why she continues to suffer. Several diagnoses have been mentioned, but not one of them properly evaluated and eliminated. Typical of what has happened in this case is the comment of Dr. Gee about the MRI: "Seems to be normal except for the fact that she has had some trauma". What exactly does that mean? Perhaps that more treatment is needed?[6]

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[5] The first physical therapist told Emma her "hand was severely damaged, and he recommended I get an MRI before I do any kind of therapy or treatment or anything. And he said there was a lot of soft tissue damage and different things." p. 328, ll. 9-24.

[6] Emma's statement about Dr. Gee at her deposition characterizes her treatment: "All Dr. Gee basically does when I walk in is hand me a paper and say, okay. I'll see you in two weeks or see you in a month or see you in two months.

The failure of carriers to provide medical treatment ordered by a doctor chosen by them is a real problem which thwarts the purposes of our workers' compensation law. The workers' compensation system was intended to provide medical treatment for injured claimants, compensation while claimants are unable to work, and disability, if appropriate. The system was designed to be simple and to get claimants the help to which they are entitled without litigation. This writer believes that the system was intended to be administratively handled, with lawyers being involved only in the most difficult claims. Yet if carriers and employers refuse to provide medical treatment that is ordered by doctors they choose, then claimants do not get the care they need, and they are not able to resume productive lives. There are medical providers who will minimize a claimant's problems, just as there are some who will maximize it. However, medical providers are supposed to decide what medical care will be provided, not insurance carriers. This case, therefore, presents a major policy issue which needs to be resolved: Carriers and employers should be required to approve treatment ordered by the doctors they choose.

The portions of the Panel Order which reject the request for further medical treatment, including medical treatment ordered by the authorized health care provider, and which advance the notion that the Defendants have provided the medical treatment anticipated by our workers' compensation laws are clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record for the reasons shown above. S.C. CODE ANN. §1-23-380(5)(e). The contention that the Defendants made a "good faith effort" to provide necessary medical treatment is arbitrary or capricious or characterized by an abuse of discretion or a clearly unwarranted exercise of discretion. S.C. CODE ANN. §1-23-380(5)(f).

He doesn't listen to anything I say. He pretty much ignores me. He doesn't want to hear it. So..." p. 329, l. 23-p. 330,

IV. The findings that the Claimant was not a credible witness are not supported by evidence.

"Credibility" has become a shibboleth at the South Carolina Workers' Compensation Commission. If a witness is designated as "credible", this supposedly adds weight to the decision of the hearing Commissioner or Appellate Panel. If a witness, usually a claimant, is not "credible", it means that a finding against the claimant upon whom this designation is fixed should be read as particularly strong. To one who has been an active lawyer for over forty years, the use of "credibility" in orders is much more prominent in workers' compensation practice today than it was a few years back. Commissioners have used it for years as a way to stress how strongly a Commissioner feels about a witness; it was used much less frequently, however.

In this case, the Panel found that Emma's credibility was "brought into question" because she tried to use a posthole digger. p. 21, para. 13. The Order also says that she was "evasive and confusing at times, which brought her credibility into question." p. 22, para. 18.

Emma was the only witness who testified. All other evidence was received as "experts' reports" under Regulation 67-612 and the Administrative Procedures Act—basically medical records. So the question is: What was Emma untruthful about? She testified as to Dr. Gee's abrasiveness and the fact that he promised medical treatment that was never provided. She testified as to the specific reasons she was not satisfied with Dr. Gee's treatment. p. 372, ll. 7-19; p. 399, l. 16-p. 402, l. 3. She felt as though Dr. Green

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l. 3. In most instances, Emma did not know of any treatment being requested by Dr. Gee and denied by the carrier.

was "very nasty and rude" and saw her only for "two to three minutes". p. 374, ll. 11-19. (Dr. Moore, who did an IME at Emma's request, spent one and one-half to two hours with her. p. 376, ll. 6-11.) She testified that Dr. Fulton was initially very nice. He told her that she "had some nerve problems going on" and was going to "get some tests". At that point, he had spent five to ten minutes with Dr. Fulton. p. 376, ll. 3-5. Then he looked at her MRI on his computer. Emma saw a note on the screen with Dr. Gee's name on it. At that, Dr. Fulton told her to leave, saying, "There was nothing wrong with you then. There is nothing wrong with you now. There never was. Now get out." p. 375, ll. 2-19. All of this testimony came in without objection. Nothing in the record contradicts Emma's testimony.

If one reads Emma's medical records, she obviously did become more upset as little was done to help her get better. She knew that she had to return to work with no restrictions by January, 2009, or she would not be allowed to continue at work. This is a woman who worked after a serious injury for a long time. The record shows that she wanted and wants to work. The record shows that she understated her pain and problems, trying to get the medical personnel to allow her to return to work without restrictions. None of the doctors noticed this, but the physical therapists who were actually watching her try to function and putting their hands on her commented on this. See e.g. p. 178. Emma is not a woman who is trying to "game" the workers' compensation system. At her hearing, she made it clear that she wanted more medical treatment so that she could get better and go back to work. Such a person should have considerable credibility.

The Panel (and the hearing Commissioner) does not say why it felt Emma's testimony was "evasive and confusing"; it gave no specifics. A reading of the Transcript shows that Emma was not evasive at all. She was very direct, specific and consistent in her testimony. Her testimony is not confusing at all; she was badly hurt, she has not

received adequate care; and she wants to return to work. Emma's deposition was admitted as evidence at the request of the Respondents. Her testimony at her deposition is consistent with her testimony at the hearing, which should say something about credibility. She complained throughout the deposition about not getting adequate treatment and the way she was treated by Dr. Gee, See e.g. p. 329, l.21-p. 330, ,l. 3. She also characterized her visit to Dr. Green the same at her deposition and at the hearing. See e.g. p. 330, ll. 6-12. She had not seen Dr. Fulton at the time of her deposition.

The bottom line is that the medical records back up Emma's testimony that she did not get adequate treatment. Look at all the treatment that was ordered that was never provided. The IME doctors were operating under Section 42-15-80, not Section 42-15-60. They were not treating doctors or authorized health care providers. Nothing was done to help Emma but occupational therapy. Does she have reflex sympathetic dystrophy? Tendon damage? Avascular necrosis? Ulnar abutment syndrome? Kienbock's Syndrome? These questions have not been answered.

And how does an attempt to use posthole diggers affect credibility? Emma testified that she did not actually use them; she couldn't. She tried to dig the hole to repair her mailbox with a shovel, too; and that didn't work either. p. 408, l. 19-p. 409, l. 19. Why would trying to use posthole diggers be unusual for a person who has been said by two IME doctors to have no restrictions? If the FCE shows anything, it shows that Emma does have considerable functional restrictions; but Dr. Gee mentions none in his last report. Dr. Fulton does not mention it in his either. Why would the Panel emphasize Emma trying to

do something, but ignore the fact that she could not do it? The Panel certainly believed that she tried to use posthole diggers.[7]

Cases are to be decided on the evidence. Credibility is important, but to find someone has lied under oath, which is what "no credibility" means, an administrative agency surely must have some standard for comparison. If a witness was confusing and evasive, shouldn't the Panel have to say how or why it reached this conclusion? To fail in this regard is to deny justice to litigants and replace our system of laws with a system of whims. There is no basis in the record for not believing Emma's testimony; and, if her testimony is believed, she should receive additional medical treatment.

The Defendants may cite the case of Fishburne v. ATI Systems, 681 S.E.2d 595, 384 S.C. 76 (S.C. App. 2009) as supporting the Panel Order. In reality, the case supports Emma's argument. The Court of Appeals affirmed an Appellate Panel of the Commission, referring to exaggeration of symptoms, inconsistent statements in the hearing and to health care providers, using a cane that was not prescribed and "wiping tears [the Commissioner] never observed, and constantly [making] loud sniffling sounds from a nose that...never 'ran'." The Court of Appeals wrote that, "This conduct, in addition to her inconsistent statements, caused the Single Commissioner to question Fishburne's credibility." (Emphasis added.) Without the inconsistent statements, the Court of Appeals surely would have reversed, notwithstanding the "crocodile tears". The truth should always trump delivery and appearances, and Emma told the truth. (Also, she did not exaggerate her symptoms or otherwise make a dramatic presentation.)

[7] The hearing Commissioner asked Emma why she didn't get her sons to help her. p. 409, ll. 20-22. Only her twenty-two year old lived with her, and "he has a lot of mental illness." p. 367, ll. 1-9.

V. The Claimant should have been awarded greater permanent partial disability of her right arm.

This appeal is not about a greater disability award. Emma went to a hearing because she wants to know what is wrong with her arm, and she wants that arm to improve as much as possible. She has not received any real treatment to date. Her injury has been described (significant roller crush injury), but it has not been diagnosed. Nevertheless, if further treatment is not allowed, she submits that she has not received an adequate award of permanent partial disability.

Although the Panel made inconsistent findings about Emma's functional loss, with several doctors saying she has no restrictions, the physical therapy records and an FCE show considerable functional loss. Emma can no longer perform the job she had before her injury, which was the best job she ever had—a job she had worked for years to maintain.. 369, l. 12-p. 370, l. 9.

Since Emma has only one body part injured, the right arm, she can only receive permanent partial disability or loss of use under Section 42-9-30(13). The level of disability or loss of use is based upon functional loss and the "character of the injury", according to the applicable cases. The award is, as stated in the statute, for disability or loss of use; the word impairment is not used in the Workers' Compensation Act. Impairment is a medical measurement of loss, and does not consider loss of vocational function. (Some argue it does include the effect on activities of daily living, but this writer does not agree, especially when a rater uses no definable source for his ratings.) Disability requires consideration of other factors like age, education, skills, and transferable skills.

The unreliability of the doctor's impairment rating in assessing disability is shown in the two Forms 14B filed by Dr. Greene. He filled out one on March 31, 2009, that said Emma suffered only 2% permanent impairment to her right hand, even though the wrist is not part of the hand and her injury affects her arm; and he filed another the next day with 1% medical impairment. pp. 89-90. (Reference is also invited to Dr. Moore's comments on these forms. p. 264.) Dr. Green said he used the" AMA Guidelines" for his rating; but compare his assessment with that of Dr. Moore, who used the sixth edition of the "AMA Guidelines", actually the AMA Guides to the Evaluation of Permanent Impairment, 6th Ed.

Dr. Moore cites the specific sections he used in arriving at his impairment rating. pp.263-264. Under the Guides, Dr. Moore could only record a 7% upper extremity rating for the "abnormal bone architecture of the lunate." The Guides require that he "defer", or not add, a 5% upper extremity rating for loss of flexion and ulnar deviation and a 20% upper extremity rating for "marked bilateral strength loss"—38% strength loss. Even though the Guides system may not consider these last two factors in an impairment rating, the Commission can; and they surely should have resulted in a higher permanent partial disability rating than the Panel awarded.

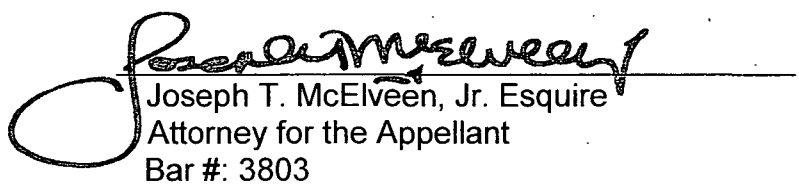
As stated above, this appeal is an urgent request for adequate medical treatment; but a considerably greater award of partial disability should have been made. Also, the Defendants should not have been given credit for any temporary compensation paid. If one looks at the course of this claim, the Defendants have failed to do what is required of them under the Workers' Compensation Act. They refused medical treatment ordered by their chosen health care provider. They tried to use IMEs to avoid treatment ordered by an authorized doctor, for instance. The Claimant is not at MMI. The Claimant should not be penalized by having her award reduced by any amount.

Conclusion

Emma respectfully requests that the Panel Order be reversed and sent back to the Commission, hopefully with directions that will lead to more medical evaluation and treatment, and not just another IME. Emma also hopes that treatment will reduce her permanent disability. As her case stands at this time, however, she is unable to perform the work duties that she did before she was hurt. She has suffered significant loss of function from a very significant and debilitating injury. So her permanent partial disability at this time is much more than was awarded by the Panel, if this Court decides not to reverse on the other issues named in this Brief.

Respectfully submitted,

BAHNMULLER, GOLDMAN, McELVEEN, FORD & BULTMAN



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October 4, 2012

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
APPELLATE PANEL

Case No. 2012-210487

Emma Hamilton

Appellant,

v.

Martin Color-Fi, Inc., Employer, and
Liberty Mutual Insurance Company, Carrier,

Respondents.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Appellant's Initial Brief complies with Rule 211(b), SCACR.

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Conclusion

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