

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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Appeal from the South Carolina  
Workers' Compensation Commission

**RECEIVED**

OCT 29 2012

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SCWCC No. 0724852

**SC Court of Appeals**

John B. Leopard, Claimant,

Appellant,

v.

Grenwood County, and S.C. Association  
of Counties SIF,

Respondents.

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INITIAL BRIEF OF RESPONDENTS

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JAN 28 2013

**SC Court of Appeals**

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## STATEMENT OF ISSUE ON APPEAL

### WHETHER THE COMMISSION'S FINDING THAT LEOPARD DID NOT SUFFER A CHANGE OF CONDITION FOR THE WORSE UNDER SECTION 42-17-90, S.C. CODE ANN. (1976), IS SUPPORTED BY SUBSTANTIAL EVIDENCE?

#### STATEMENT OF THE CASE

Appellant, John B. Leopard ("Leopard"), a volunteer fireman for Greenwood County, sustained an admitted injury to his back on October 30, 2007, when he fell while entering an attic to fight a house fire. (Accord Form 4, Workers' Compensation First Report of Injury or Illness, dated 10/31/07). As a result, Respondents ("Greenwood County") provided Leopard with appropriate medical treatment from multiple physicians, including Dr. David L. Shallcross of Upstate Medical Rehabilitation. (Defendants' APA #1). On October 8, 2009, Dr. Shallcross opined that Leopard had reached maximum medical improvement and had sustained 25% impairment to his spine as a result of his October 30, 2007 injury. (Defendants' APA #1, p. 8). An informal conference was held on February 9, 2010, and the parties entered into a Form 16A, Agreement for Permanent Disability/Disfigurement Compensation, under which Leopard received compensation for a 40% permanent loss of use of his thoracic back. The Form 16A was approved by the Commission on February 10, 2010. (Form 16A, dated 2/9/10). On February 18, 2010, Leopard signed a Form 19 acknowledging that he had received payment of compensation pursuant to the Form 16A Agreement. (Form 19, dated 2/10/10).

On February 8, 2011, Leopard filed a Form 50, Request for Hearing, alleging that he had sustained a change of condition for the worse. (Form 50, dated 2/8/11). Leopard did not attach to the Form 50 a medical report indicating a change in his condition as

required by Commission Regulation 67-603(C). (Id.) On February 14, 2011, Greenwood County filed a Form 51 denying that Leopard had suffered a change of condition for the worse and asserting S.C. Code Ann. § 42-17-90 as an affirmative defense. (Form 51, dated 2/14/11). A hearing was subsequently scheduled on April 13, 2011 in Newberry, South Carolina. (Notice of Hearing, dated 2/18/11). However, on March 21, 2011, Leopard's Attorney advised the Commission that she wished to withdraw the Form 50 and cancel the hearing. (Email from Billie Miller to Barbara Cheeseboro, dated 3/21/11). As a result, the hearing was cancelled.

On June 3, 2011, Leopard filed a second Form 50, Request for Hearing, again alleging that he had suffered a change of condition for the worse. Attached to the Form 50 was a medical report from Dr. Sybill Reddick, dated March 15, 2011. (Form 50, dated 6/3/11, including attachment). On June 28, 2011, Greenwood County filed a Form 51 again denying that Leopard had sustained a change of condition for the worse and asserting the statute of limitations under S.C. Code Ann. § 42-17-90 as an affirmative defense. (Form 51, dated 6/28/11). A hearing was subsequently scheduled before a Single Commissioner on August 24, 2011. (Notice of Hearing, dated 7/21/11).

At the hearing, Leopard contended that he had suffered a change of condition for the worse as to his back. In support of his position, Leopard submitted medical reports from Dr. Reddick and Dr. Steven C. Poletti. (Order, dated 10/21/11; p. 6). Greenwood County continued to deny that Leopard had sustained a compensable change of condition for the worse since the last payment of compensation on February 18, 2010. (Id.) Greenwood County relied upon the opinion of Dr. Shallcross, the treating physician, who opined in his medical reports and at his deposition that Leopard had not sustained a

change of condition for the worse. (Id.) Greenwood County also contended that neither Dr. Reddick nor Dr. Poletti had examined Leopard prior to the last payment of compensation on February 18, 2011 and therefore, were not in as good of a position as Dr. Shallcross to offer an opinion as to whether Leopard's condition had worsened. (Id.) Greenwood County also argued that Leopard's change of condition was barred by the twelve month statute of limitations in S.C. Code § 42-17-90. (Id.) Greenwood County contended that Leopard's original Form 50, application for review on a change of condition, dated February 8, 2011, was withdrawn and was not refiled until June 3, 2011, which was more than twelve months after the last payment of compensation. Therefore, Defendants contended that the Commission was without jurisdiction to hear the case. (Id.)

After an extensive pre-hearing conference, the parties agreed to submit the issue of a change of condition under S.C. Code Ann. § 42-17-90 solely upon the medical records submitted in the APAs and the deposition of Dr. David L. Shallcross. Thus, no testimony was taken at the hearing. (Single Commissioner Hearing Transcript, p. 5).

On October 21, 2011, the Single Commissioner issued a Decision and Order finding that Leopard failed to prove by the greater weight of the evidence that he suffered a change of condition for the worse since the last payment of compensation on February 18, 2010. (Order, dated 10/21/11). The Single Commissioner further held that he gave greater weight to the opinion of Dr. Shallcross, the physician who treated Leopard from June 4, 2009 through April 29, 2011, over the opinions of Dr. Reddick and Dr. Poletti, neither of whom had evaluated Leopard prior to February 18, 2010, the date of the last payment of compensation. (Id.)

On November 3, 2011, Leopard filed a Form 30, Request for Commission Review. (Form 30, dated 11/3/11). An Appellate Panel review was held on February 22, 2012. Thereafter, on May 8, 2012, the Appellate Panel issued its Decision and Order, unanimously affirming the Single Commissioner's Order. (Order, filed 5/8/12).

On June 4, 2012, Leopard filed his Notice of Appeal with this Court. (Notice of Appeal, dated June 4, 2012).

### STATEMENT OF THE FACTS

After his accident on October 30, 2007, Leopard went to the Emergency Room at Self Regional Healthcare where he was evaluated and released with prescriptions for several medications. (Defendants' APA 310, p. 184-5). Leopard was then seen on October 31, 2007 by Dr. Dan Divilbiss at the Montgomery Center of Family Medicine, for complaints of pain in his mid back. (Defendants' APA #7, pp. 148-150). Dr. Divilbiss diagnosed paraspinous back strain and referred Leopard for physical therapy. (Id. at 150). Leopard had approximately 12 physical therapy sessions at Optimum Life Center. (Defendants' APA #9, pp. 168-177). Because of continuing complaints of back pain, Dr. Divilbiss ordered a CT scan of the thoracic spine. (Defendants' APA #7, pp. 160-2). This was performed at Anderson Radiology on December 11, 2007. It was the radiologist's impression that Leopard had a mild flattened configuration of the central and left side of T11 vertebral body which could be the result of chronic degenerative disc disease or a subacute fracture of the T11 vertebral body. (Defendants' APA #8, pp. 166-7). It was also noted that Leopard had moderate degenerative disc disease and posterior disc protrusion and osteophytes at T10-11 and T11-12. (Id.)

Subsequently, an MRI of the thoracic spine was also performed on December 19, 2007. (Defendants' APA #6, pp. 144-5). The MRI revealed multi-level Schmorl's nodes, particularly distally, and superimposed early degenerative changes at multiple levels. (Id.) There was a borderline impingement at T10-11 upon the anterior aspect of the cord. (Id.) At T11-12, there were asymmetric disc bulges toward the right with borderline infringement upon the cord. (Id.) At T6-7 there was a minimal disc bulge lying up against the anterior margin of the cord. (Id.)

Leopard was referred to Dr. Phillip J. Hodge, a neurosurgeon, for further evaluation. (Defendants' APA #5, pp. 128-130). Dr. Hodge reviewed the MRI and advised that it showed degenerative changes of the thoracic spine without fracture or disc herniation. (Id.) It was his impression that Leopard's injuries were muscular or ligamentous in nature and would improve with time. (Id.) He recommended Naprosyn and return to work without restriction. (Id.) Leopard returned to Dr. Hodge on April 17, 2008. (Defendants' APA #5, pp. 131-3). Dr. Hodge noted that Leopard was doing better and that he was to return to regular duty after having worked restricted duty for 3-4 weeks. (Id.) On May 12, 2008, Dr. Hodge advised that Leopard had reached maximum medical improvement and had an impairment rating of 3% to the whole person as a result of the thoracic back soft tissue injury. (Defendants' APA 35, pp. 134-5). Dr. Hodge advised that Leopard could continue to work without restriction, although he might need intermittent anti-inflammatories and physical therapy to function optimally. (Id.) Dr. Hodge also completed a Form 14B advising that Leopard had sustained a three percent (3%) medical impairment to the whole person. (APA #5, p. 136).

Leopard returned to Dr. Hodge on March 9, 2009 complaining of pain. (Defendants' APA 35, pp. 138-140). Dr. Hodge ordered another MRI. (Id.) This was performed on March 12, 2009. (Defendants' APA #6, pp. 146-7). The MRI showed minor thoracic scoliosis, a combination of disc herniation and spondylosis producing central canal stenosis at T10-11 and similar changes, but to a lesser degree, at T11-12. (Id.) Leopard was seen in follow-up by Dr. Hodge on March 23, 2009. (Defendants' APA #5, pp. 141-3). Dr. Hodge advised that Leopard's thoracic spine MRI showed some stenosis in the lower thoracic region. (Id.) Leopard had mildly increased reflexes but no other symptoms of myelopathy. (Id.) Dr. Hodge did not recommend surgery and advised that the rating and restrictions remained the same. (Id.) He recommended referral to pain management. (Id.)

Leopard was seen by Dr. David L Shallcross, a physical medicine and rehabilitation specialist, on June 4, 2009. (Defendants' APA #1, pp. 1-3). It was Dr. Shallcross' impression that Leopard had a muscular thoracic sprain superimposed on thoracic herniated disc and probable mild compression fracture. (Id.) Dr. Shallcross recommended physical therapy, a TENS unit, and additional medications. (Id.) He released Leopard to return to work full duty. (Id.) Thereafter, Dr. Shallcross provided additional treatment including trigger point injections and facet injections. (Defendants' APA 35, pp. 4-7). On October 8, 2009, Dr. Shallcross advised that Leopard had reached maximum medical improvement. (Defendants' APA #1, p. 8). He released Leopard to continue working without restriction and rated Leopard as having a 25% impairment to his spine as a result of the work accident. (Id.)

On February 9, 2010, Leopard entered into a Form 16A settlement agreement for forty percent (40%) disability to the thoracic back. (Defendants' APA #1, p. 9). After the Form 16A settlement, Leopard returned to Dr. Shallcross on April 16, 2010 again complaining of mid back pain. (Defendants' APA #1, p. 9). It was Dr. Shallcross' impression that Leopard still had mechanical back pain with no evidence of true radiculopathy or myelopathy. (Id.) Leopard had follow-up appointments with Dr. Shallcross on May 27, 2010, and July 26, 2010. (Defendants' APA #1, pp. 10-11). On September 21, 2010, Dr. Shallcross stated in his office note:

Clinically I cannot see any true worsening in this patient's condition, but he is complaining of increase pain and I think at this point he is having an attorney help him decide on disability and out of work issues. (Defendants' APA #1, p. 12).

Dr. Shallcross ordered a functional capacity evaluation (FCE). On January 27, 2011, Dr. Shallcross advised that the FCE showed Leopard was capable of lifting 60 pounds from the floor to waist, 50 pounds from waist to shoulder and limited lifting from floor to shoulder of 50 pounds. (Defendants' APA #1, pp. 17-18). He could carry 100 pounds for 25 feet. He could constantly sit and walk. He could frequently stand, stair climb, ladder climb, do desk level reaching, overhead reaching (needs to limit this with heavy weight), floor level reaching, balance, kneeling, stooping, crouching and crawling. (Id.) Dr. Shallcross opined that Leopard was at maximum medical improvement with no increase in his impairment rating based upon the recent aggravation of his pain. (Id.) On April 29, 2011, Leopard was seen for a medication recheck. (Defendants' APA #1, p. 19).

On August 13, 2010, Leopard was seen for an emergency consultation by Dr. Wayne B. Sida, a neurologist. (Defendants' APA #17, pp. 231-236). Leopard gave a

history to Dr. Sida that after cutting grass the day before, he woke up the next morning and developed a severe shooting pain in his back that caused him to fall to his knees. (Id.) He complained of episodic numbness and pain into the right lower extremity. (Id.) Dr. Sida stated there was no evidence of an acute compression fracture. (Id.) Dr. Sida noted that while Leopard complained of severe pain with a history of right lower extremity numbness and pain, this was “unexpected” given the location of the lower thoracic/upper lumbar spine disease. (Id.) Dr. Sida ordered an MRI of the thoracic spine which was performed at Piedmont Health Group on August 17, 2010. (Claimant’s APA #8, pp. 119-20). The MRI showed multi level Schmorl’s nodes with chronic compression fractures at T10, T11 and possibly T8. (Id.) The T10-11 broad base disc bulge and inplate hypertrophy contributed to moderate spinal canal stenosis at T11-12 disc bulge and inplate hypertrophy with focal herniation to the left of the midline producing anterior lateral impression upon the distal cord. (Id.) An EMG/NCV study was within normal limits. (Claimant’s APA #8, pp. 116-118). Leopard returned to Dr. Sida on August 23, 2010 noting that his pain level had diminished significantly and was near baseline. (Claimant’s APA #8, p. 115). Leopard was seen again by Dr. Sida on October 15, 2010 at which time Dr. Sida offered a neurosurgical assessment but was advised by Leopard that he was not interested at that time. (Claimant’s APA #8, pp. 111-12).

Leopard was sent by his attorney to Dr. Steven C. Poletti for a medical evaluation. (Claimant’s APA #9, pp. 128-9). He was seen by Dr. Poletti for the first time on November 17, 2010. (Id.) It was Dr. Poletti’s impression that Leopard had a thoracic (T11) fracture with multi level degenerative disc aggravated by the fall. (Id.) Dr. Poletti did not recommend any surgery. (Id.) He advised that Leopard had a 15% impairment

rating as a result of the fracture. (Id.) On March 16, 2011, Dr. Poletti did an addendum report after reviewing CT and MRI scans from 2007 and 2010. (Claimant's APA #9, p. 127). It appears from Dr. Poletti's report that he reviewed a MRI scan from 2007 and a CT scan from 2007 and a CT scan and a MRI from 2010. Leopard had two MRI scans in 2010, so it is not clear which 2010 MRI scan Dr. Poletti reviewed. However, Dr. Poletti did not review the MRI scan performed on March 12, 2009. (Defendants' APA #6, pp. 146-7). Based on the MRIs that he reviewed, Dr. Poletti stated that the fractures at the T11 level had worsened since 2007. (Claimant's APA #9, p. 127). However, Dr. Poletti did not offer an opinion as to whether Leopard's condition had worsened since February 18, 2010, the date of the last payment of compensation. (Id.) The deposition of Dr. Poletti was not taken by Leopard's Attorney.

Leopard was also sent by his attorney to Dr. Sybil Reddick, a physical medicine and rehabilitation specialist with Pain Management Associates. Dr. Reddick saw Leopard for the first time on March 15, 2011. (Claimant's APA #10, pp. 130-7). Dr. Reddick noted that on August 13, 2010, Leopard developed a severe shooting pain in his back which caused him to fall to his knees. (Id.) However, Dr. Reddick stated that the pain was in Leopard's low back rather than his mid-back. (Id.) Dr. Reddick stated that while there was no documentation indicating any derangement in the pelvis or sacrum, it was reasonable to conclude that these changes occurred as a result of the fall that led to the thoracic compression fractures and pain. (Id.) Dr. Reddick offered no opinion as to whether Leopard had suffered a change of condition for the worse since February 18, 2010. (Id.)

Leopard's Attorney took the deposition of Dr. David L. Shallcross. (Deposition of Dr. Shallcross, dated June 13, 2011, pp. 3-55). Dr. Shallcross is a medical doctor who is board certified in the field of physical medicine and rehabilitation. (Id. at 4-5). Dr. Shallcross was questioned about Leopard's office visit on April 16, 2010 and whether there was any change noted. (Id. at 15-18). Dr. Shallcross testified that he did not see any change on examination of Leopard. (Id. at 16). As to whether Leopard's compression fractures have progressed, Dr. Shallcross testified that while compression fractures can progress, he would not expect progression in someone whose fracture was as long ago as Leopard's. (Id. at 17). Dr. Shallcross reviewed the radiologist's report from the MRI performed on May 27, 2010 and testified that the findings were similar to what Leopard had previously. (Id. at 18). As to his physical examination of Leopard, Dr. Shallcross testified that his findings were similar to what Leopard had had in the past:

Q. [By Ms. Meredith] Okay. What did you find on his physical examination that day?

A. Very similar findings to what we had in the past, specifically looking at a thoracic kyphosis to be sure there wasn't any evidence of further damage to the bone. He was walking well, he had tenderness in the back. I didn't see anything really different.

(Id. at 19). After further examination by Leopard's Attorney, Dr. Shallcross again testified that his clinical evaluation of Leopard did not show any difference. (Id. at 25). Dr. Shallcross was further questioned about whether Leopard's MRIs from 2009 and 2010 showed additional cord compression. (Id. at 25). Dr. Shallcross responded that in order to make such a comparison, you would need the actual MRI film and not just the radiologist's report. (Id.) He explained that to properly compare three different MRIs (2007, 2009, and 2010), a reading radiologist or neuroimaging specialist would have to

put the MRI film side by side and make the decision as to whether there had been any change. (Id. at 26).

Dr. Shallcross also saw Leopard on December 16, 2010. (Id. at 33). Dr. Shallcross testified that Leopard's physical exam did not change, and he did not see anything different. (Id. at 33-4). Dr. Shallcross testified that the things that he looks for in a clinical examination to determine any change were changes in posture, changes in gait, changes in the way he presents himself, changes in his effect, changes in muscular tone, changes in spasms, changes in strength, changes in muscle bulk, and changes in reflexes or sensation. (Id. at 34-5). Dr. Shallcross testified that he did not detect any clinical worsening of Leopard's condition. (Id. at 42).

## STANDARD OF REVIEW

In workers' compensation cases, the South Carolina Workers' Compensation Commission is the trier of fact. Hunter v. Patrick Constr. Co., 289 S.C. 46, 344 S.E.2d 613 (1986); Shealy v. Aiken County, 341 S.C. 448, 535 S.E.2d 438 (2000). The appellate court's review of these findings of fact is limited to determining whether the findings are clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981); Howell v. Pacific Columbia Mills, 291 S.C. 469, 354 S.E.2d 384 (1987); Clade v. Champion Laboratories, 330 S.C. 8, 496 S.E.2d 856 (1998). "Substantial evidence" necessary to support a decision of the Commission is:

such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. . . . It must be enough to justify, if the trial were [sic] to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury. . . . This is something less than the weight of the evidence, and the possibility of drawing two

inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.

Lark v. Bi-Lo, Inc., 276 S.C. at 136, 276 S.E.2d at 307. The final determination of witness credibility and the weight to be accorded evidence is reserved to the Full Commission. Ford v. Allied Chem. Co., 252 S.C. 561, 167 S.E.2d 564 (1969). It is not the task of the Court to weigh the evidence or to substitute its judgment as to the weight of the evidence on questions of fact. Ellis v. Spartan Mills, 276 S.C. 216, 277 S.E.2d 590 (1981); Robbins v. Walgreen's, 375 S.C. 259, 652 S.E.2d 90 (S.C. App. 2007).

The appellate court is prohibited from overturning findings of fact of the Commission, unless there is no reasonable probability that the facts could be as related by the witness upon whose testimony the finding was based. Lowe v. Am-Can Transport Services, Inc., 283 S.C. 534, 324 S.E.2d 87 (Ct. App. 1984). The appellate court is not permitted to re-weigh the evidence and to substitute its own findings of fact for those of the Commission. Brown v. R.L. Jordan Oil Co., 291 S.C. 272, 353 S.E.2d 280 (1987). The findings of an administrative agency are presumed correct and will be set aside only if unsupported by substantial evidence. Hicks v. Piedmont Cold Storage, 335 S.C. 46, 515 S.E.2d 532 (1999).

Section 1-23-380(A)(5) of the South Carolina Code also provides:

The Court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. The Court may affirm the decision of the agency or remand a case for further proceedings. The Court may reverse or modify the decision if substantial rights of the Appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are . . . (d) affected by other error of law. . . .

S.C. Code Ann. § 1-23-380(A)(5) (2007). The mere possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence. Grant v. South Carolina Coastal Council, 319 S.C. 348, 461 S.E.2d 388 (1995). Where there is a conflict in the evidence, either of different witnesses or the same witnesses, the findings of fact of the Commission as triers of fact are conclusive. Hoxit v. Michelin Tire Corporation, 304 S.C. 461, 405 S.E.2d 407 (1991).

Thus, "review is limited to deciding whether the Commission's decision is unsupported by substantial evidence or is controlled by some error of law." Rodriguez v. Romero, 363 S.C. 80, 84, 610 S.E.2d 488, 490 (2005) (citing Hendricks v. Pickens County, 335 S.C. 405, 411, 517 S.E.2d 698, 701 (Ct. App. 1999)).

## ARGUMENT

### I.

THE COMMISSION'S FINDING THAT LEOPARD DID NOT SUFFER A CHANGE OF CONDITION FOR THE WORSE, UNDER SECTION 42-17-90, S.C. CODE ANN. (1976), IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

A. Leopard did not sustain a compensable change of condition for the worse.

A 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. Jennings v. Chambers Development Co., 335 S.C. 249, 516 S.E.2d 453 (Ct. App. 1999). A change in condition means a change in the physical condition of the claimant as a result of the original injury, occurring after the first award. Causby v. Rock Hill Printing & Finishing Co., 249 S.C. 225, 153 S.E.2d 697 (1967). To justify a modification of an award based on a change of condition, a claimant must show the change in condition and its causal connection to the original compensable accident. Gattis v. Murrells Inlet, 353 S.C. 100, 576 S.E.2d 191 (Ct. App. 2003); Krell v. S.C. State Highway Dept., 237 S.C. 584, 118 S.E.2d 322 (1961). Thus, the issue before the Commission was "sharply restricted to the question of extent of improvement or worsening of the injury on which the original order was based." Robbins v. Walgreens, 375 S.C. 259, 652 S.E.2d 90 (Ct. App. 2007) (quoting Gattis, 353 S.C. at 109, 576 S.E.2d at 196).

In the present case, substantial evidence clearly supports the Commission's decision that Leopard failed to prove that he suffered a compensable change of condition for the worse. The medical records and deposition testimony of Dr. Shallcross,

Leopard's treating physician, established that Leopard did not sustain a change of condition for the worse. (Defendants' APA #1, p. 12; Dep. Dr. Shallcross, pp. 16, 18, 19, 23, 34). The Commission appropriately relied on the opinion of Dr. Shallcross, because Dr. Shallcross was the only physician who had treated Leopard both before and after the date of the last payment of compensation.

On October 30, 2007, Leopard sustained an admitted injury to his thoracic spine arising out of and in the course of his duties as a volunteer firefighter with Greenwood County. (Accord Form 4, dated 10/31/07). On the day of his accident, Leopard presented to Self Regional with complaints of severe mid-back pain. (Defendants' APA #10, p. 184). X-rays revealed mild osteoarthritis at the lower thoracic levels and "no acute skeletal abnormality." (Id. at 190). Leopard was diagnosed with a dorsal back strain, prescribed multiple medications, and released. (Id.) Following his initial visit at Self Regional, Leopard received treatment from Dr. Dan Divilbiss at the Montgomery Center of Family Medicine. (*See* Defendants APA #7). On December 6, 2007, Dr. Divilbiss recommended a CT scan of the thoracic spine due to Leopard's continued complaints of pain. (Id. at 162). The CT scan was performed at Anderson Radiology on December 11, 2007. (Defendants APA #8). It was the radiologist's impression that Leopard had a mild flattened configuration of the central and left side of T11 vertebral body, which could be the result of chronic degenerative disc disease or a subacute fracture of the T11 vertebral body. (Id.) It was further noted that Leopard had moderate degenerative disc disease, posterior disc protrusions, and osteophytes at T10-11 and T11-12 appearing to cause ventral thecal sac effacement and possible cord effacement. (Id.) Based on his

interpretation of the CT scan, the radiologist recommended an MRI of the thoracic spine.

(Id.)

On December 19, 2007, Leopard underwent an MRI of his thoracic spine at Greenville Radiology, which revealed Schmorl's nodes and degenerative changes at multiple levels. (Defendants' APA #6, pp. 144-145). Additionally, it was noted that there was borderline impingement upon the anterior aspect of the cord at T10-11, asymmetric disc bulges towards the right with borderline impingement upon the cord at T11-12, and a minimal disc bulge lying upon the anterior margin of the cord at T6-7.

(Id.) Following the MRI, Leopard was referred to Dr. Phillip J. Hodge for a neurosurgical consultation. (Defendants' APA #5, p. 128).

On February 19, 2008, Dr. Hodge examined Leopard, reviewed the December 19, 2007 MRI, and advised that it showed degenerative changes of the thoracic spine without fracture or disc herniation. (Defendants' APA #5, p. 128). Dr. Hodge opined that Leopard's injuries were muscular or ligamentous in nature and would improve with time. (Id. at 130). Following his initial visit on February 19, 2008, Leopard continued to receive conservative treatment from Dr. Hodge, including medications and work restrictions. (Id. at 131-135). On May 12, 2008, Dr. Hodge examined Leopard and opined that he had reached maximum medical improvement with a 3% impairment to the whole person due to his thoracic soft tissue injury. (Id. at 135). Dr. Hodge further opined that Leopard could return to work without restriction but that he "may need intermittent anti-inflammatories and physical therapy to function optimally." (Id.)

On March 9, 2009, Leopard returned to Dr. Hodge with continued complaints of pain. (Id. at 138). Due to Leopard's complaints, Dr. Hodge ordered another MRI of his

thoracic spine. (Id. at 139). The MRI was performed on March 12, 2009, and revealed minor thoracic scoliosis and “Schmorl’s nodes throughout the mid and lower thoracic spine.” (Defendants APA #6, p. 146-147). It was further noted that “a combination of disc herniation and spondylosis produces central canal stenosis at the T10-11 level and mildly compresses the thoracic cord” and that similar changes were present at T11-12, but to a lesser degree. (Id.) On March 23, 2009, Leopard was seen in follow-up by Dr. Hodge, who advised that Leopard’s recent thoracic spine MRI showed some stenosis in the lower thoracic region, mild degenerative disc bulge with minimal flattening of the cord at T10-11, and a central disc protrusion that rotates the cord to the left at T11-12. (Defendants APA #5, p. 142). Dr. Hodge further noted that Leopard had mildly increased reflexes but no other symptoms of myelopathy. (Id.) Dr. Hodge did not recommend surgery, advised that his impairment rating and restrictions remained the same, and recommended a referral to pain management. (Id.)

On June 4, 2009, Leopard was seen for pain management by Dr. David L Shallcross of Upstate Medical Rehabilitation. (Defendants APA #1, p. 1). After examining Leopard, Dr. Shallcross diagnosed a muscular thoracic sprain superimposed on thoracic herniated disc and probable mild compression fracture. (Id. at 2). Dr. Shallcross recommended physical therapy, a TENS unit, and additional medications. Id. Thereafter, Dr. Shallcross provided treatment, including trigger point injections and facet injections. (*See* Id. at 4-7). On October 8, 2009, Dr. Shallcross opined that Leopard had reached maximum medical improvement. (Id. at 8). Dr. Shallcross released Leopard to continue working without restriction and opined that he had sustained 25% impairment to his spine as a result of the August 30, 2007 work accident. (Id.)

On February 10, 2010, the parties settled Leopard's claim on a Form 16A, which was approved by the Commission on February 11, 2010. (Form 16A, approved 2/11/10). On February 18, 2010, Leopard signed a Form 19 acknowledging that he had received payment of compensation pursuant to the Form 16A. (Form 19). Leopard alleges that he sustained a change of condition for the worse during the twelve (12) months after February 18, 2010, the date of the last payment of compensation; however, the medical records and deposition testimony of Dr. Shallcross do not support Leopard's allegation.

On April 16, 2010, Leopard returned to Dr. Shallcross again complaining of mid back pain. (Id. at 9). Leopard also complained of some intermittent right leg pain. (Id.) After examining Leopard, Dr. Shallcross diagnosed Leopard with "mechanical back pain with no evidence of true radiculopathy or myelopathy." (Id.) At his deposition on June 13, 2011, Leopard's Attorney specifically questioned Dr. Shallcross about his physical examination findings on April 16, 2010 visit, and Dr. Shallcross testified that he did *not* see any changes in his physical examination:

Q: [Ms. Meredith] And on exam did you see any changes?

A: I did not. I was concerned, of course, because he had problems in his mid-thoracic spine and worried that perhaps the leg problems were coming from the mid-thoracic spine, but I saw no evidence of that.

(Shallcross Depo. 16:2-6).

On May 7, 2010, Leopard underwent an MRI of his thoracic spine, which revealed "disc protrusions at T10-11 and T11-12 contributing to some relative central canal stenosis without cord compression appreciated." (Defendants' APA #3, p. 37). On May 27, 2010, Leopard returned to Dr. Shallcross for a follow-up appointment. (Defendants' APA #1, p. 10). When asked about Leopard's May 27, 2010 visit, Dr.

Shallcross testified that he reviewed the radiologist's report from the MRI performed on May 7, 2010 and that the findings were very similar to what Leopard had previously. (Shallcross Depo. 18:12-21). As to his physical examination of Leopard on May 27, 2010, Dr. Shallcross testified that his findings were also very similar to what Leopard had had in the past:

Q: [Ms. Meredith] Okay. What did you find on his physical exam that day?

A: Very similar findings to what we had in the past, specifically looking at a thoracic kyphosis to be sure there wasn't any evidence of further damage to the bones. He was walking well, and he had tenderness in the back. I didn't see anything really different.

(Id. at 19:10-17).

On September 21, 2010, Leopard returned to Dr. Shallcross for a follow-up appointment. (Defendants' APA #1, p. 12). After performing a physical examination on Leopard, Dr. Shallcross opined in his office note:

**Clinically I cannot see any true worsening in this patient's condition, but he is complaining of increase pain and I think at this point he is having an attorney help him decide on disability and out of work issues.**

(Id.) (Emphasis added). At his deposition, Dr. Shallcross confirmed that he did not see a true worsening of Leopard's condition on September 21, 2010. (Depo. 23:21-24). He further testified that there was no change in Leopard's physical examination on September 21, 2010 when compared to his previous physical examinations. (Id. at 29:1-3).

Dr. Shallcross examined Leopard again on December 16, 2010. (Defendants' APA #1, p. 16). When asked about his physical examination of Leopard on December 16, 2010, Dr. Shallcross testified that he "didn't see anything different." (Depo. 33:25 –

34:4). Even though Dr. Shallcross noted that Leopard reported increased pain on December 16, 2010, Dr. Shallcross testified at his deposition that “he had an increase in pain *without* any clinical worsening that I could see.” (Id. at 43:16-17). Dr. Shallcross further testified that pain is a subjective complaint and that there is no way to determine if Leopard was actually suffering from more pain:

Q: [Mr. Kale] Okay. Is pain a subjective complaint?

A: Yes.

Q: Is there any way to measure it?

A: No.

Q: Is there any way that you can determine whether or not somebody is suffering more pain than not?

A: In acute-pain situation, we can often look at vital signs and etcetera. In a chronic-pain situation, it's extremely difficult.

Q: In Mr. Leopard's situation, it would be difficult?

A: Yes.

(Id. at 52:12-22).

Leopard argues that Dr. Shallcross' records and testimony were contradictory, because he initially stated that Leopard's condition had worsened, but later recanted. Greenwood County would submit that Leopard's argument in this regard is a misstatement of Dr. Shallcross' report of December 16, 2010. (Defendants' APA #1, p. 16). Dr. Shallcross stated in his report: “He has an aggravation of his mid thoracic pain and needs to have this brought to a conclusion.” (Id.) (Emphasis added). In fact, Dr. Shallcross consistently stated in his reports and his deposition testimony that Leopard was complaining of increased pain. (Defendants' APA #1, p. 12; Deposition Dr.

Shallcross, pp. 23, 26). However, Dr. Shallcross also consistently stated in his reports and deposition testimony that Leopard had not suffered a clinical change of condition for the worse. (Defendants' APA #1, p. 12; Deposition Dr. Shallcross, pp. 16, 18, 23, 29, 34). Indeed, when asked by Leopard's Attorney to explain his position, Dr. Shallcross clearly testified:

He had had an increase in pain without any clinical worsening that I could see.

(Deposition Dr. Shallcross, p. 34). Moreover, Leopard misstates Dr. Shallcross' testimony as to what he looks for in determining a change in a clinical exam. (Appellant's Brief, p. 11). Dr. Shallcross actually testified:

EXAMINATION BY MS. MEREDITH RESUMES:

- Q. Okay. Well as far as your clinical exam, what would you say -- what are you looking for as far as a change on his clinical exam in order to determine if he's had a change of condition?
- A. A change in posture, a change in gait, and a change in the way he presents himself, a change in the way his affect of his -- his -- comes across in his facial expressions and his words, a change in muscular tone when I touch him, whether he has spasms, whether one side of his back sticks out or another, whether there is a change in his strength, whether there is a change in muscle bulk, whether there's a change in reflexes or sensation.

(Deposition Dr. Shallcross, pp. 34-35).

The medical records and deposition testimony of Dr. Shallcross, the authorized treating physician, clearly support the Commission's finding that Leopard did not sustain a compensable change of condition for the worse. As noted above, a change in condition means a change in the *physical condition* of a claimant as a result of the original injury,

occurring after the first award. Causby, *supra*. While Leopard may have reported an increase in pain to Dr. Shallcross, there is no evidence that Leopard's physical condition actually worsened. In fact, Dr. Shallcross testified multiple times at his deposition that he never detected any clinical worsening of Leopard's condition.

Leopard argues in his brief that the Commission erred in finding that he did not sustain a compensable change of condition because of the minor differences in the radiologists' reports regarding Leopard's MRIs in 2007, 2009, and 2010. However, each MRI was reviewed by a different radiologist. Thus, the minor differences in the reports are most probably due to the fact that different radiologists, who can all have different readings, interpreted the reports. In fact, Dr. Shallcross testified at his deposition that all of the MRIs "describe similar sort of things." (Shallcross Depo. 24:19 – 25:2). While Dr. Shallcross testified that to properly compare the different MRIs, a reading radiologist or neuroimaging specialist would have to put the MRI film<sup>1</sup> side by side and make the decision as to whether there had been any change, Dr. Shallcross testified that he did not think that was necessary, because there was no change in Leopard's clinical condition. (Id. at 27:24 – 28:16). (Emphasis added).

Leopard also argues in his brief that there is evidence that he sustained a change in his physical condition because he began having subjective complaints of right leg pain during the twelve (12) months following the date of the last payment of compensation. However, there is no evidence that Leopard's subjective complaints of right leg pain are causally-related to his original October 30, 2007 thoracic spine injury. Leopard first complained of intermittent right leg pain to Dr. Shallcross on April 16, 2010.

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<sup>1</sup> Leopard's Attorney did not provide Dr. Shallcross with the MRI films to review, only the radiologist's reports of the MRI.

(Defendants' APA #1, p. 9). However, Dr. Shallcross's physical examination revealed "no evidence of true radiculopathy or myelopathy." (Id.) Dr. Shallcross also testified at his deposition that he saw no evidence that Leopard's reported right leg pain was caused by his thoracic spine condition. (Shallcross Depo. 16:2-6).

Furthermore, on August 13, 2010, Leopard was seen for an emergency consultation by Dr. Wayne B. Sida, a neurologist at Piedmont Health Group. (Claimant's APA #8, p. 123). Dr. Sida noted that Leopard cut grass the day before and that he woke up that morning and developed a severe shooting pain in his back. (Id.) While he indicated that Leopard had episodic numbness and pain into the right lower extremity, Dr. Sida opined that Leopard's numbness and pain in his right lower extremity was "unexpected" given the location of his lower thoracic/upper lumbar spine disease. (Id. at 124). However, due to Leopard's complaints, Dr. Sida ordered EMG studies and SSEP studies. (Id.) An electrodiagnostic study of Leopard's right lower extremity, dated August 23, 2010, was normal and showed "*no electrodiagnostic evidence of nerve entrapment, generalized peripheral neuropathy, or lumbar radiculopathy.*" (Id. at 116). (Emphasis added). Leopard returned to Dr. Sida on August 23, 2010, and Dr. Sida noted that Leopard's "pain level had diminished significantly and is near baseline." (Id. at 115). On September 9, 2010, Leopard underwent a bilateral tibial SSEP study, which was *normal*. (Id. at 113).

As held in Gattis, supra, and Krell, supra, Leopard had the burden of proving a change in condition, and it must be causally connected with the original compensable accident. In the present case, there is no evidence that Leopard's self-reported complaints of right leg pain are causally-related to his October 30, 2007 work accident.

Thus, even assuming that Leopard developed subjective right leg pain during the twelve (12) months following the date of the last payment of compensation, this is irrelevant to the determination of whether Leopard sustained a compensable change of condition for the worse, because Leopard's subjective complaints of right leg pain are not causally-related to his October 30, 2007 work accident.

**B. The opinions of Dr. Poletti and Dr. Reddick are unreliable and were correctly given little weight by the Commission.**

Expert medical testimony is designed to aid the Workers' Compensation Commission in coming to the correct conclusion, and therefore, the Commission determines the weight and credit to be given to expert testimony. Sharpe v. Case Produce, Inc., 336 S.C. 154, 519 S.E.2d 102 (1999). Probative value of expert testimony stands or falls with existence or nonexistence of facts upon which it is predicated. Glenn v. Dunean Mills, 242 S.C. 535, 131 S.E.2d 696 (1963). The preponderance of the evidence supports the Commission's decision to give very little weight to the opinions of Dr. Poletti and Dr. Reddick. Leopard relies on the opinions of Dr. Polletti and Dr. Reddick to support his position that he sustained a compensable change of condition for the worse; however, as discussed below, the opinions of Dr. Polletti and Dr. Reddick are inherently flawed.

On November 17, 2010, Leopard was sent by his attorney to Dr. Steven C. Poletti for an independent medical evaluation. (Claimant's APA #9, p. 128). ***This was the first time Dr. Poletti ever examined Leopard.*** Dr. Poletti never treated or evaluated Leopard prior to February 18, 2010, the date of the last payment of compensation. Dr. Poletti opined that Leopard had a thoracic fracture at T11 with multi level degenerative disease aggravated by his fall, that Leopard had a 15% impairment rating as a result of the

fracture, and that he would not recommend surgical intervention. (Id.) On March 16, 2011, more than one year after the last payment of compensation, Dr. Poletti did an addendum to his initial report after reviewing Leopard's MRI and CT scans from 2007 and 2010. He opined that Leopard's fractures at the T11 level had worsened. (Id.) While Dr. Poletti reviewed Leopard's MRI and CT scans from 2007 and 2010, Dr. Poletti did *not* review Leopard's March 12, 2009 thoracic spine MRI. Therefore, while Dr. Poletti may be in a position to give an opinion as to whether Leopard's fracture worsened sometime between 2007 and 2010, he could not give a credible and reliable opinion that Leopard's fracture worsened after February 18, 2010, the date of the last payment of compensation. Thus, the Commission correctly gave Dr. Poletti's opinion concerning Leopard's alleged change of condition very little weight.

Leopard was also sent by his attorney to Dr. Sybil Reddick, a physical medicine and rehabilitation specialist with Pain Management Associates. (Claimant's APA #10, p. 130). *Dr. Reddick saw Leopard for the first time on March 15, 2011, approximately a year and one month after the last payment of compensation.* (Id. at 133). Since Dr. Reddick did not see Leopard within the twelve month change of condition period, her opinion must be given very little to no weight. Dr. Reddick noted that on August 13, 2010, Leopard developed a severe shooting pain in his back which caused him to fall to his knees. (Id. at 134). Dr. Reddick noted that the pain was in Leopard's low back rather than his mid-back. (Id.) Dr. Reddick opined that even though there was no documentation indicating any derangement in the pelvis or sacrum, it was reasonable to conclude that these changes occurred as a result of the fall that led to the thoracic compression fractures and pain. (Id. at 137). Dr. Reddick offered *no* opinion as to

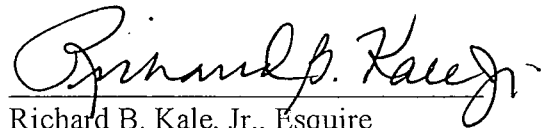
whether Leopard had suffered a change of condition for the worse within twelve months after February 18, 2010, the date of the last payment of compensation. (Id.) Additionally, like Dr. Poletti, Dr. Reddick did not review Leopard's March 12, 2009 MRI. Thus, Dr. Reddick's opinion could not be relied upon to find that Leopard's condition changed after February 18, 2010, the date of the last payment of compensation. As such, the Commission correctly gave Dr. Reddick's opinion very little weight.

### CONCLUSION

For the foregoing reasons, the Commission's Orders were supported by reliable, probative and substantial evidence. Therefore, the Orders of the South Carolina Workers' Compensation Commission, dated October 21, 2011 and May 8, 2012, should be affirmed.

Respectfully submitted,

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