THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Commissioners Melody L. James, T. Scott Beck, and Aisha Taylor

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W.C.C. File No. 0908371

Timothy Hannah, Employee, Claimant ..... Respondent,

v.

MJV, Inc./Butler Trucking, Employer, and
Palmetto Timber S.I. Fund c/o
Walker, Hunter & Associates, Inc., Carrier, ... Appellants.

REPLY TO CLAIMANT'S OPPOSITION TO PETITION FOR REHEARING

Claimant presents no valid reasons why this Court should not grant rehearing in this case. Claimant's arguments against Appellants' Petition for Rehearing avoid the core issues and are little more than an attempt to disparage Appellants and distract this Court's attention from the facts that his current claim is barred by either *res judicata* or laches, that he effectively took himself outside of the Workers' Compensation Act by seeking medical treatment on his own such that he cannot bootstrap a permanent disability award on that unauthorized treatment, and that the Commission failed to provide any reason for denying Appellants a credit.

I. This Court overlooked and/or misapprehended key factual and legal points in concluding Claimant's current claim is not barred by *res judicata.*

Looking to a portion of the standard for *res judicata*, Claimant argues that Appellants "did not claim that Mr. Hannah's C-spine claim *could have* been asserted during the pendency of the prior litigation/appeal." Appellants did not need to argue that Claimant's cervical spine *could have* been argued to the Commission and this Court in the prior appeal, because they argued that it *was raised* specifically in the prior appeal. (*See* Brief of Appellants, p. 2 (referencing the first appeal to this Court, "Claimant also argued that he had not reached MMI for his cervical spine and left elbow, and disputed the Commission's finding that he 'has no remaining impairments from the truck wreck.'" ([Claimant's/]Appellant's Final Brief, Appeal No. 2011-197631, filed March 21, 2012, R. pp. 105, 119, 132)")) (*see also* Appellants' Reply Brief, p. ("[a]lthough Claimant's Brief to this Court in Appellate Case No. 2011-197631 focused on the compensability of his lower back, Claimant also argued that he had not reached MMI for his cervical spine and left elbow, and disputed the Commission's finding that he 'has no remaining impairments from the truck wreck.' ([Claimant's/]Appellant's Final Brief, filed March 21, 2012, R. pp. 105, 119, 132)")). Because the issue of Claimant's cervical spine not only could have been raised but, in fact, actually was raised before this Court in the prior appeal, this Court erred in holding that *res judicata* did not bar Claimant's current claim. As a result, this Court should grant rehearing and hold that Claimant's claim is barred by *res judicata.*

Next, Claimant suggests that the argument that he failed to timely file his change of condition claim is "waived" because it was not raised previously. However, Appellants sufficiently raised this defense both before the Commission and this Court to preserve it

for this Court's review. First, Appellants' January 16, 2013 Form 50 raised, among other things, the following defenses: "[i]mproper filing of change of condition claim; No medical evidence to support change of condition claim." (Form 51, dated Jan. 16, 2013, R. pp. 167-168). Second, in response to Plaintiff's Brief to this Court, in which Claimant essentially conceded that he had given "late notice that his condition worsened," (Final Brief of Respondent, p. 17), Appellants again addressed this issue. (*See* Reply Brief of Appellants, p. 9 n.4 (pointing out that Appellants opposed Claimant's current claim on the basis that his Form 50 was an "[i]mproper filing of change of condition claim," among other defenses), p. 11 (rejecting Claimant's argument that giving notice of his alleged change of condition would have been a futile act)). Thus, Appellants sufficiently and adequately raised their argument that Claimant's change of condition claim was improperly filed both to the Commission and to this Court. *See, e.g.*, Stephens v. CSX Transp., Inc., 415 S.C. 182, 200, 781 S.E.2d 534, 543 (2015) (a party is not required to use the precise name of a legal doctrine in order to preserve it for appellate review); Johnson v. Roberts, 422 S.C. 406, 411-412, 812 S.E.2d 207, 210 (Ct. App. 2018) ("issue preservation 'is not a "gotcha" game aimed at embarrassing attorneys or harming litigants,'" and "where the question of issue preservation is subject to multiple interpretations, any doubt should be resolved in favor of preservation"). Third, because the Commission did not rule on the basis that Claimant had brought a valid change of condition claim, (R. pp. 12-14), and Claimant did not raise such an argument his Final Brief of Respondent to this Court, Appellants are fully entitled to address this Court's ruling on the basis of Section 42-17-90(A).

Significantly, Claimant does not even attempt to argue that his change of condition claim was timely filed, which is a clear concession of that point. As a result, the fact that Claimant did not file an even remotely timely change of condition claim serves as a valid and sufficient basis for this Court to grant rehearing and hold that Claimant's claim is barred by *res judicata*.

In addition, as Appellants noted and Claimant fails to dispute by pointing to any specific medical evidence in the record, Claimant failed to prove by a preponderance of the evidence that his condition had changed for the worse.[1] It bears repeating that, to the extent this Court's opinion rests on the determination that the surgery provided by Dr. Brennan was the same surgery recommended by Dr. Triana, then, logically and factually, Claimant's condition did not and could not have changed for the worse between Dr. Triana's recommendation" on January 14, 2010, (R. p. 185), and Dr. Brennan's surgery on June 4, 2012. (R. p. 275, lines 22-25).

Claimant points to his own testimony as the sole basis for his argument that he proved by a preponderance of the evidence that he suffered a change of condition for the worse. "Allowing" a claimant's testimony as to when a claimant's pain worsened in order to prove causation, as was the case in Burnette v. City of Greenville, 401 S.C. 417, 737 S.E.2d 200 (Ct. App. 2012), and relying solely on a claimant's testimony to prove by

[1] Instead, Claimant's focus is primarily procedural, *i.e.*, alleging Appellants' argument is conclusory and unsupported. However, Claimant's counsel is well aware that the standard set out in Appellants' Petition comes directly from the Act: "On its own motion or on the application of a party in interest on the ground of a change in condition, the commission may review an award and on that review may make an award ending, diminishing, or increasing the compensation previously awarded, *on proof by a preponderance of the evidence* that there has been a change of condition caused by the original injury, after the last payment of compensation." S.C. Code Ann. § 42-17-90(A) (emphasis added).

a preponderance of the evidence that his or her condition has changed for the worse are not the same things. *See*, Carter v. Verizon Wireless, 407 S.C. 641, 648-649, 757 S.E.2d 528, 531-532 (Ct. App. 2014) (relying on both medical and lay testimony to determine whether Commission's resolution of change of condition claim was supported by adequate evidence); Causby v. Rock Hill Printing & Finishing Co., 249 S.C. 225, 230, 153 S.E.2d 697, 700 (1967) (in a case decided before the "preponderance of the evidence" standard was added to Section 42-17-90(A), reversing the Commission's determination that the claimant had proven a change of condition for the worse because the medical evidence indicated that the painful condition that a subsequent surgery was intended to alleviate "existed at and prior the date of the original award").

In fact, the evidence this Court highlighted in its determination that laches does not apply – Dr. Brennan's testimony that he believed he was performing the same surgery previously recommended by Dr. Triana, (R. p. 338, lines 4-20), is in direct contradiction to any finding that Claimant suffered a compensable change of condition for the worse. As Claimant so aptly points out, the Commission stated that the surgery performed by Dr. Brennan is the same surgery recommended by Dr. Triana. (R. pp. 11, 22-23). While not an official finding of fact or conclusion of law, that statement is contained in a section of the Full Commission Decision titled "Full Commission Appellate Panel Reasoning." Claimant further argues that the Commission's finding on this issue, as the ultimate finder of fact, *e.g.*, Long v. Atlantic Homes, 311 S.C. 237, 242, 428 S.E.2d 711, 714 (1993), is binding on the parties and this Court. Assuming, solely for the sake of argument, it has been established that the surgery Dr. Brennan performed in 2012 is the very same surgery recommended by Dr. Trianna in 2010, well before the 2011

Commission Decision, (R. pp. 64-75), Claimant cannot establish a change of condition for the worse for purposes of avoiding the operation of *res judicata*. Either he was in need of surgery in 2010 when Dr. Triana recommended it, or he was not. Because his current claim is based entirely on the surgery performed by Dr. Brennan, if that is the same surgery Dr. Triana recommended, his current claim is barred by *res judicata*. He cannot have it both ways. Consequently, and because Claimant has taken the position that the Commission's finding on this issue is binding, this Court erred in determining that Claimant's current claim was a compensable change of condition for the worse. As a result, this Court should grant rehearing and find that Claimant's current claim is barred by *res judicata*.

II. This Court overlooked and/or misapprehended key factual and legal points in concluding Claimant's current claim is not barred by laches.

Claimant's arguments as to laches, as noted above, essentially prove that *res judicata* is appropriate in this case because he has not and cannot prove by a preponderance of the evidence that he suffered a change of condition for the worse. The claim he raised below is the same claim he raised in 2010. In addition, regardless of whether the surgery performed by Dr. Brennan was the same surgery recommended previously by Dr. Triana, Appellants were prejudiced by Claimant going outside of the terms of the Act and having serious surgery performed, all without any request or notice to Appellants, and then using the result of that surgery as the basis for a disability award.

Because Claimant has no rational or acceptable explanation of why, given that he was represented by experienced and learned counsel, he failed to request any additional treatment for his cervical spine, Claimant continues to assert that proper medical treatment for his compensable injury was somehow "denied" or "circumvented." Such

assertions are meritless and serve no end other than to attempt to distract the Court and disparage Appellants. The fact of the matter is that Claimant can point to no denial of treatment and the Commission has never found that Appellants denied appropriate causally related medical treatment. As a result, Claimant's statement in footnote one of his Reply should be disregarded as the unsupported and unwarranted attack that it is.

Inexplicably, Claimant equates Appellants' denial of treatment to his lumbar spine and/or lower back with an alleged denial of treatment to his compensable cervical spine injury.[2] Given that both the Commission and this Court determined that Claimant's cervical spine and left elbow injuries were compensable but his lumbar spine injury was not work-related, (R. pp. 50, 72-74), it is perplexing that Claimant argues that denial of treatment for his non-related body parts justified his failure to request further treatment to his compensable body part. This is not a case where Claimant was proceeding *pro se* or had incompetent counsel and justifiably could have been confused as to which body parts had been accepted and which had been denied. Here, as Appellants pointed out in their Petition, the "circumstances," including the fact that he had competent legal counsel, afforded Claimant the "opportunity for diligence, to do what in law should have been done." Muir v. C.R. Bard, Inc., 336 S.C. 266, 296, 519 S.E.2d 583, 598 (Ct. App. 1999). Claimant also suggests that, because the equitable doctrine of laches is discretionary, the fact that Claimant misunderstood whether he could seek additional care for his cervical spine – the body part that had been accepted consistently by Appellants and ruled to be compensable – is evidence that the Commission did not abuse its discretion. However,

[2] This is not a mere "mincing" of words, as Claimant suggests. An employer is required to provide medical treatment only for compensable injuries. Munn v. Nucor Steel, 336 S.C. 28, 32, 518 S.E.2d 289, 290 (Ct. App. 1999).

his equity argument fails to note that he was represented throughout by capable counsel and that he presented no rational explanation as to why either he or is counsel believed his neck suddenly was no longer compensable.

Furthermore, the Commission and this Court erred in concluding that laches do not bar Claimant's current claim, even under an abuse of discretion standard. "An abuse of discretion arises where the trial court was controlled by an error of law or where its order is based on factual conclusions that are without evidentiary support." Richland County v. South Carolina Dep't of Rev., 422 S.C. 292, 307, 811 S.E.2d 758, 766 (2018). As Appellants have pointed out repeatedly, the conclusion that the surgery Dr. Brennan performed to the C6-7 vertebrae is the same surgery Dr. Triana recommended years previously to the C5-6 vertebrae is based on nothing more than Dr. Brennan's unsupported speculation. Dr. Brennan acknowledged that he did not speak to Dr. Triana directly about this case. (R. 340, lines 8-10). In the end, Dr. Brennan was asked, "Well, that -- that's a guess, you don't really know what he was --," to which Dr. Brennan responded, "Yeah. I -- I would only assume, yeah." (R. 341, lines 16-18). Assumption is at the heart of speculation.[3] And it is axiomatic that workers' compensation awards cannot be based on surmise, conjecture or speculation. *E.g.*, Tiller v. Nat'l Health Care Ctr., 334 S.C. 333, 339, 513 S.E.2d 843, 845 (1999).

This Court should grant rehearing and hold that, if Claimant's claim is not barred by *res judicata*, it is barred by laches.

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[3] Claimant's assertion that, even if Claimant had sought additional treatment for his cervical spine, Appellants "would likely have denied the claim and refused the care and we would all likely be in the same procedural position we are in now," is, again, entirely unsupported and intended solely to disparage Appellants. Claimant has pointed to no evidence whatsoever that Appellants denied treatment to Claimant's compensable injuries and his disparaging speculation and attacks are unwarranted.

III. This Court overlooked and/or misapprehended key factual and legal points in affirming the Commission's award of permanent disability based on unauthorized surgery and resulting impairment rating.

Claimant does not address this argument at all, which indicates that he essentially has conceded it. It bears repeating that, "[g]enerally, a claimant may obtain compensation *only* by accepting services from the employer's choice of providers." Hall v. United Rentals, Inc., 371 S.C. 69, 86, 636 S.E.2d 876, 885 (Ct. App. 2006) (emphasis added).[4] Furthermore, an employer's obligation to pay disability benefits "grows solely out of statutory law. Except for the Workers' Compensation Act no benefits whatever would be paid except perhaps by reason of a common law tort action." Bartley v. Bartley Logging Co., 293 S.C. 88, 91, 359 S.E.2d 55, 56 (1987). Here, Claimant failed to comply with the provisions of S.C. Code Ann. 42-15-60(A), by unjustifiably embarking on his own to seek medical treatment, onto which he later bootstrapped his claim for permanent disability benefits. Having abandoned the provisions of the Act, he should not now be allowed to cloak himself in the protections of the Act in order to force Appellants, who have met their statutory obligations throughout this case, to pay benefits based on unauthorized, unrequested and unnoticed cervical surgery. The consequences of Claimant's alleged failure to understand his rights and obligations under the Act should fall on Claimant, who has been represented throughout by counsel, and not on Appellants, who have complied with their obligations under the Act.

[4] There is no valid dispute that *none* of the exceptions listed in Section 42-15-60(A) apply in this case.

IV. This Court overlooked and/or misapprehended key factual and legal points in affirming the Commission's denial of a credit to Appellants.

Claimant's argument regarding Appellants' entitlement to a credit under S.C. Code Ann. § 42-9-210 fails to address in any meaningful manner the fact that the Commission's denial contains no findings of fact and points to no evidence to support its conclusion. Claimant asserts that the Commission Decision on rehearing devotes "more than two full pages explaining its analysis, thereby providing the basis for its findings and conclusions." However, as noted above, the section of the Commission Decision entitled "Full Commission Appellate Panel Reasoning" is not an official finding of fact or conclusion of law. The same is true as to the section of the Commission Decision on rehearing entitled "Amendments to Original Order and Decision of the Full Commission." It is only the latter section, (R. pp. 11-12), that addresses the credit issue at all and, even then, it merely recites the arguments of the parties and states, "[t]he request for credit for overpayment is denied." There is no analysis, no reasoning, no findings of fact to support this conclusion, just as there are none to support the Commission's formal denial of a credit. As a result, because there are NO detailed findings of fact to support the Commission's conclusion, it must be remanded for further explanation of the facts and basis for the Commission's determination of this issue. *See, e.g.*, Grant v. Grant Textiles, 372 S.C. 196, 202-203, 641 S.E.2d 869, 872 (2007) (reversible error where the Commission fails "to clearly set forth the underlying facts upon which it relied to support its conclusion"); Gray v. Laurens Mills, 231 S.C. 488, 492, 99 S.E.2d 36, 38 (1957) (requiring Commission to "make such specific and definite findings upon the evidence reported as will enable this court to determine whether the general finding or conclusion should stand").

Claimant misconstrues the principle for which Appellants cite Hendricks v. Pickens County, 335 S.C. 405, 517 S.E.2d 698 (Ct. App. 1999), Curiel v. Environmental Mgmt. Servs., 376 S.C. 23, 655 S.E.2d 482 (2007), and Watson v. Xtra Mile Driver Training, Inc., 399 S.C. 455, 732 S.E.2d 190 (Ct. App. 2012). Those cases demonstrate that a claimant's entitlement to TTD ends at the date of maximum medical improvement, not the date of a hearing or of an award. Claimant does not challenge this point and should be deemed to have conceded that his entitlement to TTD ended on the date he reached MMI, or on February 10, 2010. (R. pp. 76, 100).

Instead, he again plays on this Court's sympathies, arguing (without any legal basis) that the date Claimant agreed he could return to work was not chosen by Claimant but, rather, was chosen by Appellants. Claimant acknowledged that he can read and write. "A person who signs a contract or other written document cannot avoid the effect of the document by claiming that he did not read it." Wachovia Bank, N.A. v. Blackburn, 407 S.C. 321, 755 S.E.2d 437 (2014), *citing* Regions Bank v. Schmauch, 354 S.C. 648, 663, 582 S.E.2d 432, 440 (Ct. App. 2003). "[W]hen a person signs a document, he is responsible for exercising reasonable care to protect himself by reading the document and making sure of its contents." Wachovia Bank, 407 S.C. at 333, 755 S.E.2d at 443; *see also* Evans v. State Farm Mut. Auto. Ins. Co., 269 S.C. 584, 587, 239 S.E.2d 76, 77 (1977) (a person signing a written document "should read it and avail himself of every reasonable opportunity to understand its content and meaning"). Furthermore, Claimant signed the Form 17s in his attorney's office and he acknowledged that he consulted with his attorney before he signed them. (R. p. 269, line 16 – 271, line 5). If either Claimant or his counsel failed to read the Form 17 or notice that the date Claimant was agreeing he

could return to work was February 2, 2010, again, the consequences of that failure should be on Claimant and his counsel, not Appellants.

Finally, if Claimant believed laches should bar Appellants' request for a credit, then he could and should have raised this defense before the Commission. He did not. As a result, and as he acknowledges, he cannot raise this argument for the first time on appeal. *E.g.*, Wall v. C.Y. Thomason Co., 232 S.C. 153, 156, 101 S.E.2d 286, 288 (1957). Furthermore, there is no indication that the Commission denied Appellants a credit based on the timing of their request, just as there is no indication whatsoever for the basis of the Commission's denial. Consequently, this Court must remand for further determination by the Commission regarding this issue. Grant, 372 S.C. 202-203, 641 S.E.2d 872 (reversible error where the Commission fails "to clearly set forth the underlying facts upon which it relied to support its conclusion"); Gray, 231 S.C. at 492, 99 S.E.2d at 38 (requiring Commission to "make such specific and definite findings upon the evidence reported as will enable this court to determine whether the general finding or conclusion should stand").

Claimant's argument that no remand should issue from this Court on the basis of the Supreme Court's recent ruling in Russell v. Wal-Mart Stores, 426 S.C. 281, 826 S.E.2d 863 (2019), is both misplaced and erroneous. In Russell, the Court was considering whether a third remand from the appellate panel of the Full Commission back to the single commissioner for a third full evidentiary hearing was appropriate. Unlike in Russell, here, the protracted nature of this litigation is attributable in large part to Claimant, who first sought treatment and compensation for a non-work related injury to his lumbar spine, and appealed that issue along with others to this Court. He later

sought medical treatment for his compensable cervical injury on his own and then attempted to bootstrap a permanent disability award on that unauthorized treatment.

Furthermore, Appellants' request that this Court remand to the Commission on the credit issue is supported by case law, Grant, 372 S.C. 202-203, 641 S.E.2d 872; Gray, 231 S.C. at 492, 99 S.E.2d at 38, and will require no remand to a single commissioner for further evidentiary hearings. Claimant's speculation that the Commission "is just as likely as not to make its own remand, directing a Single Commissioner to make fact findings as to the denial of TTD credit," is little more than scare-mongering and somewhat specious in light of the Supreme Court's strong opinion in Russell. Remand to the Commission for it to set out sufficient findings of fact to support its determination of the credit issue, so that the parties and this Court are assured that decision is not based on an abuse of discretion, will not require any further evidentiary hearings.

CONCLUSION

For all the reasons stated herein and in their Petition for Rehearing, this Court should grant Appellants' Petition, reverse the Commission Decision and hold that Claimant's claim for permanent disability benefits is barred by the doctrines of *res judicata* and/or laches, and that claimants cannot unilaterally seek out medical treatment for admitted injuries without first requesting the same from the employer, and then effectively bootstrap a disability award on ratings provided by the unauthorized treating physician. Finally, this Court should either award Appellants a credit for overpayment of TTD benefits paid from February 10, 2010 through August 16, 2011 or remand to the Commission for proper findings of fact on this issue.

Respectfully submitted,

July 19, 2019

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Commissioners Melody L. James, T. Scott Beck, and Aisha Taylor

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W.C.C. File No. 0908371

Timothy Hannah, Employee, Claimant ..... Respondent,

v.

MJV, Inc./Butler Trucking, Employer, and
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Walker, Hunter & Associates, Inc., Carrier, ... Appellants.

PROOF OF SERVICE

I certify that I have served the Appellants' **Reply to Claimant's Opposition to Petition for Rehearing** on Respondent Timothy Hannah by depositing a copy of it in the United States Mail, postage prepaid, on the 19th day of July, 2019, addressed to his counsel of record as follows:

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mgc | INSURANCE DEFENSE

Reply To
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July 19, 2019

VIA U.S. MAIL
The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
P.O. Box 11629
Columbia, South Carolina 29211

RE: Timothy Hannah v. MJV/Butler Trucking, Inc. and Palmetto Timber S.I. Fund c/o Walker, Hunter, and Associates
Date of Accident: July 14, 2009
WCC File No.: 0908371
Our File No.: 2069.10005
Claim No.: 0001-0593-09-0002
Appeal No.: 2016-001643

Dear Ms. Kitchings:

Enclosed please find the original and seven (7) copies of Appellants' Reply to Claimant's Opposition to Petition for Rehearing, and the original and one copy of the Proof of Service in the above-referenced matter. Please file the originals and return a clocked-in copy in the enclosed self-addressed, stamped envelope.

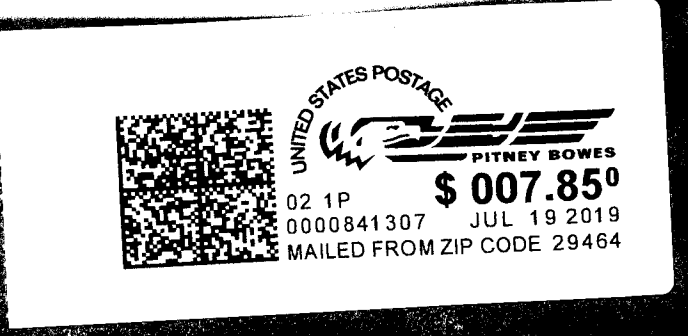
If you have any questions, please do not hesitate to contact me.

Sincerely,
McAngus Goudelock & Courie, LLC

Helen F. Hiser

Enclosures

cc: W.E. Jenkinson, III, Esquire



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