THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Appellant Panel of the Full Commission

WCC Number: 1413546

Appellate Case No.: 2018-002283

Timothy A. McDuffie, Employee, ...Respondent,

v.

Johnson Food Services, LLC, Employer,

and

Great American Alliance Insurance Co./Strategic Comp., Carrier,.....Appellants.

APPELLANTS' FINAL BRIEF

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STATEMENT OF THE CASE

The Respondent sustained a compensable injury to his back on or about September 19, 2014 when he tripped over an exposed pipe at the Employer's facility located in Richland County, South Carolina. On June 12, 2015, the Respondent filed a Form 50, hearing request, alleging an additional injury to his left leg and entitlement to further medical treatment for his left leg and back conditions. Accordingly, on July 10, 2015, the Appellants filed a Form 51, denying the Respondent's need for additional medical care and treatment.

On October 29, 2015, a hearing was held before Commissioner Aisha Taylor (hereinafter "Single Commissioner") to determine the issues as outlined in the parties' pleadings, among other things. The Single Commissioner considered testimony from the Respondent and several medical providers and reviewed the medical evidence submitted by the respective parties.

Following the hearing, the Single Commissioner issued a Decision and Order, dated May 16, 2016, whereby she found, in relevant part:

> (1) Defendants "accept financial responsibility for treatment of Mr. McDuffie's lumbar facet syndrome through ***an appropriate specialist of its choosing***, who shall provide treatment for this condition as a causally related result of Mr. McDuffie's compensable accident" [emphasis added];
>
> (2) Treatment of the left knee injury component would be provided by Dr. Christopher Mazoue; [and]
>
> (3) The Claimant is entitled to treatment for the compensable back injury component, including, but not limited to, the lumbar facet/medial branch blocks identified by these physicians.

Pursuant to the Single Commissioner's Order, the Employer and its Carrier, Great American Alliance Insurance Company (hereinafter collectively "Appellants"), acknowledged the compensability of Respondent's back injury and subsequently authorized Respondent's receipt of

certain medical treatment through several providers, including Drs. Michael W. Peele of Moore Orthopaedics and Stewart Young of First Care.

On June 1, 2016, Appellants filed a Form 30, Request for Commission Review, appealing the May 16, 2016 Order of the Single Commissioner upon several grounds, including, in pertinent part, the Single Commissioner's error in appointing Dr. Mazoue as the authorized treating physician given the Appellants' right to direct medical care and treatment pursuant to Section 42-15-60(a) of the South Carolina Code of Laws.

A hearing was held before the Full Commission Appellate Panel on August 16, 2016. By Order, dated October 12, 2016, the Appellate Panel affirmed the Single Commissioner's factual findings and conclusions of law and ordered the Appellants, in relevant part, to:

> (a) Accept financial responsibility for all medical modalities previously provided/prescribed by any authorized healthcare specialists, as well as for the charges stemming from Dr. Mazoue's June 10, 2015 evaluation;
>
> (b) Authorized the additional causally related medical treatment, medications, evaluations, diagnostic testing, evaluative procedures, physical therapy, surgical procedures, etc. provided/prescribed by Dr. Mazoue, who is hereby designated as Mr. McDuffie's treating physician relative to the left knee injury component for the purposes of this claim;
>
> (c) Accept financial responsibility for treatment of Mr. McDuffie's lumbar posttraumatic facet syndrome through an appropriate specialist of its choosing, who shall provide treatment for this condition as a causally related result of Mr. McDuffie's compensable accident; [and]
>
> (d) Provide treatment for the compensable back injury component including, but not limited to the lumbar facet/medial branch block injections identified by physicians.

Pursuant to the Appellate Panel's October 12, 2016 Order, Appellants arranged for Nurse Case Manager, Michelle Estep, to schedule an appointment for Respondent with Dr. Karl Lozanne, neurosurgeon, of Midlands Orthopaedic and Neurosurgery. Respondent's counsel was notified via e-mail correspondence on January 2, 2018 of the Respondent's January 12, 2018 evaluation

with Dr. Lozanne. Thereafter, Respondent's counsel refused to allow the Respondent to attend the appointment with Dr. Lozanne, and by Motion dated January 11, 2018, sought to quash Appellants' directive of medical care for Respondent's back injury with Dr. Lozanne. Respondent's counsel further requested designation of Dr. J. Kelby Hutcheson, a pain management physician, as the authorized treating physician. Specifically, Respondent's counsel contended the Appellants had been instructed to provide specific treatment, including injections, but that Dr. Lozanne refused to perform the injections as he was a neurosurgeon. Respondent's counsel failed to recognize that Dr. Lozanne's practice is one of the most comprehensive practices in the State and even if Dr. Lozanne could not personally administer the injections, one of his partners could certainly do so.

On January 22, 2018, Appellants responded to Respondent's Motion to Quash and maintained that the appointment with Dr. Lozanne was scheduled for evaluation and current recommendations for treatment in furtherance of the directives of the Appellate Panel and given Respondent's gap in treatment since 2016. Moreover, Appellants asked for this Commission to compel Respondent's attendance to the evaluation with Dr. Lozanne, so that the Respondent's current medical condition could be assessed and a determination could be made for what additional medical care and treatment is needed. Furthermore, Appellants contended that the evaluation with Dr. Lozanne was not inconsistent with the Appellate Panel's Order nor was it an attempt to circumvent obligations, as Respondent's counsel insinuated, but rather was an effort to fulfill certain responsibilities under the rulings prescribed by the October 12, 2016 Order.

A hearing on the motions was held on February 6, 2018 in Columbia, South Carolina before Commissioner Avery Wilkerson, Jr. (hereinafter "Hearing Commissioner"). Although the hearing was not placed on the record, upon information and belief, the Hearing Commissioner received

oral argument from both parties and reviewed the relevant portions of the Commission's claim file.

By Order, dated March 13, 2018, the Hearing Commissioner granted Respondent's Motion to Quash and, furthermore, designated Dr. J. Kelby Hutcheson of Carolinas Center for the Advanced Management of Pain as the Respondent's treating physician. On March 27, 2018, Appellants filed a Form 30, Request for Commission Review, and this appeal follows.

STATEMENT OF THE FACTS

On September 19, 2014, Respondent sustained compensable injuries to his back and left leg when he tripped over an exposed pipe while working at Johnson Food Services, LLC. (R. p. 74). On September 20, 2014, Appellants directed the Respondent to MedCare Urgent Care Center where he was assessed for back and left leg pain. (R. pp. 41-42). Appellants then directed Respondent for an evaluation with Dr. Stewart Young of First Care who assessed the Respondent for "pain in the left thigh musculature with weightbearing/walking" and "tenderness over the MCL area." Dr. Young further placed the Respondent on sedentary duty work status. (R. p. 42; see R. p. 74).

Thereafter, Appellants directed Respondent for additional evaluation and treatment by Dr. Michael W. Peelle of Moore Orthopaedics on December 17, 2014. Dr. Peelle assessed the Respondent for his September 19, 2014 tripping injury, including resulting pain in the back, left buttock, left thigh, and left leg and offered a diagnosis of left lower extremity radiculopathy. (R. pp. 43-44; see R. pp. 74-75). During a visit on December 31, 2014, Dr. Peelle released the Respondent to return to full duty work effective January 5, 2015. Id.

After that time, Respondent sought independent, further evaluation from Dr. Ezra B. Riber of Palmetto Pain Management, LLC, Dr. Nancy R. Lembo of Carolina Spine and Sport

Rehabilitation Specialists, P.A., and Dr. John F. Johnson of Southeastern Spine Institute. (R. p. 75). Upon review of the Respondent's testimony and the opinions expressed by these physicians, including deposition testimony, this Commission concluded that "these medical specialists also convincingly verified/explained the positive correlation between their diagnosis of posttraumatic facet syndrome with not only his relevant clinical findings (including diminished lumbar extension), but also he September 19, 2014 mechanism of injury" and established the need for treatment aimed toward a diagnosis proximately resulting from the September 19, 2014 accident at work as the Respondent had not yet reached maximum medical improvement. (R. p. 75). This Commission further opined that "(d) the treatment he requires for this compensable back injury component includes, ***but is not limited to***, the lumbar facet/medial branch blocks identified by these physicians; and (e) Mr. McDuffie's receipt of these additional treatment modalities for his back injury component is reasonable [and] medically necessary" [emphasis added]. (R. pp. 75-76).

In addition, the Commission ordered that Appellants shall "accept financial responsibility for treatment of Mr. McDuffie's lumbar posttraumatic facet syndrome ***through an appropriate specialist of its choosing***, who shall provide treatment for this condition as a causally related result of Mr. McDuffie's compensable accident" [emphasis added]. (R. p. 76).

Appellants arranged for Nurse Case Manager, Michelle Estep, to schedule an appointment for Respondent with Dr. Karl Lozanne, neurosurgeon, of Midlands Orthopaedic and Neurosurgery, and on January 2, 2018, Respondent's counsel was notified via e-mail correspondence of the Respondent's January 12, 2018 evaluation with Dr. Lozanne. (R. p. 77). Thereafter, Respondent's counsel refused to allow the Respondent to attend the appointment with Dr. Lozanne, and by Motion dated January 11, 2018, sought to quash Appellants' directive of medical care for

Respondent's back injury with Dr. Lozanne. Respondent's counsel further requested designation of Dr. J. Kelby Hutcheson, a pain management physician, as the authorized treating physician.

STANDARD OF REVIEW

The Administrative Procedures Act establishes the standard for judicial review of decisions of the Workers' Compensation Commission. Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981). In workers' compensation cases, the South Carolina Workers' Compensation Commission is the trier of fact. Hunter v. Patrick Construction Co., 289 S.C. 46, 344 S.E.2d 613 (1986). The appellate court's review of these findings of fact is limited to determining whether the findings are clearly unsupported by substantial evidence in the 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). The appellate court is not permitted to re-weigh the evidence and substitute its own findings of fact for those of the Commission. Brown v. Jordan Oil Co., 291 S.C. 272, 353 S.E.2d 280 (1987). An appellate court can reverse or modify the Commission's decision if it is affected by an error of law or clearly erroneous in view of the reliable, probative, and substantial evidence in the whole record. Fishburne v. ATI Systems Intern., 384 S.C. 76, 681 S.E.2d 595 (Ct. App. 2009) (citing S.C. Code Ann. §1-23-380).

A reviewing court may reverse or modify a decision of an agency if the findings, inferences, conclusions, or decisions of that agency are "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." S.C. Code Ann. § 1-23-380(A)(6)(e) (2005). Under the scope of review established in the Administrative Procedures Act, this Court may not substitute its judgment for that of the Appellate Panel as to the weight of the evidence on questions of fact, but may reverse where the decision is affected by an error of law. Liberty Mut. Ins. Co. v. South Carolina Second Injury Fund, 363 S.C. 612, 611 S.E.2d 297 (Ct. App. 2005);

Frame v. Resort Servs., Inc., 357 S.C. 520, 593 S.E.2d 491 (Ct. App. 2004); Stephen v. Avins Constr. Co., 324 S.C. 334, 478 S.E.2d 74 (Ct. App. 1996); S.C. Code Ann. § 1-23-380(A)(6)(d) (2005).

ARGUMENTS

I.

THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION ERRED IN AFFIRMING DR. HUTCHESON AS THE AUTHORIZED TREATING PHYSICIAN AS NEITHER "GOOD CAUSE" NOR SUFFICIENT EVIDENCE WAS ESTABLISHED TO WARRANT A DESIGNATION OF A TREATING PHYSICIAN.

The South Carolina Workers' Compensation Commission erred in affirming Dr. Hutcheson as the authorized treating physician as neither "good cause" nor sufficient evidence was established to warrant a designation of a treating physician. More specifically, this case does not represent a situation contemplated under §42-15-60. Section 42-15-60(A) provides:

> The employer shall provide medical, surgical, hospital, and other treatment, including medical and surgical supplies as reasonably may be required, for a period not exceeding ten weeks from the date of an injury, to effect a cure or give relief and for an additional time as in the judgment of the commission will tend to lessen the period of disability as evidenced by expert medical evidence stated to a reasonable degree of medical certainty. In addition to it, the original artificial members as reasonably may be necessary must be provided by the employer. During any period of disability resulting from the injury, the employer, at his own option, may continue to furnish or cause to be furnished, free of charge to the employee, and the employee shall accept, an attending physician and any medical care or treatment that is considered necessary by the attending physician, unless otherwise ordered by the commission for good cause shown. The refusal of an employee to accept any medical, hospital, surgical, or other treatment or evaluation when provided by the employer or ordered by the commission bars the employee from further compensation until the refusal ceases and compensation is not paid for the period of refusal unless in the opinion of the commission the circumstances justified the refusal, in which case the commission may order a chance in medical or hospital service. If in an emergency, on account of the employer's failure to provide the medical care as specified in this section, a physician other than provided by the employer is called to treat the

> employee, the reasonable cost of the service must be paid by the employer, if ordered by the commission.

In the instant case, the Appellants directed medical treatment in an adequate manner and in accordance with the directives of the South Carolina Workers' Compensation Commission, as such, the exception articulated in the statutory language of § 42-15-60 is inapplicable. In good faith, Appellants authorized and scheduled an evaluation of Respondent and arranged for a comprehensive opinion by Dr. Lozanne to determine the Respondent's current medical condition and further necessary medical care and treatment needed in compliance with the directives of the October 12, 2016 Order. Due to the fact that Respondent's counsel prohibited Respondent from attending the evaluation with Dr. Lozanne and the Hearing Commissioner granted Respondent's Motion to Quash, it is mere speculation to suggest that the potential treatment plan suggested by Dr. Lozanne fails to constitute treatment of the Respondent's lumbar posttraumatic facet syndrome.

Furthermore, there is no tangible evidence available to suggest that Dr. Lozanne's evaluation and treatment of the Respondent would not tend to lessen the Respondent's period of disability. Rather, this notion that Dr. Lozanne, an experienced neurosurgeon, would be unable to personally treat the Respondent's posttraumatic facet syndrome is not fact, but conjecture on the part of Respondent's counsel. Moreover, Respondent's counsel assumes that a pain management physician, and not a neurosurgeon who specializes in the diagnosis and treatment of the spine, is better suited to treat the Respondent's lumbar injury. There is no evidence available and none represented by the Respondent that establishes Dr. Hutcheson is in some way more qualified to evaluate the Respondent than Dr. Lozanne. It should be noted that Dr. Lozanne is part of one of the most comprehensive and well-respected practices in our State and has almost every conceivable specialist within his practice, to not only provide surgery, but also administer

comprehensive injections and treat with various methods of pain management, as required by the Workers' Compensation Commission.

Implicit in our Courts' characterization of the Appellants' ability to direct medical treatment as a right, is the requirement that Respondent must make some showing that there is a justification for extinguishing that right. Without such a requirement, Appellants' right to direct medical treatment would be completely eviscerated and essentially meaningless. Specifically, case law provides that where it deems necessary, the South Carolina Workers' Compensation Commission may "override the employer's choice of providers ad order a change in the medical or hospital service provided" stipulating that "good cause" is to be established by the employee. Clark v. Aiken County of Gov't, 366 S.C. 102, 107, 620 S.E.2d 99, 104 (Ct. App. 2005); see Gattis v. Murrell's Inlet VFW #10420, 353 S.C. 100, 576 S.E.2d 191, 197-98 (Ct. App. 2003); Martin v. Rapid Plumbing, 369 S.C. 278, 631 S.E.2d 547, 555 (Ct. App. 2006). The record in this matter is devoid of any such "good cause" or justification prompting the Commission to "override" Appellants' choice of care provider. The treatment authorized with Dr. Lozanne was adequate and directed toward providing Respondent relief and aimed at tending to lessen the period of disability resulting from the initial injury. Respondent certainly cannot and did not carry his burden in establishing that treatment by Dr. Hutcheson will somehow lessen the Respondent's period of disability. Given this consideration, the only justification that remains for Respondent's selection of Dr. Hutcheson is based upon Respondent's mere preference of physician.

If Respondent is permitted to undergo evaluation and subsequent treatment with Dr. Hutcheson pursuant to his preference and absent evidence somehow establishing that care under Dr. Hutcheson will yield a better result than with Dr. Lozanne, the case and statutory law relevant in conferring a right in Appellants to direct medical treatment is thwarted in its entirety. Had

Appellants sent the Respondent to Dr. Lozanne and he failed to provide treatment that was ordered or necessary, the Respondent would have a much more compelling argument. But this attorney never allowed the Respondent to even attend the appointment with Dr. Lozanne and thus to argue his treatment was inconsistent with the Order of the Commission, or was inadequate, is simply wrong. Accordingly, Appellants right to direct medical treatment cannot be disturbed on these grounds.

Respondent's counsel represents that this Court has recognized the Commission is vested with the authority to designate a treating physician in accordance with its assessment of an individual's particular medical needs. Gattis v. Murrell's Inlet, VFW, 353 S.C. 100, 576 S.E. 2d 191, 198 (Ct. App. 2003). ("Where it deems it necessary, the . . . [C]ommission may override an employer's choice of medical provider. . . ."; See also, Martin v. Rapid Plumbing, 369 S.C. 278, 631 S.E. 2d 547, 555 (Ct. App. 2006). The cases represented above and relied upon by Respondent's counsel and the Commission illustrate factual situations where an employer failed to provide treatment. Such a scenario is not representative of the facts in this case. Rather, here, Appellants have provided treatment for Respondent's back injury with a specialist who is simply not preferred by Respondent's attorney. Interestingly, Respondent's counsel made reference to Dr. Hutcheson, and his desire for Dr. Hutcheson to be a treating physician in an earlier hearing with Commission Taylor. (R. pp. 115-116).

Moreover, certainly, this is not the type of controversy contemplated by the statute. Nor is this situation one of emergency thereby requiring intervention of this Commission to order and designate medical care by a particular provider – especially not a provider hand selected by Respondent's attorney. Unlike an emergency, sudden change, or complication to one's condition, which might necessitate care before authorization could have reasonably been sought and obtained,

Respondent's treatment for his back injury has been ongoing for years. Here, where the Respondent seeks to select a different treating physician for an ongoing, non-emergent course of treatment, a statutory exception does not apply.

The Workers' Compensation Act provides that the employer retains the right to name the authorized treating physician once a case has been accepted. Clark at 113. More specifically, S.C. Code Ann. Reg. 67-509 states, "[t]he employer's representative chooses an authorized health care provider and pays for authorized treatment." Any refusal by the Respondent to accept treatment generally bars further compensation. Clark at 113. McKinney v. Kimberly Clark Corp., 658 S.E.2d 112 (Ct. App. 2008) further provides for the Appellants' right to choose physicians. The South Carolina Supreme Court in Risinger v. Knight Textiles, 353 S.C. 69, 73, 577 S.E.2d 222, 224-25 (2002), held that although Appellants have the right to direct medical care, a Respondent is not required to sacrifice much-needed treatment merely to comply with an employer's choice of physicians. The Risinger court further held that the South Carolina workers' compensation statute does not allow for an employer to "doctor shop" for a favorable opinion. Id. at 224. Here, the Respondent is not sacrificing treatment by attending an evaluation with Dr. Lozanne. First, there is no evidence of such, and second, the opinions and recommendations of Dr. Lozanne are unknown. So, while the Appellants are prohibited from engaging in "doctor shopping," the statute furthermore does not afford a unilateral right to the Respondent to select his treating physician. McKinney at 114.

Furthermore, a mere preference for a different physician should not enough to satisfy this burden or constitute "good cause."

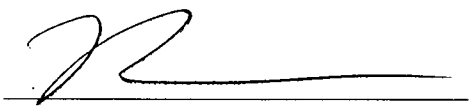
In consideration of the aforementioned, Respondent has not satisfied its burden in proving that the appointment of Dr. Hutcheson as a treating physician is reasonably necessary to effectuate

a cure, provide relief, or lessen the period of disability. Appellants further note that a mere preference for a different physician should not be enough to satisfy this burden or constitute "good cause." As such, a sufficient basis for taking away Appellants' right to direct medical treatment has not been established.

CONCLUSION

For the foregoing reasons, Appellants respectfully request that this Court reverse the Commissions' designation of Dr. Hutcheson as the authorized treating physician and allow the Appellants to exercise their well-established right to direct authorized medical treatment and care.

Respectfully submitted,



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CERTIFICATE OF COUNSEL

The undersigned certifies that this Appellants' Final Brief complies with Rule 211(b), SCACR.

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