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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM THE APPELLATE PANEL OF THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

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Unpublished Opinion No. 2020-UP-266 (Ct. App. – filed September 9, 2020)
Appellate Case No.: 2018-001516

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Johnnie Bias, Employee, Petitioner,

v.

SCANA Corporation, Self-Insured Employer, Respondent.

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**RETURN TO PETITION FOR A WRIT OF CERTIORARI**

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## ARGUMENT

### I. THE PETITIONER HAS NOT PROVIDED A JUSTIFIABLE REASON FOR THE COURT TO EXERCISE DISCRETION TO GRANT REVIEW.

Rule 242(b) of the Appellate Court Rules indicates the Supreme Court will exercise judicial discretion and grant review only where special and important reasons are presented by the Petitioner. The Rule then provides a non-exhaustive list of reasons to include (1) novel issues of law; (2) where there is a dissent in the decision of the Court of Appeals; (3) where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court; (4) where substantial constitutional issues are directly involved; and (5) where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court. The Petitioner has not asserted any of these reasons in his petition and none are otherwise present in the matter at hand. Moreover, the Respondent submits there is no other "special or important" reason for this Court to grant review.

### II. THE COURT OF APPEALS PROPERLY APPLIED THE STANDARD OF REVIEW IN CONCLUDING SUBSTANTIAL EVIDENCE SUPPORTS THE COMMISSION'S DECISION.

Substantial evidence in the record supports the Commission's denial of this claim, finding the Petitioner failed to meet his burden of proving a compensable aggravation of a preexisting condition.[1] This standard of review was properly applied by the Court below.

**A. Petitioner's allegation that no evidence, including expert testimony, exists to support a conclusion that Petitioner's symptomology is the natural progression of his preexisting condition is a misstatement of the record.**

Petitioner asserts, as the initial issue before this Court, that "no medical evidence in the record, including expert testimony, supports [the Court of Appeal's] conclusion that Bias's symptomology

[1] Petitioner no longer argues for the compensability of the claim as an injury by accident under S.C. Code Ann. § 42-1-160 (Supp. 2012) as he did before the Court of Appeals.

is the natural progression of his preexisting condition." (Pet. for Cert., p. 3). Petitioner alleges that because the Court of Appeals erroneously found there was substantial evidence to support evidence of the natural progression of the preexisting condition, the Opinion of the Court below should be reversed. Respondent, however, contends this allegation is a complete misstatement of the record.

In fact, Dr. Ivan LaMotta, one of the Petitioner's several chosen independent medical examiners, testified after finally reviewing all of the evidence that the symptoms the Petitioner was experiencing were more likely than not just the continued deterioration and worsening of his lumbar spine based upon the natural history of his pathology, and not necessarily the alleged fall. (App., p. 691, lines 5-10). Dr. LaMotta then testified it would not be unexpected for the Petitioner to have this symptomology regardless of whether he had an accident in the interim. (App., p. 691, lines 19-24). This testimony by the Petitioner's own IME physician completely contradicts the allegation now being made by the Petitioner in support of reversal by this Court.

Of further importance, however, is how Dr. LaMotta arrived at this opinion. Each of the IME's secured by the Petitioner, including Dr. LaMotta's, were discredited by the Commission after it was discovered they were conducted following an incomplete review of the evidence. (App., p. 45 (*see* App., pp. 409-416)). This incomplete evidence was provided to each physician *by the Petitioner* by way of a very detailed letter which served to frame their understanding of the Petitioner's medical history and course of treatment from the alleged injury. The Petitioner, however, omitted in each letter any mention of his appointment with Southeastern Spine Institute the day after the alleged fall. (App., pp. 404-416, 645-649). This report is troublesome for the Petitioner as he failed to mention his alleged accident and, instead, reported having "minimal complaints". (App., p. 342). This omission was a clear attempt by the Petitioner to veil material

evidence which supports the Respondent's position that there was no compensable injury. Each provider was presented with this report for the very first time, by the Respondent, during their respective depositions.

After reviewing the report from the Southeastern Spine Institute from the day after the alleged accident, which reported the Petitioner was in no acute distress and was greatly improved since surgery, Dr. LaMotta testified that he would have expected someone with the Petitioner's pre-existing conditions, if aggravated, to have experienced immediate pain after a fall. (App., p. 681). This fact, among numerous others explained *infra*, led Dr. LaMotta to the conclusion the symptoms the Petitioner was experiencing were more likely than not just the natural continuation of his preexisting condition. (App., pp. 691-692). He testified this "may be necessarily why he doesn't complain of pain right after his fall on 10-15, but he alleges that he's doing fine perhaps that particular day." (App., pp. 691-692). Importantly, Dr. LaMotta's deposition occurred just days prior to the initially scheduled Hearing in June 2017, making his the only medical deposition where the IME doctor had the benefit of viewing *all* the Petitioner's relevant medical records.

Dr. LaMotta's testimony constitutes not only evidence, but medical evidence, that the Petitioner's condition was likely the natural progression of his preexisting condition. This misstatement of the record should not serve as the basis for reversal by this Court.

**B. Substantial evidence supports the Commission's conclusion that Petitioner failed to meet his burden of proof.**

Under Section 42-9-35 Petitioner has the burden of proving, by way of medical evidence that his alleged subsequent injury aggravated a pre-existing condition . . ." S.C. Code Ann. § 42-9-35 (Supp. 2012). "Medical evidence" is defined specifically as "expert opinion or testimony stated to a reasonable degree of medical certainty . . ." Id. Even if the Petitioner's condition has worsened since mid-October 2014, substantial evidence supports the Commission's conclusion that the

worsening was not necessarily caused by the Petitioner's alleged fall and that the Petitioner failed to meet his burden of proof. According to South Carolina law, "[t]he 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." Crisp v. SouthCo., 401 S.C. 627, 641, 738 S.E.2d 835, 842 (2013). The Respondent maintains the worsening of the Petitioner's state was likely caused by the continued deterioration of the Petitioner's long-standing back condition. (App., p. 701).

The Petitioner's complaints at the time of the hearing were of left foot drop and numbness in his left foot and calf, left-side pain that goes across his buttocks, right side lower back pain across his hip and down his right leg and foot, and numbness in his right foot. (App., pp. 137-138). He also complained of urinary incontinence and erectile issues. (App., p. 138). According to relevant caselaw, "the right of a claimant to compensation for exacerbation of a pre-existing condition arises only where there is a dormant condition which has produced no disability, but which becomes disabling by reason of the aggravating injury." Hargrove v. Titan Textile Co., 360 S.C. 276, 295, 599 S.E.2d 604, 614 (2004). It would be a gross mischaracterization of the evidence to describe the Petitioner's underlying condition as "dormant."

Under the Petitioner's own admission, he has treated for back pain consistently for the last thirty years, including a surgery in March 2014, just seven months prior to his alleged fall. (App., p. 126). Since the 1980's, the Petitioner has treated with Dr. Jones, Dr. Poletti, and other physicians, receiving treatment in the form of injections, medication, at least two operations, and the use of a TENS unit. (App., p. 161). The medical records indicate, and the Petitioner admitted, he complained of right-sided low back, buttock, and right lower extremity pain in 2010, and pain radiating down both legs because of a motor vehicle accident in 1992. (App., pp. 171-173). He

admitted during the Hearing this evidence conflicts with his deposition testimony in which he claimed he had no prior issues with his right leg. (App., pp. 171-173). He further admitted to taking medication for his back the very morning of his fall and said he was experiencing some back issues around that time. (App., p. 203).

Dr. Epstein treated the Petitioner in 1993 and assigned him 20% impairment to his lumbar spine and opined his condition would worsen in the future and he would require at least one surgery. (App., p. 381). He treated with Denmark Medical Center from 2001 to 2005 for pain radiating down his left leg, neuropathy and chronic back pain, and treating with pain medication. (App., p. 178). He began treating with Dr. Jones in 2006 who continued to prescribe him the same medications until he returned to Dr. Poletti in 2010. (App., p. 178).

After the back surgery with Dr. Poletti in 2014, the Petitioner wore a brace for his left foot drop. (App., p. 196). Despite this use of the brace following the surgery, the Petitioner told Dr. Hutcheson he began wearing the brace only after his fall in October 2014, an inconsistency which led Dr. Hutcheson to withdraw his questionnaire in which he opined the Petitioner's foot drop was caused by his alleged fall in October 2014. (App., pp. 538-540, 543). Dr. LaMotta was shown the statement from Dr. Hutcheson's IME, that the Petitioner "now wears AFO brace, left foot, due to foot drop, left leg numbness is new since . . . fall, has four out of five at L4-5, recurrent pain since fall," and confirmed the statement was inaccurate. (App., p. 701).

The Petitioner's complaints of impotence and urinary incontinence are also suspect in that they are either inconsistent with contemporaneous medical records, or a continuation of prior issues. In considering the impotence issues the Petitioner alleges were caused by his fall, he admitted at the hearing he has treated for similar issues since 1992 that came and went. (App. pp. 135, 177, 377). He was even offered a prescription for Viagra in 2006, which he declined, and took Levitra or

Cialis periodically from 2008 to 2012. (App., pp. 181, 382). The Petitioner's complaints of urinary incontinence are also called into question by the lack of any mention of same in any of Dr. Poletti's records from May of 2015 to May of 2016, the period of time during which the Petitioner told Dr. Rames he was suffering from incontinence. (App. pp. 223, 258).

Dr. LaMotta performed an IME of the Petitioner in September 2016 and opined the Petitioner's problems were casually related to his alleged fall by way of an aggravation of a pre-existing condition. (App., p. 255). However, during his deposition, Dr. LaMotta confirmed he was not sure if he was provided the report from Dr. Poletti's office from the day following the Petitioner's alleged fall, and confirmed it was not in the letter summarizing all of the Petitioner's prior treatment. (App., pp. 409-416, 655-656). It became apparent during Dr. LaMotta's deposition that he was unaware of the Petitioner's many back issues between his back herniation in 1983 and re-herniation and surgery in 2014. Dr. LaMotta's understanding of the 31-year-period between 1983 and 2014 was that the Petitioner was doing better until he re-herniated in March 2014 and needed surgery. (App., p. 659). However, he was presented with multiple medical records disproving that assumption.[2] Dr. LaMotta stated during his deposition that according to the records he received, the Petitioner's issues were predominantly on his left side before October 2014, an opinion which he admitted was based upon the Petitioner's own statements rather than a review of the records from 1983. (App., p. 660).

He confirmed during his deposition that the Petitioner has had a long history of continuous lumbar spine problems including multiple herniations over time, of which he was not aware prior to the deposition. (App., p. 671). He also confirmed the Petitioner was having right-sided

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[2] Specifically, Dr. LaMotta was shown a report of a re-herniation in 1992, a 20% impairment rating to the lumbar spine in 1993, back pain radiating to the right leg from 2010, record of a disc herniation in 2010, and the assignment of a 10% impairment rating in 2004.

symptoms during that time. (App., p. 672). He concluded that given the years of recurrent herniations, two back surgeries, multiple injections and use of medication, the Petitioner was extremely prone to redeveloping and worsening of symptoms leading up to his accident in 2014. (App., p. 673). Importantly, he also noted back herniations can be caused by things such as a simple twist while sleeping, sneezing, or coughing. (App., p. 677). When reviewing the report from Dr. Poletti's office from the day following the Petitioner's alleged fall, which stated he was in no acute distress and was greatly improved since surgery, he stated that he would have expected someone with the Petitioner's pre-existing condition, if aggravated, to have experienced immediate pain following a fall. (App., p. 681). Finally, Dr. LaMotta, one of the Petitioner's chosen independent medical examiners, opined that the symptoms the Petitioner was experiencing were more likely than not just continuing deterioration of his lumbar spine and a worsening of his lumbar spine condition based upon the natural history of his pathology and not necessarily the alleged fall. (App., pp. 691-692). He noted this "may be necessarily why he doesn't complain of pain right after his fall on 10-15, but he alleges that he's doing fine perhaps that particular day." (App., pp. 691-692). According to Dr. LaMotta, it was not unexpected that the Petitioner be in his present condition regardless of an accident. (App., pp. 691-692).

In reviewing the MRI's from February 2014 and October 2014, Dr. LaMotta opined they were very similar and stated he could not say to within a reasonable degree of medical certainty that a fall in October 2014 caused a worsening of the Petitioner's symptoms "because there is ample medical evidence of the Petitioner's back pain waxing and waning, alternating leg pain with intermittent symptoms of both lower extremities in addition to sexual dysfunction as early as 2008." (App., p. 713). As was noted *supra*, Dr. LaMotta was the only physician to review all the relevant medical evidence prior to providing his deposition testimony.

Dr. Poletti, the Petitioner's long-time treating physician, also confirmed the Petitioner's leg pain alternated from side to side and that on at least one occasion he treated him for right leg pain. (App., p. 451). He confirmed in his deposition that given the Petitioner's pre-existing condition, he could develop new symptoms without a trauma or accident and that his opinion casually relating the Petitioner's symptoms to his alleged work accident was based only upon the Petitioner's statements. (App., pp. 458-459). He opined that the disc herniation in the Petitioner's MRI from October 29, 2014 could have been caused by trauma or by "activities of daily living." (App., p. 460). Dr. Poletti agreed it was unusual that in the report from his office from October 15, 2014, there was no documentation of a fall from the day before. (App., p. 478). Furthermore, of note in Dr. Poletti's deposition testimony, was his insistence that he is a "patient advocate." (App., pp. 461, 476). Respondent maintains that if Dr. Poletti is an advocate for the Petitioner, he cannot also profess to provide an impartial medical opinion regarding causation.

Based upon the evidence including medical records, deposition testimony, and the Petitioner's own Hearing testimony, the Petitioner's symptomology was not dormant and was continuously waxing and waning for the last thirty years. The Petitioner contends Dr. Poletti, Dr. Hutcheson, Dr. Rames and Dr. Lind support his allegation of an injury or aggravation of a pre-existing condition due to an October 14, 2014 accident. However, Dr. Poletti admitted his opinion was based only upon the Petitioner's own statements. (App., pp. 458-459). Dr. Hutcheson completely withdrew his opinion regarding the Petitioner's left foot drop based upon the fact that the Petitioner withheld his prior use of the foot brace. (App., pp. 538-540, 543). Dr. Rames's opinion was contradicted by the records from Dr. Poletti's office in which the Petitioner made no claim of incontinence, and Dr. Lind was unaware of the Petitioner's prior use of sleep aids or his years of issues with impotence. (App., pp. 609, 615). Additionally, Dr. LaMotta completely reversed his

opinion that the Petitioner's symptomology was casually related to a fall at work. (App., p. 713). Furthermore, Dr. Hutcheson and Dr. Lind's IME's were both based upon manipulated evidence in that they were given an inaccurate summary of the Petitioner's course of treatment.

It is well settled in South Carolina that while medical testimony is entitled to great respect, the fact finder may disregard it if other competent evidence is presented. Tiller v. National Healthcare Center of Sumter, 334 S.C. 333, 513 S.E.2d 843 (1999) (citing Ballenger v. Southern Worsted Corp., 209 S.C. 463, 40 S.E.2d 681 (1946)). Expert medical testimony is intended to aid the Appellate Panel in coming to the correct conclusion. Corbin v. Kohler Co., 351 S.C. 613, 624, 571 S.E.2d 92, 98 (Ct. App. 2002) (citing Tiller, 334 S.C. at 340, 513 S.E.2d at 846). Ultimately, the final determination of witness credibility and the weight to be accorded evidence is reserved to the Appellate Panel. Shealy v. Aiken County, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000). In this case the Commission weighed the credibility of the expert reports and testimony against the fact that several pre-deposition opinions were rendered with an incomplete review of the evidence, and determined as a result of this analysis that the claimant had not met his burden of proof under Section 42-9-35. The determination of the Commission is supported by substantial evidence.

## III. THE ASSERTION THE COURT OF APPEALS FAILED TO DEFER TO THE COMMISSION AS THE FINDERS OF FACTS IS IMPROPER UNDER RULE 242 OF THE APPELLATE COURT RULES AND IS BASED UPON A MISCHARACTERIZATION OF THE EVIDENCE.

The Petitioner attempts to create an appealable issue by arguing "[t]he Court of Appeals, in deciding without oral arguments, ruled that [the Petitioner] has been receiving treatment for urological issues prior to this accident." (Pet. for Cert., pp. 7-8). Rule 242(d)(2) states that "[o]nly those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for writ of certiorari as a question presented to the Supreme Court." Appellate Ct.

Rule 242(d)(2). A question presented will be deemed to include every subsidiary question fairly comprised therein. Id. This question raised now by the Petitioner was not raised in his petition for rehearing and does not constitute a subsidiary question. In fact, it is a completely new argument raised for the first time before this Court. As such, the Respondent requests this Court disregard Question II raised by the Petitioner.

Regarding the merits of the Question raised by the Petitioner, the Respondent asserts it is wholly based upon a mischaracterization of the evidence in the record. The Petitioner asserts the error occurred because he did not have urological issues, which necessarily includes impotence, prior to the accident. Instead, the Petitioner asserts the accident caused these issues, among others. The medical records and his own testimony from the Hearing contradict this assertion, however. In fact, the Petitioner admitted at the Hearing he has treated periodically for impotency since 1992 and was even offered a prescription for Viagra in 2006, which he declined. (App., pp. 138, 180, 380). He also took Levitra or Cialis, medications prescribed for impotency, periodically from 2008 to 2012. (App., pp. 181, 382). Dr. LaMotta also confirmed this fact. (App., p. 713). The Petitioner's argument that the Court of Appeals created a new and yet erroneous finding of fact is misplaced and without merit and should not serve as a ground for reversal.

## CONCLUSION

Based upon the foregoing, the Respondent respectfully requests the Supreme Court of South Carolina to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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