THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

Appellate Case No. 2020-001220

Paul Misuraca, Employee, Respondent,

v.

Charleston County, Employer,

and

SC Association of Counties SIF, Carrier, Appellants.

FINAL BRIEF OF APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

I. DID THE APPELLATE PANEL ERR IN AFFIRMING THE HEARING COMMISSIONER'S DECISION TO ALLOW RESPONDENT TO AMEND HIS PRE-HEARING BRIEF AT THE HEARING?

II. DID THE APPELLATE PANEL ERR IN NOT REMANDING THIS CASE TO THE HEARING COMMISSIONER TO RULE ON ALL ISSUES AT ONCE?

III. DID THE APPELLATE PANEL ERR AS MATTER OF LAW IN FINDING APPELLANTS ARE ONLY ENTITLED TO CREDIT FOR TEMPORARY TOTAL BENEFITS PAID SINCE JULY 3, 2019, RATHER THAN CREDIT FOR BENEFITS PAID AFTER RESPONDENT REACHED MAXIMUM MEDICAL IMPROVEMENT ON FEBRUARY 8, 2019?

IV. IS THE 25% PERMANENT PARTIAL DISABILITY DETERMINATION NOT SUPPORTED BY THE EVIDENCE IN THE RECORD?

STATEMENT OF THE CASE

Claimant/Respondent (Respondent hereafter) sustained an admitted accident arising out of the course and scope of his employment on February 16, 2017. On a Form 50[1] dated March 24, 2017, Claimant alleged injury to his "left leg (fracture)." (R. p. 124). Defendants/Appellants (Appellants hereafter) filed a Form 21[2] on May 1, 2019, in which they requested a hearing to determine permanent partial disability (PPD hereafter) and address termination of temporary disability benefits (TTD hereafter). (R. p. 125). Appellants also requested a credit for overpayment of temporary compensation. Id. On May 31, 2019–thirty days after Appellants filed their Form 21–Respondent filed a second Form 50 alleging injury to left leg (fracture); back; depression. (R. p. 130).

A hearing on Appellants' Form 21 was scheduled for June 24, 2019. During the pre-hearing conference, Respondent argued the hearing should not move forward until Appellants became current on TTD benefits. The Hearing Commissioner issued an Interim Order on June 27, 2019, requiring Appellants to become current on TTD benefits. (R. p. 2). Appellants complied with the Order,[3] and the hearing was reset for July 25, 2019.

Respondent filed two Pre-Hearing Briefs[4]: one on June 14, 2019, and one on July 15, 2019. On both of Briefs, Respondent listed left leg (fracture; requiring multiple surgeries); aggravation to back; depression. (R. p. 198; R. p. 202). Additionally, Respondent listed PPD to the left leg and back as legal issues for the hearing. Id. In the Addendum to his brief, Respondent alleged that he

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[1] A Form 50 is an injured worker's "Complaint" in a workers' compensation claim. (*See e.g.* R. p. 124).

[2] A Form 21 is the form used by employers to request a hearing. (*See e.g.* R. p. 125).

[3] Appellants became current on TTD benefits paid to Respondent on July 3, 2019.

[4] Prior to a workers' compensation hearing, both parties file Form 58: Pre-Hearing Briefs to identify injured body parts, facts in controversy, and legal issues involved.

was not at maximum medical improvement (MMI hereafter) for his injuries due to continued pain in his ankle and back and that these injuries have aggravated his depression and related symptoms. (R. pp. 199–200; R. pp. 203–04).

However, following a pre-hearing conference discussion with the Hearing Commissioner on the day of the July 25, 2019 hearing, Respondent decided to "withdraw" the other body parts listed on his Form 58, as well as withdraw any APAs[5] related to the back or depression.[6] Based on this "withdrawal," the Hearing Commissioner only allowed testimony to be heard on the left ankle. On November 25, 2019, the Hearing Commissioner issued a Decision and Order finding Respondent had reached MMI for his left leg and he sustained 25% permanent partial disability[7] to the left leg, and Appellants were entitled to a credit back to July 3, 2019. Thereafter, Appellants timely appealed.

A hearing before the Appellate Panel of the Full Commission occurred on March 16, 2020. In a Decision and Order dated August 3, 2020, the Appellate Panel affirmed the Order of the Hearing Commissioner in full. This appeal follows.

STATEMENT OF THE FACTS

Respondent sustained an injury during the course and scope of his employment on February 16, 2017, after an alternation with another individual. Following the altercation, Respondent felt immediate pain in his left ankle and noticed swelling. (R. p. 56, line 5–p. 57, line 11). He initially treated at Charleston Center of Occupational Health but was subsequently referred to Dr. William

[5] "APAs" is a shorthand designation for the medical evidence and reports to be submitted at workers' compensation hearings under the Administrative Procedures Act (APA hereafter).

[6] Appellants note the pre-hearing conference was conducted off-the-record and accordingly, are unable to cite to the transcript for this discussion.

[7] At workers' compensation hearings, parties submit evidence regarding impairment ratings assigned by physicians. In conjunction with the assigned ratings, Commissioners view all the evidence in the record to determine a claimant's PPD.

Corey at Lowcountry Orthopedics for further treatment. (R. pp. 57–58; R. pp. 136–71). Dr. Corey performed surgery on Respondent's left ankle on November 7, 2017. (R. p. 212). Respondent then requested a second opinion with Dr. Kestner, and Appellants agreed to provide the same. (R. p. 176; R. p. 76, lines 8–11).

After examining Respondent, Dr. Kestner recommended removal of the prior surgical hardware. (R. pp. 269–85). Following the hardware removal, Dr. Kestner implanted new hardware in the left ankle, specifically a Smith & Nephew 3.5mm suture anchor. (R. pp. 269–70). On February 8, 2019, Dr. Kestner noted Respondent was doing extremely well, and that he had reported no issues or limitations with regard to his ankle. (R. p. 183). Respondent was cleared to return to work without any restrictions or limitations, and Dr. Kestner assigned a 5% impairment rating to the left leg. (R. p. 187).

Respondent was seen by Dr. McConnell for an independent medical evaluation on June 3, 2019. (R. pp. 288–91). Dr. McConnell assigned a 10% impairment rating to the left leg. (R. p. 290). At the hearing, Respondent testified that at the time he saw Dr. McConnell, he could not fully walk and could not run because putting his full weight on his left ankle caused pain in the heel area of his left foot and on the top and sides of his left foot. (R. p. 67–68). Respondent testified he limps as a result of not being able to fully bear weight on the left leg. (R. p. 67). Dr. McConnell noted in his report Respondent had some occasional soreness along the distal fibular, stiffness in his ankle, but no instability or giving way. (R. pp. 287–91). However, Dr. McConnell's note also indicates Respondent walked with a non-antalgic gait pattern. Id. At the hearing, Respondent stated he developed a limp after being seen by Dr. McConnell. (R. p. 50). In his report, Dr. McConnell noted the Respondent had not returned to work as a deputy sheriff, secondary to disability retirement through the VA. (R. p. 289). Respondent did not receive medical treatment from the

VA Hospital for his work-related ankle injury and is not receiving VA disability benefits for his ankle. (R. p. 79).

Respondent resigned from his employer on February 19, 2019. (R. p. 188). Significantly, Respondent did not see any need to mention he could not perform the functions of his job due to his ankle injury in his letter of resignation. (R. p. 78, line 21–p. 79, line 4). At the hearing, Respondent testified he had applied for Social Security Disability benefits prior to his resignation and stated he is currently receiving Social Security Disability benefits for his left ankle. However, Respondent also testified the Social Security Disability benefits could also be for his migraines, back injury, depression, hearing loss, anxiety, panic attacks, and left knee. (R. p. 81, lines 1–15).

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act establishes the standard for judicial review of decisions of the Appellate Panel of the Workers' Compensation Commission. Fredrick v. Wellman, Inc., 385 S.C. 8, 682 S.E.2d 516 (Ct. App. 2009). 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(5)(e) (2008). 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, 619, 611 S.E.2d 297, 300 (Ct. App. 2005); S.C. Code Ann. § 1-23-380(5)(d) (2008).

Additionally, an award of the Commission cannot be based upon mere possibilities, probabilities, surmise or conjectures. Broughton v. South Carolina Game & Fish Dept., 219 S.C. 50, 54, 64 S.E.2d 152, 154 (1951). If the findings of the Commission are based on surmise,

speculation or conjecture, then the issue becomes one of law for the court and not of fact for the Commission. Herndon v. Morgan Mills, Inc., 246 S.C. 201, 210, 143 S.E.2d 376, 381 (1965).

ARGUMENTS

I. THE APPELLATE PANEL ERRED IN AFFIRMING THE HEARING COMMISSIONER'S DECISION TO ALLOW RESPONDENT TO AMEND HIS PRE-HEARING BRIEF AT THE HEARING.

As a matter of law, it was error to allow Respondent to amend his pleadings[8] at the time of the hearing. S.C. Code Regulation 67-611(B)(2) provides, "[a]ll amendments and supplements to a Form 58 **must** be made at least 5 days prior to the date of the schedule hearing. Otherwise, a party seeking to amend the Form 58 **must** move for relief pursuant to R.67-613." S.C. Code Regs. 67-611(B)(2) (emphasis added). When properly applied, the relief provided for in Regulation 67-613 is postponement or adjournment of the scheduled hearing. S.C. Code Regs. 67-613.

Respondent filed a Form 50 on May 31, 2019, alleging injuries to the left leg, back, and depression. (R. p. 125). In both of his Pre-Hearing Briefs, one filed on June 14, 2019, and the other filed on July 25, 2019, Respondent alleged the same injuries and further marked to amend the Form 50 to "include the back and depression as affected body parts." (R. p. 199; 202). In response to Respondent's filed pleadings, at the hearing, Appellants requested the Hearing Commissioner rule on whether the alleged back and depression injuries were compensable. (R. pp. 36–37). However, following the pre-hearing conference with the Hearing Commissioner, Respondent then suddenly sought to amend his Pre-Hearing Brief and withdraw the alleged injuries to the back and depression but preserve the argument for a later time. (R. p. 41).

By allowing Respondent to amend his Pre-Hearing Brief, the Hearing Commissioner completely disregarded SC Reg. 67-611(B)(2) and subjected Defendants to substantial material

[8] Specifically, the Hearing Commissioner allowed Respondent to amend his Form 58: Pre-Hearing Brief.

prejudice. Appellants are being forced to litigate each individual injury of one claim in separate hearings rather than resolving the entire claim at one time. Permitting amendment on the day of the hearing is in direct contravention of the 5-day limitation placed in Reg. 67-611. At the hearing, Respondent should have moved for a postponement or adjournment of the hearing.

From a procedural standpoint, the proper course of action by the Hearing Commissioner and the Appellate Panel would have been either: 1) postpone the hearing for good cause pursuant to S.C. Reg. 67-613(B); or 2) move forward with the hearing. With respect to the latter, both parties had proper notice and adequate time to prepare for the hearing. Instead, the Hearing Commissioner improperly forced the parties to engage in piecemeal litigation, by adjudicating the permanency of one body part now, and allowing Respondent to have the opportunity to litigate the merits of the additional body parts later on. Again, it is worth noting the injuries all arise out of the same incident in 2017, and all injuries were noted in pleadings filed as a requisite to participating in the underlying hearing.

The Hearing Commissioner erred in allowing Respondents to withdraw and otherwise amend their pleadings on the date of the hearing–arguably after the hearing had already commenced. This procedural, legal error substantially and materially prejudiced Appellants as this claim is now improperly bifurcated into separate claims for admitted and denied injuries which arise out of the same accident. Accordingly, Appellants request this case be remanded for a hearing consistent with these rulings.

II. THE APPELLATE PANEL ERRED IN NOT REMANDING THIS CASE TO THE HEARING COMMISSIONER TO RULE ON ALL ISSUES AT ONCE.

a. Allowing Respondent to bifurcate his claim frustrates the goals of the Workers' Compensation Act.

By failing to address the compensability of the alleged back and depression, the

Commission is not acting reasonably to move the claim toward a quick and efficient resolution. A primary goal of the Workers' Compensation Act is to prevent both employers and employees from becoming bogged down in complicated and never-ending litigation. *See* Peay v. U.S. Silica Co., 313 S.C. 91, 94, 437 S.E.2d 64, 65 (1993). This Court has explicitly addressed the issue as to when the Commission delayed adjudicating the merit of claims stating, "[i]f the claimants were entitled to benefits, they were entitled to receive them many years ago. If the claimants were not entitled to benefits, [the employers] were entitled to have the claims denied many years ago." Ex parte S.C. Prop. & Cas. Ins. Guar. Ass'n, 411 S.C. 501, 506, 768 S.E.2d 670, 673 (Ct. App. 2015).

Almost four years have passed since Respondent sustained his work-related accident on February 16, 2017. He quickly hired counsel and filed a Form 50 alleging injury to his left leg one month later. (R. p. 124). Two years later–and only two months prior to the hearing–Respondent then amended his Form 50 to allege injury to his back and depression. (R. p. 130). Respondent cannot allege that he was not ready to litigate the alleged back injury or depression or that there was lack of notice, as both were listed on his pre-hearing brief, which was submitted one month prior to the hearing.[9] Due to the advance notice, and the fact that Respondent had hired counsel two years prior to the hearing date, Respondent cannot credibly argue that he was not ready to litigate these alleged body parts.

Additionally, Respondent argued at the hearing before the Appellate Panel that Appellants should have amended their Form 21 in order to have the alleged body parts addressed at the hearing. (R. p. 111). In response, Appellants assert that unlike a claimant's Form 50, there is no line on a Form 21 that allows defendants to assert certain body parts.[10] Further, at the hearing,

[9] Respondent even went as far as to obtain a vocational evaluation on the issue of wage loss, which only comes into play if there are two or more compensable body parts, as discussed below. *Infra* pg. 12.

[10] *Compare* Appellants' Form 21 *with* Respondent's Form 50. (R. p. 125; R. p. 124).

Appellants specifically requested the Hearing Commissioner to address the compensability of all alleged body parts. (R. p. 37, line 23–p. 38, line 6).

In Tucker,[11] the South Carolina Supreme Court interpreted Russell[12] and held a claim will not sit unattended even if a claimant does not request a hearing. Specifically, the Court held, in pertinent part:

> In [Russell], we pointed out a "primary goal of the Workers' Compensation Act is to provide quick and efficient resolution of work-related injury claims." 426 S.C. at 285, 826 S.E.2d at 865. The commission shares with the parties the responsibility to meet that goal. 426 S.C. at 287, 826 S.E.2d at 866. [The Court] stated, "In most instances, . . . a claim filed with the commission will be assigned to one commissioner who must promptly conduct a hearing and 'determine the dispute in a summary manner.'" 426 S.C. at 288, 826 S.E.2d at 866 (quoting S.C. Code Ann. § 42-17-40(A) (2015)). If the parties reasonably need time to prepare, or to negotiate in good faith, the assigned commissioner—or an appellate panel on review—should allow it. In ordinary circumstances, however, no claim may be allowed to sit while the commission waits for a party to request a hearing. In other words, even if a claimant checks the line 13a box indicating "I am not requesting a hearing at this time," the commission must act reasonably to move the claim toward a "quick and efficient resolution."

Tucker at 303–304, 831 S.E.2d at 428.

Moreover, the case of Tucker discusses the possibility that a claimant may file a Form 50 and then intentionally delay a hearing in hopes that evidence will later develop. Id. Indeed, in Tucker, the Court expressly stated that such an improper effort should have no chance of success.[13] Id. Respondent's last-minute decision to not address the compensability of these additional body parts, even though his brief detailed the injuries in full, leads to only one conclusion–Respondent

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[11] Tucker v. S.C. Dep't. of Transp., 427 S.C. 299, 831 S.E.2d 426 (2019).

[12] 426 S.C. 281, 826 S.E.2d 863 (2019).

[13] *See* Rule 3.1, RPC, Rule 407, SCACR ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous....").

is attempting to delay the adjudication of those issues in order to gather additional evidence to support his position.

Respondent has been complaining of depression and back issues for quite some time. On his brief, Respondent lists specific instances where he reported depression and back issues. According to the brief, Respondent complained of depression as far back as on April 18, 2017, as well as back pain on January 30, 2018, and June 12, 2018. (R. pp. 199–200). This is clearly evidence Respondent attempted to do this as a delay tactic in order to obtain medical evidence to support the alleged back and depression injuries, which is precisely what Tucker prohibits.

Respondent cannot feasibly allege he did not have sufficient notice or was not prepared to litigate the depression and back issues. He clearly did not have the requisite evidence on the date of the hearing to prove compensability and used a "withdrawal" of the alleged injuries as a delay tactic to allow him to gather the evidence needed. If Respondent wanted to obtain more evidence, the proper avenue was to request a postponement or adjournment pursuant to S.C. Reg. 67-613. This rule exists for two reasons: 1) to prevent parties in workers' compensation claims from being ambushed with additional alleged compensable body parts or other new arguments/positions on the date of the hearing, and 2) to prevent the last second withdrawal of claims that were ripe for adjudication. Claimant clearly filed a Form 50 and then intentionally delayed a hearing in hopes that evidence will later develop. This was legal error and the case should be remanded for a determination on the merits.

b. This case fails to meet the standard for bifurcation.

This claim also fails to meet the standard of bifurcation. A trial[14] should be bifurcated only

[14] Appellants recognize jury trials are different than workers' compensation proceedings. However, because a Hearing Commissioner acts in a similar capacity as fact finder, the same principles apply.

if the issues are so distinct that trial of each alone would not result in injustice. Fortune v. Gibson, 304 S.C. 279, 403 S.E.2d 674 (Ct. App. 1991). Where evidence relevant to the issues of both liability and damages overlap, bifurcation is inappropriate. Creighton v. Coligny Plaza Ltd. Pshp., 334 S.C. 96, 108, 512 S.E.2d 510, 516 (Ct. App. 1998). Additionally, the reason for the "distinct issues" requirement is for the practical reason that if separate fact finders are allowed to pass on overlapping issues, the verdicts rendered could be inconsistent. Fortune at 281–82, 403 S.E.2d at 675.

Here, if the Appellate Panel's Order is affirmed, separate fact finders[15] are going to be allowed to make decisions on overlapping issues. At the hearing, the Hearing Commissioner was asked to determine Respondent's PPD. In doing so, he considered evidence regarding Respondent's employability with the sheriff's department, specifically the opinion of Dr. Weissglass. (R. p. 155). Respondent relied on the opinion of Dr. Weissglass for his inability to return to his job. However, the opinion from Dr. Weissglass relies not only on Respondent's admitted ankle injury, but also his significant lumbar spine and cervical spine arthritis, his bilateral carpal tunnel syndrome, his migraine headaches, and his anxiety. While the Hearing Commissioner only made a finding of permanent disability for the left ankle, he explicitly considered evidence containing Respondent's laundry list of underlying health conditions, including his alleged lumbar issues and anxiety, none of which have been proven to be work-related.

In fact, if this case is allowed to proceed as decided by the Appellate Panel, it is entirely possible that a second commissioner will make a determination of compensability of the back and depression and then a third commissioner may decide the amount of permanent disability to any

[15] In the South Carolina Workers' Compensation system, there are currently seven commissioners who serve as both fact finder and judge. These commissioners rotate districts in the state every two months. As a result, the likelihood of a claim coming before the same commissioner multiple times is low.

additional alleged body parts. Bifurcation is inappropriate because the alleged injuries of the back and depression involve evidence and common questions of fact that clearly overlap issues of both liability (compensability of the injuries) and damages (permanent disability). Allowing bifurcation contravenes the well-established legal principles of judicial efficiency and consistency.

As a result of bifurcating this claim, at least two, and possibly three, fact finders will consider overlapping issues. The possibility of inconsistent decisions is almost entirely inevitable. These issues are so interwoven that bifurcation is inappropriate. Appellants request this Court remand for a determination of all issues at once based on the evidence in the record.

c. Allowing the bifurcation of a workers' compensation claim by body part injured will unduly prejudice both employers and employees in the future.

A ruling by this Court allowing Respondent to bifurcate his claim is prejudicial towards Appellants in this case. From a procedural standpoint, it would also be detrimental and prejudicial to all parties because bifurcating workers' compensation claims by individual body parts will result in never-ending litigation. Delaying the resolution of a claim hurts injured workers by preventing them from receiving benefits in a timely manner. As explained in Russell, it also negatively impacts employers and insurance carriers because they are entitled to know whether benefits are owed or not in a timely basis. The law is also cognizant of the value of finality for all parties with well-established principles such as statutes of limitations and *res judicata*. While litigants must timely and properly pursue claims, including not bringing the same claim multiple times, defendants are likewise not expected to defend a stale claim or the same claim in multiple iterations. Appellants contend the Appellate Panel's decision would not be upheld in a circuit court posture. For example, Plaintiffs in a motor vehicle accident do not get to go to one trial for their back, another for their depression, and another for their leg–all stemming from the same underlying accident. To allow such would waste vital judicial resources. If the Appellate Panel decision is

affirmed by this Court, Appellants will ostensibly be forced to litigate this one accident multiple times.

Notwithstanding the dubious, general practicality of affirming the Appellate Panel, affirming the Appellate Panel is also improper in the context of workers' compensation claims. Specifically, there are also procedural issues that would arise if a claimant was allowed to separately litigate alleged injured body parts. Under South Carolina law, a worker can recover for disability under either 1) "wage loss theory" found in S.C. Code Ann. § 42-9-10 or § 42-9-20, or 2) a "scheduled member theory" found in § 42-9-30, but not both. *See* Singleton v. Young Lumber Co., 236 S.C. 454, 114 S.E.2d 837 (1960).

In the case of Singleton, the claimant suffered an injury to one scheduled member, his leg. Id. at 471, 114 S.E.2d at 845. While the claimant had no other condition that contributed to the amount of his disability, he argued that the injury to his leg was so disabling that he should be found totally disabled. Id. at 468, 114 S.E.2d at 844. The Supreme Court of South Carolina disagreed with this argument and found that because his injury was confined to one scheduled member, his compensation must be determined under the scheduled injury statute, § 42-9-30, as provided by the legislature. The Court held that, "[t]o obtain compensation in addition to that scheduled for the injured member, [Singleton] must show that some other part of his body is affected." Id. at 471, 114 S.E.2d at 845. Therefore, Singleton, is instructive for Appellants' position that affirming the Appellate Panel's decision would likely lead to a result incongruous with binding precedent described therein.

Here, in following the Hearing Commissioner's Order, Respondent received a "scheduled member" disability award for his left ankle under S.C. Code Ann. § 42-9-30. If the decision of the Appellate Panel is affirmed, the parties will then have to go to a second hearing on the

compensability of the alleged back and depression. If those additional injuries are found compensable, Respondent will potentially be able to receive another disability award. However, Appellants assert that because Respondent has already received one award under § 42-9-30, Respondent is restricted to recovering solely under a scheduled member theory, and he cannot "double dip" and also receive disability through a wage loss theory. To allow otherwise would contravene the workers' compensation framework as established by the Legislature. *See* Singleton, 236 S.C. 454, 114 S.E.2d 837 (1960).

This possibility only exists because not all of the alleged body parts were heard and adjudicated at the same time; hence, this the reason they are usually all heard at once. Workers' compensation claims simply cannot be bifurcated in this way without the possibility of significant prejudice to one or both parties. Consequently, this Court should remand for a determination of all the merits of this case.

III. THE APPELLATE PANEL ERRED AS MATTER OF LAW IN FINDING APPELLANTS ARE ONLY ENTITLED TO CREDIT FOR TEMPORARY TOTAL BENEFITS PAID SINCE JULY 3, 2019, RATHER THAN CREDIT FOR BENEFITS PAID AFTER RESPONDENT REACHED MAXIMUM MEDICAL IMPROVEMENT ON FEBRUARY 8, 2019.

South Carolina Code Ann. § 42-9-210 provides, "[a]ny payments made by an employer to an injured employee during the period of his disability,...which by the terms of this title *were not due* and payable when made may, subject to the approval of the commission, be deducted from the amount to be paid as compensation." (emphasis added). In Curiel v. Envtl. Mgmt. Servs., the South Carolina Supreme Court noted "the date of [MMI] signals the end of entitlement to temporary total benefits." 376 S.C. 23, 29, 655 S.E.2d 482, 485 (2007). Further, this Court has explained:

> Essentially, workers' compensation benefits accrue along a time continuum: [TTD] benefits are available from the date of injury through the date of maximum medical improvement; post-MMI benefits may then be awarded either as a permanent total or partial

disability, or as a percentage of impairment to a scheduled member.

Smith v. NCCI, Inc., 369 S.C. 236, 255, 631 S.E.2d 268, 278 (Ct. App. 2006). A claimant will be entitled to TTD compensation only when his incapacity to earn wages is due to or because of the injury. Pollack v. Southern Wine & Spirits of Am., 405 S.C. 9, 15, 747 S.E.2d 430, 433 (2013).

As noted above, Appellants' Request for Hearing[16] sought a determination of PPD, termination of TTD, and credit for overpayment of benefits pursuant to S.C. Code Ann. § 42-9-210. Here, the date of MMI is not in dispute. The parties stipulated Respondent reached MMI as to his ankle on February 8, 2019, the date he was released by Dr. Kestner. (R. p. 5; R. p. 48, lines 9–12). At the time of the hearing on the merits, Appellants were current with TTD benefits.

Under Curiel, any benefits paid after the date of MMI (February 8, 2019) are no longer temporary total benefits; instead, they are permanent disability benefits. Appellants should not be forced to pay additional permanent disability benefits on top of the benefits paid since February 8, 2019. In order to prevent a windfall to Respondent, Appellants should be awarded credit back to the date of MMI.

Moreover, it was legal error for the Hearing Commissioner to arbitrarily give credit back to the date of July 3, 2019, as this date was randomly picked by the Commissioner, and it has no factual or legal basis. Based on the foregoing, the Appellate Panel erroneously failed to award credit to Appellants back to the date of MMI.

IV. THE 25% PERMANENT PARTIAL DISABILITY DETERMINATION IS NOT SUPPORTED BY THE EVIDENCE IN THE RECORD.

a. A determination of 25% permanent partial disability to the left leg is not supported by the substantial evidence in the record.

[16] Under S.C. Reg. 67-506, if a Claimant is released at MMI greater than 150 days after the date of injury, employers should file a Form 21 to stop TTD.

The Appellate Panel found Respondent has limitations walking, running, moving, and daily limitations and awarded 25% permanent partial disability to the left leg. The substantial evidence in the record does not support this finding.

The treating physician, Dr. Kestner, placed Respondent at MMI on February 8, 2019. His report provides:

> He has no issues. He has no limitations as far as ankle though his back is [sic] been bothering him substantially incites only thing really keeping him down but he feels comfortable walking on uneven ground and doing even impacts on his ankle as his back allows.

(R. p. 183). A physical exam conducted the same day noted full range of motion and 5/5 strength in the left ankle. Dr. Kestner released Respondent to resume all activities as tolerated for his ankle and further noted his back was likely a limiting factor at that point. Id. Again, Respondent was cleared to return to work without restrictions or limitations, and Dr. Kestner assigned a 5% impairment rating to the Respondent's left leg. Id. Importantly, Appellants note Respondent specifically chose to see Dr. Kestner as he believed him to be one of the best doctors in town. (R. p. 75, lines 1–8).

At the hearing, Respondent testified he was having constant, everyday pain in his ankle since being released by Dr. Kestner. (R. p. 77, lines 1–10). Despite this, Respondent did not return to Dr. Kestner for further treatment. Respondent saw Dr. Bright McConnell for an independent medical evaluation on June 3, 2019, a little over a month prior to the hearing. (R. pp. 287–91). Per Dr. McConnell, Respondent had only *occasional* soreness in the distal fibula with *occasional* snapping which was *intermittently* painful. Id. (emphasis added). Dr. McConnell further reported that Respondent "walks with essentially a non-antalgic gait pattern." Id. However, Respondent testified that when seen by Dr. McConnell, he walked with a limp when putting full weight on his

left leg. (R. p. 67, lines 7–19). Dr. McConnell assigned a 10% impairment rating to the leg. (R. p. 290).

Respondent's hearing testimony directly contradicts the medical evidence in the records, including reports both from the authorized treating physician and Respondent's own doctor. Based on the repeated inconsistencies, the Appellate Panel's determination that Respondent should be awarded a 25% impairment rating to his leg is not supported by the substantial evidence in the record.

b. The Hearing Commissioner infringed on Appellants' due process rights by not allowing cross examination on relevant and probative issues other than the left ankle.

The South Carolina Constitution provides that in procedures before administrative agencies: "No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard . . . ." Art. I, § 22 (2009 & Supp. 2011). The South Carolina Supreme Court has explained:

> Procedural due process requirements are not technical; no particular form of procedure is necessary. The United States Supreme Court has held, however, that at a minimum, certain elements must be present. These include (1) adequate notice; (2) adequate opportunity for a hearing; (3) the right to introduce evidence; and **(4) the right to confront and cross-examine witnesses**.

In re Dickey, 395 S.C. 336, 360, 718 S.E.2d 739, 751 (2011) (quoting In re Vora, 354 S.C. 590, 595, 582 S.E.2d 413, 416 (2003)) (emphasis added). The APA requires that, in a contested case, all parties must be afforded the opportunity for a hearing and to respond and present evidence on all issues involved. S.C. Code Ann. § 1-23-320(A), (E) (2005 & Supp. 2011). Moreover, the APA provides that, in a contested case, "[a]ny party may conduct cross-examination." S.C. Code Ann. § 1-23-330(3) (2005); *see also* Adams v. H.R. Allen, Inc., 397 S.C. 652, 657, 726 S.E.2d 9, 12 (Ct. App. 2012).

At the hearing, Respondent argued he was entitled to greater disability for the leg because his injury prevented him from working as a deputy. (R. pp. 44–45). However, the evaluation submitted by Respondent with Dr. McConnell noted that he had not returned to work as a sheriff's deputy secondary to disability through the VA. (R. p. 289). Respondent further testified that he never treated at the VA for his left ankle injury. (R. p. 79, lines 11–19).

Due to his hearing testimony, Appellants questioned Respondent as whether he had any other health conditions that would impact his ability to return to work as a deputy sheriff. (R. p. 82, lines 18–20). Counsel for Respondent objected to this question because it addressed other body parts. (R. p. 82, lines 22–24). Counsel for Appellants asserted that the question actually goes to disability. (R. p. 83). The Hearing Commissioner sustained Respondent's objection and did not allow Appellants to continue with the line of questioning. Id. Appellants argue that if it was actually Respondent's other non-compensable health conditions that prevented him from performing the physical demands of the job and working as a deputy, this is directly relevant to the amount of disability determined for the left ankle. In other words, if there were other reasons that prevented Claimant from working as a deputy, and it is not his solely his ankle injury preventing him from returning to work, then the line of questioning is particularly relevant to a determination of disability. Appellants have the right to determine if it was only the ankle injury preventing him from working. By prohibiting counsel for Appellants from eliciting testimony on these issues, the Hearing Commissioner unduly prejudiced Appellants by infringing upon due process rights.

Counsel for Appellants also asked Respondent if he sustained any injuries aside from his left ankle as a result of his accident. (R. p. 84, lines 13–15). Respondent's counsel objected again. (R. p. 84, lines 16–20). This was a direct additional infringement on Appellants' due process rights:

Ms.: Meehan: Again, I'm going to object. We're only going forward–

Commissioner Wilkerson: Single member. You–

Ms. Meehan: –on the left ankle.

Commissioner Wilkerson: –we're here on your behalf.

Ms. Meehan: We're going forward, I think–

Commissioner Wilkerson: You–you have designated that–

Mr. Lyon: Commissioner, I think that's a proper question. I–

Commissioner Wilkerson: –well, I don't–not on your 21. Look–look what your 21 says. What does your 21 say we're here for? Look at it.

Mr. Lyon: –well, I–and I understand, Commissioner, but–

Commissioner Wilkerson: I didn't–I didn't fill it out. What does it say? That's my question to you; what does your 21 say?

Mr. Lyon: –well, and I think–

Commissioner Wilkerson: That's what we're here for.

Mr. Lyon: –I understand Commissioner. I just want to put on the record that we've asked for all injuries to be addressed, all alleged injuries.

Commissioner Wilkerson: I asked you a question that hasn't been answered.

Mr. Lyon: I'm sorry, Commissioner.

Commissioner Wilkerson: what is on your 21?

> Mr. Lyon: A request to determine permanent disability compensation.
>
> Commissioner Wilkerson: For the single member.
>
> Mr. Lyon: For the–
>
> Commissioner Wilkerson: That's the only thing that is accepted; that's the only thing we're here for. That's what you asked for; that's what the hearing is held today for. If you had alleged other body parts, everything that came forward, then you would have an opportunity to open that question but you didn't ask for that. You said stop pay for the PPD and/or–that's what we're here for and–and you all have only accepted the left ankle; that's it. That's what we're here for is the left ankle and foot; I'll give you that, okay?

(R. p. 84, line 16–p. 85, line 18).

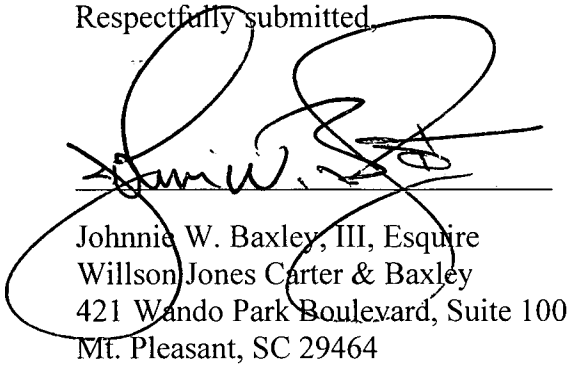
As noted above, there is no line on a Form 21 that allows defendants in a workers' compensation claim to request adjudication of specific body parts. Further, the Form 21 filed by Appellants expressly says, "Defendants request hearing to determine PPD and address termination of temporary disability payments." (R. p. 125). The Form 21 does not exclude the consideration of any additional body parts; indeed, Appellants specifically asked that the Hearing Commissioner address the back injury and alleged depression at the hearing, as the Respondent listed the additional body parts on his brief and even went so far as to obtain a vocational evaluation on the exact issue. Accordingly, the Hearing Commissioner improperly infringed upon Appellants' due process rights by limiting the scope of cross examination. In sum, it was legal error for the Full Commission to affirm the Decision and Order of the Hearing Commissioner, and this Court should

remand for reconsideration based on the evidence in the record.

CONCLUSION

Based on the foregoing, this Court should reverse the Full Commission Decision and Order and remand for a decision based on the evidence in the record as to whether Respondent sustained compensable injuries other than to his left leg, the extent of PPD to his left leg, and the extent of Appellants' credit for benefits paid after the date of MMI.

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

Appellate Case No. 2020-001220

Paul Misuraca, Employee, Respondent,

v.

Charleston County, Employer,

and

SC Association of Counties SIF, Carrier, Appellants.

CERTIFICATE OF COUNSEL

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

February 26, 2021

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