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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM SOUTH CAROLINA
SC Workers' Compensation Commission
Appellate Panel

SC Court of Appeals

Trial Court Case Nos. 1716288 & 1801098

Michael K. Crowley, Claimant, Appellant,

v.

Darlington County, Employer, and
SC Association of Counties, Carrier, Respondents.

NOTICE OF APPEAL

Appellant, Michael K. Crowley, appeals the Decision and Order of the SC Workers' Compensation Commission Appellate Panel filed February 1, 2022. Appellant received notice of entry of the Appellate Panel Decision and Order (the final Agency Decision) according to an unsigned "Certificate of Service" by email on February 1, 2022. The Appellate has not been properly served as required by Statute, SC Code §42-17-60, which requires service by registered mail. Email service is allowed for under Commission Reg. 67-210 but a Regulation may not alter or add to the terms of

a Statute. Gadson v. Mikasa Corp., 368 S.C. 214, 628 S.E.2d 262 (SC App. 2006).

Pursuant to SC Code §42-17-60, the grounds of the appeal and/or the errors of law presented to the Court are set out hereinafter:

1. That pursuant to S.C. Code of Laws §42-17-50, the Appellant requests a review of all of the Findings of Fact, the Conclusions of Law, the Order and Award and of all rulings and decisions made by the Commission at the hearing, as contained in the Record or as made at any unrecorded pre-hearing conference, and in any communications concerning the claim, Order, Award and Decision rendered by the Commission in this matter.

2. That the Court should review the Award and find that while Deputy (former now Police Officer disabled retired) Crowley's burden of proof is to establish by a preponderance of the evidence that he is entitled to the benefits sought, there is absolutely no evidence on the essential issue for decision by the Commission as to loss of use of the back to do work requiring the use of the back, other than that (former) Deputy Crowley has lost 50% or more of the functional use of his back to do work requiring the use of his back and is entitled to an Award of 500 weeks of compensation for that scheduled member

loss of use under SC Code §42-9-30(21). Under that Code Section, the scheduled member Award to be made is for "loss of use" and is based on the character of the injury, not wage loss. The Commission erred in failing to make an Award based on the reliable, probative and substantial evidence in all of the Findings of Fact and Conclusions of Law and that part of the Order involved with and addressing that issue. The Commission specifically erred in making Findings of Fact, 29,30 & 31, and Conclusions of Law 3 and specifically Conclusion of Law 5 and in the Order and Award made based on those and all Findings and Conclusions in reference to the back and leg.

3. That the Commission erred as a Matter of Law by failing to make Findings of Fact and Conclusions of Law on the essential issue of, "loss of use" of the back to do work requiring the use of the back under SC Code §42-9-30(21) in contradiction to our Appellate Court and specifically the Supreme Court's decision in Clemmons v Lowes Home Improvement of Irmo.

4. That the Commission erred as a Matter of Law by making Findings of Fact 22, 23, 24, 25 & 26, which are not Findings of Fact but are in fact legal opinions and legal positions. They contain arguments, legal positions, legal opinions and citations

to case references not presented to the Commissioner, either before or after the Hearing, by either party which constitutes the Commission going outside of the Record and arguments made to him by the parties and based on a legal analysis not presented.

5. That the Commission erred as a Matter of Law in specifically making Finding of Fact number 22, which is actually not a Finding of Fact, but is a legal opinion or legal interpretation or legal position based on review of Law and which also is contrary to the actual argument and objection made by the Appellant. The Finding of Fact specifically states in pertinent part:

"... Claimant asserts that prior physicians' opinions are not credible because they allegedly fail to address causation ...

The issue in this case is what weight to assign to medical records that may or may not state 'to a reasonable degree of medical certainty' that Claimant's pre-existing conditions are or are not related to his work injuries ...

Additionally, the records may be admitted for impeachment purposes, and it is necessarily so that a party will not know whether or not the Records will be used for that purpose until a witness testifies at the Hearing."

However, the actual objection that was made, as set out in the Record at the Hearing, and as capsulized in a letter from the Appellant's Counsel submitting additional authority in support of the Claimant's objection, was as follows:

"You will recall that we objected to medical records for past treatment being submitted into evidence without any supporting medical opinion establishing a causal relationship between any of that medical care to any of Deputy Crowley's current medical problems stemming from the accident and for which benefits are sought. Without such expert opinion evidence, the submission calls for speculation by the Commission on a causal relationship. As part of Defendants response to our objection, the Defendants position was, in part that the Records were being submitted concerning the Claimants credibility."

In the Findings of Fact, in Finding #18 in reference to the prior medical history the Commission actually found the Appellant credible; he: "either admitted or could not recall the extent or nature of his previous complaints regarding his cervical spine, lumbar spine, right groin, right shoulder, and lower extremity complaints".

There is no finding that the Appellant's testimony was not credible in any regard. From the additional authority cited to the Commissioner, Clark vs. Phillips Electronics:

"Phillips contends the panel rightfully treated all the medical evidence as suspect because Clark did not disclose his 2006 injury. But Dr. Storick deflated this theory when he testified that learning of the 2006 injury did not change his opinion that the 2011 injury caused Clark's injuries. Phillips could have offered contrary evidence; without any, the panel had no basis to discount the objective medical evidence and Crane tells us a vague nod to credibility cannot close the gap."

The Panel's Absolutist treatment of Clark's credibility in effect adopts the Latin maximum, well known to lawyers... 'false in one, false in

all'. ... Wigmore denounced the maximum as 'primitive psychology' that 'is in itself worthless'....

... "Dubious and Archaic as the saying may be, we are not aware of any instance where it has been used to disregard not just a party's testimony but their entire array of proof."
(Emp. add.)

The Commission erred by admitting these medical records without any medical opinion evidence stating that they were in any way relevant concerning the Appellant's current injuries to his low back (not neck) and leg.

6. That the Commission erred as a Matter of Law and Fact by affirming the Award of future medical care. The undisputed medical evidence establishes that former Deputy Crowley will need all types of medical care, not included in the Commission's Award and specifically including chronic pain management for the severe problems that he is having with his low back:

Dr. Nigel Watt January 31, 2019, stated that Deputy Crowley will not need follow-up appointment because he, "is established with a pain management physician ..."

Dr. Leonard Forrest "I recommend that Deputy Crowley continue his pain management under the direction of Integrated Pain Management and also Dr. Barbara Sarb that is needed in order to maintain his current level of function."

At the time of release, 11/21/2019 Dr. Naso and Dr. Sarb

noted his current and continuing medications as:

"CURRENT MEDICATIONS - Taking: Lortab 10-325 MG Tablet Orally Four times a day, Capacet Orally, Zomig 2.5 MG Tablet Orally, Simvastatin 40 MD Tablet Orally, Gabapentin 300 MG Capsule Orally Three times a day, Hydrocodone-Acetaminophen 10-325 MG Tablet Oral, Tizanidine HCl 4 MG Tablet Oral, Diclofenac Sodium 75 MG Tablet Delayed Release Oral, Butalbital-APAP-Caffeine 50-325-40 MG Capsule Oral, Keflex 500 MG Capsule 1 capsule Orally every 12 hrs.

Medication List reviewed and reconciled with the patient."

Integrated Pain Management Ms. Sharon Coggin, PA-C:

"Mr. Crowley will need the chronic pain treatment which we are providing him due to the condition of his lower back without regard to his cervical spine problems, and he will need this treatment for the foreseeable future as reflected in our records and treatment notes. This is my opinion stated to a reasonable degree of medical certainty."

There is simply no contrary medical opinion evidence that former Deputy Crowley will not need this medical care.

7. That the Commission erred by admitting and not excluding the medical opinion and evaluation report of Dr. James Bethea where the Respondents violated and failed to comply with the provisions of SC Code §42-15-95. That Code Section provides that an employer, carrier or its representative may communicate or discuss the worker's claim without consent with any Provider that either provides examination or treatment, provided that the employee must be given notice and this notification:

"must occur prior to the actual discussion or communication" ... (2) advised by the employer, carrier or its representative ... of the nature of discussion or communication prior to discussion or communication ... (3) provided with a copy of the written questions at the same time the questions are submitted to the health care provider...

(C) Any discussions, communications, medical reports, or opinions obtained in violation of this section must be excluded from any proceedings under the provisions of this title."

The evidence established that there were multiple communications and specifically including a detailed letter attaching hundreds of pages of medical records sent to Dr. Bethea on October 27, 2020; all of which conversations and communications which occurred between October 2020 and January 2021 were not copied to nor was the Appellant made aware of; and the Appellant only became aware of such communications with Dr. Bethea following his Subpoena issued on January 6, 2021 to Dr. James Bethea, MUSC Primary Care as set out in the Record.

The Commission erred in violation of the Statute as a matter of Law requiring a reversal or a new Hearing since that evidence was obtained in violation of §42-15-95. It was the fruit of the poisonous tree.

8. That the Commission erred by accepting the medical records and report of Dr. James Bethea, in violation of the agreement of the Respondents to provide an evaluation for

treatment by a specialist at the Medical University of South Carolina, wherein it is clearly established in the Record that Dr. James F. Bethea is not part of nor a specialist with the Medical University of South Carolina, Department of Orthopaedics and Physical Medicine, nor any other specialty department at the Medical University of South Carolina and is only a treating physician within MUSC's, "Primary Care" at the Epic Center in Mount Pleasant, South Carolina.

9. That the Commission erred as a Matter of Law in making Findings of Fact 23, 24, 25 and 26 which are not actually Findings of Fact, but are legal opinions, positions, and statements and which contain rulings that are not Findings of Fact in reference to the Appellant's objections to the admission of Dr. Bethea's medical report and opinions which were put into evidence over those objections; and further by making decisions in Findings of Fact on legal issues including:

A. After a request for a Commission Subpoena by failing to issue a Subpoena for Dr. James F. Bethea to appear at the Hearing to testify so that the Appellant could exercise his right of cross-examination, wherein the Respondents had placed Dr. Bethea's report into evidence over objection. The right of cross-examination is specifically preserved and particularly as

to any written documentation put into evidence under SC Code §1-23-330(1) and (3).

B. By interpreting the Workers' Compensation Act so as to not require the Commission upon request to issue a Subpoena requiring the attendance of a witness upon whose written documentary evidence the Commission relied in making its decision and wherein a specific request was made for Dr. Bethea to be subpoenaed by the Commission to the Hearing, so that the Appellant could exercise his right of cross-examination. The Commission interpreted the Statute which allows for it to subpoena witnesses, to hold that the Commission didn't have to subpoena the witness, but at the same time admitting the documentary evidence into evidence and relying on that evidence in limiting benefits.

C. Requiring the Appellant to pay to exercise his right of cross-examination wherein the Respondents paid Dr. Bethea a fee of \$5,000.00 to conduct, instead of a treatment evaluation, an Independent Medical Evaluation, and to answer questions far beyond a treatment evaluation which was introduced by the Respondents as their evidence to support a limitation on the Award. Thus violating the very fundamental principles of the Act, including that it designed to be a no cost/no fault system

interpreted in favor of the injured worker to provide for swift and sure benefits.

D. By concluding as a Finding of Fact, which is not a Finding of Fact, that, "Dr. Bethea, who is a private citizen, is not a State actor as contemplated by our Laws. He may charge appropriate fees for his time in testifying at a deposition".

There is no Law, Regulation or Court holding referencing a physician as a private citizen versus a State actor as contemplated by any Law, Regulation or Court decision, and what that has to do with anything in reference to whether or not a claimant has to pay to cross-examine a Defense Expert is arbitrary and capricious.

E. As a Matter of Law, by confusing or failing to recognize the difference between a discovery deposition, which a party takes to know what a witness is going to say at trial versus a De Bene Esse deposition, that a party takes in order to be allowed to submit evidence into the Record in support of their claim or defense in lieu of live testimony. The Commission failed to recognize the difference between a discovery deposition and evidence which constitutes an error of Law.

10. That the Commission erred as a Matter of Law and Fact based on the reliable, probative and substantial evidence in the

Record on loss of use by failing to make a scheduled member Award under SC Code §42-9-30 (21) for total and permanent disability, which is undisputed, as follows:

Dr. Leonard Forrest expressed the medical opinion stated to a reasonable degree of medical certainty that Mr. Crowley had lost 50% or more of the functional use of his back to do work requiring the use of his back.

Deputy Crowley testified that in his opinion he had lost 80% of the use of his back as a result of injuries to do work requiring the use of his back.

The Functional Capacity evaluation, and Dr. Naso, and all treating physicians released Deputy Crowley to only sedentary work. In fact, the Functional Capacity Evaluation limited him to only "limited" sedentary work, thus excluding him under the Dictionary of Occupational Titles from 4 out of the 5 physical demand classification categories due to the injury to his back and thus excluding him from over 80% of the job classifications available throughout the entire economy. Per vocational expert actually 89%.

Both the vocational expert, who personally evaluated Deputy Crowley and the records review expert for the Respondents opined that Deputy Crowley was only capable of doing sedentary work.

There is no other evidence in the Record concerning "loss of use".

11. That the Commission erred in making Findings of Fact #3 and #9 and by not recognizing and finding that both prior to and subsequent to the first injury, Deputy Crowley was a full-regular duty Deputy Sheriff working in the Fox Trot Unit of the Sheriff's Department who was performing the full range of physical demands and activities of a Deputy Sheriff. Subsequent to the second accident, he was placed on sedentary work only restrictions on which he remained from that date until the day that he left employment. During this time, he was reassigned to the Court House and to only be a "security officer for the Judge".

12. That the Commission erred as a Matter of Law in making Findings of Fact 2,3,5 and 6 inferring and finding that (former) Deputy Crowley was provided, "all appropriate medical care", whereas subsequent to the 2018 injury after the authorized treating physician, Dr. Nigel Watt recommended an MRI in February, no treatment was provided for the back and the back was totally denied until after the Appellant was sent for an evaluation by Dr. Cheatle, not in Florence, but in Myrtle Beach, SC, after which the MRI was provided over 9 months later. The

Record establishes that there was no treatment between February and September for the Appellant's severe back injury, thus the finding that the Appellant's injury to the back was "accepted" and that he was provided "all appropriate medical care" is not supported by and is contrary to the Record.

13. That the Commission erred in its review of the vocational expert testimony by not addressing in its Findings of Fact concerning the vocational expert testimony that Ms. Harriett Fowler did a detailed analysis under the Dictionary of Occupational Titles Physical Demand Classification System concerning the number of job classifications that are available in each of the physical demand categories which concluded that since it was agreed by all physicians that the Appellant was excluded from all but, "sedentary" work, that assuming he could do the full range of sedentary work, he was still excluded from, "89% of job titles in the US economy based on his physical capacities, and can only work from 2.67 to 5.28 hours total in an 8 hour day even in the sedentary physical demand category" This issue is not addressed in the report of the vocational analysis conducted by the vocational evaluator for the Respondents. This misunderstanding of this uncontradicted evidence requires reversal of the Commission's decision.

14. That the Commission erred as a Matter of Fact of Law by failing to address the essential issue for decision in any of its Findings of Fact or even to mention Deputy Crowley's opinion concerning the amount of loss of use of the back that he has. The Commission is required to make Findings of Fact and Conclusions of Law on every essential issue presented to the Commissioner for decision.

15. That the Commission erred as a Matter of Law and Fact in reference to all Findings of Fact and all Conclusions of Law referencing the leg particularly including Findings of Fact 5, 6, 7, 15, 18, 20, 29, 30 and Conclusions of Law 2 and 5, and in the Order part of the Award referencing the leg wherein there is no reference to the fact that Deputy Crowley has a documented radiculopathy based on EMG/NCS studies and which is documented in his treatment notes with Integrated Pain Solutions. There is no evidence in the Order that the Commission took this radiculopathy into consideration in reference to the Appellant's loss of use of the back or loss of use of the leg stemming from the injuries.

16. That while the Commission in part addressed the Appellant's need for further medical care to maintain his current condition and functioning level and Awarded the

Appellant a TENS Unit and physical therapy, there is no reference to follow-up medical care or the authorized physician to prescribe a TENS Unit and/or order physical therapy. As is set out in the records of Drs. Naso and Sarb, and even in the vocational expert used by the Respondents report, the Appellant is on continuing medications and chronic pain management which is not addressed in the Commission's Order.

17. That the Commission erred as a Matter of Law in its application under Conclusion of Law #4 as to the provision of medical care under SC Code §42-15-60 or that the future medical care needs of the Appellant under the undisputed evidence as a Matter of Law was even considered by the Commission. Under the Appellant's burden of proof and the reliable, probative and substantial evidence in the Record, and the uncontradicted medical opinion evidence as to the future medical care needs of the Appellant. If the Commission is not going to award any medical care thought to be necessary by the treating physicians or under the evidence, the Commission must find substantial evidence in the Record for such denial and cite that evidence in support of any Findings of Fact or Conclusions of Law denying or limiting care.

18. That the Commission erred as a Matter of Law in making Finding of Fact #5, which is not a part of the Law as established by the SC Supreme Court in reference to loss of use of the back or for loss of use of the right leg. The Supreme Court has specifically held, and the Statutes require that the Commission address the essential issue of fact and Law under SC Code §42-9-30, the Scheduled Member Award Statute, which is loss of use, not impairment or disability. Disability is defined under SC Law under SC Code §42-1-120 and under Supreme Court decisions and the Statutes of our State, loss of earning capacity is not a requirement or a consideration in reference to loss of use under §42-9-30. Loss of use under our Supreme Court decisions and particularly as to the back is to be compensated based on the evidence in the Record based on the character of the injury and specifically loss of use to do work requiring the use of the back; and wage loss is not a consideration.

19. That the Commission erred as a Matter of Law in making Conclusion of Law #6, wherein that was not an issue presented to the Commission for decision, nor was it cited, nor was it a part of the Record in any way, shape or form nor was it in fact an issue before the Commission for decision. The Conclusion of Law is arbitrary (based on random choice of personal whim rather

than any reason or system), and capricious (a judicial decision which is the subject of whim not based on and which does not follow the law, logic or proper procedures).

20. That the Commission erred as a Matter of Law in making Conclusion of Law #7 and in citing the case of Barr v. Darlington County School District which decision was not rendered at the time that this matter was heard; it is not part of the Record; it was not submitted by any party; and is not a proper consideration for the Commission unless and except as raised by a party in argument or in support of their position.

It violates the neutrality of a Hearing Officer and the responsibility of the Commission under the Act for the Commission to look up and consider legal authority outside of that presented by the parties with the intent and purpose of denying the Appellant benefits.

Further, that part of Conclusion of Law #7 that refers to the Appellant's due process rights not being violated and the Commission not required to issue a Subpoena, does not reference the requirements of the United States Supreme Court that where a Claimant or any litigant asserts their right to cross-examination of a document placed into evidence and specifically asks that the administrative body subpoena the witness so that

they may exercise their right of cross-examination the submission violates due process and is contrary to the Law and the Commission's Oath of Office.

That part addressing that the Commission is not required to issue a Subpoena and referencing the Commission's responsibility and authority under the Act is contrary to Law. The Commission's responsibility under Statute and specifically §42-3-140 and §42-3-150 in reference to a request for a Subpoena which is made by a party and particularly the injured worker, is to determine and make a decision and set forth Findings of Fact and Conclusions of Law supporting that review and decision as to whether or not the presence and attendance of a witness is necessary as it relates to "the questions in dispute"; and whether or not the testimony is deemed "necessary in connection with any proceeding" under this Title. SC Code §1-23-330 specifically provides that the right to cross-examination shall be preserved in all administrative hearings, and that has been determined to require the attendance of witnesses for that purpose concerning any documentation that is placed into evidence or sought to be placed into evidence.

21. That the Commission erred as a Matter of Law under Conclusion of Law #8 by not referencing the Statutes under which

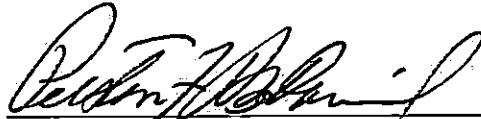
it is ordered, but more importantly as it relates to the Award set forth under Conclusion of Law #8 as to the Award that was made to Deputy Crowley for his back and leg wherein Deputy Crowley is entitled to an Award for loss of use of the back, for the full 500 weeks of compensation due under the Act, due to the character of his injury.

22. That the Commission erred in its Order part in its Award to the back and its Award to the leg as being contrary to Fact and Law and as to the provision of medical care which is contrary to Fact and Law under the undisputed medical and testimonial evidence in the Record.

23. That the Commission erred as a Matter of Fact and Law by not making any Findings of Fact and Conclusion of Law in reference to whether or not the Appellant has sustained serious disfigurement. This factors into the Commission's consideration of the back. It is well documented and undisputed throughout the entire Record that Deputy Crowley has a documented, unchallenged radiculopathy in his right leg and that he suffers gait derangement. Gait derangement is an awardable disfigurement, but more importantly it is a factor that should have been considered and is not reflected in the Commission's Findings of Fact or Conclusions of Law. Without making Findings of Fact and

Conclusions of Law on the issue of serious disfigurement, the Commission erred within its Order by concluding that the Appellant did not sustain any serious or permanent disfigurement as a result of the accident.

Respectfully submitted,



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March 2, 2022

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THE STATE OF SOUTH CAROLINA
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APPEAL FROM SOUTH CAROLINA
SC Workers' Compensation Commission
Appellate Panel

Trial Court Case Nos. 1716288 & 1801098

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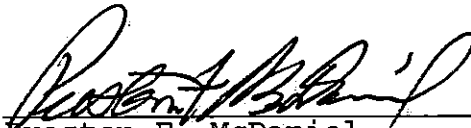
v.

Darlington County, Employer, and
SC Association of Counties, Carrier, Respondents.

PROOF OF SERVICE

I certify that I have served the NOTICE OF APPEAL by depositing a copy of it in the United States Mail, postage prepaid, on March 2, 2022 addressed to: Ms. Amy Bracy, Judicial Director, South Carolina Workers' Compensation Commission, Post Office Box 1715, Columbia, South Carolina 29202 AND also serving a copy upon: John Gabriel Coggiola, Esquire, Willson Jones Carter & Baxley, 3600 Forest Drive, Ste. 204, Columbia, SC 29204.

Dated: March 2, 2022



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Proudly representing injured workers
for over 35 years.

Preston F. McDaniel

Matthew Robertson

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SC Court of Appeals

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March 2, 2022

Honorable Jenny Abbott Kitchings
Clerk of Court
SC Court of Appeals
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RE: Michael K. Crowley, Employee, v. Darlington County,
Employer, and SC Association of Counties, Carrier.
Trial Court Case Nos.: 1716288 & 1801098


Dear Ms. Kitchings:

Enclosed for filing is a Notice of Appeal in the above case.
Also enclosed are the following:

1. Proof of Service of the Notice of Appeal on the Respondents;
2. A copy of the Order which is to be challenged on appeal.
3. A Filing fee of \$250.00.

We would appreciate your returning to us a clocked copy in the enclosed self-addressed stamped envelope. I hope this is sufficient for filing but should you need any additional information, please let us know.

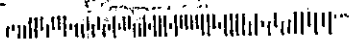
Sincerely yours,



Preston F. McDaniel

PFM/kth
Enclosures

cc: John Gabriel Coggiola, Esquire
Ms. Amy Bracy, Judicial Director, SCWCC
Gerald Malloy, Esquire
Mr. Michael K. Crowley



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