THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

Commissioners Aisha G. Taylor, Susan S. Barden and Gene McCaskill

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Appellate Case No. 2021-001174

Trial Court Case No. 1717573

Jeffrey McCoy, Employee, ... Appellant-Respondent,

v.

Cromed, LLC, Employer, and
Guarantee Ins. Co. (in Liquidation)/S.C. Property & Casualty Ins. Guaranty
Assoc., Carrier, Respondents-Appellants, ... Respondents-Appellants.

INITIAL RESPONDENT'S BRIEF OF APPELLANT-RESPONDENT

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2. Whether the Appellate Panel properly gave more weight to the expert opinions of the orthopaedic surgeons (Drs. LaMotta, Ulrich and Poletti) than to the opinion of the radiologist (Dr. Bull) retained by Employer to support the finding that McCoy's a compensable injury arose out of his employment?

3. Whether the Appellate Panel's Finding of Fact awarding temporary total disability compensation for any period was supported by substantial evidence when it is undisputed that McCoy was deemed legally disabled due to medical work restrictions and the Employer made no offer of employment suitable to his capacity?

4. Whether the Appellate Panel abused its discretion in finding good cause to designate Dr. LaMotta as the attending physician pursuant to its statutory authority in § 42-15-60 (A)(2007)?

STANDARD OF REVIEW

An appellate court must affirm the findings of fact made by the Commission if they are supported by substantial evidence. Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981). Substantial evidence is not a mere scintilla of evidence, but evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the agency reached. Grayson v. Carter Rhoad Furniture, 317 S.C. 306, 454 S.E.2d 320 (1995). Where there is a conflict in the evidence, either by different witnesses or in the testimony of the same witness, the findings of fact of the Commission are conclusive. Glover v. Columbia Hospital of Richland County, 236 S.C. 410, 114 S.E.2d 565 (1960). Indeed, the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence. Moore v. City of Easley, 322 S.C. 455, 472 S.E.2d 626 (1996). An appellate court may not substitute its judgment for that of an agency as to the weight of the evidence on questions of fact unless the agency's findings are clearly erroneous in view of the reliable, probative, and substantial evidence on the record. Rodney v. Michelin Tire Corp., 320 S.C. 515, 466 S.E.2d 357 (1996). Workers' compensation awards must not be based on surmise, conjecture or speculation. Kennedy v. Williamsburg County, 242 S.C. 477, 131 S.E.2d 512 (1963).

ARGUMENT

1. Substantial *medical* evidence supports the Finding of Fact that "McCoy has proven by both lay and expert medical testimony that he suffered an injury by accident arising out of and in the course of his employment on October 9, 2017 which aggravated a preexisting condition in his lumbar spine." [In Response to Respondents-Appellants' argument at pages 6-10].

Cromed argues "The Appellate Panel of the full Commission *erred in assigning less weight to the opinions* of a board-certified radiologist than to orthopedists, Drs. LaMotta and Poletti . . ." [Brief of Respondent/Appellant, page 7 (emphasis added)]. This argument fails as a matter of law.

The entire thrust of Cromed's argument is that the Appellate Panel should have given greater weight to their expert than it did to the other experts. Cromed asks this Court to become the fact finder and reweigh the evidence. This the Court cannot do. "In a workers' compensation case, the [Appellate Panel] alone is the ultimate factfinder. Where the medical evidence conflicts, the findings of fact of the [Appellate Panel] are conclusive." Mullinax v. Winn–Dixie Stores, Inc., 318 S.C. 431, 435, 458 S.E.2d 76, 78 (Ct.App.1995). See, also Dozier v. Am. Red Cross, 768 S.E.2d 222, 411 S.C. 274 (Ct.App. 2014)("The Appellate Panel, as the ultimate factfinder, operated within its discretion when it cited to and relied upon these doctors in making its decision.").

The Appellate Panel made a specific and detailed finding as to the rationale behind giving greater weight to the "spine surgeons who regularly review imaging studies," to wit:

> In making this finding, great weight is given to the documented worsening of condition with new symptoms after the accident as stated in the medical records and in McCoy's credible testimony. The lay testimony is confirmed by the expert opinions of Dr. LaMotta and Poletti. Dr. LaMotta testified "in my opinion, looking at the CT examination, there was a disc bulge without any evidence of stenosis, and now on the MRI examination, you have a disc protrusion with evidence of nerve compression. So, to me, there is clear change, although Yes, I can tell you that we don't have the same level of detail as we did on the MRI examination on the CT, but there is there is a clear difference there." [LaMotta Tr. Page 3 I, line 22-page 32, line 5]. Dr. Poletti opined there is an objectively determinable disc herniation on the MRI which is substantially different than the CT scan. Greater weight is given to the opinions of Drs. LaMotta and Poletti as they are spine surgeons who regularly review

> imaging studies. Unlike Dr. Bull, these two surgeons were able to conduct a physical examination of McCoy. Although Dr. Bull's opinion was considered, the more complete reports and deposition testimony of Drs. LaMotta and Poletti are far more persuasive. [FC Order, page 16, Finding of Fact 22].

Despite its exceptional detail and cogent reasoning, Cromed contends "this finding is vague and ambiguous in light of the conflicting opinions between the two physicians relied upon by the Claimant to establish the alleged 'worsening of condition." The "conflicting opinion" Cromed seeks to create is whether there was a "disc *protrusion* with evidence of nerve compression" or "an objectively determinable disc *herniation*."[1] [Brief of Respondent/Appellant, page 7 (emphasis added)]. These subtle differences in terminology are not relevant to the ultimate issue – which is whether the MRI taken post-accident showed a difference from the scan taken before the accident.

On this point, Dr. LaMotta and Poletti are of one mind. As quoted by Cromed, Dr. LaMotta testified "there is a clear difference there." Dr. Poletti testified "I do believe that the MRI shows worsening of the disc deformity compared to the previous CT scan." [Poletti Tr. Page 35, line 24-page 34, line 10]. In short, there is no conflict between the spine surgeons. Even if there were, any conflict in the testimony should be, and was, resolved by the Appellate Panel. See Stokes v. First Nat'l Bank, 306 S.C. 46, 50, 410 S.E.2d 248, 251 (1991) (regardless of a conflict in the evidence, either of different witnesses or of the same witness, a finding of fact by the Appellate Panel is conclusive).

Cromed attempts to bolster the qualifications of their radiologist, suggesting that as he is, in their words, "far more qualified", the Commission should have given his opinion "greater weight."

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[1]It is somewhat ironic that Cromed would take this tack on appeal, as counsel for Cromed asked Dr. Poletti to "Tell me if I'm right or wrong. Radiologists or even orthopedists sometimes use the terms 'protrusion' and 'herniation' interchangeably?" Dr. Poletti responded "That's correct." [Poletti Tr. Page 13, lines 2-6]. The question came after Dr. Poletti explained why he opted to use *herniation* to describe McCoy's injury, adding "I believe that the language – [the radiologist] would agree with my language, and I would agree with his language. It's just that the radiologist used those adjectives a little differently." [Poletti Tr. Page 11, line 22-page 13, line 13].

The Appellate Panel did not ignore or overlook Dr. Bull's report. They gave it full consideration, yet, with good reason, gave greater weight to the spine surgeons because they "were able to conduct a physical examination of McCoy."[2] Indeed, the Appellate Panel did not decide the case solely on the reviews of the imaging studies. They considered all the evidence, including the lay testimony, the contemporaneous medical records, the depositions of the spine surgeons and the experts' reports. They laid out their reasoning in thoroughly documented findings going through the chronology and evidence in detail.

Even the premise Cromed relies on is flawed. Cromed argues, without evidence, that a radiologist is more qualified to make a diagnosis concerning a spinal injury than a spine surgeon because a radiologist is a "certified specialist in radiology." The logical disconnect here is self-evident. Even Cromed admits "radiologists typically do not examine patients." [Brief of Respondent/Appellant, page 9].

More to the point, Dr. Poletti dispensed with this notion in his deposition. Cromed's counsel asked: "But would you agree that Dr. Bull, as a board-certified radiologist, would have a greater degree of expertise in interpreting imaging studies such as – such as MRIs and CTs than you would have being as that's his speciality?" Dr. Poletti definitively dispensed with this premise, testifying:

> Well, I mean, again, – I'll say it again because – it sounds arrogant to say it, but – but if you ever have an MRI scan or a CAT scan of your back and you want somebody to interpret it, you want me to interpret it. I promise you, I've looked at more of them than anybody. I feel more qualified than anyone to read a MRI or a CT scan of the spine. And that's by no means a diss on radiologists or anything like that. I'm just in the – I would describe it as unique position of seeing more than just about anybody over my career.

[Poletti tr. Page 20, lines 8-23].

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[2]Strictly speaking, Cromed is correct that Dr. LaMotta did not personally examine McCoy. He relied on the detailed physical examination documented by his Physician's Assistant, Troy Blanks, plus his personal review of the imaging studies. Dr. LaMotta testified about the specific pathology found including an antalgic gait, tenderness to palpation and a neurological deficit in the left lower extremity. [LaMotta Tr. Page 13, lines 1-20].

Unlike the unsubstantiated arguments of counsel, Dr. Poletti's testimony confirms he is qualified – if not more qualified – to diagnose and treat spinal injuries using, in part, MRI and CT scans. Cromed never challenged Dr. Poletti's qualifications to opine on this issue. Their entire argument goes to the weight given to the expert opinions. Unfortunately for them, an argument over the weight given to conflicting expert opinions cannot succeed on appeal. This Court is required to affirm under the substantial evidence standard of review.

The findings of the Appellate Panel are supported by substantial evidence. Therefore, the Court should affirm the finding that "McCoy has proven by both lay and expert medical testimony that he suffered an injury by accident arising out of and in the course of his employment on October 9, 2017 which aggravated a preexisting condition in his lumbar spine."

2. Substantial *lay* evidence supports the Finding of Fact that "McCoy has proven by both lay and expert medical testimony that he suffered an injury by accident arising out of and in the course of his employment on October 9, 2017 which aggravated a preexisting condition in his lumbar spine." [In Response to Respondents-Appellants' argument at pages 10-19].

Respondents take a different tack in their second argument, although it essentially reprises their first argument. They still contend the Appellate Panel should have "relied on the medical records and board-certified radiologist" rather than Drs. LaMotta and Poletti. [Brief of Respondent/Appellant, page 11]. This argument fails for the same reason their primary argument fails: the standard of review prohibits this Court from reweighing the evidence. "Indeed, the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence." Moore v. City of Easley, 322 S.C. 455, 472 S.E.2d 626 (1996).

Respondents make an entirely factual argument, more akin to a closing argument in a jury trial than an appellate argument. They cite no authority. They merely spin the evidence to fit the

story they seek to tell, never mind that the facts have already been decided by the Appellate Panel. See Eaddy v. Smurfit-Stone Container Corp., 355 S.C. 154, 584 S.E.2d 390 (Ct.App. 2003)(where appellant "cites no law in support of [its] assertion" the issue is deemed abandoned).

The same arguments presented here were presented to the Commission. The Single Commissioner and Appellate Panel recognized the issues – recognized this was a factually complicated case. No one disputes that McCoy had preexisting back pain arising from no apparent cause beginning September 14, 2017. The Appellate Panel worked its way through the evidence and came to the correct answer. Not only was the ultimate decision correct; the method of fact finding was logical, thorough and well-reasoned.

The Commission made sixteen separate factual findings building to the conclusion that "McCoy has proven by both lay and expert medical testimony that he suffered an injury by accident arising out of and in the course of his employment on October 9, 2017 which aggravated a preexisting condition in his lumbar spine." [Order, pages 12-16, Findings of Fact 6-22]. The Panel focused on three things: (1) testimony of the witnesses, particularly McCoy; (2) medical records from before and after the October 9, 2017 injury; and (3) reports and testimony of the doctors.

The Panel began by noting that McCoy's "clear, honest and direct . . . testimony provides an understanding of what actually happened in September 2017 and October 2017." This is a case whether both the lay testimony and medical evidence are important, such that the Commission properly based its findings, in part, on credibility of the witnesses. Crane v. Raber's Disc. Tire Rack, 429 S.C. 636, 842 S.E.2d 349 (2020)("When credibility is a reasonable and meaningful basis on which to make a factual determination, and when there is evidence of sufficient substance to afford a reasonable basis for the credibility finding, we will uphold the commission's factual determinations on the basis of credibility.").

The Commission then described in detail the onset of McCoy's "back and abdominal pain

with radiation into his left groin on or about September 17, 2017." [Order, page 12, Finding of Fact 7]. From there, the Order goes through the chronology from McCoy's initial medical treatment and time off from work up until the accident.

The Order relates the events of October 9, 2017 in detail. The Commission rejected Cromed's theory that the wheelchair accident could not have happened within the 4-5 minute timeframe. The Commission resolved slightly conflicting testimony between McCoy and Cromed's employee as to when and how the accident was reported.

The Commission then described the new and different symptoms experienced by McCoy, relying on both his testimony and the contemporaneous medical records. Finally, the Commission closely examined the medical evidence – including Dr. Bull's report. The panel cited specific conflicts between the opinions of Dr. Bull and Drs. LaMotta and Poletti, ultimately giving greater weight "to the opinions of Drs. LaMotta and Poletti as they are spine surgeons who regularly review imaging studies. Unlike Dr. Bull, these two surgeons were able to conduct a physical examination of McCoy. Although Dr. Bull's opinion was considered, the more complete reports and deposition testimony of Drs. LaMotta and Poletti are far more persuasive." [Order, page 16, Finding of Fact 22].

Cromed is understandably disappointed that the Commission rejected their theory of the case. Nonetheless, there is no ground for the Court to reverse the Commission's factual findings. Cromed, perhaps inadvertently, makes this point when they frame the issue as "The Full Commission therefore erred in *failing to give greater weight* to the opinions of Dr. Bull . . ." [Brief of Respondent/Appellant, page 19 (emphasis added)]. Even if "there are conflicts in the evidence and medical testimony, it is not the province of the Court to weigh the testimony; findings of fact of the Commission are conclusive where supported by competent evidence." Sturkie v. Ballenger Corp., 235 S.E.2d 120, 268 S.C. 536 (1977). On this issue, the Court must affirm.

3. McCoy should be paid Temporary Total Disability Compensation on a running award from October 10, 2017 as the Employer neither offered nor was able to offer employment within Dr. LaMotta's 15-pound lifting restriction [In Response to Respondents-Appellants' argument at pages 19-24].

Both parties appealed the Appellate Panel's award of temporary total disability compensation (TTD). McCoy appealed the limitation in time to 12 weeks. Cromed appealed any award of TTD.

Cromed argues that the South Carolina "Supreme Court set forth a two-part test that Claimant must satisfy: 1) Claimant must establish that he failed to obtain employment because of an injury-produced handicap; and 2) Claimant made 'reasonable efforts to obtain employment.'" [Respondents' Brief of Respondent-Appellants, page 20, *citing* Shealy v. Algernon Blair, Inc., 250 S.C. 106, 156 S.E.2d 646 (1967)]. Cromed's argument misses the mark. Shealy addresses permanent disability; not temporary total disability. And it does so in an outdated concept that has largely been superceded by legislative and case law changes over the last half-century since Shealy was decided. See Lee v. Bondex, Inc., 406 S.C. 97, 103, 749 S.E.2d 155, 158 (Ct. App. 2013)("[W]hile a claimant must prove disability, he is not required to prove he could not find employment with another employer in order to receive temporary disability benefits.").

Shealy followed a case decided two years earlier in which the court addressed the means by which a claimant could prove total disability under the economic model. The Coleman court set out three alternative methods of proof (1) expert vocational testimony; (2) testimony of employers who refused to hire the claimant; and (3) "diligent efforts to secure employment." Id. Any one of these methods will suffice. Coleman v. Concrete Products, Inc., 245 S.C. 625, 142 S.E.2d 43 (1965).

In Coleman, the Commission awarded compensation for total disability "until such time as the claimant returns to gainful employment suitable to his capacity." The Coleman court added "that the award here for total disability was not a permanent one, but a temporary one." It noted "the employer can be relieved of the liability to pay total disability benefits by either offering or procuring

for the employee . . . employment . . . suitable to his capacity . . ." Coleman at 627, 632, 142 S.E.2d at 44, 46.

The concept that the award would be temporary rather than permanent is not congruent with modern practice. As Coleman had been discharged by the operating surgeon, he was effectively at MMI (although the term MMI was not used by the court). See Hall v. United Rentals, Inc., 371 S.C. 69, 89, 636 S.E.2d 876, 887 (Ct. App. 2006) ("MMI is a term used to indicate that a person has reached such a plateau that, in the physician's opinion, no further medical care or treatment will lessen the period of impairment."). In modern practice, "workers' compensation benefits accrue along a time continuum: temporary total disability 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." Curiel v. Env. Management Services, 655 S.E.2d 482, 376 S.C. 23 (2007). Thus, today the award would be considered permanent and would be paid in a lump sum.

The point made in Coleman is that *post-MMI* disability under the economic model can be awarded one of three ways. Coleman proved his claim by testifying to the fact he applied to 18 different employers, all of whom refused to hire him. The court noted he:

> could well have offered stronger and clearer proof, showing any causal connection between his partial physical incapacity and his unemployment, by calling as witnesses various employers who refused to hire him, or by calling an expert such as the director of the employment service, as to the absence of a reasonable stable market for the services of a person of his limited capacity.

Id.

Shealy followed Coleman. Shealy worked sporadically as a cement finisher after being released by his doctor. He claimed disability for the periods where he could not find work. The Shealy court observed "[t]he medical testimony does not indicate a compensable disability." Id. at 110, 156 S.E.2d at 648. "All of the medical testimony and the evidence as to claimant's post injury

activities demonstrate his physical ability to work at ground level, albeit with occasional discomfort according to his testimony." Id. at 113, 156 S.E.2d at 650.

The court then compared Shealy's efforts to those of Coleman:

> Unlike in Coleman, the efforts of this claimant to obtain employment were intermittent and lackadaisical, rather than diligent. More conclusively, there is no evidence to support an inference that an injury produced physical impairment was the cause of claimant's failure to secure employment.

Id.

Shealy simply failed to meet his burden of proof.[3]

For the instant case, any discussion of Shealy and Coleman is purely academic. It is undisputed that McCoy has not reached MMI. [LaMotta Dep. Tr. Page 42, lines 1-14]. As such, consideration of the extent of his compensation for permanent disability is premature.

This brings us back to the requirements for payment of *temporary* total disability. Temporary disability benefits are triggered "[w]hen an employee has been out of work due to a reported work-related injury . . . for eight days[.]" S.C. Code Ann. § 42–9–260(A) (2007). As a matter of law, when the injured worker is under work restrictions, the employer must either offer suitable employment within the injured worker's capacity or pay temporary total disability compensation or wages in lieu of compensation. See S.C. Code Ann. § 42-9-190 (2007); S.C. Code Ann. § 42-9-200 (2007)("if the injury results in disability of more than fourteen days, compensation shall be allowed from the date of disability"); S.C. Code Ann. § 42-9-260(A) (2007); S.C Code Ann. Reg. 67-502 (2007)(defining "disability", "return to work without restriction", and "temporary partial incapacity").

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[3]To the extent it is relevant, McCoy met the requirements set forth in Coleman and Shealy. He testified about his efforts to find consistent employment within his restrictions. He testified "I've been looking [for a regular job] since that day; since the day I got let go. I mean, when I was able to go back I started looking; I go to Goodwill because I'm – I don't have a computer at home so I go to Goodwill to the job connections and I put my applications there." He further testified that "I've had interviews but the last one told me that, basically, without a doctor's release I'm a liability; so, they wouldn't hire me." [Tr. Page 62, line 20-page 64, line 8].

Cromed's argument that an injured worker must seek other employment when the liable employer fails to offer work within his restrictions is simply not the law. The identical argument was rejected by this Court in Lee v. Bondex. The court reasoned:

> [Employer] argues, a claimant must go into the marketplace and seek from other employers a job that does not conflict with his work restrictions. We disagree. This is not a claim for permanent disability compensation. For temporary disability benefits, a claimant must prove only that work restrictions prevent him from performing the job he had before the injury, and that his current employer has not offered him light-duty employment. For sound policy reasons, the workers' compensation system encourages an injured employee who is still able to perform light-duty work to continue working for his current employer until he reaches maximum medical improvement and then, if possible, to return to his previous position. Therefore, while a claimant must prove disability, he is not required to prove he could not find employment with another employer in order to receive temporary disability benefits. Rather, the claimant satisfies his burden by proving work restrictions that prevent him from performing his regular job and the unavailability of light-duty employment through the same employer.

Lee v. Bondex, Inc., 406 S.C. 97, 103, 749 S.E.2d 155, 158 (Ct. App. 2013).

The Court should reject Cromed's argument that McCoy was required to seek other employment as a condition of qualifying for TTD.

Cromed also argues McCoy "was never medically excused from work at either of his two visits to Midlands Orthopedics following his alleged injury of 10/9/17." [Respondents' Brief of Respondent-Appellant, page 20]. While this statement is literally true, it is misleading. At the time of the actual visits, the doctors at Midlands Orthopaedics did not address his work status one way or the other. This is hardly surprising as McCoy had been terminated and was not working.

McCoy's attorney, recognizing that the medical records did not address the issue, went to Dr. LaMotta and asked for his opinion. Dr. LaMotta responded in the questionnaire that McCoy was under a 15-pound weight restriction. Dr. Poletti kept him in out of work status. Both opinions necessarily relate back to the date of accident – or at least the date of the evaluations, which in Dr. LaMotta's case was October 26, 2017.

Cromed argues that because Dr. LaMotta did not personally examine McCoy and based his

opinions on work restrictions on a report drafted by his PA, Troy Blanks (reviewed and signed by Dr. LaMotta), that "his opinions and *the weight to be accorded to them* [is called] into question." [Respondents' Brief of Respondent-Appellant, page 20 (emphasis added)]. Once again, Cromed argues over the weight to be given evidence – a point this Court lacks authority to reverse under the substantial evidence standard of review. See, e.g., Rodney v. Michelin Tire Corp., 320 S.C. 515, 466 S.E.2d 357 (1996)(an appellate court may not substitute its judgment for that of the commission as to the weight of the evidence on questions of fact).

Cromed also argues that the opinions of Drs. LaMotta and Poletti "are so out-of-date as to be speculative." [Respondents' Brief of Respondent-Appellant, page 22]. The fact remains that the opinions of these two orthopaedic surgeons are the only medical evidence of disability in the record. Both doctors stated the restrictions were temporary – to be reevaluated once McCoy received treatment. If Cromed sought to change the restrictions, all it had to do was provide the treatment. To presume McCoy got better without treatment would be speculation.

Cromed argues that McCoy's "job as a medical transport driver would not violate Dr. LaMotta's fifteen-pound restriction." [Respondents' Brief of Respondent-Appellant, page 23]. They base this argument on incomplete testimony from Robert Cronan and McCoy. McCoy did testify he could do the job without giving assistance to the elderly and infirm people he was transporting. However, he went on to testify that he was required to lift wheelchairs and walkers into the vehicle. [Tr. Page 48]. Cronan admitted lifting a wheelchair "is something that is performed [and] it would be beneficial if the driver can lift the wheelchair and put it in the trunk. [Tr. Page 187, line 25-page 188, line 12]. He also admitted "there was no light duty at [his] company." [Tr. Pages 192-193]. Furthermore, even if Cromed could hypothetically have offered work within McCoy's restrictions, no work of *any* kind was actually offered. At some point Cromed learned of Dr. LaMotta's 15-pound restriction; yet never availed themselves of the opportunity to offer McCoy work and mitigate

their damages. See Johnson v. Rent–A–Ctr., Inc., 398 S.C. 595, 604-605, 730 S.E.2d 857, 860 (2012)(awarding TTD and rejecting employer's argument that claimant constructively refused employment suitable to her capacity where "it is highly speculative to presume Employer would offer Employee light duty work had she remained with Employer."). See, also S.C. Code Ann. § 42-9-260(B)(5) (2007)(TTD cannot be suspended or terminated unless "the employee has been released by the treating physician to limited duty work and the employer provides limited duty work consistent with the terms upon which the employee has been released.").

This testimony – combined with the work restrictions from the two surgeons – is substantial evidence to show "that work restrictions prevent him from performing the job he had before the injury, and that his current employer has not offered him light-duty employment." Lee v. Bondex, Inc., 406 S.C. 97, 103, 749 S.E.2d 155, 158 (Ct. App. 2013). As to any perceived inconsistencies in the testimony about light work and McCoy's ability to work, these were resolved by the Commission. See, e.g., Glover v. Columbia Hospital of Richland County, 236 S.C. 410, 114 S.E.2d 565 (1960)(where there is a conflict in the evidence, either by different witnesses or in the testimony of the same witness, the findings of fact of the Commission are conclusive); Moore v. City of Easley, 322 S.C. 455, 472 S.E.2d 626 (1996)(the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence).

As the evidence shows McCoy remained under medical restrictions which the Employer could not accommodate, McCoy is still deemed disabled under the Act. He must be paid TTD from October 10, 2017 and continuing on a running award. The Court should affirm the finding that McCoy is disabled and entitled to some period of TTD. The Court should reverse the 12-week limitation and hold TTD should be paid on a running award until the conditions to terminate TTD set forth in § 42-9-260 have been met (as argued in Appellant's Brief of Appellant- Respondent).

4. The Appellate Panel properly exercised its discretion in finding good cause to designate Dr. LaMotta as the attending physician pursuant to its statutory authority in § 42-15-60 (A)(2007) [In Response to Respondents-Appellants' argument at pages 24-25].

Cromed argues their "good faith denial of a claim should not warrant the Commission's appointment of a treating physician on that basis alone and where there is no evidence of a 'dispute' between the parties relating to treatment, but only as to compensability." [Respondents' Brief of Respondent-Appellant, page 24]. Cromed is simply wrong. "The Worker's Compensation Act provides that the employer names the authorized treating physician *once a case has been accepted.*" Hall v. United Rentals, Inc., 371 S.C. 69. 636 S.E.2d 876 (Ct.App. 2006)(emphasis added). As this is a denied case where no alternative doctor had been named by Cromed, the Commission had to designate the treating physician.

Cromed misapprehends its authority, for it is the Commission, not the employer, who ultimately has the authority to select the attending physician. The Act provides that: "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.*" S.C. Code Ann. § 42-15-60(A)(2007). As such, when the employer accepts the case, it generally is given authority to select the attending physician. The employer cannot actually direct treatment – it must provide any care or treatment "considered necessary by the attending physician." Id. This makes logical sense as the Act is supposed to be self-administering. The intent is for the employer and carrier to provide treatment and compensation without the need for adjudication by the Commission. It is logical in this sort of managed care system for the employer to select the medical provider.

The Act recognizes that disputes will arise. Sometimes over underlying compensability;

other times over the extent of injuries or the course of treatment. When those controversies arise, the Commission is empowered to adjudicate the dispute.[4]

For the Commission to designate the attending physician, there must be a showing of good cause. The Appellate Panel found:

> Dr. LaMotta is designated as the attending physician per § 42-15-60. As there is a dispute between the parties and Defendants have not provided any treatment, good cause exists for the Commission to appoint Dr. LaMotta. Dr. LaMotta is most familiar with the patient, he is well-known to the Commission, and he has already provided a treatment plan. Defendants are required to provide all treatment under the Workers' Compensation fee schedule. [Order].

Cromed never appointed an attending physician. Indeed, they never even obtained a medical opinion from a physician who could offer treatment. A fundamental tenet of the Act is that "a claimant is not required to sacrifice much-needed treatment merely to comply with an employer's choice of physicians." Hall. See, also Risinger v. Knight Textiles, 353 S.C. 69, 73, 577 S.E.2d 222, 224-25 (2002)(the statute "does not allow an employer to dictate the medical treatment of injured employees."). McCoy did what he had to do – he went to doctors at his own expense.

"This is not a case where an employee is refusing treatment offered by an employer. Rather, this is a situation where the employee feels he still needs treatment and the employer fails to provide it." Martin v. Rapid Plumbing, 369 S.C. 278, 631 S.E.2d 547 (Ct.App. 2006). It made sense for the Appellate Panel to appoint either Dr. Poletti or Dr. LaMotta as the attending physician. Both doctors were qualified; both had treatment plans; both were familiar with the patient. Ultimately Dr. LaMotta was chosen because he was geographically closer to McCoy's home. Good cause having been shown, the Court should affirm the designation of Dr. LaMotta as the attending physician.

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[4]"The Appellate Panel, when necessary, may override the employer's choice of providers and order a change in the medical or hospital service provided. . . . Ultimately, the Appellate Panel is authorized and empowered to order further medical care and payment for that medical care when controversies arise between a claimant and the employer." Hall v. United Rentals, Inc., 371 S.C. 69. 636 S.E.2d 876 (Ct.App. 2006)(internal citations omitted).

CONCLUSION

For the foregoing reasons, the Decision and Order below should be affirmed in part and reversed in part. McCoy should be awarded medical treatment with Dr. LaMotta. The 12-week temporary total disability award should be reversed and modified to provide that temporary total disability compensation must be paid from October 10, 2017 and continuing on a running award.

Respectfully Submitted,

Stephen B. Samuels
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COUNSEL FOR THE APPELLANT-RESPONDENT

May 4, 2022
Columbia, South Carolina

RECEIVED
May 04 2022
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

Appellate Case No. 2021-001174

WCC File No. 1717573

Jeffrey W. McCoy, Claimant, ... Appellant-Respondent,

v.

Cromed, LLC, Employer,
and Guarantee Ins. Co. (*in liquidation*)/S.C. Property & Casualty Ins. Guaranty Assoc,
Carrier, ... Respondents-Appellants.

PROOF OF SERVICE

I certify that I, Wanda Powell, paralegal for the Samuels Reynolds Law Firm, LLC, have caused the **Initial Respondent's Brief of Appellant-Respondent** to be served on the parties below, via electronic service, addressed as follows:

Mark D. Cauthen, Esquire
Cauthen Law Group, LLC
2231 Devine Street, Suite 101
Columbia, SC 29205
mcauthen@cauthenlawgroup.com

May 4, 2022

Wanda Powell
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SAMUELS REYNOLDS
LAW FIRM

STEPHEN B. SAMUELS
P. JASON REYNOLDS
C. DAVID BEALE, JR.
ATTORNEYS AT LAW

RECEIVED
May 04 2022
SC Court of Appeals

May 4, 2022

The Honorable Jenny Abbott Kitchings
Clerk of the South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

RE: Jeffrey McCoy v. Cromed, LLC and Guarantee Insurance Company *(in liquidation)*/S.C. Property & Casualty Insurance Guarantee Association
Appellate Case No.: 2021-001174

Dear Ms. Kitchings:

Enclosed for filing please find a copy of our **Initial Respondent's Brief of Appellant-Respondent** and **Proof of Service** in the above referenced matter. Please have your staff clock in and return to us the **Initial Respondent's Brief of Appellant-Respondent** and **Proof of Service** and return to us a clocked copy

By copy of this letter and enclosure to Mark D. Cauthen, Esquire, we are hereby serving him with a copy of our **Initial Respondent's Brief of Appellant-Respondent** as indicated by the attached **Proof of Service.**

. Please contact us with any questions or if further information is needed from our office.

Sincerely,

Wanda Powell
Paralegal for Stephen B. Samuels

/wp
Enclosure(s) as stated
cc w/encl.: Mark D. Cauthen, Esquire.