

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

SC Court of Appeals

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 Association,
Carrier,.....Respondents/Appellants.

REPLY BRIEF OF RESPONDENTS/APELLANTS

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(a) The Appellate Panel erred as a matter of law and/or abused its discretion in finding a documented worsening of disc deformities after Claimant’s alleged accident and in disregarding or assigning less weight to the opinions of a board certified radiologist relating to interpretation of various imaging studies, and instead, relying on the opinion of an orthopedist who never saw the Claimant and whose opinions lack sufficient factual foundation and probative value, the error being search findings were unsupported by the evidence and contrary to the most competent, relevant and probative medical evidence and/or clearly erroneous as a matter of law	
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ARGUMENT

I. THE APPELLANT PANEL OF THE FULL COMMISSION ERRED AS A MATTER OF LAW IN FINDING THAT CLAIMANT SUSTAINED A COMPENSABLE INJURY OR AGGRAVATION OF HIS LUMBAR SPINE ON OCTOBER 9, 2017, THE ERROR BEING SUCH FINDING WAS UNSUPPORTED BY SUBSTANTIAL EVIDENCE AND/OR CLEARLY ERRONEOUS AS A MATTER OF LAW

- (a) The Appellate Panel erred as a matter of law and/or abused its discretion in finding a documented worsening of disc deformities after Claimant's alleged accident and in disregarding or assigning less weight to the opinions of a board certified radiologist relating to interpretation of various imaging studies, and instead, relying on the opinion of an orthopedist who never saw the Claimant and whose opinions lack sufficient factual foundation and probative value, the error being search findings were unsupported by the evidence and contrary to the most competent, relevant and probative medical evidence and/or clearly erroneous as a matter of law

The Claimant asserts in his Respondent's Brief that this Court may not disturb a finding of the Appellate Panel as to the "weight" assigned to an expert witnesses' testimony/opinion. (Respondents Brief of Appellant - Respondent, pp. 3-6.) Although the rule is well established that the Appellate Panel has the final determination of witness credibility and the weight to be accorded witness testimony, the findings of the Commission may be set aside on appeal if there is a lack of competent evidence to support those findings. See Young v. Hickory Bus. Furn., 353 N.C. 227, 538 S.E.2d 912 (N.C. 2000) (Award for injury to claimant's back based upon weight of opinion of expert in internal medicine and rheumatology reversed where on appeal causation opinion found to be affected by speculation and conjecture.) See also Brown v. Peoplelease Corp., 402 S.C.476, 741 S.E. 2d 761 (Ct. App. 2013) ("appellate court may not substitute it's judgment for that of the Appellate Panel as to the weight of the evidence or questions of fact, but may reverse or modify

the Appellate Panel's decision if the appellant's substantial rights have been prejudiced because the decision is affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record.”).

In McLeod v. Piggly Wiggly Carolina Co., 280 S. C. 466, 313 S. E. 2d 38 (Ct. App.1984), the SC Court of Appeals reversed an award of partial disability benefits for a back injury which had been based on testimony of the Claimant in addition to testimony of a general practitioner. In McLeod, the Court did in fact evaluate the “weight” or proficiency of an expert witnesses’ testimony and found that “a higher degree of expertise” was required to determine the degree of partial loss of use. Id. at 471. The Court noted the complexity of the injury was a factor, here, an injury to the back “a much more complicated area of the body.” The Court therefore reversed the award and remanded for redetermination. Id. at 471.

In the present case, we are presented with some of the same factors considered by the Court in McLeod, supra. First, the part of the body injured by McCoy was the same as in McLeod, the back, described by the Court as a “complicated area of the body.” Id. at 471. However, McCoy's back injury was unusually complex, due not only to his long-standing pre-existing back problems, but in particular the fact that McCoy visited an emergency room for unrelated, severe back pain on two occasions during the three week period prior to his alleged back injury of October 9, 2017. (R. p ____). The Claimant was given a work excuse by a physician in the emergency room and was ultimately out of work two weeks prior to returning to work at CroMed, approximately one week before his alleged work injury on October 9, 2017. (R. p. ____). The complexities of the claim and the injuries asserted are acknowledged by Claimant's counsel (Respondents brief p. 6) and covered in detail in both parties prior briefs.

Beyond the Claimant's medical history, the complexities of this case were exponentially increased by the disparity of the opinions of Claimant's experts, Dr. Poletti and Dr. Lamotta with regard to their differing findings on the CT scan obtained prior to play minutes work accident and the MRI obtained thereafter. Claimant's counsel cites Dr. Poletti's deposition testimony that the terms "protrusion" and "herniation" could be used interchangeably, suggesting 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." (Respondents brief of Appellant- Respondent, p. 4). However, on this point Dr Lamotta in his own deposition disagreed.

Q. So, is—You talked about the difference between a protrusion and a bulge. Is that – Is that—Those terms—Are those terms always differentiated as to being different pathology or sometimes do you see radiologists kind of using the terms interchangeably, bulge as protrusion, a protrusion a bulge. Do you see that?

A. Certain not. Certainly no.

Q. You don't? Okay.

A. There's a clear difference between bulge, protrusion, extrusion, herniation. Those are definitely terms that are not interchangeable for anybody in the spine filed. No, to –to a patient, you know, somebody non-medical, they may say herniation or bulge, the same thing, but that –that's not at all the case when you talk about –when you talk to a radiologist or spine practitioners.

Q. Okay. But neither one of those is a herniation, is it?

A. A protrusion is one degree short of a herniation, but no, neither one of those is a true herniation.

Q. The MRI did not show a herniation at all; is that correct?

A. That is correct.

Lamotta Depo. p. 32. 13-25 ./p 33. 1-12

This illustrates yet another conflict in the opinions of Claimant's two experts, which the Employer asserts makes the sum total of their opinions subject to speculation and conjecture. If Claimants experts can't even agree on what the two scans show, how can the Commission accurately make its findings on this issue based on their opinions? As in McLeod, supra, a higher degree of expertise was required to determine the issue of causation in this case, that is whether there was a worsening of disc deformities objectively determinable between the pre -accident and post- accident imaging studies. That expertise could only be provided by a board-certified radiologist with regard to analysis and interpretation of the preinjury versus post injury imaging studies. Even Dr. Lamotta's colleague Dr. Uhlrich, agreed with that (R p__). Only Dr. Douglas Bull provided a competent opinion on the comparison of these studies and his precise opinion and findings were unrebutted by the Claimant who notably failed to offer a radiologist's opinion of his own.

CONCLUSION

For the Foregoing reasons the Respondents-Appellants respectfully request that the decision and order of the full Commission be reversed and the claim for benefits be denied.

Respectfully Submitted,

A handwritten signature in blue ink, appearing to read "Mark D. Cauthen", with a horizontal line underneath.

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COLUMBIA SOUTH CAROLINA
May 26, 2022

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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, Karen L. Fitch, paralegal for Cauthen Law Group, LLC, have served the **Reply Brief of Respondents-Appellants** on Jeffrey McCoy by depositing a copy of it in the United States Mail, postage prepaid on **May 26, 2022**, addressed to his attorney of record, Samuel B. Stephens, addressed as follows:

Stephen B. Samuels, Esquire
Samuels Reynolds Law Firm, LLC
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Respectfully submitted,



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VIA: USPS FIRST CLASS MAIL

The Honorable Jenny Abbott Kitchings
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Appellate Case No.: 2021-001174

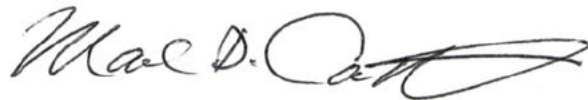
Dear Ms. Kitchings:

Enclosed for filing, please find the original and one (1) copy of the **Reply Brief of Respondents-Appellants**, along with Proof of Service, in the above referenced matter.

I would appreciate if you would return the additional clocked-in copy to us in the enclosed envelope.

By copy of this letter, I am serving a copy of our **Reply Brief of Respondents-Appellants** upon counsel for the Appellant-Respondent.

Very Truly Yours,



Mark D. Cauthen

MDC/klf
Enclosure
cc: Stephen B. Samuels, Esquire

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