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SC Court of Appeals

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

RESPONDENT'S BRIEF OF RESPONDENTS/APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

Whether the Appellate Panel of the Full Commission erred as a matter of law in awarding Temporary Total Disability Benefits and in finding the employer had no suitable employment available to Claimant, the error being such findings and/or conclusions were unsupported by the evidence and clearly erroneous in light of the relevant and probative evidence in the record.

STATEMENT OF THE CASE

This matter comes before the Court of Appeals from an appeal of the decision of the Appellate Panel of the South Carolina Workers' Compensation Commission which upheld the decision of the Single Commissioner.

The Claimant, Jeffrey McCoy, ("Claimant), was employed as a medical transport driver for Defendant Cromed, LLC. Cromed provides non-emergency medical transportation services. The Claimant alleges he injured his lower back and left leg while loading a patient's wheelchair into the trunk of a vehicle on October 9, 2017.

This claim was denied. The Claimant had been experiencing non-work-related back pain for several weeks prior to the alleged injury of October 9, 2017 and had been seeking treatment for those symptoms. On September 18, 2017, the Claimant reported to the Providence Hospital Northeast emergency room with complaints of lower back pain and radiation to his groin and down his bilateral lower extremities. (APA p. 2-3) These symptoms were not alleged to be work-related and are not part of this claim. The Claimant was diagnosed with a left lumbar spasm and was prescribed Valium and Motrin. The Claimant was given a work excuse until September 21, 2017. Cromed, LLC ("Cromed") provided Claimant with a full week off to rest and recover.

The following Monday, September 25, 2017, the Claimant attempted to return to work with Cromed but was still having significant back pain and was unable to stay at work. He returned to the Providence Hospital Northeast emergency room the next day, September 26, 2017, reporting worsening symptoms to the extent that he was now vomiting secondary to the pain. A CT scan of Claimant's lumbar spine was obtained which revealed diffusely bulging disc at L4-5 with mild central canal and biforaminal stenosis. There is mild bulging of the L5-S1 disc without central canal stenosis. At this visit, the impression of the evaluating physician was bulging lumbar disc, abdominal pain, elevated blood pressure, and lumbar radiculopathy. The Claimant was given another work excuse to September 28, 2017. Cromed again accommodated the Claimant with another week off to rest.

At the September 25, 2017 Providence ER visit, the Claimant was also referred to Midlands Orthopedics for evaluation. This referral was made approximately two weeks prior to the alleged injury of 10/9/17. (APA Submissions, p, 15-26).

The Claimant finally returned to work as a medical transport driver with Cromed on October 2, 2017.

On October 12, 2017, the alleged date of injury and also the Claimant's final day of work with Cromed, the Claimant received a verbal reprimand from his supervisor and co-owner, Robert Cronin, for performing patient pickups in the wrong order. The Claimant immediately contacted the other co-owner, Malcolm Young, apparently unhappy with the discussion with Mr. Cronin, and he advised that this would probably be his last day at Cromed. Mr. Young testified he advised the Claimant at that point to bring his vehicle in, but claimant requested that he work the rest of the day, and Mr. Young agreed. In his conversation with Claimant that morning, Mr. Young indicated Claimant said nothing about injuring or re-injuring his back and nothing about

lifting a wheelchair. Mr. Cronin also testified the Claimant reported nothing to him about injuring his back lifting a wheelchair on October 9, 2017.

On October 10, 2017, the Claimant was seen by Midlands Orthopedics per the referral made at Providence Hospital back in September. The Claimant's initial visit at Midlands on October 12, 2017 was three days after his injury on his final day at work at Cromed. In his deposition, Dr. Ulrich testified that he saw the Claimant on October 12, 2017 to follow-up on Claimant's complaints of low back pain with radiating symptoms to his left leg. At that visit, Claimant reported that he was a driver and that he "developed lower back pain with radiating pain down his left leg while driving" and that "lifting passengers" caused him significant discomfort. However, in a questionnaire completed on October 12, 2017, Claimant gave no answer when asked if this was a result of an accident, (ADA p.30). (It is important to note, however, that neither the Claimant nor any other driver with Cromed was required to "lift" patients but could only assist them in transferring in and out of a vehicle, wheelchair, etc.)

The Claimant was diagnosed with lower back pain and left lumbar radiculopathy. Dr. Ulrich commented, "This is a work-related injury. He has difficulties driving." However, the Claimant reported nothing to Dr. Ulrich about injuring his back while lifting a wheelchair, and that narrative is nowhere in history taken by Dr. Ulrich. At that time, an MRI of the lumbar spin was ordered and the Claimant was referred to Dr. LaMotta at Midlands.

Interestingly, Dr. Ulrich testified in his deposition about comparing a CT scan and MRI to determine pathology, he indicated, "[T]his question probably should be answered by a radiologist...but I still think a good radiologist can use a CT scan and compare it to an MRI and access an interval change...." (pp. 21, ll. 17-18; 22, l. 24 – p. 23, l.1).

The MRI was obtained on October 20, 2017 and revealed disc deformities at L4-L5 and L5-S1, worse at L4-L5 where there is a prominent broad-based disc deformity (protrusion extending centrally to the left). On October 26, 2017, the Claimant followed up at Midlands and saw Troy Blanks, Dr. LaMotta's physician assistant. Dr. LaMotta has never evaluated or even met the Claimant.

At this appointment, Claimant reported to a medical provider for the first time lifting a wheelchair at work on October 9, 2017, when he allegedly experienced a flareup of pain in lower back and left lower extremity. The Claimant was diagnosed with left lower extremity radiculitis, L4 nerve root pattern and lumbar stenosis at L4-L5. Dr. LaMotta's PA indicated Claimant could be treated nonoperatively and he recommended a selective nerve root block at L4 and then a course of physical therapy along with anti-inflammatories.

This was the Claimant's most recent medical visit related to this claim, except for an IME with Dr. Steven Poletti, arranged by Claimant's counsel. Although Claimant was seen twice in the emergency room in the span of two weeks in September 2017, he has not been back to the emergency room even once since then.

Claimant was not given a work excuse or work restrictions at either appointment at Midlands in 2017. The Claimant only obtained limited duty restrictions from Dr. LaMotta by way of a questionnaire submitted by his attorney and signed almost four months later, February 20, 2018.

At the time of the alleged injury and the following five months, Claimant made no effort to return to Cromed or request any type of employment, modified or otherwise. A hearing was held on the Forms 50 and 51 on July 16, 2020. On April 12, 2021 Commissioner Wilkerson issued his Decision and Order, finding that the Claimant sustained a compensable injury to his

back on October 9, 2017 while employed with CroMed. The Commissioner also awarded causally related medical care for the Claimant's back, as well as designating Dr. LaMotta as treating physician. Finally, Commissioner Wilkerson awarded 12 weeks temporary total disability but denied claim its request for TTD benefits dating back to the injury. Both parties appealed Commissioner Wilkerson's order to the Appellate panel of the Full Commission, which affirmed the hearing commissioners order in its entirety on September 20, 2021. This appeal then followed.

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act governs judicial review of decisions by the Workers' Compensation Commission. Bass v. Isochem, 365 S.C. 454, 467, 617 S.E.2d 369, 376 (Ct. App. 2005). An appellate court's review is limited the determination of whether or not the decision of the Appellate Panel of the Workers' Compensation Commission was supported by substantial evidence or is controlled by some error of law. Grant v. Grant Textiles, 372 S.C. 196, 200, 641 S.E.2d 869, 871 (2007); S.C. Code Ann. § 1-23-380(A)(5) (Supp. 2006).

The judicial review of the appellate panel's factual findings is governed by the substantial evidence standard. Gadson v. Mikasa Corp., 368 S.C. 214, 221, 628 S.E.2d 262, 266 (Ct. App. 2006). The appellate panel's decision must be affirmed if supported by substantial evidence in the record. Shuler v. Gregory Elec., 366 S.C. 435, 440, 622 S.E.2d 569, 571 (Ct. App. 2005) (internal citations omitted). A reviewing court may not substitute its judgment for the judgment of the Commission as to the weight of the evidence on questions of fact. S.C. Code Ann. § 1-23-380(A)(5) (Supp. 2006). However, a reviewing court may reverse or modify a decision of the

appellate panel if the findings of the panel are, "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." S.C. Code Ann. § 1-23-380(A)(5)(e) (Supp. 2006); (Houston v. Deloach & Deloach, 378 S.C. 543, 550; 663 S.E.2d 85, 88) (S.C. Ct. App. 2008)).

While an appellate court's review of factual findings in a workers' compensation case is governed and controlled by the substantial evidence rule, an appellate court may freely and absolutely review a trial court's decision concerning an issue of law. Where the Commission's decision is controlled by an error of law, the appellate review is plenary. Grant v. Grant Textiles, 361 S.C. 188, 191, 603 S.E.2d 858, 859 (Ct. App. 2004) (noting that a reviewing court will not overturn a decision by the Workers' Compensation Commission unless the determination is unsupported by substantial evidence or is affected by an error of law) (*reversed* on other grounds (Grant v. Grant Textiles, 372 S.C. 196, 200, 641 S.E.2d 869, 871 (2007)). "An award in a workers compensation case cannot be based on surmise, conjecture or speculation." McLeod v. Piggly Wiggly Carolina Co., 280 S.C. 466, 313 S.E.2d 38 (1984).

ARGUMENT

I. THE APPELLATE PANEL OF THE FULL COMMISSION ERRED AS A MATTER OF LAW IN AWARDING TEMPORARY TOTAL DISABILITY BENEFITS AND IN FINDING THE EMPLOYER HAD NO SUITABLE EMPLOYMENT AVAILABLE TO CLAIMANT, THE ERROR BEING SUCH FINDINGS AND/OR CONSCLUSIONS WERE UNSUPPORTED BY THE EVIDENCE AND CLEARLY ERRONEOUS IN LIGHT OF THE RELEVANT AND PROBATIVE EVIDENCE IN THE RECORD

The Defendants deny that Claimant sustained a compensable, causally related injury on October 9, 2017, However, in the event the Appellate Panel's finding of compensability is

affirmed, Defendants assert that Claimant failed to meet his burden of proof to establish entitlement to temporary total disability benefits at all. Alternatively, Defendants request that the Hearing Commissioner's award of twelve weeks TTD be affirmed.

Under the Workers Compensation Act, an employee's entitlement to temporary total disability "is premised on the nexus between the work-related injury and the inability to earn wages. An injured employee will be entitled to TTD compensation when his incapacity to earn wages is due to or because of the injury." Pollack v. S. Wine and Spirits of Am., 405 S.C. 9, 747 S.E. 2d 430 (2013). The Claimant cites Lee v. Bondex, Inc.,406 S.C. 97, 749 S.E.2d 155 (Ct. App. 2013) in support of his entitlement to TTD benefits. In Lee, this Court ruled that "for TTD 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 to him light duty employment." Id. at 102. The Claimant the claimant bears the burden of proving entitlement to TTD benefits. Id. In Lee, the Court determined that the employer's act of instructing the Claimant not to return to work based on physical restrictions assigned by the treating physician was sufficient to support the Appellate Panel's finding that Claimant was temporarily totally disabled. Id at 102.

In this case, the Claimant failed to establish that work restrictions prevented him from performing his job with CroMed. Moreover, Claimant failed to establish that his employer was even made aware of the purported work restrictions or any work excuse.

First, the Claimant was never medically excused from work at either of his two visits to Midlands Orthopedics following his alleged injury of October 9, 2017. The Claimant first sought medical care for the alleged October 9, 2017 injury three days later, on October 12th. At that time, he was seen by Dr. Slif Ulrich at Midlands Orthopedics for evaluation of lower back pain. The Claimant reported to Dr. Ulrich that "he is a driver and states that he developed lower back pain

with radiating pain down his left leg while driving. Lifting passengers causes him significant discomfort." Claimant reported nothing at this visit about lifting a wheelchair nor any specific injury three days earlier on October 9th. At this visit, Dr. Ulrich recommended an MRI of the lumbar spine, physical therapy, anti-inflammatories, and a prescription for Mobic; however, Dr. Ulrich did not give Claimant a work excuse nor did he recommend any specific work restrictions despite his awareness this was a Workers' Compensation claim. (APA, Pgs. 35-38)

Claimant's second visit to Midlands Orthopedics was on October 26, 2017. This was the first time Claimant reported to any medical provider anything about attempting to lift a wheelchair at work on October 9, 2017, at which time he reportedly experienced a flare-up of lower back pain. At this visit, Claimant's MRI findings were discussed, and a selective nerve root block at L4 was recommended. However, again, no work excuse was provided nor any specific work restrictions. (APA, P.40-45)

The medical records indicate that no medical work excuse nor work restrictions were ever provided to the Claimant unsolicited relating to the October 9, 2017 accident. In fact, the first work limitation at all was a fifteen-pound lifting restriction issued by Dr. LaMotta by way of medical questionnaire prepared by Claimant's counsel and dated February 20, 2018, more than four months after the alleged injury. The fifteen-pound lifting limitation was noted to be "temporary." (APA, Pgs. 50-51). Moreover, Dr. LaMotta admitted in his deposition that he had never actually seen or examined the Claimant at the time he completed the medical questionnaire at the request of Claimant's counsel and that the October 26th appointment was with his physician's assistant, not Dr. LaMotta himself. (LaMotta deposition, P.7)

At a minimum, this admission by Dr. LaMotta calls his opinions into question. Additionally, there is no current evaluation or opinion that Claimant remains under the "temporary" restrictions or any work restrictions as he hasn't been seen at Midlands Orthopedics since October of 2017 or by Dr. Poletti since January, 2018. Their opinions are based on evaluations that are so remote and out-of-date as to be speculative. *See* Coleman v. Quality Concrete Products, 245 S.C. 625, 142 SE2d 43 (1965). (A claimant has the burden of proving facts essential to his right to compensation and an award may not be based upon conjecture or speculation.)

Therefore, Claimant has clearly failed to establish that any legitimate or timely "work restrictions" prevented him from performing his job as a medical transport driver with Cromed. .

The Claimant has also failed to satisfy the second requirement of Lee v. Bondex, Inc., supra, " that his current employer has not offered him light duty employment". Id. at 102. In fact, there was no evidence offered by the Claimant that CroMed was even made aware of the solicited opinions of Dr. LaMotta or Dr. Poletti or any other purported work restriction prior to commencement of this claim with the Workers Compensation Commission. The Claimant admitted he advised his employer on the date of accident and his final day of work (10/9/17) "that this may or may not be my last day", following his disagreement that morning with Robert Cronan. (Full Comm. Order pp 4-5). Malcolm Young and Robert Cronan both understood this to be notice that the Claimant was quitting. (Full Comm. Order p.6, tr. p__). There was no further communication from the Claimant to his employer subsequent to the date of accident, other than a few texts between the Claimant and Cronan in October 2017 regarding Claimant's final check and return of employer property. (APA., pp.). Obviously, the employer had no reasonable expectation that the Claimant intended to or desired to return to work with CroMed, in a light duty position or otherwise and Claimant made no effort to notify them otherwise. Therefore, the

employer had no opportunity to even offer light duty employment and Claimant has therefore failed to establish the second requirement of Lee v. Bondex, supra.

Additionally, work was available with no lifting requirements with Claimant's employer, had he chosen to avail himself of this opportunity. As explained by Robert Cronin, Cromed needed drivers and would work to accommodate limitations as clearly evidenced by Cromed's granting two weeks off for the Claimant in September 2017 prior to the alleged injury to enable him to recover from his back pain. (Transcript, P. 150-151)

It was error for the Commissioner to find that Cromed had no suitable employment available to McCoy and could not provide work to McCoy within Dr. LaMotta's restrictions (Finding of Fact #17), even if legitimate restrictions had been provided to the employer on a timely basis. Claimant contends Robert Cronan testified that Cromed had no light duty work available and therefore could not have accommodated Dr. LaMotta's restrictions. This argument is misleading at best. In the deposition, Claimant's counsel failed to define what he meant by "light duty." Mr. Cronan testified there are no lifting requirements for medical transport drivers for Cromed, and thus, Claimant's job as a medical transport driver would not violate Dr. LaMotta's fifteen-pound restriction. (Tr. P. ___) In fact, Claimant testified at the hearing that his job with Cromed did not require lifting. Claimant testified further:

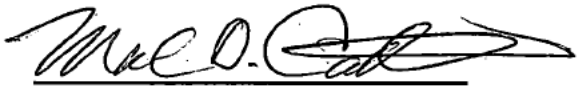
> Q: Okay. Would you be able to do that job, given the nature of your - - your people you're transporting, without giving them some assistance?
>
> A: Yes.
>
> Q: You could?
>
> A: Yes.
>
> (Transcript, p. 48)

Accordingly, Claimant has failed to satisfy his burden to establish entitlement to TTD benefits and, in the event the finding of compensability is affirmed, Defendants request the award of TTD benefits be reversed. Alternatively, Defendant's request the Commission's award of 12 weeks TTD benefits be affirmed.

CONCLUSION

As to the issue temporary total disability benefits, in the event the finding of compensability is affirmed, Defendant's respectfully request the award of TTD benefits be reversed or alternatively, that the Commission's award of 12 weeks TTD be affirmed.

Respectfully submitted,



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Columbia, South Carolina
June 3, 2022

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WCC FILE NO. 1717573

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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 **Respondent's Brief of Respondents-Appellants** on Jeffrey McCoy by depositing a copy of it in the United States Mail, postage prepaid on **June 3, 2022**, addressed to his attorney of record, Samuel B. Stephens, addressed as follows:

Stephen B. Samuels, Esquire
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Respectfully submitted,

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June 3, 2022

VIA: USPS FIRST CLASS MAIL
The Honorable Jenny Abbott Kitchings
Clerk of the South Carolina Court of Appeals
P.O. Box 11629
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RE: Jeffrey W. McCoy v. Cromed, LLC
Appellate Case No.: 2021-001174

Dear Ms. Kitchings:

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

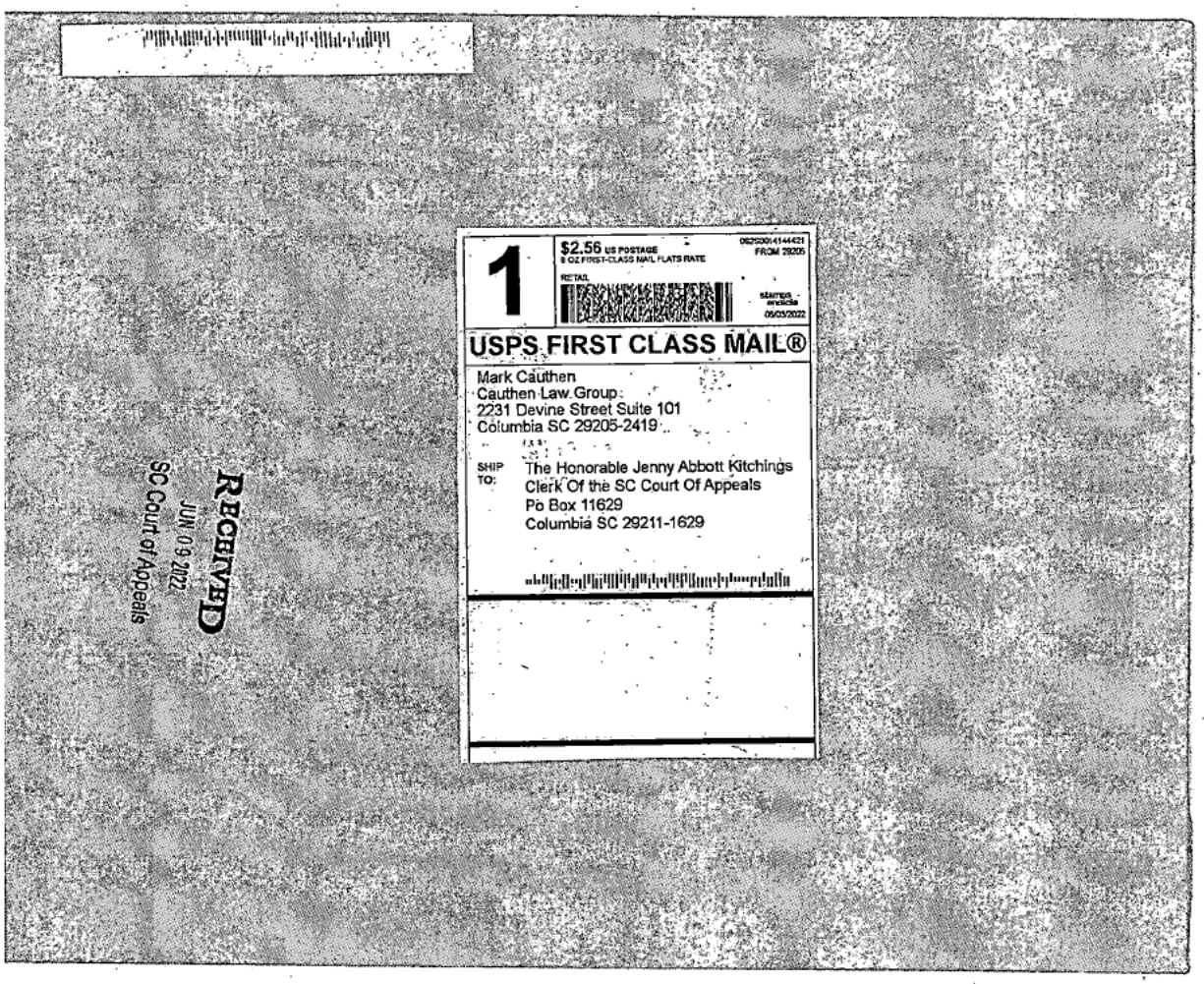
I would appreciate if you would return the additional clocked-in copy to us in the enclosed envelope.

By copy of this letter, I am serving a copy of our **Respondent's 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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