NOT FOR OFFICIAL PUBLICATION

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION II

IC BUS OF OKLAHOMA, LLC, and IC BUS OF OK A NAVISTAR INC. CO. (Own Risk #19208),

Petitioners,

vs.

STEVEN W. BACHLOR and THE OKLAHOMA WORKERS' COMPENSATION COMMISSION,

Respondents.

Case No. 119,534

APPEAL FROM THE WORKERS' COMPENSATION COMMISSION

SUSTAINED

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OPINION BY DEBORAH B. BARNES, JUDGE:

IC Bus of Oklahoma, LLC, and IC Bus of OK a Navistar Inc. Co. (collectively, Employer) seek review of an order of the Oklahoma Workers'

Compensation Commission vacating in part and affirming in part an order of an administrative law judge (ALJ). Based on our review, we sustain.

BACKGROUND

Steven W. Bachlor (Claimant) works as a bus inspector for Employer.[1] He has worked for Employer for more than seventeen years. In a CC-Form 3 filed in September 2017, Claimant alleged he sustained a cumulative trauma injury to his lungs as a result of exposure to exhaust and other chemicals at the workplace. In its CC-Form 10, Employer denied Claimant sustained a work-related injury, and asserted it had not provided Claimant with medical treatment.

The ALJ of the Oklahoma Workers' Compensation Commission ordered Claimant to submit to an independent medical examination by Dr. Dennis M. Parker, M.D., and the case proceeded to a trial in January 2020. Claimant was the only witness to testify at trial, and he explained Employer is a bus manufacturer and that his job involves "inspect[ing] and repair[ing] pre-delivered and delivered [buses]" as part of Employer's quality control process. He stated the vehicle inspections require, among other things, "run[ning] [the vehicles] at seventy miles an hour" indoors on a "dyno machine." He stated the vehicles being tested on the dyno machine would "emit[] . . . exhaust fumes into the building" because there

[1] In his appellate brief filed in July 2021, Claimant states he "has continued to work for Employer to this day."

was "no exhaust vent off the exhaust pipe, which basically forced the exhaust fumes into our building year around whether the doors were open or closed." He stated it was not until "towards the end of 2017, they finally started hooking up an exhaust system . . . [with] a suction tube that attache[s] to the tailpipes." He stated the dyno machine is less than ten feet from his work station, and that he was exposed to the fumes "[f]or probably eight to ten years[.]" Claimant stated the dyno test is performed at least fifty times a day, four days a week.[2]

Claimant also testified that as part of his job he would spray an "undercoat" on the buses. He explained that this undercoat is "a rubberized material that is sprayed to the undercarriage" that is "an anti-rust, anti-corrosion material" and is "sprayed with an aerosol can[.]" He stated that for eight years he sprayed "multiple cans[,] up to a case a day" on "up to ten buses a day[.]" He stated, "We had no protection, no respirators, no mask, no clothing was given to us."

When questioned by his counsel whether he "went off on [his] own and sought medical treatment [for his] lungs during the process of this claim," Claimant responded in the affirmative and stated he went, first, to his primary care doctor, and "[s]he recommended me to Dr. Gottehrer." Claimant stated Dr. Gottehrer placed him on a regular inhaler, a rescue inhaler, and a nasal inhaler. Claimant stated he uses the nasal inhaler once a day, the regular inhaler twice a

[2] Claimant testified the shifts are ten hours long.

day, and the rescue inhaler "[m]aybe once every couple of weeks." Claimant responded in the affirmative when questioned whether the inhalers he takes daily provide a benefit to him, and he testified that without these inhalers, "I have chest and back pain, I have shortness of breath, I can't . . . be very physical in my job or at my home, because I run out of energy fairly frequently."

Regarding his chest pain, Claimant stated it is

> a pressure center of my chest. There is pressure and pain. It also, in the center of my back, a lot of times, it will start where I feel the pressure in my back where it almost feels like somebody has punched me. And then if I don't – It seems like if I don't have my inhaler, then the pressure starts pushing from the front, also.

Regarding his shortness of breath, Claimant stated: "There's good days and bad days. Sometimes I really don't have any issue and then there's days that I will have where I can't hardly breathe. I had one instance where I started coughing and basically it dropped me to my knees because the pain was that great."

In an order filed in January 2020, the ALJ found Claimant "sustained compensable work-related cumulative trauma injury to the lungs which has now resolved." The ALJ further found Claimant "sustained 0% permanent partial disability" (PPD) to his lungs as a result of the injury, and denied Claimant's request for continuing medical maintenance (CMM).

Claimant filed a Request for Review with the Commission. Claimant asserted the ALJ erred in denying PPD and CMM. In an order filed in April 2021,

the Commission affirmed in part and vacated in part the ALJ's order. The Commission found Claimant's argument that the ALJ erred in denying PPD to be without merit. The Commission pointed out that Dr. Parker "found no evidence of any permanent pulmonary dysfunction or damage to Claimant's lungs, and [in a separate medical report submitted by Employer it was] opined that Claimant sustained 0% PPD." Thus, the Commission concluded the ALJ's determination was within the range of competent medical reports submitted at trial and was not against the clear weight of the evidence or contrary to law.

However, the Commission agreed with Claimant that the ALJ erred in denying CMM. The Commission stated that "[t]he purpose of CMM is not to change a claimant's impairment, but to provide him with more comfort in maintaining his present condition." The Commission stated that although Dr. Parker opined that Claimant did not require treatment to improve his pulmonary function, "the question before us is not whether the requested treatment would *improve* Claimant's pulmonary function, but whether it would *maintain* his present condition." The Commission also found Dr. Parker's deposition testimony "to be more probative of the issue under review"; in particular, the Commission found that portion of Dr. Parker's deposition to be probative in which, as summarized by the Commission, "Dr. Parker agreed that it would be reasonable for Claimant to continue medications, such as the inhalers prescribed by Dr. Gottherer, if they

alleviate his respiratory symptoms[.]" The Commission also stated that Claimant's testimony "established that his exposure to the injurious chemical irritants was ongoing"; in particular, Claimant's testimony that he continued to work for Employer and continued to "regularly spray[] rubberized undercoat without using protective equipment."

The Commission stated that, "[u]nder the circumstances presented, we find that the requested CMM is both reasonable and necessary in connection with Claimant's **ongoing** cumulative trauma lung injury." Accordingly, the Commission found "the ALJ's denial of CMM is against the clear weight of the evidence" and, therefore, modified the ALJ's order "to award [CMM] with Dr. Gottherer as is reasonably necessary to maintain Claimant's respiratory condition in connection with his compensable injury and his ongoing exposure to injurious chemicals and fumes at work." In all other respects, the ALJ's order was affirmed by the Commission.

From the Commission's order, Employer appeals.

STANDARD OF REVIEW

In cases before the Workers' Compensation Commission, "[t]he law in effect at the time of the injury controls both the award of benefits and the appellate standard of review." *Mullendore v. Mercy Hosp. Ardmore*, 2019 OK 11, ¶ 11, 438

P.3d 358 (citation omitted).[3] "[T]he date of awareness continues to be the determinative date of injury in cumulative trauma cases[.]" *Kelley v. Wolverine Tube, Inc.*, 2017 OK CIV APP 19, ¶ 13, 392 P.3d 711 (quoting *Am. Airlines Inc. v. Crabb*, 2009 OK 68, 221 P.3d 1289). The date of awareness in the present case lands in January 2017, and the law in effect at that time will be applied to the present case. With regard to the appropriate standard of review, the law in effect at that time provides as follows:

> The Supreme Court may modify, reverse, remand for rehearing, or set aside the judgment or award only if it was:
>
> 1. In violation of constitutional provisions;
> 2. In excess of the statutory authority or jurisdiction of the Commission;
> 3. Made on unlawful procedure;
> 4. Affected by other error of law;
> 5. Clearly erroneous in view of the reliable, material, probative and substantial competent evidence;
> 6. Arbitrary or capricious;
> 7. Procured by fraud; or
> 8. Missing findings of fact on issues essential to the decision.

85A O.S. Supp. 2014 § 78(C).

[3] *See also* 85A O.S. Supp. 2014 § 3 ("[The Administrative Workers' Compensation Act] shall apply only to claims for injuries and death based on accidents which occur on or after [February 1, 2014]," and "The Workers' Compensation Code in effect before [February 1, 2014], shall govern all rights in respect to claims for injuries and death based on accidents occurring before [February 1, 2014].").

As the Oklahoma Supreme Court has explained, "the language of [§ 78(C)(5)] is similar to that" applicable to review "of factual matters in other administrative proceedings," and, "[a]ccordingly, with respect to issues of fact, the Commission's order will be affirmed if the record contains substantial evidence in support of the facts upon which it is based and is otherwise free of error." *Mullendore*, 2019 OK 11, ¶ 13 (citation omitted).[4]

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[4] Employer argues, in effect, that this Court should apply a clear-weight-of-the-evidence standard of review to factual matters raised on appeal. Employer points out that § 78(A) of the Administrative Workers' Compensation Act provides that "the Commission may reverse or modify the decision [of the ALJ] only if it determines that the decision was against the clear weight of the evidence or contrary to law." Employer further points out that, as quoted above, § 78(C) provides that this Court "may modify, reverse, remand for rehearing, or set aside the judgment or award . . . if it was: . . . 2. In excess of the statutory authority or jurisdiction of the Commission[.]" Combining these two provisions, Employer asserts the Commission entered a ruling in excess of its statutory authority by vacating the ALJ's ruling on CMM that, according to Employer, was not against the clear weight of the evidence. Employer thus asserts the Commission acted in excess of its statutory authority by determining this ruling was against the clear weight of the evidence when it was not, and requests that this Court apply the clear-weight-of-the-evidence standard on appeal to reverse the Commission. However, as set forth above, the Supreme Court has held that, "with respect to issues of fact," the Commission's order will be reviewed on appeal under the clearly erroneous standard set forth under § 78(C)(5) such that "the Commission's order will be affirmed if the record contains substantial evidence in support of the facts upon which it is based and is otherwise free of error." *Mullendore*, ¶ 13. We, thus, reject Employer's argument that this Court should apply a clear-weight-of-the-evidence standard of review.

Moreover, to the extent Employer's statutory argument is not directly addressed in *Mullendore*, we further note that we disagree that § 78(C)(2) was intended to provide a basis for challenging the Commission's factual rulings. Indeed, a ruling may be properly within the Commission's "statutory authority or jurisdiction" regardless of whether it is supported by sufficient evidence. "When possible, different provisions must be construed together to effect a harmonious whole," *Villines v. Szczepanski*, 2005 OK 63, ¶ 9, 122 P.3d 466 (footnote omitted), and

> the courts of this state are required to consider all parts of [an act] together and not an isolated word, phrase, sentence or paragraph and consider such to the exclusion of the remaining parts of the act. Words, phrases and sentences of a statute are to be understood

Employer also raises issues of statutory construction. Issues of statutory construction are issues of law subject to a de novo review. *Mullendore*, ¶ 12. "Under this standard on appeal, we assume plenary, independent, and non-deferential authority to reexamine the lower tribunal's legal rulings." *Id.* (citations omitted).

ANALYSIS

I. CMM and PPD

Employer challenges the Commission's decision to vacate that portion of the ALJ's order denying CMM on the basis that CMM cannot be awarded in the absence of an award of PPD. As set forth above, the ALJ found Claimant

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> as used, not in any abstract sense, but with regard to the context and that sense which best harmonizes with all other parts of the statute.

Matter of Dobson Tel. Co., 2017 OK CIV APP 16, ¶ 13, 392 P.3d 295 (citation omitted). Section 78(C)(5) directly addresses this Court's power to reverse a Commission's factual ruling that is "[c]learly erroneous in view of the reliable, material, probative and substantial competent evidence[.]" On the other hand, § 78(C)(2) allows this Court to reverse a ruling "[i]n excess of the statutory authority or jurisdiction of the Commission[.]" Construing these provisions together, § 78(C)(5) applies to fact issues on appeal (as stated by the Supreme Court in *Mullendore*), and § 78(C)(2) does not. In addition, Employer essentially invites this Court to examine the Commission's ruling under the standard which the Legislature, in § 78(A), has reserved for the Commission to apply to rulings of the ALJ. We must decline this invitation as inconsistent with the legislative intent of § 78.

Finally, to the extent Employer is attempting to challenge the Commission's ruling regarding CMM as in excess of the Commission's statutory authority or jurisdiction (i.e., to the extent Employer is not merely utilizing this provision in support of its argument that this Court should apply the clear-weight-of-the-evidence standard), we conclude that because the Commission ruled, consistent with § 78(A), that "the ALJ's denial of CMM is against the clear weight of the evidence," the Commission cannot be said to have acted in excess of its statutory authority or jurisdiction. Nevertheless, we turn, further below, to the question of whether this ruling was clearly erroneous under § 78(C)(5).

sustained 0% PPD to his lungs as a result of the injury, and this finding was affirmed by the Commission. Employer asserts that the Commission, in affirming this ruling while also awarding CMM, entered an "order inherently inconsistent, contradictory, and contrary to law."

CMM and PPD are not interdependent as portrayed by Employer. CMM is defined as "medical treatment that is reasonable and necessary to maintain claimant's condition resulting from the compensable injury or illness after reaching maximum medical improvement." 85A O.S. Supp. 2014 § 2(12).[5] PPD is defined as "a permanent disability or loss of use after maximum medical improvement has been reached which prevents the injured employee, who has been released to return to work by the treating physician, from returning to his or her pre-injury or equivalent job." 85A O.S. Supp. 2014 § 2(12). Even accepting Employer's assertion that CMM and PPD are "awarded at the same time," and that an injured worker who reaches maximum medical improvement and who is awarded CMM may often also be found to have suffered some degree of disability which prevents that worker from returning to the equivalent job, it is nevertheless the case that CMM may also be awarded to injured workers whose injuries are found to *not* prevent them from returning to their equivalent job. Indeed, so long as those

[5] Maximum medical improvement "means that no further material improvement would reasonably be expected from medical treatment or the passage of time[.]" 85A O.S. § 2(28).

workers require "medical treatment . . . to maintain [their] condition resulting from the compensable injury or illness after reaching maximum medical improvement," *id.* § 2(12), the fact that they are able to return to their pre-injury or equivalent job has no bearing on their ability to receive CMM.

"Legislative intent governs statutory interpretation and this intent is generally ascertained from a statute's plain language." *State ex rel. Okla. State Dep't of Health v. Robertson*, 2006 OK 99, ¶ 6, 152 P.3d 875 (citation omitted). As set forth in § 2(12), in order for CMM to be properly awarded, the medical treatment must be "reasonable and necessary to maintain claimant's condition resulting from the compensable injury or illness after reaching maximum medical improvement." Because CMM does not depend on an award of PPD – i.e., on the worker's inability to return to his or her pre-injury or equivalent job – we reject Employer's argument.[6]

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[6] Employer also contends that under 85A O.S. Supp. 2014 § 50(D), the Commission's award of CMM was erroneous as a matter of law. Pursuant to this statutory provision, Employer asserts the Commission's award of CMM should be vacated because "the CMM awarded in this case was never previously ordered by the Commission or approved in advance by Employer." Br.-in-chief at 14. Employer quotes the following from § 50(D): "The employer or insurance carrier shall not be responsible for continuing medical maintenance or pain management treatment not previously ordered by the Commission or approved in advance by the employer or insurance carrier." Employer has failed to set this contention in a separate proposition in its appellate brief. Oklahoma Supreme Court Rule 1.11(f) provides that "[t]he main contentions of the parties must be set forth in separate propositions. The argument and authorities in support of each proposition must follow the statement of the proposition. Briefs in every proceeding, whether appellate or original jurisdiction, shall comply with Rule 1.11(f)." 12 O.S. Supp. 2013, ch. 15, app. 1. Moreover, it is difficult to discern precisely what Employer is asserting. Pertinent to the present case, the portion of § 50(D) quoted by Employer can be condensed to the following: that "[t]he employer or insurance carrier shall not be responsible for continuing

II. CMM and Substantial Evidence

Claimant argues the Commission's award of CMM is not supported by sufficient evidence. On appeal, we must determine whether the award is "[c]learly erroneous in view of the reliable, material, probative and substantial competent evidence," 85A O.S. Supp. 2014 § 78(C)(5); i.e., whether the record contains substantial evidence in support of the facts upon which it is based, *Mullendore*, 2019 OK 11, ¶ 13.[7]

> The term "substantial evidence" means something more than a scintilla of evidence and means evidence that possesses something of substance and of relevant consequence such as carries with it fitness to induce conviction, and is such evidence that reasonable [persons] may fairly differ as to whether it establishes a case. The determination of whether there is substantial evidence in support of the Commission's order does not require that the evidence be weighed, but only that the evidence in support of the order be examined to see whether it meets the above test.

Cent. Okla. Freight Lines, Inc. v. Corp. Comm'n, 1971 OK 57, ¶ 15, 484 P.2d 877 (citations omitted). "The term 'substantial evidence' means 'more than a mere

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medical maintenance . . . not previously ordered by the Commission[.]" Thus, an employer is not responsible for CMM *until* it is ordered. But, here, the Commission has ordered CMM, and, therefore, Employer cannot rely on § 50(D) to deny responsibility for CMM after it has been ordered. To the extent Employer asserts that the Commission's order of CMM is ineffective because it was not also previously ordered by the Commission in a prior order – a strained reading of the statute that would require the Commission to order CMM twice – we reject this assertion.

[7] As noted above, Employer argues the ALJ's denial of CMM was not against the clear weight of the evidence and, thus, the award of CMM should be vacated. However, as explained above, we will apply the substantial evidence standard.

scintilla' but a quantum that may be less than the weight of the evidence. It is proof that possesses something of real and relevant consequence and that carries with it a fitness to induce conviction." *Cox Okla. Telecom, LLC v. State ex rel. Okla. Corp. Comm'n*, 2007 OK 55, ¶ 36, 164 P.3d 150 (footnotes omitted).

> [S]earching a record for substantial evidence that supports an order does not entail a comparison of the parties' evidence to determine that which is most convincing. Instead, if the evidence supporting an order possesses a quality of proof inducing a conviction that the evidence furnished a substantial basis of facts from which the issue could be reasonably resolved, it is sufficient.

Id. (footnotes omitted).

In the medical report of Dr. Parker, he states that "[m]ost likely, within a reasonable medical certainty, associated with and as a result of exposure to chemicals and diesel exhaust in the workplace," Claimant suffered "Mild Upper Airway and Chemical Irritative Bronchitis." Dr. Parker stated:

> With the patient's description of the poor ventilation in the work area when the buses are running, it is not at all surprising that he would have the symptoms which he relates to me. In addition, the MSDS sheet reports respiratory irritation as well as central nervous system depression as a potential side effect of this chemical. It is interesting that one of the first aid measures suggests that if an individual is overcome by this chemical it may be dangerous to another individual to provide mouth-to-mouth resuscitation suggesting that exposure to this chemical may be significantly toxic.

Although Dr. Parker stated in his report that he does "not think that there is any specific treatment that is required to improve [Claimant's] pulmonary function," the Commission accurately observed in its order that "the question before us is not whether the requested treatment would *improve* Claimant's pulmonary function, but whether it would *maintain* his present condition."[8] The Commission also quoted the following from Dr. Parker's deposition testimony:

> Well, I think that it is likely that if he is seen by a healthcare provider, myself or Dr. Gottehrer or somebody else, during one of those acute episodes, that perhaps a steroid pack, perhaps an inhaler, perhaps an antibiotic, something along those lines, might be appropriate at that time.
>
> It's hard for me to give you a blanket statement that says "this will be what he needs to have done" because I have not seen one of those episodes and he was not having one of those when I saw him. At the time that I saw him, he needed no treatment at that point.

Thus, it is not the case that Dr. Parker was of the opinion that Claimant was not in need of treatment that would maintain his condition. Rather, Dr. Parker stated in his medical report that "it is not at all surprising that [Claimant] would have the symptoms which he relates to me," and explained in his deposition that Claimant was simply "not having one of those when I saw him." The following

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[8] In support, the Commission quoted, among other things, the definition of CMM which, as set forth above, is: "medical treatment that is reasonable and necessary to maintain claimant's condition resulting from the compensable injury or illness after reaching maximum medical improvement." 85A O.S. Supp. 2014 § 2(12).

exchange, also quoted in the Commission's order, further clarifies Dr. Parker's position on the issue of CMM:

> Q. If those medications, inhalers, steroid pack prescribed by this physician provided a benefit to the claimant, meaning that they helped with his subjective symptoms of shortness of breath on exertion, things of that nature, would it not be beneficial for him to continue them?
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> A. Yeah. I think that if you had an objective positive response to the therapy, then you have to say, well, perhaps despite normal pulmonary function tests, he really did have some sort of asthmatic bronchitis presumably, in this case, on the basis of chemical or irritant exposure.
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> If you get a positive response, then you could make the argument that those medications and treatments should be continued.

Importantly, as set forth above, Claimant, the only witness to testify at trial, responded in the affirmative when questioned whether the inhalers he takes daily provide a benefit to him, and Claimant testified that without these inhalers, "I have chest and back pain, I have shortness of breath, I can't . . . be very physical in my job or at my home, because I run out of energy fairly frequently." Claimant testified that he experiences pressure and pain at the center of his chest and that his condition worsens "if I don't have my inhaler[.]" In addition, pertinent to Dr. Parker not directly observing Claimant's symptoms, Claimant testified at trial, as quoted above, that "[t]here's good days and bad days. Sometimes I really don't have any issue and then there's days that I will have where I can't hardly breathe."

It is also significant that Claimant's treating physician, Dr. Gottehrer, placed Claimant on the inhalers. For example, Dr. Gottehrer sets forth the following in his April 2019 medical report: "mild persistent asthma – stop QVAR and change to Symbicort 160/4.5 two puffs twice a day – sample given and prescription sent . . . shortness of breath and chest pressure . . . ." And, finally, Claimant presented medical reports of Dr. Richard Hastings, D.O., Ph.D, in which it is opined that Claimant requires continuing medical treatment.

We conclude the Commission's award of CMM is supported by substantial evidence, evidence that is more than a mere scintilla and furnishes a substantial basis of facts from which the issue could be reasonably resolved in Claimant's favor. Accordingly, the Commission's determination regarding CMM is not clearly erroneous under § 78(C)(5).

III. Selection of the Physician

Employer asserts the Commission's order should be vacated "to the extent it orders CMM with Dr. Gottehrer. Employer did not choose Dr. Gottehrer, and by statute, the employer gets to select the treating physician." Claimant responds by pointing out that "Employer has never provided medical treatment to Claimant." Claimant states that "Employer cannot statutorily deny the claim, deny responsibility for medical treatment, then insist on designating a physician."

Claimant's position is supported by the following statutory provisions. Title 85A O.S. Supp. 2014 § 50 provides, in pertinent part:

> A. The employer *shall promptly provide* an injured employee with medical, surgical, hospital, optometric, podiatric, and nursing services, along [with any] medicine, crutches, ambulatory devices, artificial limbs, eyeglasses, contact lenses, hearing aids, and other apparatus as may be reasonably necessary in connection with the injury received by the employee. *The employer shall have the right to choose the treating physician.*
>
> B. *If the employer fails or neglects to provide* medical treatment within five (5) days after actual knowledge is received of an injury, *the injured employee may select a physician to provide medical treatment* at the expense of the employer; provided, however, that the injured employee, or another in the employee's behalf, may obtain emergency treatment at the expense of the employer where such emergency treatment is not provided by the employer.
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> . . . .
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> D. Unless recommended *by the treating doctor* at the time claimant reaches maximum medical improvement or by an independent medical examiner, continuing medical maintenance shall not be awarded by the Commission. . . .

(Emphasis added.)

In the present case, it is undisputed Employer denied Claimant sustained a work-related injury and did not provide Claimant with medical treatment. Instead, consistent with § 50(B), Claimant went, first, to his primary care doctor, and "[s]he recommended [him] to Dr. Gottehrer," who has provided Claimant with medical treatment. Pursuant to § 50, we reject Employer's argument that the Commission's

order should be vacated to the extent it orders CMM with a doctor that Employer did not choose.

CONCLUSION

We reject Employer's argument that an award of CMM cannot be made in the absence of an award of PPD. We further conclude the Commission's determination regarding CMM is supported by substantial evidence. Finally, we reject Employer's argument that the Commission's order should be vacated to the extent it orders CMM with a doctor that Employer did not choose. Consequently, we sustain the Commission's order.

SUSTAINED.

WISEMAN, P.J., concurs, and BLACKWELL, J., concurs specially.

BLACKWELL, J., specially concurring:

I concur in full with the majority opinion but write separately to suggest an additional basis for affirmance. The petitioners contend that an award of CMM must be accompanied by an award of PPD. This is wrong, as the majority correctly notes, because the definition of CMM necessitates a finding of *compensable* injury, not *permanent* injury. The ALJ specifically found that the claimant suffered a compensable injury, and the petitioners did not appeal that finding to the commission. The petitioners have thus waived any argument attacking the ALJ's

finding of a compensable injury, *Corbeil v. Emricks Van & Storage, Guarantee Ins.*, 2017 OK 71, ¶ 25, 404 P.3d 856, 862, an argument implicit in much of the petitioner's briefing. *See, e.g., Reply Brief*, pg. 1 (disputing that "there is an 'undisputed injury finding'"); *id.* (stating that "[t]he Commission … apparently found that Claimant has an 'ongoing cumulative trauma lung injury,' which Employer disputes."); *id.* at 5-7 (summarizing Dr. Parker's testimony and arguing it "hardly supports Claimant's assertions" of an ongoing injury).

For this additional reason, I concur in the affirmance of the commission's order.

September 30, 2021