

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Full Commission

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Case No. 0906486

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Shawn E. Pauling, ..... Appellant,

v.

PeopLease Corporation, ..... Employer,

and

Arch Insurance Company c/o  
Gallagher Bassett Services, Inc., ..... Respondents.

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REPLY BRIEF OF RESPONDENTS

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MAY 20 2013

**SC Court of Appeals**

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**STATEMENT OF ISSUES ON APPEAL**

- I. Did the Commission err when it ruled the Claimant was not entitled to any temporary total for his out of work period?
- II. Did the Commission err when it ruled that the only medical bill to be paid was that of the hospital?
- III. Did the Commission err when it characterized this accident as an admitted accident?

## STATEMENT OF THE CASE

Claimant was involved in an admitted motor vehicle accident arising out of and in the course of his employment in Indianapolis, Indiana on May 13, 2009. Specifically, Claimant was coming around a bend in his 18-wheeler truck when the truck rolled over. Claimant was provided initial medical evaluation and emergency treatment at Wishard Hospital in Indianapolis, Indiana following the accident. Thereafter, Claimant returned to South Carolina where his employment was terminated because he was determined to be at-fault in the accident. Claimant did not request any medical evaluation or treatment from the employer or the workers' compensation carrier at that time.

Shortly after being terminated, Claimant retained his current attorney. Claimant's counsel immediately referred Claimant for further medical evaluation and treatment with Dr. Gal Margalit, a primary care physician with Sunset Family Practice in West Columbia. Claimant's attorney did not seek approval of Claimant's employer or workers compensation carrier. Dr. Margalit subsequently referred Claimant for an MRI of his left knee and recommended physical therapy at Columbia Rehabilitation Clinic. Dr. Margalit released Claimant at maximum medical improvement on or about June 1, 2010. Dr. Margalit assigned Claimant an impairment rating of 5% to the knee and 5% to the back.

Claimant's Form 50, filed on or about May 20, 2010, requested a finding of a compensable injury to Claimant's left knee and low back, an award of temporary total disability benefits from May 14, 2009 until reaching maximum medical improvement on June 1, 2010. Claimant also sought payment and reimbursement for medical care he received from Dr. Margalit, including an MRI and physical therapy prescribed by him. Finally, Claimant sought an award of permanent partial disability compensation for specific loss of use of the left leg and

back based on Dr. Margalit's permanent partial impairment ratings of 5% to the back 5% to the knee.

Defendants readily admitted that Claimant sustained compensable injuries arising out of and in the course of his employment but denied the extent of on injuries alleged. Specifically, Defendants denied that Claimant sustained a compensable back injury. Claimant's initial complaints to the emergency room in Indianapolis were only related to his knee. Further, Defendants submit they are not liable for any unauthorized medical care Claimant has incurred through Dr. Margalit, including physical therapy at Columbia Rehabilitation and an MRI scan of his left knee. Claimant did not complain of pain or problems to the employer at any point after returning to South Carolina following his accident. Additionally, Claimant did not, at any time, request medical evaluation or treatment for any alleged injuries prior to his termination. As such, Defendants deny liability for medical bills from Dr. Margalit, CRC, and Inmed Diagnostics.

Defendants further deny Claimant's entitlement to temporary total disability benefits for any period alleged, noting that neither Dr. Margalit nor any other provider specifically wrote Claimant out of work or restricted his activities in any way following the accident. Finally, Defendants admitted that Claimant is entitled permanent partial disability compensation for his left knee injury based on the 5% impairment rating from Dr. Margalit, but deny that Claimant sustained compensable injury to his back.

By order dated May 7, 2012, Commissioner Wilkerson found, inter alia, that (1) Claimant sustained compensable injuries, (2) Defendants shall pay for Claimant's hospital visit in Indianapolis, (3) Defendants are not liable for subsequent medical bills, (4) Claimant did not request any medical treatment from employer, (5) Claimant is not entitled to temporary total

disability benefits because he was not written out of work, (6) Claimant sustained a 5% permanent partial specific loss of use to the left leg, and (7) Claimant did not present enough testimony to be entitled to an award for permanent partial disability.

This matter was heard before the South Carolina Workers' Compensation Full Commission Appellate Panel. Claimant timely appealed the Commissioner's Order by contending the Single Commissioner erred by (1) not awarding temporary total disability benefits, (2) not ordering payment of all medical care administered by Dr. Margalit, (3) failing to award Claimant permanent partial disability for his back, and (4) failing to award greater permanent partial disability for Claimant's knee injury. The Full Commission affirmed the Single Commissioner Decision and Order in its entirety. This appeal followed.

## FACTS

At the hearing, Claimant testified regarding his accident, subsequent course of medical treatment, current work status and restrictions on activities of daily living, subjective complaints of pain, impairment, and disability.

Medical records from Dr. Margalit confirmed that Claimant initially presented via referral from his attorney on May 27, 2009, complaining of a mild neck sprain, a lumbar sprain, and a contusion to the left knee. Claimant was seen again by Dr. Margalit on June 3, August 5, and August 12, 2009, following x-rays of his cervical and lumbar spine. Dr. Margalit notes there was "no significant segmental dysfunction" per the x-rays and that Claimant can rotate his neck and back approximately 80% of normal. Thereafter, Dr. Margalit referred Claimant for an MRI of his left knee. The MRI showed a small tear of the medial meniscus and degenerative arthritic changes. Dr. Margalit referred Claimant to Columbia Rehabilitation Clinic for physical therapy. Eventually, Dr. Margalit released Claimant at maximum medical improvement on June 1, 2010, noting "I would estimate a physical impairment function loss of 5% to the left knee and 5% to the low back secondary to injuries received a year ago in a motor vehicle accident on May 13, 2009." Dr. Margalit did not impose any specific work restrictions.

Claimant did not file and serve Defendants with a proper Form 50 until May 18, 2010. Following receipt of the properly filed and served Form 50, a Consent Order was signed by both parties on September 21, 2010 admitting that Claimant sustained an injury in a work-related accident. Defendants subsequently referred Claimant for an evaluation of his knee with Dr. Robert DaSilva on December 16, 2010. Dr. DaSilva found moderately severe compartment arthritis in the left knee with medial meniscus tear. Dr. DaSilva stated that arthroscopic surgery repair of the meniscus tear may be an option for Claimant, but warned that Claimant may not

obtain a good result due to his size and weight. Dr. DaSilva noted that Claimant would have 3% impairment rating for the medial meniscus tear if he did not elect surgery. Like Dr. Margalit, Dr. DaSilva did not impose any specific work restrictions.

Following the hearing, the Single Commissioner issued a Decision and Order making the following findings of fact:

1. Claimant sustained compensable injuries to his lower back and left leg as a result of his compensable work accident on May 13, 2009.
2. Defendants shall pay/reimburse causally related medical bills incurred by Claimant via Wishard Hospital in Indianapolis following the accident.
3. Defendants are not liable for medical bills incurred by and through Dr. Gal Margalit, including the MRI scan Dr. Margalit referred Claimant for at Inmed Diagnostics and physical therapy with Columbia Rehabilitation Clinic.
4. Claimant did not request medical evaluation and treatment from the employer/carrier after returning to South Carolina following his accident. Claimant was referred to Dr. Margalit by his attorney without securing the carrier's consent and designation of Dr. Margalit as the authorized provider under S.C. Code Ann. §42-15-60.
5. Claimant is not entitled to temporary total disability benefits for any period alleged on the grounds that Dr. Margalit, nor any other provider, specifically and/or contemporaneously with the injury, or in close proximity to the date of injury, wrote Claimant out of work or otherwise specifically restricted him in from working. As such, Claimant has failed to meet his burden of proving that he was "disabled" during the period alleged.
6. Claimant has sustained a 5% permanent partial specific loss of use of left leg secondary to his compensable knee injury.
7. Notwithstanding Dr. Margalit's 5% permanent partial impairment rating to the back, Claimant presented very little testimony regarding permanent pain or symptoms from his back. Therefore, Claimant is not entitled to an

award of permanent partial disability for loss of use of the  
back.

As previously noted, the Full Commission made identical findings of fact and affirmed  
the Single Commissioner Decision and Order in its entirety.

## ARGUMENTS

### **I. THE COMMISSION DID NOT ERR WHEN IT RULED THAT CLAIMANT WAS NOT ENTITLED TO TEMPORARY DISABILITY PAYMENTS FOR HIS TIME SPENT OUT OF WORK.**

Claimant is not entitled to temporary total disability benefits for any period of time. The generally accepted test for total disability is inability to perform services other than those that are “so limited in quality, dependability, or quantity that a reasonable stable market for them does not exist.” Wynn v. Peoples Natural Gas Co., 238 S.C. 1, 118 S.E.2d 812 (S.C. 1961). The burden of proving the right to compensation rests upon the claimant. Herndon v. Morgan Mills, Inc., 246 S.C. 201, 143 S.E.2d 376 (S.C. 1965). In addition, the failure of a workers’ compensation claimant to demonstrate any loss of earning capacity precluded her from receiving general disability benefits, where there was no evidence that she even sought employment. Nettles v. Spartanburg School Dist. #7, 341 S.C. 580, 535 S.E.2d 146 (S.C.App. 2000) rehearing denied.

Even though Dr. Margalit was not an authorized provider, he still could have written Claimant out of work for his injuries if he believed that Claimant was unable to work during his period of rehabilitation. Dr. Margalit did not contemporaneously write Claimant out of work or place any specific work restriction on him during the time Claimant was not working. In fact, the only evidence that Claimant can rely on is a notation by Dr. Margalit near the end of Claimant’s year-long treatment that Claimant had not worked since the accident. The note did not indicate that Claimant was unable to work or did not work on orders of Dr. Margalit.

In addition, Claimant presented no evidence as to loss of earning capacity or his inability to find a job due to his compensable injuries. For these reasons, Claimant failed to meet his burden of proving that he was disabled and unable to work during the time he is requesting

temporary total disability benefits and the Commissioner's findings on this issue should be affirmed.

**II. THE COMMISSION DID NOT ERR WHEN IT RULED THAT CLAIMANT WAS NOT ENTITLED TO AN AWARD FOR MEDICAL TREATMENT FOR ANY TREATMENT FOLLOWING THE INITIAL EMERGENCY ROOM VISIT.**

The Commissioner awarded Claimant the costs associated with his visit to the emergency room in Indiana following the accident, but not for any subsequent medical treatment. Respondents do not dispute that the injuries sustained were compensable and that Claimant incurred the costs in Indiana as a direct result of the accident.

However, Respondents are not responsible for any medical bills incurred by Claimant's visit(s) to Dr. Gal Margalit. These costs include Dr. Margalit's fees, the MRI at Inmed Diagnostics, and physical therapy with Columbia Rehabilitation Clinic. Claimant never requested medical evaluation or treatment from his employer or the insurance carrier after returning to South Carolina following the accident. Claimant contends that he was not required to seek evaluation or treatment through his employer because he was terminated following the accident. Unfortunately, that is not the law in South Carolina. A claimant is required to seek permission for evaluation and/or treatment from his employer or carrier prior to beginning a course of treatment<sup>1</sup>. It is only after an employer denies treatment to a claimant, and the employer and claimant fail to reach an agreement within fourteen days, that the claimant may seek independent medical care pursuant to Section 42-17-20.

Under Section 42-17-20, Claimant was required to make application to the Commission for a hearing in regards to his entitlement to future medical treatment and evaluations. Claimant failed to do this. Claimant contends that Employer had notice of the injury and Claimant's termination from employment served as a constructive refusal and/or denial of compensation.

Even assuming Claimant's contentions about the effect of his termination on his worker's compensation benefits status are correct (which the Defendants do NOT concede), his remedy for this alleged failure was to request a hearing before the Commission—it was not to seek out private medical care from Dr. Margalit.

Further, the employer has a right to designate an authorized provider of care. Claimant's argument that he had a right to choose Dr. Margalit as his treating physician is "...inconsistent with S.C. Code Ann. § 42-15-60 and § 42-9-10 (1976), which establishes the rights of the employer and the employee with regards to payment for treatments, and ultimately gives great deference to the appellate panel." McKinney v. Kimberly Clark Corp., 376 S.C. 636, 639, 658 S.E.2d 112, 114 (S.C. App. 2008). Dr. Margalit was never approved as an authorized provider for Employer. Claimant failed to even ask for permission, let alone acquire authorization from Employer, Carrier, or the Commission. The Commission is afforded tremendous discretion on payment and direction of medical care issues<sup>2</sup>. Commissioner Wilkerson and the Full Commission did not abuse that discretion by failing to order Defendants to pay for treatment rendered by and through Dr. Margalit. Therefore, the Commissioner's findings on this issue should be affirmed.

### **III. THE COMMISSION DID NOT ERR WHEN IT CHARACTERIZED CLAIMANT'S ACCIDENT AS AN "ADMITTED" ACCIDENT.**

Defendants admitted the injuries to Claimant's left leg were the result of the work-related accident<sup>3</sup>. Because the accident was admitted, the Single Commissioner did not err by characterizing this event as an admitted accident.

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<sup>1</sup> See S.C. Code Ann. § 42-15-60.

<sup>2</sup> In a workers' compensation case a finding of the Workers' Compensation Commission cannot be reversed or modified by a court unless the finding is controlled by legal error or is "[c]learly erroneous in view of the reliable, probative and substantial evidence on the whole record." CODE OF LAWS OF SOUTH CAROLINA § 1-23-380(g)(3) and (5) (1976); *Lail v. Georgia-Pacific Corp.*, 285 S.C. 234, 328 S.E.2d 911 (1985); *Hanks v. Blair Mills, Inc.*, 286 S.C. 378, 335 S.E.2d 91 (Cl.App.1985).


<sup>3</sup> See Single Commissioner Hearing Transcript p. 6, l. 16-18; September 21, 2010 Consent Order; Form 51

CONCLUSION

For the foregoing reasons, this court should AFFIRM the findings of the Full Commission Panel of the South Carolina Workers' Compensation Commission.

Respectfully submitted,

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May 20, 2013

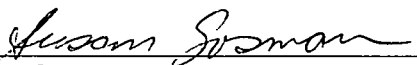
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CERTIFICATE OF SERVICE

I, the undersigned, Legal Assistant of law offices of McAngus Goudelock & Courie, L.L.P., attorneys for defendants, do hereby certify that I have served counsel of record with the foregoing document(s) by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

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