

**THE STATE OF SOUTH CAROLINA  
In the Court of Appeals**

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**APPEAL FROM THE SOUTH CAROLINA  
WORKERS' COMPENSATION COMMISSION**

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WCC File No. 1113278  
Appellate Case No. 2013-000764

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Gary Jeter, Jr., Employee, Respondent,

v.

All My Sons Moving & Storage, Inc., Employer,

and

Hartford Insurance Company of the Midwest, Carrier, Defendants,

Of Whom Hartford Insurance Company of the Midwest is the Appellant.

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**INITIAL BRIEF OF APPELLANT**

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JUN 07 2013

**SC Court of Appeals**

Greenville, South Carolina  
June 5, 2013

Myada O. El-Sawi, Esquire  
S.C. Bar. No. 100362  
Post Office Box 1509  
Greenville, SC 29602  
Telephone: 864-552-4611  
ATTORNEY FOR APPELLANT

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**STATEMENT OF ISSUES ON APPEAL**

- I. DID THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION ERR IN FINDING AS A FACT AND CONCLUDING AS A MATTER OF LAW THAT GARY JETER SUSTAINED A COMPENSABLE INJURY BY ACCIDENT ARISING OUT OF AND IN THE COURSE AND SCOPE OF HIS EMPLOYMENT WITH ALL MY SONS MOVING & STORAGE, INC. ON SEPTEMBER 23, 2011?
  
- II. DID THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION ERR IN FINDING AS A FACT AND CONCLUDING AS A MATTER OF LAW THAT GARY JETER IS ENTITLED TO PAST AND ONGOING TEMPORARY TOTAL DISABILITY COMPENSATION UNTIL HE REACHES "MAXIMUM MEDICAL IMPROVEMENT" WITH RESPECT TO ALL OF HIS WORK INJURIES?
  
- III. DID THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION ERR IN FINDING AS FACT AND CONCLUDING AS A MATTER OF LAW THAT GARY JETER IS ENTITLED TO ONGOING MEDICAL TREATMENT FOR HIS ALLEGED BACK, NECK, AND LEFT ARM INJURIES?
  
- IV. DID THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION LACK SUBJECT MATTER JURISDICTION OVER THIS MATTER IN THE ABSENCE OF AN EMPLOYEE/EMPLOYER RELATIONSHIP BETWEEN GARY JETER AND STRATEGIC OUTSOURCING, INC., THE INSURED EMPLOYER?

## STATEMENT OF THE CASE

This matter initially came before the Commission based upon an alleged injury to Gary Jeter, Jr.'s (hereinafter Respondent) neck, back, bilateral shoulders, left arm, left hand and fingers, and headaches as a result of an accident that occurred on or about September 23, 2011, while Respondent was in the employ of All My Sons Moving & Storage, Inc. (hereinafter All My Sons). Respondent was employed as a laborer, moving furniture, for All My Sons on the date of the alleged accident.

Respondent filed a Form 50, requesting a hearing, on October 4, 2011. A hearing to determine the issues as set forth on the Form 50 and by operation of Regulation 67-603 was scheduled to occur on December 16, 2011; however, the hearing was postponed. The reset hearing notice was issued on December 22, 2011, and a hearing was held on January 24, 2012 with the Honorable Avery B. Wilkerson, Jr. presiding. A formal decision on Respondent's entitlement to benefits was held in abeyance pending a resolution of the coverage issue at a supplemental proceeding.

Commissioner Wilkerson issued an Order dated August 21, 2012 in which he found Respondent's back, neck, and left arm compensable. (Decision & Order, p. 12). Commissioner Wilkerson also ordered Appellant to provide ongoing medical treatment for Respondent's back, neck, and left arm. Moreover, Appellant was ordered to continue paying Respondent temporary total disability compensation until Respondent reaches maximum medical improvement. (Decision & Order, p. 13). Appellant filed a timely Form 30, Request for Commission Review, on August 31, 2012.

This matter came before the Full Commission on December 18, 2012. The Appellate Panel issued an Order dated March 12, 2013, in which it fully affirmed Commissioner

Wilkerson's Single Commission Order. From this decision, on April 8, 2013, Appellant filed a Notice of Intent to Appeal to this Honorable Court and a Petition for Review of the Decision and Order of the South Carolina Workers' Compensation Commission.

### **STATEMENT OF THE FACTS**

Respondent is a thirty-four year old male who was employed by All My Sons Moving & Storage on or about September 23, 2011, when he allegedly sustained an injury to his neck, back, bilateral shoulders, left arm, left hand and fingers. He also alleges that he experiences headaches as a result of this incident. Respondent testified that his foregoing injuries occurred when Frank Fantigati (hereinafter Fantigati), the owner of All My Sons, grabbed Respondent by his neck and lifted him upward. (Hr'g. Tr. January, 24, 2011, 27: 18-23).

Respondent's alleged work injuries occurred on a Friday, and Respondent testified that his pain worsened the following day. (Hr'g. Tr. January, 24, 2011, 41: 20). Despite his alleged worsened pain, Respondent continued working on Friday and returned to work on Saturday, where he continued his normal job duties of moving furniture. (Hr'g. Tr. January, 24, 2011, 43: 6-8; 55:9-12; 56:1-6). It was not until Monday, September 26, 2011 that Respondent sought medical attention at Greenville Hospital System (GHS) with Dr. Bertolami (APA, p. 1-11). Dr. Bertolami's primary diagnosis was a neck sprain and the additional diagnosis was thumb pain. (APA, p. 2). Dr. Bertolami also gave Respondent a work release form enabling him to return to work. (APA, p. 4). Respondent returned to GHS on October 9, 2011 where he treated with Dr. Mills (APA, p. 12-14). The diagnosis was a neck strain. (APA, p. 13). On November 16, 2011, Respondent was seen by Joyce Cook, a nurse practitioner, for his neck pain. (Respondent's Supplemental APA, p. 25). Respondent also complained of some low back pain and radiating

symptoms of left arm tingling and pain into his thumb (Respondent's Supplemental APA, pp. 25-28).

Additionally, Respondent had several MRIs and a CT scan performed. All results were normal. The MRI of the cervical spine dated September 26, 2011 revealed osteophyte formation, but no acute fracture or subluxation were present. (APA, p. 6). Moreover, the prevertebral soft tissues were within normal limits and the disc spaces were well-maintained (APA, p. 6). A MRI was also performed on Respondent's left hand, and the results showed no evidence of acute fracture or subluxation of the left hand. (APA, p. 7). Later, a CT of the cervical spine dated October 18, 2011 showed that Respondent suffered only from spondylitic changes and mild degenerative changes. (APA, p. 16). Furthermore, Respondent's MRI results, dated December 6, 2011 reveal that Respondent has mild multilevel degenerative disc disease throughout the cervical spine, without evidence of neural impingement. (APA, p. 20B). No herniation or spinal stenosis was seen. (APA, p. 20A).

### **STANDARD OF REVIEW**

The Appellate Court in a workers' compensation appeal has the authority to review the facts to determine whether or not there is any competent evidence to support the findings of the fact-finding body. Arnold v. Benjamin Booth Co., 257 S.C. 337, 185 S.E. 2d 830 (1971). To this end, an award of the South Carolina Workers' Compensation Commission may be reversed if there is an absence of substantial competent evidence to support it. See Linen v. Ruscon Construction Co., 286 S.C. 67, 332 S.E. 2d 211 (1985); Cross v. Concrete Materials, 236 S.C. 440, 114 S.E. 2d 828 (1960).

In assessing the term "substantial evidence", South Carolina Appellate Courts have ruled that such is not a mere scintilla of evidence, nor evidence viewed blindly from one side of the

case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusions the administrative agency reached in order to justify its action. See Sharpe v. Case Produce, Inc., 336 S.C. 154, 519 S.E. 2d 102 (1999); Muir v. C. R. Bard, Inc., 336 S.C. 266, 519 S.E. 2d 583 (Ct. App. 1999).

Moreover, an Appellate Court has the authority to reverse or modify the Decision of the South Carolina Workers' Compensation Commission if the substantial rights of an Appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are affected by an error of law. See Etheredge v. Monsanto Co., 349 S.C. 451, 562 S.E.2d 679 (Ct. App. 2002); S.C. CODE ANN. §1-23-380 (5)(d) (2013).

### ARGUMENTS

**I. THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION ERRED IN FINDING AS FACT AND CONCLUDING AS A MATTER OF LAW THAT GARY JETER SUSTAINED A COMPENSABLE INJURY BY ACCIDENT ARISING OUT OF AND IN THE COURSE AND SCOPE OF HIS EMPLOYMENT WITH ALL MY SONS MOVING & STORAGE, INC. ON SEPTEMBER 23, 2011.**

***A. Respondent did not suffer a compensable injury to his back or neck.***

First, the substantial evidence supports the position that Respondent did not suffer a compensable injury to his back. The records from Respondent's initial visit with Dr. Bertolami on September 26, 2011 reveal that he had a "normal inspection" of the back and suffered no pain with straight leg raises. (APA, p. 2). Moreover, the diagnosis from that visit was a neck and thumb sprain, making no mention of the back or arm. (APA, p. 2). When Respondent returned to GHS on October 9, 2011, the only diagnosis was a neck strain. (APA, p. 12-14). It is evident that throughout the record, Respondent's complaints focused on his alleged neck pain. The only medical note mentioning an assessment regarding Respondent's lumbar pain was completed by a

nurse practitioner. (Respondent's Supplemental APA, pp. 25-28). Furthermore, upon review of the video displaying the incident, reasonable minds would conclude that being lifted by one's neck would not cause lower back pain, as Respondent has alleged.

Second, the medical evidence also does not support a finding that Respondent suffered a compensable neck injury as a result of his work incident. There is nothing in the record suggesting that Respondent has an acute neck problem that would cause disabling pain. Moreover, no medical provider has recommended surgical intervention. Respondent merely sustained a minor, temporary neck sprain. As a result, he underwent several diagnostic tests, which all reveal that Respondent suffers solely from mild multilevel degenerative disc disease, a condition commonly caused by aging. (APA, p. 16, 20A-20B). Further, Respondent has provided no medical or expert opinion demonstrating that Respondent's temporary neck sprain or mild multilevel degenerative disc disease are causally related to Respondent's work incident.

Pursuant to § 42-1-160(E) of the South Carolina Workers' Compensation Act, "in medically complex cases, an employee shall establish by *medical evidence* that the injury arose in the course of employment." (2013) (Emphasis added). South Carolina case law has established that the back is a complicated body part. McLeod v. Piggly Wiggly Carolina Co., 280 S.C. 466, 313 S.E.2d 38 (Ct. App. 1984). In McLeod v. Piggly Wiggly Carolina Co., the South Carolina Court of Appeals held that "we are concerned with the back, a much more complicated area of the body. The area of the body, the congenital defect and the type of injury sustained are factors which require a higher degree of expertise than was presented ...." Id. at 471, 40-41. In McLeod, the only evidence the employee had presented was his own testimony regarding the types of activities he could no longer engage in and a general practitioner's

testimony regarding his “nonexpert opinion” about the employee’s disability. Id. As a result, the McLeod court reversed for a redetermination of the award. Id. at 471, 41.

Similar to McLeod, who provided no medical evidence regarding his disability to his back, in the case at bar, Respondent has failed to establish by medical evidence that the minor neck strain or multilevel degenerative disc disease arose out of his work-related incident. Also similar to the facts in McLeod, Respondent merely relies on his own lay testimony regarding his pain and belief that his medical problems are related to his 2011 work incident. Therefore, considering South Carolina case law and statutory law requiring medical evidence in medically complex cases, the Commission erred in its determination that Respondent suffered a compensable back or neck injury.

Should the Court of Appeals find that Respondent suffered compensable injuries, Appellant alternatively takes the position that Respondent merely suffered a temporary neck sprain. (APA, p. 2, 13). Respondent was diagnosed with a neck sprain and a neck strain during both his visits at GHS (APA, p. 2, 13). Therefore, while Appellant submits that the Commission erred in holding that Respondent suffered compensable neck, back, and left arm injuries, if the Court affirms such holding, Appellant takes the position that Respondent’s injury is limited to his neck, and the Commission’s Order should be affirmed only in part.

***B. Respondent did not suffer a compensable injury to his left arm.***

The medical evidence supports the assertion that Respondent did not suffer an injury to his left arm. Although Respondent complained of numbness in his left arm, he was able to move his left arm with no difficulty when he treated with Dr. Bertolami on September 26, 2011. (APA, p. 1). The records reveal that there were no signs of cyanosis, clubbing, or edema. (APA,

p. 2). There were also no signs of sensory deficits. (APA, p. 2). The only diagnosis by a physician relative to Respondent's upper extremity was the thumb sprain. (APA, p. 2).

Despite the fact that Respondent may have complained of some arm numbness, such does not render the arm compensable, as the numbness is merely radicular pain radiating from Respondent's alleged neck pain. (APA, p. 14). Respondent complained of pain on the left side of his neck, so it is likely the left arm numbness is resulting from the left neck pain. (APA, p. 14). South Carolina courts comply with the situs of the injury approach, and have held that "our scheduled compensation scheme focuses on the site of the injury and not the resulting functional limitation." Therrell v. Jerry's Inc., 370 S.C. 22, 29, 633 S.E.2d 893, 897 (2006). In the case at issue, the situs of the injury is the neck. Despite the lack of medical evidence in the record showing that Respondent has suffered some functional limitation in his left arm, assuming *arguendo* that he has suffered some limitation, South Carolina case law mandates a compensability finding limited to the situs of the injury.

Considering the substantial evidence, Appellant respectfully requests that this Court reverse the finding of compensability relative to Respondent's alleged neck, back, and left arm injuries.

**II. THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION ERRED IN FINDING AS A FACT AND CONCLUDING AS A MATTER OF LAW THAT GARY JETER IS ENTITLED TO PAST AND ONGOING TEMPORARY TOTAL DISABILITY COMPENSATION UNTIL HE REACHES "MAXIMUM MEDICAL IMPROVEMENT" WITH RESPECT TO ALL OF HIS WORK INJURIES.**

Respondent is not entitled to temporary total disability benefits relative to his alleged injuries. There is no evidentiary support proving that Claimant is unable to work, and therefore is entitled to temporary compensation. Respondent provided no evidence that any medical

provider ever took him out of work or even placed him under any work restrictions. In fact, on September 26, 2011, Dr. Bertolami gave Respondent a work release form and did not excuse him from work. (APA, p. 4). Respondent is fully capable of working, as was demonstrated by his continuance of moving furniture at work the day of the incident and by his return to work the following day. (Hr'g. Tr. January 24, 2012, 41:40, 43: 6-8). Moreover, the medical evidence clearly corroborates the assertion that Claimant is able to work, as he suffers from no disabling injuries.

Assuming Respondent is restricted to working in a modified capacity, he is still able to continue working, even if he does undergo physical therapy. Therefore, if the Court finds that Respondent is entitled to temporary total disability benefits, Appellant submits that the benefits should be limited since Respondent was able to work in either a full or modified capacity.

Although Appellant takes the position that Respondent did not suffer any compensable injuries, if the Court holds otherwise and also finds that Respondent is entitled to temporary total disability benefits, Appellant submits that Respondent is only entitled to temporary total disability compensation relative to his alleged neck injury.

### **III. THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION ERRED IN FINDING AS FACT AND CONCLUDING AS A MATTER OF LAW THAT GARY JETER IS ENTITLED TO ONGOING MEDICAL TREATMENT FOR HIS ALLEGED BACK, NECK, AND LEFT ARM INJURIES.**

Pursuant to § 42-15-60 of the South Carolina Workers' Compensation Act, the employer shall provide medical treatment "for a period not exceeding ten weeks from the date of an injury...and for an additional time as in the judgment of the commission will tend to lessen the period of disability as evidenced by expert medical evidence stated to a reasonable degree of medical certainty." (2013). Thus, Respondent is not entitled to ongoing medical care for his

alleged injuries to his back, neck, or left arm because there is no proof or medical evidence that supports the assertion that additional medical treatment is reasonable, necessary, or would tend to lessen Respondent's disability.

**IV. THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION LACKED SUBJECT MATTER JURISDICTION OVER THIS MATTER IN THE ABSENCE OF AN EMPLOYEE/EMPLOYER RELATIONSHIP BETWEEN GARY JETER AND STRATEGIC OUTSOURCING, INC., THE INSURED EMPLOYER.**

The South Carolina Workers' Compensation Commission lacked jurisdiction over this matter because there was never an employee and employer relationship between Respondent and Strategic Outsourcing, Inc. (hereinafter SOI), the insured. The Commission's Coverage and Compliance records reflect that SOI, a professional employer organization, is the insured of Hartford Insurance Company of the Midwest (hereinafter Hartford).

According to Respondent's testimony, he was an employee of All My Sons on or about September 23, 2011, the date of his alleged injury (Hrg. Tr. January, 24, 2011, 20:6). Respondent's testimony in no way remotely implicates SOI as his employer. Respondent testified that his direction with respect to assignments and his ultimate termination was conducted by the President of All My Sons. Accordingly, the Commission's Orders designate All My Sons as Respondent's employer.


Further, the employment relationship between Respondent and All My Sons is evidenced by the W-2 Form issued by All My Sons. Additionally, the Forms 50 and 58 all demonstrate that Respondent was employed by All My Sons. No employee and employer relationship ever existed between Respondent and SOI. Therefore, the Commission erred as a matter of law and abused its discretion in finding that Hartford is the proper carrier in the absence of an employee and employer relationship between Respondent and SOI.

The issue of whether Respondent was an employee of SOI at the time he was injured is jurisdictional. Chavis v. Watkins, 256 S.C. 30, 180 S.E.2d 648 (1971). See also S.C. CODE ANN. § 42-1-140 (2013); § 42-1-150 (2013). The lack of an employee and employer relationship deprived the Commission of subject matter jurisdiction over this matter. Hence, the Commission's lack of jurisdiction over Appellant, in turn, prevents the Commission from ordering Appellant to pay Respondent temporary compensation or provide medical treatment relative to his alleged work-related injury.

**CONCLUSION**

For all of the foregoing reasons, Appellant respectfully submits that the Order of the Appellate Panel, which affirmed the Single Commissioner's Order, is contrary to South Carolina law and must, therefore, be set aside.

Respectfully submitted,

  
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Myada O. El-Sawi, Esquire  
S.C. Bar. No. 100362  
TURNER PADGET GRAHAM & LANEY  
Post Office Box 1509  
Greenville, SC 29602  
Telephone: 864-552-4611  
ATTORNEYS FOR APPELLANT

Other Counsel of Record:

Linda Byers McKenzie, Esquire  
Bowen, McKenzie & Bowen  
P.O. Box 2547  
Greenville, SC 29602  
Telephone: 864-271-2270

ATTORNEY FOR RESPONDENT

Peter H. Dworjanyn, Esquire  
Collins & Lacy, P.C.  
P.O. Box 12487  
Columbia, SC 29211  
Telephone: 803-256-2660

ATTORNEY FOR ULLICO CASUALTY COMPANY