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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
Full Commission Appellant Panel

Case No. 2012-210487

Emma Hamilton ..... Appellant,

v.

Martin Color-Fi, Inc., Employer and
Liberty Mutual Insurance Company, Carrier ..... Respondents.

PETITION FOR REHEARING AND FOR REHEARING *EN BANC*

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INTRODUCTION

The Appellant respectfully moves for a rehearing with regard to the Opinion of the South Carolina Court of Appeals in this matter, filed June 19, 2013. She asks that the Opinion be revised by remanding this matter to the South Carolina Workers' Compensation Commission to allow the Appellant to be evaluated by a specialist and treated, should the specialist determine a need for treatment.

The Appellant further suggests to the Honorable Court of Appeals that the rehearing should be en banc, as the Appellant submits matters of exceptional importance are involved as regard the Workers' Compensation Act and its application.

ARGUMENTS AND AUTHORITY

The above requests and suggestions are based upon the following grounds:

I. **The Appellant argued that the Defendants were not entitled to a "stop payment hearing" because Regulation 67-506(B) requires that the "authorized health care provider" report that the injured worker has reached maximum medical improvement (MMI).**

A. The Appellant submits that the Opinion of the Court of Appeals misapprehended this issue, i.e. whether the finding of MMI must be from the authorized health care provider and not a doctor hired for an independent medical examination (IME). The Appellant's contention is that **no hearing** should have been scheduled or conducted because the authorized health care provider did not state that the Appellant had reached MMI. Regulation 67-506B, cited in the Opinion, must be read in conjunction with Regulation 67-208: "Requesting a Hearing, Employer". Subsection C reads as follows:

> To request a hearing to terminate temporary compensation after one hundred fifty days after notice of the injury to the employer, file a form 21 with the Judicial Department pursuant to R.67-506. (Emphasis added.)

The Form 21 filed by the Respondents quotes Regulation 67-506B as the basis for terminating temporary compensation.

B. The Opinion relied on a March 27, 2009, statement of MMI by Dr. Gee (some time "between February 25, 2009, and March 25, 2009") (TR 85) and overlooked the November 11, 2009, statement of Dr. Gee that the Appellant was not at MMI (TR 122). Dr. Gee treated the Appellant through February 25, 2010, without ever making a finding of MMI.

C. Dr. Gee was the only authorized health care provider. This is not contested. The Opinion of the Court of Appeals states that Dr. Gee found

MMI "at some point between February 25, 2009 and March 25, 2009" in a report dated May 27, 2009 (TR 85). The Appellant submits that this is not a finding of MMI for three reasons: (1) Dr. Gee gave a range of one month for MMI in that report, not a specific date; (2) Dr. Gee stated that a crush injury such as Appellant's "can improve for up to one year", so he did not want to do a permanent impairment rating until July, 2009; (3) Dr. Gee "felt" the Appellant had reached MMI, but did not state his opinion to a reasonable degree of medical certainty; and (4) Most importantly, Dr. Gee continued to provide authorized medical treatment for almost an additional year, until February 25, 2010. Surely the most recent statements or lack of statements on MMI rendered the earlier statement of no effect.

D. The Opinion does not mention that on May 7, 2009, Dr. Gee wrote that MMI was "to be determined" (TR 62); or that on November 11, 2009, he wrote that the Appellant was **not** at MMI (TR 122) (emphasis added.); or that in his last report on February 25, 2010, Dr. Gee wrote: "Patient continues to have symptoms ... May need another MRI, etc." (TR. 139). Therefore, the Opinion overlooked two subsequent statements of Dr. Gee that Appellant was not at MMI and relied on an inadequate early opinion.

E. Even assuming, without conceding, that so indefinite a statement as the one on March 27, 2009, can be a valid finding of MMI, Dr. Gee also says that a permanent impairment rating will not be appropriate until July, 2009 (TR 85). This also negates any suggestion of MMI on March 27, 2009. Permanent impairment ratings are not appropriate until the patient reaches MMI. See *AMA Guides to the Evaluation of Permanent Impairment* (5th Ed.), Section 2.4, page 19 and (6th Ed.), Section 2.5e, page 26.

F. Dr. Gee's May 27, 2009, report cannot be a finding of MMI. The Opinion misapprehended the relationship between MMI and permanency. Dr. Gee never indicated in his records that the Appellant could not improve medically. He was trying to find out what her problems were. After physical therapy and work hardening, his last act was referral to a hand specialist, hardly an indication that a patient has reached a "plateau" in her healing.

G. Whether a carrier or employer can get a "stop payment hearing" without a finding of MMI by the authorized health care provider is an important policy issue that needs to be clarified. The requirement that the authorized doctor - not an IME doctor - find MMI before a hearing for stop payment can be had is a significant protection for injured workers, especially in a state like ours where the carrier gets to choose the physician who will provide treatment. If the carrier can simply send the worker to an independent medical examiner to override the medical advice of the authorized doctor, how is an injured worker ever to receive comprehensive, coordinated, and competent care?

As pointed out in the Brief of Appellant, an independent IME doctor does not form a physician-patient relationship with the examinee; and the Medical Provider Manual of the South Carolina Workers' Compensation Commission will not allow an IME doctor to be a treating doctor without consent of all parties. The requirement for a claimant's agreement to use an IME doctor for treatment is most certainly intended to be a protection for claimants. If payment can be stopped on the finding of MMI by an IME doctor, then all carriers have a sure-fire method for frustrating a major goal of the South Carolina Workers' Compensation Act—necessary and appropriate medical treatment for claimants. That tactic has succeeded so far in this case. Dr. Gee's last note asked for the Appellant to be sent to a "hand specialist" for treatment. Drs. Green and Fulton were not authorized by the Respondents to provide treatment; they performed independent medical examinations.

II. **Even if a hearing was appropriate, there is no competent evidence supporting a finding of MMI. The Appellant respectfully submits that the Opinion of the Court of Appeals failed to apprehend that the opinion of Dr. Green on MMI was given one year before active treatment concluded with the authorized health care provider and that the opinion of Dr. Fulton on MMI is indefinite and is not stated to a reasonable degree of medical certainty.**

A. The above paragraph (1) shows that Dr. Gee's last statements did not find the Appellant to be at MMI. Dr. Green found MMI at an IME, but he also recommended further treatment (occupational therapy), which is inconsistent with MMI. Also, treatment was provided by Dr. Gee for about a year after Dr. Green's finding; and continued authorized treatment is inconsistent with MMI in this case, as treatment never ceased. "Maximum medical improvement is a term used to indicate that a person has reached such a plateau that in the physician's opinion there is no further medical care or treatment which will lessen the degree of impairment." *O'Banner v. Westinghouse Elec. Corp.,* 319 S.C. 24, 27, 459 S.E.2d 324, 326 (Ct.App.1995) [Emphasis added.]

B. Dr. Fulton, also an IME doctor, never used the language of MMI, nor does his report state his opinion in sufficiently certain terms to be accepted as proof of MMI. He wrote that he "did not believe any further treatment or testing is medically necessary", that he saw "no contraindication to return to work without restriction". He "did not believe" any further treatment or testing was medically necessary (TR 93). (Emphasis added.) To be considered as competent evidence, a physician's opinion must be stated to a reasonable degree of medical certainty, or at least contain equivalent language of medical certainty. The standard for medical evidence is stated on the Form 14 of the Commission: "more likely than not". Dr. Fulton did not use the Form. The Appellant respectfully submits that "believing" and

"no contradiction" clearly do not reach the required standard for medical proof. The Random House Dictionary of the English Language, Second Edition Unabridged (1987) says that, when followed by a noun clause, "believe" means "to suppose or assume". The word "believe" generally connotes acceptance without proof. One can have a belief without any proof at all. As to "contraindication", it is a medical term meaning "any condition, especially any condition of disease, which renders some particular line of treatment improper or undesirable." Dorland's Illustrated Medical Dictionary, W.B. Saunders Company (1994). One is hard-pressed to understand what to "see no contraindication to return to work without restriction" means. In Price v. Gamble, 289 S.C. 538, 347 S.E.2d 131 (S.C. App. 1986), the Court of Appeals found that a physician stating that a person "has sustained disability from this accident" (emphasis added) is a more definite statement than "most probably", and therefore acceptable as medical proof. The case of Baughman v. AT&T, 306 S.C. 101, 410 S.E.2d 537 (1991) is also instructive. In that case, the doctor said that there was "considerable evidence" of medical causation; but the Supreme Court said the testimony did not "rise to the 'most probably' level." Dr. Fulton's report cannot be accepted as competent, substantial evidence of MMI.

C. The Opinion says that the Appellant does not deny that Drs. Green and Fulton are "hand specialists". In her Appellant's Brief, she states:

> The Claimant disputes the finding which says that Dr. Moore's opinion should be given less weight than the opinions of Drs. Green and Fulton, because the latter two are "hand specialists". All three opinions are in evidence as "expert reports" under Regulation 67-612. Nothing in any report establishes any one of the three limits his practice to any area of specialty, and no rule of evidence says that an IME doctor employed by a claimant is less believable that one employed by the carrier. If you read the three reports, Dr. Moore's is by far the most thorough. Appellant's Brief, p. 12.

Dr. Moore's report is by far the most thorough of the three IME doctors. (TR 259-266).

Incidentally, the Opinion refers to Dr. Gee as an "orthopedist", which is not a fact in the record. Dr. Gee is licensed as an orthopedic surgeon. To the best knowledge of this writer, however, Dr. Gee now works in industrial medicine and no longer performs surgery.

III. The Appellant did not receive necessary medical treatment as guaranteed by Section 42-15-60 of the Code of Laws of South Carolina (1976, as amended). The Appellant respectfully submits that the Opinion of the Court of Appeals overlooks uncontroverted testimony of the Claimant and misapprehends the significance of treatment that was ordered and not provided.

A. Dr. Gee believed that time would take care of the Appellant's problems for well over one year. Yet at his last appointment with the Appellant on February 25, 2010, he referred her to a hand specialist and thought a repeat MRI was in order. One can argue that Dr. Gee did nothing other than observe the Appellant. He saw her MRI as "essentially normal", whereas Dr. Moore suspected "ulnar abutment and/or avascular necrosis (Kienblock's Syndrome)" (TR 265). The nerve conduction study (NCS) was said to be "essentially normal", but Dr. Moore noted that the NCS "studies reveal different conduction velocities in the contralateral hands". In other words, the Appellant has significant weakening of the injured arm and the NCS shows the non-dominant arm to be much stronger than the dominant arm, which is unusual ("a highly significant loss of grip and pinch strength in her dominant hand" (TR 263). Yet Dr. Gee did try. He referred the Appellant for a second NCS to check for reflex sympathetic dystrophy on December 3, 2008, and he asked for an MRI in February, 2010. Neither request was permitted.

B. What has been overlooked or misapprehended in the Opinion are the diagnostic tests and referrals ordered by Dr. Gee which were not allowed. After the IME with Dr. Green, the Appellant entered physical therapy and then work hardening. Even getting this started took a long time, according to Dr. Gee's records. (TR 115). On December 23, 2009, Dr. Gee wanted her to continue to "work through" work hardening, despite the problems she was having. (The Appellant was actually telling the physical therapists that she was fine, because she so wanted to return to work; but the therapists could tell she was hurting.) On February 18, 2010, the Appellant was "discharged from the work hardening program for apparent fear on the therapist's part that the program was not in her best interest", according to Dr. Gee (TR 129). On this same date, Dr. Gee wrote:

> It is my opinion that she needs to be very thoroughly reevaluated before further aggressive treatment is initiated. I think the first thing that needs to be done is get another MRI of her wrist and maybe get more than one opinion as well as seeing if anything has changed since the previous MRI.

On February 27, 2010, Dr. Gee, referring the Appellant to a "hand specialist", wrote:

> Patient continues to have symptoms which seem to be unusual and not totally explained by studies, course, etc. May need another MRI, etc. (TR 133).

This is Dr. Gee's last statement.

What the Appellant got was referral to Dr. Fulton, not for evaluation and treatment, but for an IME. As stated above, the two are not the same. Please read the Appellant's testimony about her appointment with Dr. Fulton. It is in evidence with no objection (TR 375). The Appellant testified that Dr. Fulton was discussing with her what treatments he could order to help her until he turned to his computer. She testified that Dr. Fulton changed abruptly. Perhaps he saw that he was only doing an IME. In any event, something caused Dr. Fulton to change his opinion about what the Appellant needed. As argued above, his report is useless as evidence for its lack of definiteness.

C. The Appellant respectfully submits that she cannot have received the level of care anticipated by the law of our State until she is allowed to see a hand specialist for evaluation and treatment—not an IME. The Medical Provider Manual of the Commission cannot be ignored: an IME doctor is different from an authorized or treating doctor. The IME doctor does not form a "physician-patient" relationship with the examinee.

IV. **The Appellant submits that she was found not to be credible by the Commission without any proof. The Opinion of the Court of Appeals erroneously states that the Appellate Panel "saw and talked with Appellant". The hearing Commissioner did see and talk to the Appellant; and he gave only one reason in his Order for not believing the Appellant: she tried to use a post-hole digger.**

A. For a person who cares about her reputation and self-respect, being called a liar is about as bad as it can get. Perhaps being denied needed medical treatment because you are called a liar is worse. That's what the decision of the Commission called the Appellant: a liar—didn't tell the truth.

B. Trying to use post-hole diggers cannot make any person a liar. The Opinion confirms this. The issue is argued in Appellant's brief at length. The bottom line is that it is absolutely wrong to find someone not credible just because she was not a "good witness". (This writer does not believe the Appellant was a "bad witness"; she was very expressive and straightforward.) The hearing Commissioner did write that the Appellant's testimony was "evasive and confusing". However, he gave no example of such shortcomings; and none is evident in the record.

C. This matter of credibility is a significant policy issue for the South Carolina Workers' Compensation Commission. Typically carriers and employers call no witnesses. When they do, it is most often to contest causation with a supervisor or co-employee or to contest the degree of disability with an investigator or other fact witness. Medical evidence

comes in through records. Occasionally there are depositions of doctors, but they are usually taken by carriers, because claimants cannot afford to take them. Claimants have to pay for discovery from whatever award they receive. Yet time and time again, in cases where only a claimant testifies, that claimant is found "not to be credible" for no reason that can be found in the record.

D. The medical evidence in this case is limited to precisely what is written in the records that have been admitted. When only a claimant testifies and no untruths are revealed, how can her testimony be disregarded? No example of any inconsistency or untruth in the Appellant's testimony has been given by anyone. Is she not believable because she was angry at Dr. Gee? Dr. Gee acknowledged her anger in his notes. Was her anger unjustified? She was refused a nerve conduction study and an MRI. Physical therapy was delayed. Did the Commission not believe her testimony about how Dr. Green treated her? She testified consistently about that matter at her deposition and at the hearing. Did the Commission not believe that Dr. Fulton treated her as she says he did? What justifies that disbelief? Certainly nothing in the record. Was she not telling the truth about her problems? Dr. Gee never questioned that she continued to have pain and other problems; he just couldn't figure out what was causing them. Read the reports of Mr. Zalenka, the physical therapist. He documents the problems the Appellant was having and the pain. The Appellant was truthful in her testimony.

CONCLUSION

The Appellant urgently requests that the Opinion of the Court of Appeals be changed to remand this matter to the Workers' Compensation Commission so that she can be referred to a hand specialist for evaluation and treatment. She further submits that important issues are raised in this appeal.

The Appellant respectfully submits that, until a directive comes from an Appellate Court requiring specific findings as to why a witness is not credible, claimants will be prejudiced greatly. If the claimant is the only witness and the Commission gives no examples of the lack of credibility, the decision comes down to how the claimant is able to express himself or just whether the finder of fact "liked" the claimant.

The same is true with the practice of referring claimants to doctors for an IME, instead of for the evaluation and treatment the authorized treating physician has ordered. This is extremely important if claimants are to get better and return to work. There is a difference between referral for evaluation and treatment and for an IME. In the latter instance, the doctor does not treat the claimant as a patient. This permits avoidance of care ordered by the treating doctor chosen by the employer and carrier. The workers' compensation system is supposed to be "user friendly" for claimants. Clear rules need to be stated as to the degree to which carriers can interfere with treatment. The employer and carrier get to choose the doctor; a claimant has to submit to authorized medical treatment or lose benefits; so employers and carriers should have to abide by

recommendations of the authorized doctor, unless a Commissioner holds otherwise or the claimant agrees. Health care professionals should guide treatment, not insurance company employees.

The requirement that the authorized health care provider find a claimant to be at MMI before a "stop payment" hearing can be requested is an important protection for claimants. Without it, employers and carriers can "shop" for an IME finding MMI and conclude a claim without the claimant receiving the care she needs.

Quite a few South Carolina cases clearly state the intention of our workers' compensation act. It is primarily for the benefit, protection and welfare of working men and women and their dependents. Emma Hamilton suffered what the authorized doctor called a "significant roller-crush injury". She received conservative care: physical therapy and medications. That obviously didn't work. She needs to see a specialist who is authorized to render treatment, if treatment is needed.

RESPECTFULLY SUBMITTED,

July 3rd, 2013

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CERTIFICATE OF SERVICE

I, Joseph T. McElveen, Jr., as counsel for the Appellant, Emma Hamilton, certify that I have served the within Petition for Rehearing and for Rehearing *En Banc* upon the person named below by mailing a copy to the address below:

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I further certify that all parties required by Rule to be served have been served.

July 3rd, 2013

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