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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM
THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Appellate Panel Decision

Case No: 2023-001944

Amy Perez,

Employee, Claimant,
Appellant,

v.

Aman Medical Transport, LLC, Employer
And SC Uninsured Employers' Fund,
Carrier

Respondents.

**INITIAL BRIEF OF RESPONDENT
SOUTH CAROLINA WORKERS' COMPENSATION
UNINSURED EMPLOYERS' FUND**

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STATEMENT OF ISSUES ON APPEAL

- I. THE WORKERS' COMPENSATION COMMISSION CORRECTLY HELD THAT THE THIRD-PARTY SETTLEMENT IN THIS CASE WAS MADE BY THE CLAIMANT WITHOUT NOTIFICATION TO OR THE CONSENT OF THE DEFENDANTS AND WITHOUT NOTIFICATION TO OR APPROVAL OF THE WORKERS' COMPENSATION COMMISSION, BARRING HER FROM RECOVERY UNDER THE WORKERS' COMPENSATION ACT.

STATEMENT OF THE CASE

This matter arises out of an accident which occurred on January 21, 2022, in Darlington County, South Carolina. On that day, the Claimant, Amy Perez was driving an ambulance owned by Aman Medical Transport when a vehicle driven by Cellica Elizabeth Martin crossed the center line and struck the vehicle driven by the Claimant, head-on. As a result of that collision. The Claimant suffered injuries including substantial injuries to her right leg and ankle.

On March 24, 2022, the Claimant filed a Form 50 with the South Carolina Workers' Compensation Commission. That Form named Aman Medical Transport, LLC as Employer and the South Carolina Uninsured Employers' Fund as Carrier. According to Commission Records, the claim was established on April 4, 2022 and assigned the Workers' Compensation file number 2203275. The South Carolina Uninsured Employers' Fund established their file numbered 2022-0699 on March 31, 2022.

On August 8, 2022, the deposition of the Claimant was secured by the Attorney for the Uninsured Fund. During that deposition, the Claimant was questioned regarding the status of her third-party claim. The Claimant testified that no lawsuit/claim had been filed. However, she stated that an insurance company had agreed to pay, but stated that she received no monies as a result of that Agreement. During that questioning, the Attorney for the Claimant, Andrew Smith, objected

to the line of questioning, invoking Attorney-Client privilege. However, Attorney Smith stated that the lawsuit against the third-party had not been settled and no election of remedy had been made. (deposition of Claimant, pages 28-29)

A Hearing in the matter was held before the Single Commissioner on October 6, 2022, in Hartsville. During the Claimant's testimony, she was asked by her Attorney how she had been supporting herself during the pendency of the Workers' Compensation claim. She stated that she received child support from her ex-husband, used her savings and stated that she had recently received settlement money from her third-party claim. At that time, a Motion was made to have documents regarding the third-party claim produced and provided to the Commission to allow a determination of whether an Election of Remedies had been made. The Attorney for the Claimant, Andrew Smith agreed to provide those documents and the record was held open for their production.

On October 14, 2022, the Attorney for the Claimant forwarded to the Workers' Compensation Commission documents regarding the Third-Party Settlement. Those documents show that monies from the Third-Party Settlement were dispersed to the Claimant on August 16, 2022, a week or so following her deposition. Included in those monies were liability insurance proceeds from the adverse driver's insurance coverage.

The documents also included an Agreement and Covenant Not to Execute signed by the Claimant as to the Third-Party Tortfeasor, Cellica Elizabeth Martin. That Document effectively ended all claims against the Third-Party in this case.

Following the production of those documents, the single Commissioner requested Briefs from the parties regarding the issue of Election of Remedies. Those Briefs were provided to the Commissioner by mid-November.

By email dated November 23, 2022, the single Commissioner requested an Order be prepared by the Attorney for the Uninsured Fund pursuant to her instructions. A transcript was needed for the preparation of that Order. Following the preparation of the transcript, an Order was prepared. The single Commissioner issued her Decision and Order on January 30, 2023. The single Commissioner dismissed the claim of the Claimant finding that the Claimant had settled her third-party claim without notification to or consent of the Defendants. In addition, the settlement was made without notification to and without the approval of the Workers' Compensation Commission. The single Commissioner found that the Claimant had elected her remedy in this case and waived any right to benefits she may have had under the South Carolina Workers' Compensation Law. The claim was dismissed.

On February 9, 2023, the Claimant/Appellant filed an Appeal with the Workers' Compensation Commission. Shortly thereafter, Briefs were filed by the Claimant/Appellant and the South Carolina Uninsured Employers' Fund. An Appellate argument was held on April 17, 2023. On December 7, 2023, the Appellant Panel issued its Order unanimously affirming the Single Commissioner with amendments. This Appeal follows.

ARGUMENT

THE WORKERS' COMPENSATION COMMISSION CORRECTLY HELD THAT THE THIRD-PARTY SETTLEMENT IN THIS CASE WAS MADE BY THE CLAIMANT WITHOUT NOTIFICATION TO OR THE CONSENT OF THE DEFENDANTS AND WITHOUT NOTIFICATION TO OR APPROVAL OF THE WORKERS' COMPENSATION COMMISSION, BARRING HER FROM RECOVERY UNDER THE WORKERS' COMPENSATION ACT.

During the pendency of her Workers' Compensation Claim, the Claimant negotiated and settled her Third-Party Claim. Neither the Commission nor the Defendants were notified of this

Settlement. Pursuant to the Workers' Compensation Act, the Claimant is barred from further remedy under the Act.

The Claimant contended in her assignment of error that the Commission erred in finding that the Claimant's Third-Party Settlement was made without notification to or consent of the Defendants. The Attorney for the Uninsured Fund questioned the Claimant regarding her Third-Party Settlement during her deposition on August 8, 2022. At that time, the Claimant stated that an insurance company had agreed to pay monies, but none had been paid. The Attorney for the Claimant objected to this line of questioning. However, he assured the Uninsured Fund that no Election of Remedy had been made. (Depositions of Claimant, pp. 28-29). The Attorney for the Claimant, the Attorney for the Uninsured Fund, and the Commission learned that the Settlement had in fact been made during the Claimant's Attorney questioning of the Claimant during the Hearing. (Hearing Transcript pp. 28-30). Documents were provided after the Hearing showing that the Settlement had been consummated one week or so following her deposition. (Documents presented to Workers' Compensation Claim by Claimant, October 14, 2022). The Claimant presented no evidence that the Commission or the Defendants had been notified of the consummation of this settlement and nor any evidence that the Commission or the Defendants approved of this Settlement.

The facts in this case are identical to those in **Fisher V. South Carolina Department of Mental Health**, 291 S.E.2d 200 (1982). In **Fisher**, the Claimant sought benefits under the South Carolina Workers' Compensation Act after making a Compromise Settlement with a Third-Party Tortfeasor without the consent of the carrier. The South Carolina Supreme Court in **Fisher** agreed with the Single Commissioner, Full Commission and Circuit Court that the Claimant had elected

a remedy against the Third-Party without complying with §42-1-560 and, having done so, had no further remedy under the South Carolina Workers' Compensation Act. **Fisher**, p. 200.

Under South Carolina Case Law, the Claimant has three remedies for job related injuries;

- 1) To proceed solely against the Employer thereby allowing the Employer/Carrier the opportunity to pursue reimbursement against the Third-Party for its obligated payments:
- 2) To proceed solely against the Third-Party Tortfeasor under §42-1-550 by instituting and prosecuting an action at law:
- 3) To proceed against both the Employee, Carrier, and the Third-Party Tortfeasor by complying with §42-1-560. **Fisher**, p. 201.

Section 42-1-560 sets forth the terms and conditions which must be met if the injured employee is to pursue both remedies simultaneously. It further provides for a Carrier's lien on the proceeds of the Third-Party Recovery to the extent of the total amount of compensation including medical expenses and other expenses to be paid. Moreover, that lien cannot be reduced without the consent of the Carrier and no compromise Settlement between the Employer and Third-Party can be made binding on the Carrier without the consent or approval of the Commission. **Id.**

In **Fisher**, the Court noted that §42-1-560 does not specifically state that settlement with a third-party without the Carrier's consent constitutes an Election of Remedies but found it clear from the reading of the Statute that the Legislature did not intend for a Claimant to settle his third-party case without regard to the Employers' rights for subrogation under §42-1-550 and still maintain a Workers' compensation Claim. The object of §42-1-560 is to affect an equitable adjustment of all the rights of all the parties. The Court held "it would defeat this objective to allow the Employee to demand compensation from the Employer after having destroyed the Employers' normal right to obtain reimbursement from the Third-Party". In **Fisher**, the Court

held that settlement of a third-party claim without Carrier's approval and the Commission's approval barred further Worker's compensation Benefits. **Id.**

The ruling in **Fisher** has been upheld in numerous decisions. In **Talley v. John Mansfield Sales Corporation**, individuals had brought products liability actions against various asbestos manufacturers. The cases were approaching trial, and settlement negotiations were taking place. The Appellants moved before the Workers' Compensation Commission under §42-1-560 (F) to have the settlement offers approved. The Commission refused to approve the Settlement ruling they had no jurisdiction because the Appellants were not yet disabled. The South Carolina Supreme Court noted that "had the Appellants concluded their Products liability actions by Settlement or otherwise, they would have made a Binding Election of Remedies under **Fisher v. South Carolina Department of Mental Health** and would be barred from pursuing Workers' Compensation at a later date. **Talley**, 328 S.E.2d 621 (1985). In the present case, the claimant has settled her third-party claim without complying with Section 42-1-560. Thus, she is barred from pursuing Workers' Compensation Benefits.

In the present case, the Claimant did not notify the Commission, her Employer, or the South Carolina Uninsured Employers' Fund of the Settlement of her Third-Party Claim. During her deposition, her lawyer denied that the claim had been settled and denied that an Election of Remedies had been made. (Deposition pp. 28-29). However, in her testimony, the Claimant advised her Workers' Compensation Attorney of the settlement. (Hearing Transcript pp. 28-30). Settlement Payments were made between the time of her deposition and the time of the Workers' Compensation Hearing, without notification or consent of the UEF or approval of the Commission.

It is clear that the Settlement was made without the Commission's approval or the consent of the Employer or the Uninsured Employer's fund. In fact, no consent was sought. The South

Carolina Court of Appeals noted in Johnson v. Penn Millers Mutual Insurance Company that if a Claimant settles the third-party action without the Defendants' consent, the Supreme Court Holding in Fisher would bar a Claimant from thereafter pursuing a Workers' Compensation Claim. Johnson. 354 S.E.2d 791 (1987).

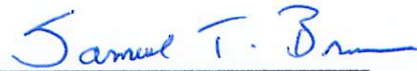
The Claimant seems to argue in her Appellant Brief that because she was seriously injured and because her recovery from liability limits of the adverse driver's policy did not cover her cognizable damages at law, the settlement of her Third-Party Claim does not constitute an election of remedies. The Claimant may be arguing that election of remedies does not apply in cases where one is seriously injured. The Fund would point out the Court of Appeals case of Kimmer v. Murata filed on December 18, 2006. In that case, the Claimant was seriously injured in an automobile accident and had three knee surgeries following that accident. The Claimant settled with the adverse parties liability insurance carrier for the policy limits of Fifteen Thousand and no/100 (\$15,00.00) Dollars. The Commission found that the Claimant had elected his remedy and, thus, denied his Workers' Compensation Claim. In an Appeal to the Circuit Court, the Trial Judge reversed the Order of the Appellant Panel, awarded Total and Permanent Disability to the Claimant, and awarded the Defendants an offset of Ten Thousand and no/100 (\$10,000.00) Dollars, the net amount of the third-party settlement. The Court of Appeals, citing Fisher, reversed the Circuit Court and reinstated the finding of the Appellant Panel that an Election of Remedy had been made.

CONCLUSION

In the present case, the Commission was correct in finding that the Claimant made an Election of Remedies by settling her Third-Party Claim without complying with the provisions of

§42-1-560 of the Workers' Compensation Act. The Commission correctly found that the Claimant is barred from pursuing further Workers' Compensation Benefits.

Respectfully Submitted,



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