

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH
CAROLINA WORKERS'
COMPENSATION COMMISSION

Aisha Taylor, R. Michael Campbell, II, T. Scott Beck, Commissioners

Appellate Case No. 2023-001944

Amy Perez, Claimant,
Appellant.

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MAY 02 2024

SC Court of Appeals

v.

Aman Medical Transport, LLC, Employer, and SC Uninsured Employers'
Fund, Carrier, Respondents.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

- I. DID THE COMMISSION ERR IN FINDING THE CLAIMANT'S THIRD-PARTY SETTLEMENT IS BARRED AS IT WAS ALLEGEDLY MADE WITHOUT NOTIFICATION OR CONSENT OF THE DEFENDANTS AND WAS TO BE APPROVED BY THE COMMISSION?

STATEMENT OF THE CASE

This matter arises out of an accident that occurred on January 21, 2022, in Darlington, County, South Carolina. The Claimant, Amy Perez, was driving an ambulance owned by Aman Medical Transport, LLC, (hereinafter, "Employer") when a vehicle driven by Celica Elizabeth Martin crossed the center line and struck the vehicle driven by the Claimant. As a result of the collision, the Claimant suffered severe injuries to her right foot, right lower extremity, and spine.

On March 31, 2022, the Claimant filed a Form 50, request for a hearing, with the South Carolina Workers' Compensation Commission. It named Aman Medical Transport, LLC as the Employer, and the South Carolina Uninsured Employers' Fund (hereinafter, "Fund") as the Carrier. On April 11, 2022, the Fund filed a Form 51 issuing a general denial.

The Claimant was an employee of Aman Medical Transport on the date of accident. The Employer and the Fund had maintained she was an independent contractor. In addition, the Employer and the Fund argued they were not subject to the SC Workers' Compensation Act, since the Employer did not regularly employ four or more employees.

The Claimant sought payment for her past and future medical care and expenses. She requested an evaluation for her lumbar spine and continued treatment for her right foot and right lower extremity. In addition, the Claimant sought TTD benefits from the date of accident and

continuing. The Claimant submitted her TTD should be based upon her dual employment.

The Claimant was working two jobs at the time of her accident, and her total average weekly wage from both positions was Six Hundred Twenty-Four and 36/100 (\$624.36) Dollars per week resulting in an applicable compensation rate of Four Hundred Sixteen and 26/100 (\$416.26) Dollars. The Fund requested that the issue of the average weekly wage be made without prejudice as wage records had been requested from the Employer on numerous occasions but were not provided. The Claimant requested that it be determined with prejudice.

A representative of Aman Medical Transport, LLC did not appear at the Hearing. On May 3, 2022, Mr. Brunson wrote Shannon Bennett, the Registered Agent for Aman Medical Transport, LLC, a letter requesting she contact him without a response.

In June of 2022, the Commission issued a Hearing Notice setting this matter for a Hearing during the third week of August. At that time, Mr. Brunson again wrote Ms. Bennett and forwarded a Subpoena requesting wage records for the Claimant and a list of her other workers. Again, Ms. Bennett did not respond.

A week prior to the first scheduled Hearing, the Commission was emailed by a Tonya Lloyd who claimed to be a consultant with Aman Medical Transport. Ms. Lloyd explained that the owners of the company, Shannon Bennett and Rhonda Watts, had a medical emergency and needed to have the matter postponed. The matter was postponed at that time and was reset to be held on October 6, 2022.

On September 26, 2022, approximately ten (10) days before the second scheduled Hearing, Mr. Brunson talked with Tonya Lloyd who informed him that the matter needed to be further postponed. Shortly thereafter, Rhonda Watts requested postponement by emailing the Workers'

Compensation Commission. The Claimant objected to her request for postponement and no further action was taken on the motion.

Following Pre-Trial, Mr. Brunson walked around the Hearing location and could not find anyone appearing on behalf of Aman Medical Transport, LLC. Obviously, since Rhonda Watts requested postponement, it is clear she had notice of the Hearing. The Claimant was then called to testify.

The Claimant's date of birth is August 16, 1977, rendering her 46 years of age. She is divorced with four children and resides in Chesterfield, South Carolina. She has never been in the business of transporting medical patients before she went to work for Aman Medical Transport, LLC. (Tr. Pg. 15-16; R. p. 30, lines 1-25. 31, lines 1-2). She began working for Aman Medial Transport in late 2019, early 2020. (Tr. Pg. 16; R. p. 31, lines 3-9).

The Claimant stated her Employer regularly employed nine (9) or more employees at the time of her accident, although she could not recall all their names. Her Employer did have a full-time mechanic, Jimmy and then Logan, a dispatcher, two females named Courtney, who drove individual vans, and Debra, a van operator, as well as other employees. (Tr. Pg. 18; R. p. 32, lines 1-24).

Rhonda Watts set the Claimant's schedule and would designate whether she was going to work in a van or ambulance. The schedule would dictate where she was supposed to drop off and pick up the Employer's clients. She used all her Employer's equipment, she did not use any equipment of her own on-the-job, and she was required to wear a uniform that stated, "Aman Transportation." (Tr. Pg. 19; R. p. 33, lines 3-20. 34, lines 1-2). She could be fired if she did not adhere to the schedule. (Tr. Pg. 19-20; R. p. 33, lines 21-25). Her Employer paid for SC required driving courses in order for the Claimant to be able transport patients. (Tr. Pg. 16; R. p. 31, lines 10-

24). The Employer also provided and paid for courses on how to operate the equipment. (Tr. Pg. 16, R. p. 31, lines 10-24).

The Claimant earned ten (10) dollars per hour and worked 30 to 40 hours per week at Aman Medical Transport, LLC. She also worked for the Dollar General earning Nine twenty-five (\$9.25) per hour and averaged 25 to 30 hours per week. (Tr. Pg. 20-21, R. p. 34, lines 12-25. 35, lines 1-6). The Claimant obtained the position at the Dollar General since the vans and ambulances, with Aman Medical Transport, LLC, would not be in state compliance often, so she had to obtain the position at the Dollar General to support herself with dual employment. (Tr. Pg. 21; R. p. 35, lines 7-21).

On January 21, 2022, she was proceeding to a medical facility when the at-fault driver struck her Employer's vehicle at an estimated speed of 80 miles per hour. She was transported by EMS to McLeod in Florence, SC for injuries to her right foot, right ankle, and right leg. She had to undergo three surgeries, the last of which was to take off the external fixator and to place metal plates, pins, and bolts in her ankle, foot, and leg. She then attended MUSC for after-care physical therapy.

Since the date of the accident, the Claimant has been unable to work. In May 2022, her granddaughter died, and she could not drive or attend her funeral. She has not worked since the date of accident, and she does not believe she is able to work currently due to the pain she is experiencing in her back and right lower extremity. (Tr. Pg. 25-27, R. pp. 36-38). The Claimant has not been released by Dr. Sparkman.

The Claimant did not compromise the settlement and procured all the recovery possible under the policies, and, unfortunately, it will not cover her cognizable damages. The Claimant has over \$200,000.00 dollars in medical expenses from Darlington County EMS, McLeod Regional Medical Center and McLeod Home Health that were all resolved through settlement. The Claimant has had

three operations, with retained hardware, and she was hospitalized for close to a month.

Obviously, liability is not an issue in this matter, and if the matter was to go before a jury, they would likely return an award for three times the medical damages. Three times the medical damages will not even compensate the Claimant for her cognizable damages to include but not limited to pain and suffer, loss of earning capacity, and incidental and consequential damages. The Claimant's conservative cognizable damages are at least \$600,000.00.

On January 30, 2023 the single Commissioner issued a Decision and Order finding the third-party settlement in this case was made without notification to or consent of the Defendants and that the settlement was made without notification to and without the approval of the Workers' Compensation Commission. The Commissioner concluded the Claimant was precluded from recovery under the Act. (R. pp. 1-14).

On February 13, 2023, Claimant filed a Form 30, request for Commission Review. On February 17, 2023, the Commission issued a Form 31, Briefing Schedule, and Notice of Appellate Hearing. On March 17, 2023, Claimant filed an Appellant Brief raising the following issues:

- I. Did the Single Commissioner err in failing to find that Aman Medical Transport, LLC, was subject to the SC Workers' Compensation Act?
- II. Did the Single Commissioner err in failing to find the Claimant was an employee of Aman Medical Transport, LLC and not an independent contractor?
- III. Did the Single Commissioner err in failing to find the Claimant is entitled to TTD from the date of accident and continuing?
- IV. Did the Single Commissioner err in failing to find the Claimant has an applicable average weekly wage, from dual employment, at the rate of Six Hundred Twenty-Four and 36/100

(\$624.36) Dollars per week resulting an applicable compensation rate of Four Hundred Sixteen and 26/100 (\$416.26) Dollars applicable?

- V. Did the Single Commissioner err in failing to find the Claimant is entitled to additional medical care and treatment for her right lower extremity and spine?
- VI. Did the Single Commissioner err in finding that the Claimant's third-party settlement was made without notification to or consent of the Defendants, so the Claimant has waived any rights to benefits under the Workers' Compensation Act and that the third-party settlement was required to be approved by the Commission?

The Appellate Panel Hearing was held in Columbia, SC on April 17, 2023. The Employer, Aman Medical Transport, LLC failed to appear. The Commission's Decision and Order was filed on December 7, 2023.

The Commission found as a matter of fact as follows:

1. The Claimant, Amy Perez was involved in a motor vehicle accident on January 21, 2022, and injured her right lower extremity.
2. Following her automobile accident on January 21, 2022, the Claimant received medical treatment at McLeod Regional Medical Center in Florence, South Carolina.
3. The Claimant was evaluated at McLeod Medical Center on January 21, 2022, where she was diagnosed with a fibula fracture, dislocated right ankle, and laceration of her leg. She complained of pain in the left calf, right ankle, and low back. The right lower extremity was splinted (Claimant's APA pages 1-103).
4. On January 22, 2022, the Claimant underwent closed reduction and external fixation of the right comminuted intra articular distal tibia pilon fracture with associated distal fibular shaft

fracture and complete syndesmotoc disruption which was completed by Dr. Sparkman. The Claimant remained in the hospital from January 21, 2022, until January 28, 2022. (Claimant's APA, page 23).

5. The Claimant was evaluated by John Ulmer, P.A. on February 15, 2022, and internal fixation was scheduled for February 21, 2022. (Claimant's APA pages 104-107).
6. The Claimant underwent internal fixation of the right tibia by Dr. Sparkman on February 21, 2022. (Claimant's APA pages 108-125).
7. The Claimant seeks a determination that she was employed by Aman Medical Transport, LLC on and before January 21, 2022, and that she made Ten and no/100 (\$10.00) Dollars per hour and worked thirty to forty hours per week. She also alleged that Aman had over four employees on the date of the accident. The Claimant also claims that she had a second job with Dollar General where she earned Nine and 25/100 (\$9.25) Dollars per hour and worked twenty-five to thirty hours per week. She alleges a combined average weekly wage of Six Hundred and Twenty-Four and 36/100 (\$625.36) Dollars and compensation rate of Four Hundred Sixteen and 26/100 (\$416.26) Dollars. The Claimant seeks temporary total benefits from the date of the accident and continuing, additional medical treatment and the payment of past and future medical treatment until she reaches maximum medical improvement. The Claimant also alleges an injury to her back on the date of the accident.
8. Aman Medical Transport was timely served with Notice of the Previous Hearing which was scheduled for August 23, 2022. The Company requested a postponement at that time due to illness which was granted.
9. Another Notice of Hearing was timely served upon Aman Medical Transport for the Hearing

of October 6, 2022. Several days before that Hearing, Aman again asked for postponement of the Hearing due to illness. The Claimant's attorney objected to that postponement as the claim had been previously postponed and the Claimant had not received benefits or medical treatment since her accident. The Commission planned to rule on the request for postponement at the hearing. However, Representatives for Aman Medical Transport failed to appear.

10. Aman Medical Transport did not appear for the properly scheduled and Noticed Hearing and the Hearing proceeded as scheduled.
11. The Uninsured Employers' Fund was present at the scheduled Hearing. The Uninsured Employers' Fund tried to reach Aman Medical Transport on numerous occasions. The UEF also requested employment documents including wage records and never received any response to those requests. The Uninsured Fund requested that any determination of an average weekly wage and compensation rate be made without prejudice if payroll records later became available.
12. We find Claimant was an employee of Aman Medical Transport, LLC at the time of her work accident on January 21, 2022. This finding is based on the greater weight of the evidence in the record including the uncontradicted testimony of the Claimant.
13. We find Claimant has an average weekly wage of \$624.36, which yields a compensation rate of \$416.26. This finding is based on the greater weight of the evidence including Claimant's testimony, which was credible and uncontradicted, as well as the payroll and wage information from Claimant's dual employment with Dollar General Corp.
14. We find the Defendant Employer, Aman Medical Transport, LLC, regularly employed four

or more employees during the period in which Claimant was involved in the motor vehicle accident. As such, the employer is subject to the Workers' Compensation Act. This finding is based on the greater weight of the evidence as a whole including the Claimant's testimony which was uncontradicted.

15. During the Claimant's testimony, in response to questioning by her Attorney, she admitted that she received settlement money from her third-party claim.
16. At that time, a Motion was made to have the documents regarding the third-party claim produced to determine whether an election of remedies had been made. The Claimant's attorney consented to that Motion.
17. The Settlement documents show that monies from the third-party settlement were disbursed to the Claimant on August 16, 2022, and included in those monies were liability insurance payments from the adverse driver's insurance coverage.
18. The documents also include an Agreement and a Covenant not to Execute signed by the Claimant as to the third-party tort-feasor, Celica Elizabeth Martin. That document effectively ends all claims against the third-party in this case.
19. The third-party settlement in this case was made 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. For that reason, the Claimant has elected her remedy in this case. In making that election, the Claimant has waived any rights to benefits she may have under the South Carolina Workers' Compensation Law. (R. pp. 24-28).

The Commission found as a matter of law as follows:

1. Claimant was an employee of Aman Medical Transport, LLC as defined in S.C. Code Ann section 42-1-130.
2. Aman Medica Transport, LLC regularly employes four or more employees and was subject to the South Carolina Workers' Compensation Act per S.C. Code Ann. Section 42-1-150.
3. Claimant has an average weekly wage of \$624.36 and a compensation rate of \$416.26 per S.C. Code Ann. Section 42-1-140.
4. 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. The facts in this case are identical to those in Fisher v. South Carolina Department of Mental Health, 291 S.E. 2nd 200 (1982). In Fisher, the Claimant sought benefits under the South Carolina Workers' Compensation Act after making a compromised settlement with a third-party tort-feasor without the consent of the Employer and/or 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 Section 42-1-560 and, having done so, had no further remedy under the South Carolina Workers' Compensation Act. Pursuant to Section 42-1-560 and Fisher, the Claimant is barred from further recovery under the Act. (R. p. 28).

The Appellant filed a Notice of Appeal on December 15, 2023 appealing the Commission's Order.

STANDARD OF REVIEW

The standard of review in workers' compensation cases is clear, in that a court may overturn a conclusion of the South Carolina Workers' Compensation Commission if that conclusion is clearly erroneous in view of the reliable, probative and substantial evidence on the whole record. Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304, 306 (1981). See also Rodney v. Michelin Tire Corp., 320 S.C. 515, 466 S.E.2d 357 (1996); S.C. Code Ann. § 1-23-380 (2009).

The test is whether the decision of the Commission is supported by substantial evidence. Substantial evidence is not a mere scintilla of evidence, nor the 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 conclusion that the administrative agency reached in order to justify the action.

Mullinax v. Winn-Dixie Stores, Inc., 318 S.C. 431, 458 S.E.2d 76 (Ct App. 1995). The Appellate Court is prohibited from overturning findings of fact of the Commission, unless there is no reasonable probability that the facts could be as related by the witness upon whose testimony the finding was based. Lowe v. Am-Can Transport Services, Inc., 283 S.C. 534 S.E.2d 87 (Ct. App. 1984). The Appellate Court is not permitted to re-weigh the evidence and to substitute its own findings of fact for those of the Commission. Brown v. Jordan Oil Co., 291 S.C. 272, 353 S.E.2d 280 (1987).

Thus, "review is limited to deciding whether the Commission's decision is unsupported by substantial evidence or is controlled by some error of law." Rodriguez v. Romero, 363 S.C. 80, 84, 610 S.E.2d 499, 490 (2005) citing Hendricks v. Pickens County, 335 S.C. 405, 411, 517 S.E.2d 698, 701 (Ct. App. 1999). In an appeal from the Commission, the Court of Appeals is free to reverse where the decision is affected by an error of law. Pratt v. Morris Roofing, Inc., 577

S.E.2d 475 (S.C. App. 2003). The agency charged with administration of an Act will be accorded the most respectful consideration and the Appellant must present compelling reason for reversal. Dunton v. S.C. Bd of Exam. in Optometry, 291 S.C. 221, 223, 353, S.E.2d 132, 133 (1987). The court can modify the Commission's decision in this case if the substantial rights of the Appellants have been prejudiced because the decision is affected by an error of law. Shealy v. Aiken County, 341 S.C. 448, 454-55, 535 S.E.2d 438, 442 (2000).

ARGUMENT

I. THE COMMISSION ERRED IN FINDING THE CLAIMANT'S THIRD-PARTY SETTLEMENT IS BARRED AS AN ACTION WAS NEVER COMMENCED AGAINST THE THIRD-PARTY AND THE DEFENDANTS WERE NOTIFIED OF THE THIRD-PARTY SETTLEMENT.

It is clear Section 42-1-560(b) governs, as the insured employee sought recovery from both the third-party and the workers' compensation carrier. Under case law, a claimant has three remedies for job-related injuries under Section 42-1-560.

(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 tort-feasor under 42-1-550 by instituting and prosecuting an action at law; and

(3) To proceed against both the employer-carrier and the third-party tort-feasor by complying with 42-1-560.

On March 24, 2022, the Claimant filed the Form 50, request for a hearing, against Aman Medical Transport, LLC, and the SC Uninsured Employers' Fund. The workers' compensation

action had already commenced when a two-million-dollar demand was made.

Section 42-1-560 only requires “Notice of the *commencement of an action* shall be given within thirty days thereafter to the Workers’ Compensation Commission, the employer and carrier upon a form prescribed by the Workers’ Compensation Commission.” (emphasis added). In this instance, the matter settled, and an action was never commenced on the third-party claim. Thereby, notice is not required to be given to the Workers’ Compensation Commission since an action had not commenced.

In addition, the Defendants had notice of the settlement. It was given to the Employer and the Fund when the Claimant was in the process of settling her UIM claim against the Employer’s insurance carrier. The Employer’s acting agent imputed notice onto the Employer and the Fund. Correspondence from the Employer’s Insurance Co. states, “I do not see any support for personal property of Ms. Perez’s that was destroyed in the loss. If you have some, please provide documentation of the damaged property. *Additionally, the named insured, AMAN Medical Transport, LLC is making a claim under the underinsured motorist property damage coverage for lost income resulting from this accident.*” (R. pp. 64-65). (emphasis added).

The Employer and the Fund were on notice when United Specialty Insurance Co. settled the UIM claim for the maximum \$25,000.00 in bodily injury and the maximum \$25,000.00 for property damage.

The case law regarding 42-1-560(b) and the election of remedies applies to compromised settlements. *See Fisher v. S.C. Dep’t of Mental Health*, 277 S.C. 573, 575, 291 S.E.2d 200, 201 (1982). The Claimant received the maximum \$50,000.00 in coverage from the liability carrier, Liberty Mutual Ins. Co., \$25,000.00 (Liability BI) and \$25,000.00 (Liability PD) as well as the

maximum \$25,000.00 (UIM BI).

The Claimant did not compromise the settlement and procured all the recovery possible under the policies, and, unfortunately, it will not cover her cognizable damages. The Claimant has over \$200,000.00 dollars in medical expenses from Darlington County EMS, McLeod Regional Medical Center and McLeod Home Health that were all resolved through settlement. The Claimant has had three operations, with retained hardware, and she was hospitalized for close to a month.

Obviously, liability is not an issue in this matter, and if the matter was to go before a jury, they would likely return an award for three times the medical damages. Three times the medical damages will not even compensate the Claimant for her cognizable damages to include but not limited to pain and suffer, loss of earning capacity, and incidental and consequential damages. The Claimant's conservative cognizable damages are at least \$600,000.00.

Judicial authority in South Carolina enables a party to defeat an attempt to force an election of remedies. *See Pamplico Bank & Trust Co. v. Prosser*, 259 S.C. 621, 193 S.E.2d 539 (1972). The Court held the doctrine of the election of remedies may also be used against the defendant.

The Supreme Court has provided a procedural device to soften the harsh effects of its decision in *Fisher*. At least three theories have been developed to prevent the harsh effect of *Fisher*. In *Lancaster v. Smith Co.*, 241 S.C. 451, 128 S.E.2d 915 (1962), when the plaintiff pursued the wrong remedy, the court reasoned, "If the party has no such remedy as he invokes, his action in pursuing it does not constitute an election. . . ." In *Talley*, if the claimant would have waited until they were disabled before filing a workers' compensation claim, their third-party action would be barred by the statute of limitations. *See Talley v. John-Mansville Sales Corp.*, 285 S.C. 117, 328 S.E.2d 621 (1985). Also, in *Montalbano v. Automobile Insurance Co. of Hartford, Connecticut*, 218 S.C. 367, 62 S.E.2d

915 (1962) the court showed its willingness to stretch this theory to prevent hardship for a party facing an election of remedies claim.

The legislature is also clearly trying to avoid the harsh effects of Fisher by its recent legislation. The Committee on Judiciary proposed the following amendment (JUD4321.004) to H.4321 bill in order for Section 42-1-560(b) to include “failure to notify the Workers’ Compensation Commission, the employer, and the carrier upon a form prescribed by the Workers’ Compensation Commission *does not* constitute an election of remedy.” (emphasis added). In this instance, the legislature is also trying to cure the hardship caused by the election of remedies even when an action has commenced without the employer or carrier’s knowledge.

CONCLUSION

For the reasons stated herein, the Appellant respectfully requests that an order be issued finding the Appellant is entitled to temporary total disability benefits from January 21, 2022, and continuing, ongoing treatment for her right lower extremity, an orthopedic evaluation of her lumbar spine.

Respectfully submitted,

April 29, 2024

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CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

April 29, 2024

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