

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
WCC FILE No. 1118397

Appellate Panel

Appellate Case No: 2013-000727

William D. Rhodes,

Appellant,

v.

M. B. Kahn Construction Company
and Self-Insured,

Respondent.

INITIAL REPLY BRIEF OF APPELLANT

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COURT OF APPEALS

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TABLE OF CONTENTS

Table of Contents.....ii

Table of Authorities.....iii

Arguments..... 1

 I. The Commission erred in finding that Mr. Rhodes’ left shoulder and
 right elbow injuries are not were not compensable..... 1

 II. The Commission erred in finding that Mr. Rhodes had reached maximum
 medical improvement and was entitled to only a 10% award of permanent
 disability benefits..... 2

Conclusion..... 5

TABLE OF AUTHORITIES

CASES

Corbin v. Kohler Co., 351 S.C. 613, 571 S.E.2d 92 (Ct. App. 2002) 3

G.E. Moore Co. v. Walker, 232 S.C. 320, 102 S.E.2d 106 (1958).5

Mullinax v. Winn-Dixie Stores, Inc., 318 S.C. 431, 458 S.E.2d 76 (S.C. App. 1995)..... 1

Potter v. Spartanburg Sch. Dist. 7, 395 S.C. 17, 716 S.E.2d 123 (Ct. App. 2011)..... 2, 3

Therrell v. Jerry’s Inc., 633 S.E.2d 893, 370 S.C. 22 (S.C. 2006).....5

STATUTES

S.C. Code Ann. § 42-9-10 (2012).....4

S.C. Code Ann. § 42-9-20 (2012).....4

S.C. Code Ann. § 42-9-30(14) (2012).....4,5

ARGUMENTS

I. The Commission erred in finding that Mr. Rhodes' left shoulder and right elbow injuries were not compensable.

In support of their position, Respondents appear to argue that because “there is no contemporaneous report” of left shoulder and right elbow injuries that the Commission committed no error in denying compensability of such. However, such a “requirement” as alleged by Respondents is not supported by the Act nor is it supported by any case law. Applying Respondents’ rationale to a workers’ compensation claim would result in not only an absurd outcome, but one that is inconsistent with controlling law as it would ultimately bar any resulting injuries that occurred after the work accident. See Mullinax v. Winn-Dixie Stores, Inc., 318 S.C. 431, 458 S.E.2d 76 (S.C.App. 1995) (finding that new injuries resulting indirectly from treatment or the original injury are also compensable).

Moreover, despite the absurdity of Respondents’ reasoning, the claim that Mr. Rhodes did not contemporaneously report his left shoulder and right elbow injuries is factually inaccurate. At hearing, Mr. Rhodes testified that he was having problems with his right elbow and left shoulder when he saw Dr. McFadden for his pre-op appointment and again when he saw him for surgery. (Hrg. Tr. p. 41; 13-18). Following his surgery, Mr. Rhodes remained out of work until he was released by Dr. McFadden to return to light duty work on February 13, 2012. (Claimant’s APA 3, p. 45). At the next visit on February 27, 2012, Dr. McFadden continued to recommend light duty work, but modified such by increasing the amount of weight he could push, pull, lift and carry. (Claimant’s

APA 3, pp. 47-48). At the next visit with Dr. McFadden on March 26, 2012, it was documented that Mr. Rhodes was complaining of left shoulder pain after using a sledge hammer while on light duty work. (Claimant's APA 3, p. 49) He was next seen by Dr. McFadden on April 30, 2012. At that time, Dr. McFadden noted that "...he has had some issues with his left shoulder and right elbow since he had to return to work with light duties." He further went on to note, "However, we have not been authorized to see him for the left shoulder or the right elbow at this point." (Claimant's APA 3, p. 51)

II. The Commission erred in finding that Mr. Rhodes had reached maximum medical improvement and awarded only a 10% loss of permanent disability benefits for his right shoulder.

a. Maximum Medical Improvement (MMI):

Respondents fail to acknowledge that the undisputed evidence of the record establishes that Mr. Rhodes had not reached maximum medical improvement with regard to his work-related injuries. As more thoroughly addressed in Appellant's Initial Brief, both Dr. McFadden and Dr. Zgleszewski opined that he had not reached maximum medical improvement. Disregarding the uncontroverted opinions of the only two physicians in the record results in nothing more than a blatant error of law.

b. Permanent Disability Benefits:

In their brief, Respondents cite Potter v. Spartanburg Sch. Dist. 7, 395 S.C. 17, 716 S.E.2d 123 (Ct. App. 2011) for the proposition that the Commission is not bound by the opinions of medical experts and may disregard in favor of other competent evidence

in the record. (Respondents' Initial Brief, p. 6). While Mr. Rhodes will concede that this is the underlying proposition in Potter, he maintains that it is inapplicable to the case presently before the Court as it dealt with the issue of causation and not permanent disability. Furthermore, in Potter, the Commission was presented with contradictory medical evidence from a variety of physicians as to whether his physical brain injury was causally-related to the work accident. Id. at 125. Mr. Rhodes asserts that in the case at bar, the medical opinions presented in the evidentiary record consistently establish that he had no less than a 16% loss to his right shoulder. Expert medical testimony is intended to aid the Appellate Panel in coming to the correct conclusion. Corbin v. Kohler Co., 351 S.C. 613, 624, 571 S.E.2d 92, 98 (Ct. App. 2002). To completely disregard the uncontroverted medical evidence of the record is clearly erroneous and in direct contradiction of the Act and the controlling law.

In further support of their position, Respondents argue that there is other more competent, reliable, probative and substantial evidence which allows the Commission to ignore the expert medical opinions in the record. However, Mr. Rhodes maintains that to rely on other competent evidence in the record, such evidence must be relevant to the issue. The evidence that the Respondents cite is clearly irrelevant to this case. They rely on Dr. McFadden's reports which note that Mr. Rhodes had full range of motion in his right shoulder as well as his opinions that Mr. Rhodes can return to full duty work for his right shoulder with no physical limitations. (Respondents' Initial Brief, p. 7). Respondents disregard the fact that Dr. McFadden assigned a sixteen percent (16%) loss of use to the right shoulder based on the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. (Claimant's APA 3, p. 51). To argue that portions of Dr.

8
McFadden's medical opinions are reliable while others are not; is not only inconsistent but ridiculous.

In their brief Respondents inaccurately note, "Moreover, Claimant testified that he takes no prescription medication for his work-related condition." (Respondents' Initial Brief, p. 7). However, at hearing Mr. Rhodes testified that he continues to take eight-hundred milligrams of Ibuprofen on a daily basis. He noted that Dr. McFadden continued to prescribe the medication. (Hrg. Tr. p. 48; 17-22). Additionally, Dr. Zgleszewski noted in his May 29, 2012 report under the "Current Medications" section that Mr. Rhodes was taking "Ibuprofen". (Claimant's APA 4, p. 56).

Respondents again mischaracterize the evidence in their brief when noting, that "absent his alleged left shoulder or right elbow injuries, he would take his old job back if offered." (Respondents' Initial Brief, p. 7). When asked if he could do his job given his ongoing right shoulder complaints, he testified, "Well, you know, to the best I could." (Hrg. Tr. p. 28; 13). However, it is important to note that Mr. Rhodes last worked for the employer on March 27, 2012 while he was still under light duty work restrictions. (Hrg. Tr. p. 23; 14-20). The fact remains that Mr. Rhodes' desire to *try* to work should not and does not have any bearing on the extent of disability he has to his right shoulder. Mr. Rhodes would concede that his lay testimony regarding his ability to return to work, in theory, may be relevant had his claim been brought under a total disability claim or a wage loss claim. S.C. Code Ann. §§ 42-9-10, 42-9-20 (2012). However, since Section 42-9-30 of the South Carolina Code Annotated is the only applicable statutory section for review when strictly looking at the extent of disability that Mr. Rhodes sustained to his right shoulder, the Respondents argument is clearly flawed. S.C. Code Ann. § 42-9-

30(14) (2012). As more thoroughly noted in Appellant's Initial Brief, it is not required to show a loss of earnings in order to recover for scheduled injuries. G.E. Moore Co. v. Walker, 232 S.C. 320, 102 S.E.2d 106 (1958). Rather, "compensation is based on the character of the injury." Therrell v. Jerry's Inc., 633 S.E.2d 893, 370 S.C. 22 (S.C. 2006).

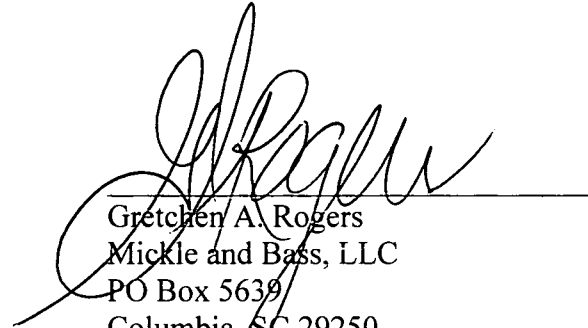
Furthermore, in addition to the expert medical opinions, the only relevant and competent evidence in the record regarding the permanent loss Mr. Rhodes sustained to right shoulder came from his own testimony. At hearing, Mr. Rhodes testified that he suffers worsened symptoms in his right shoulder on a daily basis when he tries to move it too much. (Hrg. Tr. p. 30; 22-24). He also testified that his right shoulder has restricted motion when trying to move his right arm backward. (Hrg. Tr. p. 30; 18-21). His testimony was supported by Dr. Zgleszewski's findings in his May 29, 2012 report. In that report, Dr. Zgleszewski documented objective limited range of motion in the flexion; extension; abduction; internal rotation and external rotation of his right shoulder. (Claimant's APA 4, p. 56).

CONCLUSION

In conclusion, the reliable, probative and substantial evidence of the entire record clearly shows: (a) that Mr. Rhodes' left shoulder and right elbow injuries are causally related and compensable injuries; (b) that the Commission's finding that Mr. Rhodes had reached MMI is erroneous based on the uncontroverted evidence; and (c) that an award of 10% disability to the right shoulder is not supported by the evidence in the record and based on an arbitrary and capricious finding that constituted an abuse of discretion. Accordingly, Mr. Rhodes respectfully requests that this Court reverse the Commission

and find that the Respondents must reinstate temporary total disability benefits and provide causally-related medical treatment for Mr. Rhodes left shoulder and right elbow injuries.

Respectfully submitted, this, the 3rd day of September, 2013.

A handwritten signature in black ink, appearing to read 'G. Rogers', is written over a horizontal line. The signature is fluid and cursive.

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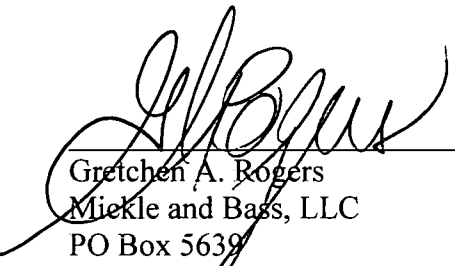
I certify that I have served the Initial Reply Brief of Appellant on the parties in the above referenced claim by depositing a copy of it in the United States Mail to their attorney of record, postage prepaid, on September 3, 2013 addressed as follows:

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