

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE GREENVILLE COUNTY
COURT OF COMMON PLEAS

Civil Action No.: 2011-CP-23-7975
W.C.C. File No.: 0622179

Jacqueline Carter, Respondent,

v.

Verizon Wireless Southeast and
American Home Assurance Company, Appellants.

RETURN TO RESPONDENT'S PETITION FOR REHEARING

Grady L. Beard
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Attorneys for Appellants

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MAR 06 2014

SC Court of Appeals

Pursuant to Rule 240(e) of the South Carolina Appellate Court Rules, Verizon Wireless Southeast and American Home Assurance Company (“Appellants”) submit this Return to Respondent’s Petition for Rehearing. For the reasons set forth herein, Respondent’s Petition for Rehearing should be denied.

This Court reversed the Order of the Circuit Court that substantial evidence in the record does not support the Appellate Panel’s finding that the Respondent did not suffer a change of condition. Moreover, this Court affirmed the Order of the Circuit Court reversing the Appellate Panel’s modification of the Single Commissioner’s decision regarding the Respondent’s future medical treatment. Finally, this Court rendered the remaining issues on appeal, specifically whether the Circuit Court erred in reversing the Appellate Panel’s finding of an intervening accident(s), moot.

Respondent now advances four arguments in support of its Petition that were allegedly overlooked or misapprehended by the Court. First, the Respondent contends the Court erred in failing to affirm the holding of the Circuit Court that the alleged change of condition was compensable. Specifically, the Respondent asserts the Court’s apparent basis for reversing the Circuit Court – “that Respondent’s change of condition ‘was the result of the natural progression of her pre-existing degenerative joint disease and not the result of her original injury’” – was predicated upon the Court overlooking Dr. Grady’s testimony that the change of condition was due to the surgery which resulted from the original compensable accident. (Pet. for Reh’g 2.) In addition, the Respondent contends it is inconsistent to “[conclude] there is no change of condition, while at the same time stating the reason for the change in her condition is not compensable.” (Pet. for Reh’g 2.)

To the contrary, it is clear the Respondent has misinterpreted the holding of the Court as it pertains to the compensability of the alleged change of condition, as the Court's holding is not inconsistent. The Court held that the testimony of Dr. Grady and the Respondent constitute substantial evidence to support the finding of the Appellate Panel that the Respondent did not sustain a **compensable** change of condition. The Court further held that if the Respondent did sustain a change of condition, the change of condition was the result of the natural progression of her pre-existing condition and not the result of her original injury. See Brown v. R.L. Jordan Oil Co., 291 S.C. 272, 275, 353, S.E.2d 280, 282 (1987)("[A] condition due solely to the natural progression of a pre-existing disease is not compensable."); see also Causby v. Rock Hill Printing & Finishing Co., 249 S.C. 225, 227, 153 S.E.2d 697, 698 (1967)(A compensable change of condition requires "a change in the Respondent's physical condition as a result of the original injury, occurring after the first award"). In short, the Court was simply affirming that any change in the Respondent's condition was not the result of her original injury, as is required under Causby for a compensable change of condition, but the result of the natural progression of her pre-existing arthritic condition.

Additionally, the parties do not dispute Dr. Grady's testimony that the Respondent had a "natural progression of her disease process from the time that I did surgery on her until the time I saw her on November 4, 2010." (R. p. 28, ll. 9-11). However, the Respondent now asks this Court of make the quantum leap to compensability by holding this testimony equates to the evidence that her current condition resulted from nature progression of her pre-existing condition **because** of her surgery, not **since** her surgery. This request is simply not supported by the testimony of Dr. Grady. In fact, Dr. Grady testified that the Respondent's current knee

condition is the result of a natural progression *since* surgery. Dr. Grady clarified this point by testifying the worsening of her left knee is "more of a degenerative insidious, slow problem." (R. p. 38, ll. 11-12). Accordingly, the record contains substantial evidence to support that the Respondent's current left knee condition, if changed, is the result of the natural progression of her pre-existing arthritic condition, and not causally-related to her original injury as required by Causby.

Second, the Respondent contends the Court erred in misapprehending the scope of its review in allegedly substituting its own factual finding that Respondent's change of condition is due to the natural progression of her pre-existing degenerative condition. The Respondent argues this finding, which Respondent believes is the only reason for the reversal, was not made by the Appellate Panel but by this Court in violation of Supreme Court precedent. See Shealy v. Aiken Cnty., 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000) ("The Appellate Panel is the ultimate fact finder in workers' compensation cases.").

The Appellants assert the Respondent has failed to recognize the actual holding of the Court. This Court held that the testimony of the Respondent and Dr. Grady constitutes substantial evidence to support the decision of the Appellate Panel, requiring a reversal of the Circuit Court's Order to the contrary. See Pierre v. Seaside Farms, Inc., 386 S.C. 534, 540, 689 S.E.2d 615, 618 (2010) ("[A]n appellate court must affirm the findings of fact made by the Appellate Panel if they are supported by substantial evidence."). In support of this holding, the Court cites to several pieces of testimony relied upon the Appellate Panel in support of its decision, including but not limited to the testimony of Dr. Grady that the Respondent's current condition resulted from the natural progression of her pre-existing arthritic condition.

Importantly, the Court also cited in its Opinion the testimony of the Respondent and Dr. Grady pertaining to the Respondent's exercise regimen, pain complaints, and use of prescription medications. The testimony regarding the "natural progression" was simply the most compelling evidence to the Court to support its holding. Accordingly, the argument is without merit and should serve as a basis to deny the Petition.

Third, the Respondent argues the Court has failed to apply its own precedent in Mungo v. Rental Uniform Service, wherein this Court held that evidence not considered in forming the basis for the original award may be considered in adjudicating a subsequent change of condition claim. 383 S.C. 270, 768 S.E.2d 825 (Ct. App. 2009). Specifically, the Respondent asserts "this Court misapprehends the law to provide that because there was a hearing on October 15, 2009, any evidence of a change before that date may not be considered in the change of condition claim." (Pet. for Reh'g 6.) Frankly, the Appellants are unsure how this argument is even relevant to the matter at bar, as neither party submitted any evidence to assist the Court in addressing the alleged change of condition which was in existence prior to but not considered at the Hearing on October 15, 2009. As the facts in this matter are distinguishable from the facts in Mungo, the holding in Mungo is not applicable to the matter at bar.

In addition, this Court correctly applied the longstanding precedent for determining a change of condition as provided by the Supreme Court. See Causby, 249 S.C. at 227, 153 S.E.2d at 698 (A change of condition in a workers' compensation claim is a change in the claimant's physical condition as a result of the original injury, occurring after the first award."). As such, the Court should reject this argument as a basis for granting a rehearing.

Finally, the Respondent argues that the Court overlooked or misapprehended the testimony regarding the Respondent's level of pain on November 4, 2010. Specifically, the Court was "incorrect" in noting that Dr. Grady and the Respondent disagreed as to her level of pain on that date. (Pet. for Reh'g 7.) This is a mischaracterization of the record. In the report of Dr. Grady from November 4, 2010, he notes the Respondent reported an average pain level of 5 out of 10, but also noted the pain "does . . . go up to 6 or 7 out of 10." (R. p. 152). This was confirmed in his testimony, when Dr. Grady testified that the Respondent level of pain was at "five or above," the same level she was at in 2008. (R. p. 124, ll. 8-14). To the contrary, the Respondent repeatedly testified her pain was average 8 out of 10 from the summer of 2010, when she was exercising, through the date of her deposition on January 20, 2011. (R. pp. 132, 136-138). It is the opinion of the Appellants that the Court was not necessarily focusing on the disagreement or inconsistency between the testimony of the Respondent and Dr. Grady but on the testimony that the Respondent's pain had not changed since 2008, as this fact is part of the substantial evidence the Court found to support the determination of the Appellate Panel that the Respondent did not sustain a compensable change of condition.

This Court did not overlook or misapprehend the law or facts in this case. Rather, this Court applied the facts to the well-established law and properly held the Decision and Order of the Appellate Panel was supported by substantial evidence and, therefore, should not have been reversed by the Circuit Court. Respondent's Petition for Rehearing is therefore without merit and should be denied.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Grady L. Beard', is written over a horizontal line.

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March 6, 2014

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE GREENVILLE COUNTY
COURT OF COMMON PLEAS

Civil Action No.: 2011-CP-23-7975
W.C.C. File No.: 0622179

Jacqueline Carter, Respondent,

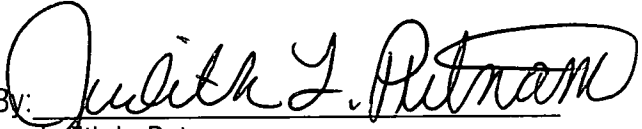
v.

Verizon Wireless Southeast and
American Home Assurance Company, Appellants.

PROOF OF SERVICE

I certify that I have served a copy of the Return to Respondent's Petition for Rehearing on Jacqueline Carter, by depositing a copy of same in the United States Mail, postage prepaid, on March 6, 2014, addressed to her attorney of record, Jeremy A. Dantin, Esquire, Harrison, White, Smith & Coggins, P.A., 178 West Main Street, Post Office Box 3547, Spartanburg SC 29304.

SOWELL GRAY STEPP AND LAFFITTE, L.L.C.

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March 6, 2014

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March 6, 2014

VIA HAND DELIVERY

Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1015 Sumter Street
Columbia, SC 29201

RE: Jacqueline Y. Carter v. Verizon Wireless Southeast
SC Court of Appeals Appellate Case No.: 2012-212924
Civil Action No.: 2011-CP-23-7975
WCC File No.: 0622179
Date of Accident: 12/27/06
Claim No.: 200612457380001
Our File No.: 5332/8041

Dear Ms. Kitchings:

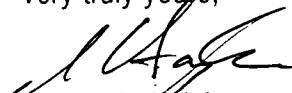
We represent the Appellants Verizon Wireless and American Home Assurance Company in the above-referenced matter.

Please find enclosed for filing an original and ten (10) copies of a Return to Respondent's Petition for Rehearing on behalf of the Appellants, as well as the Proof of Service serving same. Please file the original and six copies and return the remaining four clocked-in copies to us via our courier.

By copy of this letter and aforementioned document to Jeremy A. Dantin, Esquire, we are serving him with a copy via U.S. Mail.

Should you have any questions or need anything further, please do not hesitate to contact me.

Very truly yours,



Nicolas L. Haigler

NLH:jjp
Enclosures

cc: Jeremy A. Dantin, Esquire (w/enclosure)
Mr. Brandon Parreno (w/enclosure)
Ms. Pamela Shannon (w/enclosure)
Ms. Sheila Wyles (w/enclosure)

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