

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Gene McCaskill, Commissioner
T. Scott Beck, Commissioner
Melody L. James, Commissioner

RECEIVED

JAN 27 2015

Appellate Case Number : 2012-212972

SC Court of Appeals

74872

Alison Morrett,

Employee, Claimant/Appellant.

v.

Capital City Ambulance of GA, Ltd. and
Companion Property and Casualty Group,

Employer, Carrier/Respondents,

PETITION FOR REHEARING

This petition is filed pursuant to Rules 221 and 240 of the South Carolina Appellate Court Rules. Rule 221 governs rehearing. Rule 240 governs motions and petitions generally.

This Court issued the decision in this matter on January 14, 2015. See Op. No. 2015-UP-036. This petition is therefore timely. See Rule 221(a), SCACR.

This petition's principal purpose is to preserve Alison Morrett's ability to request further review of the arguments that she offered this Court on the merits. To that end, Ms. Morrett wishes to completely incorporate the arguments from her principal and reply briefs by reference. Ms. Morrett understands and appreciates that this Court has reviewed this matter and rendered its

decision, but as the Court must surely have suspected, Ms. Morrett has strong but respectful disagreements with the decision to affirm.

ISSUES 1 & 6

As the Court will recall it was Morrett's position that she met her burden of proof pursuant to South Carolina Code § 42-1-160 and § 42-9-35. The opinions of Dr. Piasecki in the record clearly meet the burdens established by South Carolina Code § 42-1-160 and § 42-9-35. The psychological aggravation is noted in Dr. Piasecki's office note (R. pp. 471 - 472). Dr. Piasecki also completed a questionnaire dated November 30, 2011 which was introduced as Claimant's APA 148 (R. p. 481). Dr. Piasecki was also deposed and reaffirms his opinions that the injury coupled with the extensive treatment aggravated the Claimant's pre-existing psychological and eating disorder. (R. p. 150, lines 14 - 21). The substantial and overwhelming evidence supports Morrett's argument and there is no evidence to support the Full Commission's holding that the Claimant did not meet her burden of proof. An aggravation of Ms. Morrett's psychological condition was proven by a preponderance of the evidence including medical evidence.

Ms. Morret would respectfully request that the Court reconsider this issue and reexamine the evidence presented as well as the controlling statutory law.

ISSUE 2

The decision of the Full Commission is not supported by substantial evidence in the record. In fact, the only evidence that supports the decision of the Full Commission is the flawed report of Dr. Lind. The reliance on the opinion of Dr. Lind is misplaced for many reasons. There are many obvious flaws with the report of Dr. Lind and his conclusions are based on assumptions that are incorrect, simply wrong and not supported by the record. Dr. Lind only met with the Claimant one time for 60 minutes. (R. p. 1335). Dr. Lind's report also contains inaccuracies about the Claimant, the medical records involved and the medical treatment received by the Claimant. At Defendant's

APA 16 (R. p. 1336) Dr. Lind indicates that the Claimant lives in Manning. (R. p. 1336). The Claimant has never lived in Manning. Dr. Lind also lists the records he supposedly reviewed. (R. p. 1336). Dr. Lind indicates that he reviewed records from SouthEastern Spine Institute, Manning Medicine, Easter Cooper Regional Medical Center, Physical Rehabilitation Group, Clarendon Memorial Hospital, Lowcountry Urology Clinics, Fifi Jubran, MA, Rehabilitation Consultant. The Claimant has not treated with any of the providers listed within Dr. Lind's report at R. p. 1336. Dr. Lind also based his opinion on the false statement that the medical notes of Counselor Hobbs only mention the Claimant's work related injury 5 times when in fact it was mentioned at least 12 times. See (R. P. 1338 of Dr. Lind's Report) also See (R. p. 252-257 Records of Counselor Hobbs).

Furthermore, because of the flaws in Dr. Lind's report it is impossible to say what if any records he reviewed to form his opinion. Dr. Lind's report does not list any of the medical providers who actually treated Ms. Morrett before or after the accident. The South Carolina Supreme Court has stated "It is, of course, elementary that the factual or underlying basis for the expert's opinion be set out, otherwise the opinion lacks probative value" Young v. Tide Craft, 270 S.C. 453, 468, 242 S.E. 2d 671, 678 (1978). Clearly an expert report based on data that is not correct lacks probative value.

It was clearly assumed by the Full Commission that Dr. Lind reviewed the prior records of the Claimant before rendering his opinion. The Full Commission's decision to give Dr. Lind's report more weight was based on this incorrect assumption. By assuming that Dr. Lind has reviewed the prior records of the Claimant the Commission has engaged in surmise, conjecture and speculation. The South Carolina Supreme Court has held that "an award may not rest upon surmise, conjecture or speculation. Tiller v. Nat'l Health Care Ctr. Of Sumter, 334 S.C. 333, 339 513 S.E. 2d 843, 845 (1999).

The foundation of Dr. Lind's opinion is that the Claimant did not complete the treatment at Ridgeview. A fact that is not true and not supported by the record. The Claimant testified that she completed the program at Ridgeview. (R. p. 179, line 12-p. 180, line 22)(R. p. 202, lines 19-25). Although the Claimant had some health problems on February 10, 2009 she returned to Ridgeview. (R. pp. 970 - 971). Her return to Ridgeview is noted in the Record at page 972 and within Defendants' APA 1300 (R. p. 1290) which is the admission note for her collapsed Lung and it indicates that she is being admitted on February 17, 2009 to Wellstar from a local psychiatric hospital where she is being treated for bullimia. The note states "The patient was due to be discharged" when referring to the local psychiatric hospital. (R. p. 1290). The Evidence is that the Claimant completed the program. There was no Finding of the Full Commission or the Single Commission that the Claimant did not complete the program at Ridgeview. Furthermore, the Full Commission did not reverse the Single Commissioner's finding that the Claimant testified accurately and in-line with the medical records.

Ms. Morret would respectfully request that the Court reconsider this issue and reexamine the evidence presented as well as the controlling case law that is refereced above.

ISSUE 3

The Full Commission stated in Finding of Fact 15 that Dr. Piasecki was not aware of the Claimant's extensive preexisting psychological treatment and did not take her preexisting condition into account when rendering his opinion. This finding is not supported by substantial evidence and is an error of fact. (R. pp. 36 - 37). At page 8, line 11 of Dr. Piasecki's deposition he was asked to review the report of Dr. Lind. (R. p. 149, lines 11 - 14). After being confronted with the report of Psychologist Lind and the extensive prior treatment and trauma that the Claimant has endured, Dr. Piasecki stated that "I would say that the stress of undergoing as many surgeries as she has, has

increased the likelihood of her having worsening depression and eating disorders more than 50 percent..." (R. p. 150, lines 14 - 21). At page 10, line 16 of Dr. Piasecki's deposition he was asked: "Were you aware that, at the time of this accident and after this accident, the Claimant had anxiety issues regarding the relationship with her mother?" (R. p. 151, lines 16-18). At page 151, line 20, Dr. Piasecki is asked : "Were you aware that, at the time of this accident and after this accident, the Claimant has had anxiety issues with regard to relationships with men?" (R. p. 151, line 20). At page 151, line 25 through page 152, line 3 Dr. Piasecki was asked: "Were you aware that, before this accident and after this accident, the Claimant has had anxiety issues as a result of the molestation at age five?" (R. p. 151, line 20 - p. 152, line 3). After being confronted with the report of Dr. Lind and the facts regarding the Claimant's prior psychological issues Dr. Piasecki is asked at page 152, line 4: "Do you still agree that the Claimant's psychiatric condition has been aggravated by the knee injury?" Dr. Piasecki answered "Yes" at page 152, line 6 of the record. (R. p. 151, lines 4 - 6).

The answer of Dr. Piasecki at page 159 and 160 of the Record clearly proves he considered the Claimant's pre-existing issues. (R. pp. 159 - 160). At page 159, line 18 Dr. Piasecki states: "Whether or not she needed inpatient treatment at the time of the injury, I think is immaterial because what I think she has is a relative worsening of whatever she had then. So there may be a certain threshold above which a psychiatrist or a psychological or a counselor would recommend inpatient treatment. And beyond that, patients could have any of a number of degrees of severity of psychiatric problems. If she was at the threshold of needed admission at that point, the fact that she's worse now and still needs that, does not necessarily negate that she's had a worsening as a result of this whole process." (R. p. 159, line 18 - p. 160, line 5). Dr. Piasecki is then asked "So are you saying even if she needed treatment at the time, the treatment she needs now is more than the treatment she needed at the time? Dr. Piasecki answered "Yes". (R. p. 160, lines 6 - 10).

Ms. Morret would respectfully request that the Court reconsider this issue and reexamine the evidence as the Full Commission's holding that Dr. Piasecki did not consider Ms. Morrett's preexisting condition when rendering his opinion is not supported by the evidence in the record.

ISSUE 4

At the oral argument before the Full Commission, Defense Counsel handed up an 18 page summary of the Claimant's psychological treatment over the objection of Claimant's Counsel. Counsel for the Claimant objected to the introduction and consideration of the summary. (R. p. 215-216). Claimant's Counsel stated that the objection was based on the fact that the summary was not a piece of evidence (in the record) and had not been briefed. (R. p. 215-216). Claimant's Counsel also noted it was not a medical record. (R. p. 215). With all due respect to the Court of Appeals, to require a more detailed objection when Claimant's Counsel was seeing this 18 page document for the first time is unfair. This issue was clearly preserved for review. It is important to remember that the record was closed and the parties were appearing at an oral argument after the Defendants had appealed the decision of the Single Commissioner. It was clear that Claimant's Counsel's argument was that it should not be considered as it was not in the record. Over the objection of Claimant's Counsel the Full Commission decided to consider the summary and allowed it to be handed up to the Commissioners on the Panel.

To consider such a document at an oral argument before the Full Commission was a violation of the statutory provisions of the Workers' Compensation Act, the Administrative Procedures Act, was in excess of the authority granted to the Full Commission, was unlawful procedure, affected by an error of law, clearly erroneous and to consider the summary amounts to an abuse of discretion.

Pursuant to S.C. Code Ann. § 1-23-320(E) (1976); Opportunity must be afforded all parties to respond and present evidence and argument on all issues involved. In the case at hand the Full

Commission committed an error of law when the allowed the summary to be handed up and considered. The summary was not served on Claimant's Counsel prior to the hearing, was not in the record, was not a piece of evidence and the Claimant did not have the opportunity to brief references within the summary.

The Full Commission's decision to allow the summary to be handed up and considered was an abuse of discretion and an error of law. This is a clear violation of S.C. Code Ann. § 1-23-320(E) (1976), § 1-23-330 (1), S.C. Code Reg. 67-707(B) and S.C. Code Reg. 67-705. The decision to allow the summary in was in excess of the authority granted the Full Commission, was unlawful procedure, affected by an error of law and a misapplication of the law and to consider the summary amounts to an abuse of discretion.

Ms. Morret would respectfully request that the Court reconsider this issue and reexamine the record as well as the Statutory and Regulatory law cited above.

ISSUE 5

Within their Form 30, the Defense raised the issue at #3 "Whether the Commissioner erred in Finding of Fact No. 9 that the Claimant "testified accurately and in line with the medical and counseling records in this case". The Defendants also raised the issue in their Brief to the Full Commission. On page 6 of their brief they list the Issue of whether or not the Claimant testified accurately and in-line with the medical records and counseling records as #3. (R. p. 53). Under the heading of "Arguments" Number 1a. the Defendants argued that the testimony of the Claimant was not accurate and in-line with the medical and counseling records. (R. p. 54). Page 7 and 8 of Defendants' brief is devoted to arguing that the Claimant did not testify accurately and in-line with the medical and counseling records. (R. pp. 54-55). The Claimant responded to this argument in

their brief and argued that the Claimant's testimony was accurate and in-line with the medical and counseling records.

Despite the Single Commission's Finding that the testimony of the Claimant was accurate and the issue being appealed in the Form 30, the Full Commission failed to specifically address this issue in their decision. As the Full Commission made no finding of fact concerning whether or not the Claimant's testimony was accurate and in-line with the medical records this matter must be remanded to the Full Commission for a proper finding. The Case of Nettles v. Spartanburg School District #7, 341 S.C. 580, 535 S.E. 2d 146 (S.C. Ct of Appeals 2000) is controlling.

In the case of Nettles v. Spartanburg School District #7, 341 S.C. 580, 535 S.E. 2d 146 (S.C. Ct of Appeals 2000) the South Carolina Court of Appeals stated; "As the commission made no specific finding of fact concerning this issue, but implicitly ruled on it, we must remand the issue to the commission for a proper finding. Further, within the footnote to this paragraph at FN4 it is noted:

"The commission's failure to explicitly rule on an issue raised to it in a Form 30 does not create an error preservation problem although a similar omission in a civil proceeding would be fatal. While a trial court's ruling may be challenged by an aggrieved party with a motion to reconsider under Rule 59 or 60, worker's compensation law does not contain a motion to reconsider before the commission. An aggrieved party may not challenge the commission's decision with a motion to the commission, but only with an appeal...

The Court went on to say that the "Commission's implicit ruling concerning the hip is too indefinite for this Court to review. The Commission must make specific findings of fact upon which a claimant's right to compensation are based. S.C. Code Ann. 1-23-350. The Nettles Court cited the South Carolina Supreme Court decision of Airco, Inc. V. Hollington, 269 S.C. 152, 160 236 S.E. 2d 804, 808 (1977) in which the Supreme Court held that the Commission has a statutory duty to make a finding of fact for all "essential factual issues."

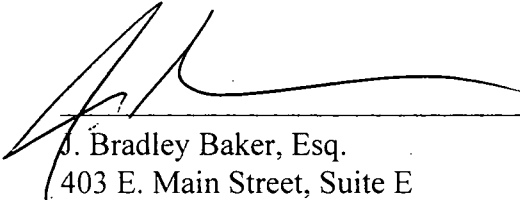
The Full Commission in the case of Alison Morrett has failed to rule on the issue of whether or not the Claimant testified accurately and in line with her medical and psychological records. Instead she chose to completely ignore the testimony of the Claimant to include the testimony that the injury and six (6) surgeries, the rehab, the pain, the stress of the unknown and the inability to work for over (3) three years has aggravated her psychological and eating disorder. The Full Commission also decided to ignore the testimony that the Claimant completed the treatment at Ridgeview despite Dr. Lind's opinion being based on his assumption that she did not. The Full Commission has implicitly ruled that the Claimant is not credible but failed to make specific findings of fact concerning this issue. As the Court of Appeals did in Nettles v. Spartanburg School District #7, 341 S.C. 580, 535 S.E. 2d 146 (S.C. Ct of Appeals 2000) the case of Alison Morrett should be remanded for specific findings to indicate why the Full Commission felt the testimony of the Claimant could be ignored. Whether or not the testimony of the Claimant was accurate is an essential factual issue and must be ruled upon pursuant to Airco, Inc. V. Hollington, 269 S.C. 152, 160 236 S.E. 2d 804, 808 (1977).

Ms. Morrett would respectfully request that the Court reconsider this issue and reexamine the evidence presented as well as the controlling case law cited above.

CONCLUSION

It is respectfully submitted that the Court overlooked or misapprehended these points, along with the other points raised by Ms. Morrett in the previously filed briefs when rendering its decision. Ms. Morrett respectfully requests that the Court withdraw its previous decision and issue a decision that reverses the Full Commission's decision which held that Ms. Morrett's psychological condition and eating disorder were not aggravated by the admitted physical injury and the 6 surgeries that

followed. In the alternative, this matter should be remanded to the Full Commission for further findings and to correct statutory and procedural errors.



J. Bradley Baker, Esq.
403 E. Main Street, Suite E
Lexington, South Carolina 29072
(803) 356-2800
(803) 358-9402 - Facsimile
Jbb@jbradleybakerlaw.com
Attorney for Appellant

January 27, 2015

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Gene McCaskill, Commissioner
T. Scott Beck, Commissioner
Melody L. James, Commissioner

RECEIVED

JAN 27 2015

SC Court of Appeals

Appellate/Tracking Case Number : 2012-212972

Alison Morrett,

Employee, Claimant/Appellant.

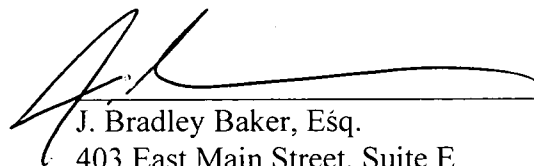
v.

Capital City Ambulance of GA, Ltd. and
Companion Property and Casualty Group,

Employer, Carrier/Respondents,

PROOF OF SERVICE

I certify that I have served the Petition for Re-Hearing of Appellant on the Respondents, Capital City Ambulance of GA, Ltd. and Companion Property and Casualty Group by hand delivering a copy of the same, January 27, 2015, to their attorney of record, Michael E. Chase, at Turner, Graham, Padgett & Laney, P.A., 1901 Main Street, 17th Floor, Columbia, South Carolina 29202 and Carmelo Barone Sammataro, at Turner, Graham, Padgett & Laney, P.A., 1901 Main Street, 17th Floor, Columbia, South Carolina 29202.



J. Bradley Baker, Esq.
403 East Main Street, Suite E
Lexington, South Carolina 29072
(803) 356-2800 - Office
(803) 358-9402 - Facsimile
Jbb@jbradleybakerlaw.com

January 27, 2015

Law Office of J. Bradley Baker, LLC

403 EAST MAIN STREET, SUITE E
LEXINGTON, SC 29072

J. BRADLEY BAKER
LYNN M. BAKER
WWW.JBRADLEYBAKERLAW.COM

TELEPHONE (803) 356-2800
FAX (803) 358-9402
E-MAIL: JBB@JBRADLEYBAKERLAW.COM
LYNN@JBRADLEYBAKERLAW.COM

January 27, 2015

Via Hand Delivery

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: Alison Morrett vs. Capital City Ambulance of GA, Ltd. and Companion Property
and Casualty Group
Tracking No.: 2012-212972

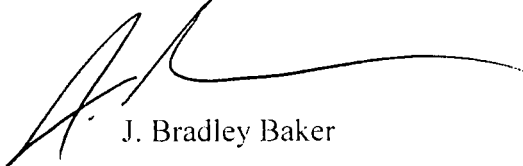
Dear Ms. Kitchings:

Enclosed for filing please find the original and six copies of Appellant's Petition for Re-Hearing and the Proof of Service in the above referenced matter. I have also enclosed a check for \$25.00 for the fee associated with this filing.

If you require additional information or have any questions, please give me a call at (803) 356-2800.

Your assistance in this matter is greatly appreciated.

Sincerely,



J. Bradley Baker

JBB/edd
Enclosure

cc: Client (w/ enclosures)
Michael E. Chase, Esq. (w/ enclosures)
Carmelo Barone Sammataro, Esq. (w/ enclosures)