

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Order of the Appellate Panel

Appellate Case No.: 2015-001169

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SC Court of Appeals

Wanda Weaver....., Employee, Appellant,

v.

SC Department of Disabilities and Special Needs,Respondent.

APPELLANT'S INITIAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

- I. WHETHER THE FULL COMMISSION ERRED IN REVERSING THE ORDER OF THE SINGLE COMMISSIONER BY DETERMINING THAT APPELLANT FAILED TO MEET HER BURDEN OF PROVING AN INJURY BY ACCIDENT OR AGGRAVATION OF HER PRE-EXISTING CONDITION

- II. WHETHER THE FULL COMMISSION ERRED IN FAILING TO REMAND THE CASE TO THE SINGLE COMMISSIONER FOR A MEDICAL EVALUATION TO DETERMINE CAUSATION AS RECOMMENDED BY THE AUTHORIZED TREATING PHYSICIAN

STATEMENT OF CASE

This Workers Compensation Action was commenced on August 13, 2014 against Respondents with the filing of Form 50, Request for Hearing with WCC File Number 1404431.

This claim was heard before the Single Commissioner on October 8, 2014. The Single Commissioner, by Order dated October 28, 2014, concluded that Appellant sustained a compensable injury by accident arising out of and in the course of employment and awarded benefits.

Respondent filed a Form 30, Request for Commission Review on November 11, 2014. The Full Commission hearing was held on February 25, 2015. The Full Commission reversed the Decision and Order of the Single Commissioner by Order filed April 27, 2015.

Appellant filed the Notice of Appeal on May 26, 2015.

STATEMENT OF FACTS

Appellant is a fifty-nine year old woman who is approximately five feet tall and has worked as an LPN since 1992. (TR. p. 10, ll. 8-9). She worked for the South Carolina Department of Disabilities and Special Needs for two years with special needs patients that are autistic and/or mentally retarded. On April 11, 2014, Appellant was giving out medications when an adult male patient that was approximately five feet ten inches tall came up behind her and grabbed her left arm and twisted and jerked it behind her. (TR. p. 13, l. 23-p. 14, l. 2). Appellant felt something pop or snap and felt immediate pain in her left shoulder. (TR. p. 14, l 1). Appellant reported the injury to her supervisor, Vicky Leeke who is an RN and also the Director of Nursing. (TR. p. 11, ll. 5-10).

Appellant was sent to Dr. June Jones at McLeod Occupational Health on that same day and Dr. Jones diagnosed Appellant with a rotator cuff strain, gave Appellant medication for pain and placed Appellant on work restrictions. (Claimant's APA pp. 4-5). Appellant returned to Dr. Jones on April 17, 2014 and the diagnosis was rotator cuff syndrome of the left shoulder. Dr. Jones order physical therapy and Naproxen for pain and continued Appellant's work restrictions. (Claimant's APA pp. 16-17).

Appellant reported to her supervisor that they were going to start her on physical therapy. Her supervisor questioned whether they were going to obtain an x-ray or MRI and stated "how are they going to treat you if they don't know what they're treating?" Appellant's supervisor tried to get Appellant an MRI but

was not successful which delayed Appellant's physical therapy for two weeks. (TR p. 14, ll. 23-24).

Appellant continued treating with Dr. Jones and at each visit the diagnosis was always rotator cuff strain/syndrome. Dr. Jones gave prescriptions, ordered physical therapy and continued work restrictions. (Claimant's APA pp. 1-46). On Appellant's June 9, 2014 visit, Dr. Jones stopped physical therapy and ordered an MRI (Claimant's APA pp. 38-39).

Appellant last saw Dr. Jones on June 24, 2014 and the MRI results were discussed. The MRI showed multiple significant changes in the left shoulder and Dr. Jones did not believe that all of the changes were as a result of this injury. Dr. Jones referred Appellant to Dr. Kyle Watford, an orthopedic surgeon for an evaluation. (Claimant's APA pp. 43-46).

While Appellant was waiting for her appointment with Dr. Watford to be authorized her claim was denied. (TR p. 18, ll. 17-21). Appellant tried to see Dr. Watford but was unable to so her family doctor, Dr. Daniel Hyler referred her to Dr. Elvington at Pee Dee Orthopaedic Associates. (TR. p. 16, l. 22- p. 17, l. 24,). Dr. Elvington has given her a cortisone shot and prescribed physical therapy. (TR. p. 18, ll. 9-11). Appellant is still on work restrictions and the employer has been unable to provide light duty work. (TR. p. 18, l. 23-p. 19, l. 10).

Prior to her April 11, 2014 injury, Appellant has never had any problems with her left shoulder and has never filed a workers' compensation claim. (TR. p. 19, ll. 11-18):

ARGUMENT

I. **WHETHER THE FULL COMMISSION ERRED IN REVERSING THE ORDER OF THE SINGLE COMMISSIONER BY DETERMINING THAT APPELLANT FAILED TO MEET HER BURDEN OF PROVING AN INJURY BY ACCIDENT OR AGGRAVATION OF HER PRE-EXISTING CONDITION.**

The Full Commission erred in finding that Appellant failed to meet her burden of proving an injury by accident. There is no question that Appellant sustained an injury by accident.

This is an admitted claim in which Respondents deny the extent of Appellant's injury. Respondents' counsel stated, "The position of the State Accident Fund and the South Carolina Department of Disabilities and Special Needs is that although the...my clients indicate that yes, there was an injury by accident, that the extent of Ms. Weaver's injuries are not causally related to her work." (TR. p. 7, l. 25). Additionally, Respondents claim in their Form 58 brief that although Appellant sustained an injury by accident "medical evidence supports Claimant has a pre-existing condition that was not aggravated by the alleged accident." (Resp. Form 58). As support for this position Respondents rely on the report of Dr. June Jones dated June 24, 2014 (APA pp. 43-46). Dr. Jones states, "The MRI shows multiple significant changes in the left shoulder. All of the changes did not occur from this injury of pulling her left arm backwards. Writer will recommend that you refer her to an orthopedic surgeon who will evaluate this employee and give an opinion on whether this occurred from the injury the employee describes. This explains why the employee wanted the writer to get an MRI earlier. She told her therapist she should be scheduled for

an MRI before she starts PT. The employee denies any previous injury to the left shoulder. There are obvious changes in the shoulder that have been there for sometime (years). Will make referral to Dr. Watford for evaluation.” (APA p. 43). Dr. Jones treated Appellant from April 11, 2014 to June 24, 2014 and at each visit indicated that this was a work-related accident and diagnosed Appellant with rotator cuff syndrome/strain of the left shoulder. Dr. Jones prescribed medications and ordered physical therapy. (APA pp. 1-46).

The overwhelming evidence in the record supports a finding that Appellant’s problems with her left shoulder were caused and/or aggravated by her work related accident on April 11, 2014:

- 1) Appellant’s description of the accident in which she states that she felt something pop or snap and felt immediate pain. (TR. p. 14, l. 1).
- 2) At every visit, Dr. Jones diagnosed Appellant with left rotator cuff strain/syndrome and kept Appellant on work restrictions.
- 3) The MRI report which revealed multiple significant problems with Appellant’s left shoulder including several tears. The radiologist, Dr. Zachary Kilpatrick does not indicate in his report that this was an old injury. (APA pp. 81-82).
- 4) Appellant is 59 years old and has never had any prior problems with her left shoulder.
- 5) Appellant has worked for employer, South Carolina Department of Disabilities and Special Needs for two years with no prior complaints.
- 6) Appellant has never filed a workers’ compensation claim before.

7) Dr. Jones, in her last note dated June 24, 2014, states "The MRI shows multiple significant changes in the left shoulder. All of the changes did not occur from this injury of pulling her left arm backwards." Significantly, Dr. Jones has never stated that none of Appellant's shoulder problems came from the April 11, 2014 injury; simply that she did not believe all of the problems did. Dr. Jones then referred Appellant to Dr. Kyle Watford, an orthopedic surgeon for further evaluation. Dr. Jones also questioned why Appellant wanted an MRI earlier; however, it was not Appellant but Appellant's supervisor, a RN and the Director of Nursing, who thought that Appellant should have an MRI before beginning physical therapy.

Based on Dr. Jones' last report, Respondents denied Appellant's case altogether, stopped temporary total, would not authorize the treatment or referral as recommended by the authorized treating physician, and the Employer would not let her come back to work because she was still on restrictions. This is when Appellant was forced to file her first workers' compensation claim.

This overwhelming evidence in the record supports that Appellant's left shoulder problems were caused and/or aggravated by her April 11, 2014 injury at work.

II. WHETHER THE FULL COMMISSION ERRED IN FAILING TO REMAND THE CASE TO THE SINGLE COMMISSIONER FOR A MEDICAL EVALUATION TO DETERMINE CAUSATION AS RECOMMENDED BY THE AUTHORIZED TREATING PHYSICIAN.

The decision and Order of the Full Commission fails to address the issue of a medical evaluation to determine causation as presented by Respondents in

their Form 30 Request for Commission Review. Respondents sought a determination of whether the hearing Commissioner erred in not limiting the Order to a medical evaluation to determine causation.

The Full Commission reversed the Order of the Single Commissioner relying on a portion of Dr. Jones' report without considering the report as a whole. Dr. Jones states, "The MRI shows multiple significant changes in the left shoulder. All of the changes did not occur from this injury of pulling her left arm backwards." (APA. p. 43). Significantly, Dr. Jones never said none of the charges occurred from this injury. By stating that all of the changes did not occur, she is implying that some of the changes, as shown on the MRI, are related to this injury. She goes on to recommend a referral to an orthopedist and actually does refer Appellant to Dr. Kyle Watford, an orthopedic surgeon, for an evaluation to determine causation.

In the present case, the Full Commission denied Appellant the referral to the orthopedic surgeon as recommended by the authorized treating physician for an opinion on causation then used the lack of opinion as justification for denying benefits to the injured worker.

Section 42-9-35 applies to the aggravation of a pre-existing condition and provides in relevant part:

- (A) The employee shall establish by a preponderance of the evidence, including medical evidence, that:
 - (1) the subsequent injury aggravated the pre-existing condition or permanent physical impairment; or
 - (2) the pre-existing condition or the permanent physical impairment aggravates the subsequent injury.

(B) The Commission may award compensation benefits to an employee who has a permanent physical impairment or pre-existing condition and who incurs a *subsequent disability* from an injury arising out of and in the course of his employment for the resulting disability of the permanent physical impairment or pre-existing condition and the subsequent injury. S.C.Code Ann. § 42-9-35 (Supp.2010).

“Statutory interpretation is a question of law.” *Hopper v. Terry Hunt Constr.*, 373 S.C. 475, 479, 646 S.E.2d 162, 165 (Ct.App.2007). This court is free to decide matters of law with no particular deference to the fact finder.” *Pressley v. REA Constr. Co.*, 374 S.C. 283, 287-88, 648 S.E.2d 301, 303 (Ct.App.2007). *Murphy v. Corning*, 393 S.C. 77, 710 S.E.2d 454 (S.C. App., 2011).

The Administrative Procedures Act (the APA) “governs appellate review of a final decision from an administrative agency.” *Hill v. Eagle Motor Lines*, 373 S.C. 422, 427, 645 S.E.2d 424, 428 (2007) (citation omitted); see S.C. Code Ann. §§ 1-23-310, et. seq. (Supp. 2011). Under the APA, this Court “may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of facts.” S.C. Code Ann. § 1-23-380(A)(5); *Shealy v. Aiken Cnty.*, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000) (the Commission is tasked with finding facts, evaluating the credibility of the witnesses, and assigning weight to the evidence).

The Court may reverse or modify the decision if substantial rights of the Appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) affected by other error of law;
- (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. § 1-23-380(A)(5)(a)-(f).

Crisp v. SouthCo., Inc. (S.C. 2013).

In the present case, the Full Commission erred as a matter of law in denying Appellant the referral to the orthopedic surgeon as recommended by the authorized treating physician and using the lack of opinion as justification for denying benefits to the injured worker.

Additionally, substantial rights of the Appellant have been prejudiced as the Full Commission's findings and Order are clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record.

CONCLUSION

Appellant, Wanda Weaver, by and through her undersigned attorney, would respectfully request that this Court reverse the rulings of the Worker's Compensation Commission and award Appellant benefits for the reasons stated in this brief. In the alternative, Appellant would respectfully request that this Court remand the case to the Workers' Compensation Commission for an

evaluation by the orthopedic surgeon to determine causation as recommended
by the authorized treating physician.

Respectfully submitted,



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PROOF OF SERVICE

I certify that I have served Appellant's Initial Brief and Designation of Matter on Ashley R. Kirkham, Attorney for Respondent by depositing a copy of the same in the United States Mail, postage prepaid, on July 31, 2015, addressed to Ashley R. Kirkham, Collins and Lacy, P.A., Post Office Box 12487, Columbia, South Carolina 29211.



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July 31, 2015