

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

APPELLATE PANEL
The Honorable R. Michael Campbell, II,
The Honorable T. Scott Beck and
The Honorable Avery Wilkerson

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NOV 30 2015

SC Court of Appeals

WCC NO. 1119818

Appellate Case No: 2015-001380

Shameka S. Green, Employee,

Appellant

v.

Teleperformance Group, Inc.,
Employer,

AND

Zurich North America, Carrier,

Respondents

APPELLANT'S FINAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

- I. DID THE WORKERS' COMPENSATION COMMISSION ERR IN GIVING GREATER WEIGHT TO THE DEPOSITION TESTIMONY AND OPINION OF DR. FRANK NOOJIN; THE ERROR BEING THAT DR. NOOJIN GAVE CONFLICTING OPINIONS IN HIS AFFIDAVIT DEPOSITION TESTIMONY AND BASED HIS OPINIONS ON OUT DATED X-RAYS AND MEDICAL INFORMATION.

- II. DID THE WORKERS' COMPENSATION COMMISSION ERR IN FAILING TO ACCORD GREATER WEIGHT TO THE OPINION OF DR. JOSEPH JACKSON; THE ERROR BEING THAT DR. JACKSON'S RADIOGRAPHIC EVIDENCE WAS CONTEMPORARY AND HIS OPINION WAS BASED EXPLICITLY ON SUCH EVIDENCE AS OPPOSED TO THE OUT DATED RADIOGRAPHIC EVIDENCE RELIED ON BY DR. NOOJIN.

- III. DID THE WORKERS' COMPENSATION COMMISSION ERR IN ADOPTING THE FINDINGS OF THE HEARING COMMISSIONER WHEREIN HE FOUND THAT CLAIMANT FAILED TO MEET HER BURDEN AS TO CHANGE OF CONDITION FOR THE WORSE; THE ERROR BEING THAT THE PRELIMINARY EVIDENCE SUPPORTED BY DR. NOOJIN AND THE CONTEMPORARY EVIDENCE AFFORDED BY DR. JACKSON MANDATE OTHERWISE.

- IV. DID THE WORKERS' COMPENSATION COMMISSION ERR IN FAILING AND REFUSING TO REFER CLAIMANT FOR AN INDEPENDENT MEDICAL EVALUATION IN ORDER TO ATTEMPT TO RECONCILE THE DIVERGENT MEDICAL OPINION AND PROVIDE A CONTEMPORARY EVALUATION OF ALL THE EVIDENCE.

- V. DID THE WORKERS' COMPENSATION COMMISSION ERR IN ADOPTING THE FINDING OF THE HEARING COMMISSIONER WHEREIN HE DENIED CLAIMANT THE OPPORTUNITY TO TAKE DR. NOOJIN'S DEPOSITION SUBSEQUENT TO DR. JACKSON'S REVIEW AND OPINION; THE ERROR BEING THAT SUCH DECISION LEFT CLAIMANT IN AN UNTENABLE QUANDARY IN RELATION TO DR. NOOJIN'S OUTDATED OPINION.

STATEMENT OF THE CASE

This case arises out of an admitted injury to the leg sustained by the Claimant on September 23, 2011. Claimant was initially treated at Doctor's Care and referred to an orthopaedic surgeon who performed an ACL repair surgery on February 21, 2012. Claimant continued under the care of the surgeon, Dr. Frank Noojin for in excess of 14 months and continued working with light duty restrictions and limitations.

Defendants filed a Form 21 Request for Hearing on May 28, 2013 asserting that Claimant had reached maximum medical improvement at the time of her release on April 23, 2013 by Dr. Noojin and Defendants also sought credit for an overpayment of temporary partial disability benefits and requested an award of permanent partial disability benefits as appropriate.

A hearing was held before Commissioner Avery B. Wilkerson, Jr., on July 9, 2013. Commissioner Wilkerson issued his Order dated September 18, 2013 finding that Claimant was no longer entitled to temporary partial disability benefits and granting Defendants a overpayment credit in the amount of \$1,210.90; further finding that Claimant reached maximum medical improvement on April 23, 2013 and awarding a 35% disability to the right lower extremity and denying any allegations of an associated back injury determining the case to be governed by Singleton.

Claimant filed a change of condition petition on April 11,

2014 and submitted an affidavit from the treating physician Dr. Noojin in support of her petition. Dr. Noojin's deposition was taken on May 15, 2014 and a hearing was held before Commissioner Gene McCaskill on July 18, 2014. In his deposition, Dr. Noojin substantially recanted the opinions stated in his Affidavit. Prior to the hearing, the Claimant made a motion for a postponement or alternatively to allow the record to remain open to secure medical evidence from an evaluating orthopaedic surgeon. Commissioner McCaskill allowed the record to remain open for the Claimant to secure the independent evaluation from an orthopaedic surgeon and for the Defendants to respond to that evidence only. Claimant presented a report from Dr. Joseph Jackson dated September 5, 2014 expressing his opinion that Claimant had sustained a change of condition based on his review of x-rays taken on that same date.

Defendants did not take Dr. Jackson's deposition and their only response took the form of a questionnaire dated September 17, 2014 which was submitted to Dr. Noojin with three "loaded" specific questions regarding whether he still agreed with the three specified opinions he had stated in his previous deposition. Dr. Noojin was never presented with the contemporaneous x-rays taken and reviewed by Dr. Jackson. Claimant requested a reconsideration from Commissioner McCaskill to conduct a supplemental deposition of Dr. Noojin in regard to

the newly acquired evidence which was denied.

The Appellate Panel heard oral argument on March 17, 2015. Appellant/Claimant argued that Dr. Noojin's opinions were based on outdated information and requested that the Appellate Panel order a remand or alternatively a referral to an orthopaedic surgeon of the Commission's choice for an independent evaluation with such evaluator having all the medical information available to allow a full assessment of the updated evidence acquired in September 2014 still within the time parameters for a change of condition.

ARGUMENTS I, II, & III

I. The Workers' Compensation Commission erred in giving greater weight to the testimony and opinion of Dr. Frank Noojin in derogation of the opinion of Dr. Joseph Jackson; the error being that Dr. Jackson's opinions were based explicitly on contemporary evidence as opposed to the outdated evidence relied on by Dr. Noojin.

The Workers' Compensation Commission erred in failing to accord greater weight to the opinion of Dr. Joseph Jackson; the error being that Dr. Jackson's radiographic evidence was contemporary and his opinion was based explicitly on such evidence as opposed to the out dated radiographic evidence relied on by Dr. Noojin.

The Workers' Compensation Commission erred in adopting the findings of the Hearing Commissioner wherein he found that Claimant failed to meet her burden as to change of condition for the worse; the error being that the preliminary evidence supported by Dr. Noojin and the contemporary evidence afforded by Dr. Jackson mandate otherwise.

The treating physician Dr. Frank Noojin last saw the

Claimant on December 2, 2013. At that time, Dr. Noojin ordered an x-ray and indicated in his notes that he would request authorization to perform a surgical procedure denominated as a high tibial osteotomy. Such authorization was never granted.

Subsequently, Dr. Noojin executed an affidavit on May 5, 2014 in which he opined that Claimant had presented to him with worsened pain which in his medical opinion represented a progression of her arthritic condition which was aggravated by the work related accident to the point that he would now recommend the high tibial osteotomy based on his view of her overall condition. He further opined that Claimant was not at maximum medical improvement and the high tibial osteotomy was the best medical option and would likely tend to lessen her degree of disability. In his subsequent deposition of May 15, 2014, Dr. Noojin partially recanted these opinions and testified that the x-rays taken in December 2013 did not significantly differ from the x-rays taken on August 16, 2012 and that objectively speaking there had been no change in condition other than Claimant's subjective pain. Dr. Noojin never saw the x-rays taken on September 5, 2014.

Dr. Noojin indicated that Claimant's pain levels appeared to be the same numerically but conceded that pain perceptions differ

and that pain has a cumulative component.

Dr. Joseph P. Jackson, Jr., a practicing orthopaedic surgeon examined Claimant on September 5, 2014 and also ordered and reviewed x-rays on that same date. Dr. Jackson specifically opined that those contemporary x-rays showed a complete loss of joint space on the medial side. (R.p. 288-291. This opinion based on the new x-rays specifically contradicts Dr. Noojin's testimony that when reviewing the December 2013 x-rays that there had been still roughly 2 millimeters of joint space in the medial compartment. Dr. Noojin was never provided the opportunity to review the x-rays taken by Dr. Jackson on September 5, 2014 and his opinions were based on the obsolete x-rays taken on December 2, 2013. Dr. Jackson summarized his opinion indicating that his interpretation of the x-rays taken on September 5, 2014 show that Claimant had tricompartmental osteoarthritis and therefore an unequivocal progression of her condition for the worse. Not only was Dr. Noojin not allowed to review these up dated x-rays, he was only asked loaded questions to confirm his previously stated "opinions." (R.p. 302-303).

Dr. Noojin's testimony as recited in Finding of Fact number 18 of Commissioner's McCaskill's Order indicates that he did not think there had been a medical change in the overall condition of the knee based on his best assessment with the x-ray tools that

he had. The obvious shortcoming of this testimony and opinion is that he was not provided the best x-ray tools. In fact, Dr. Noojin's own office's failure to provide Claimant with the appropriate records hampered Claimant's ability to present earlier evidence in support of her change of condition petition - as found by Commissioner McCaskill in holding the record open past the time of the hearing. If Dr. Noojin had not recanted his opinion and Claimant had not been precluded (by Dr. Noojin's office failures) from securing Dr. Jackson's evaluation earlier, Dr. Jackson's test results and opinions could have been presented prior to the record being closed.

ARGUMENTS IV & V

IV. The Workers' Compensation Commission erred in failing and refusing to refer Claimant for an independent medical evaluation; the error being that such independent medical evaluation was the only feasible method to attempt to reconcile the divergent medical opinions and provide a contemporary evaluation of all the evidence.

The Workers' Compensation Commission erred in adopting the finding of the Hearing Commissioner wherein he denied Claimant the opportunity to take Dr. Noojin's deposition subsequent to Dr. Jackson's review and opinion; the error being that such decision left Claimant in an untenable quandary in relation to Dr. Noojin's outdated opinion.

It is clear from the record that Dr. Noojin's opinion was based on medical information available to him earlier in the process but what information had been superceded by the medical

information relied on by Dr. Jackson. The Workers' Compensation Commission erroneously defied the opinion of Dr. Noojin without even allowing the opportunity of cross-examination or further independent medical evaluation of his opinion in light of Dr. Jackson's opinion. This action by the Workers' Compensation Commission completely deprives Claimant of any opportunity to effectively prove a change of condition petition under these circumstances.

The change of condition petition was filed on April 11, 2014 which was four months after Dr. Noojin's last medical visit with the Claimant; thus the radiographic evidence assimilated by Dr. Jackson constitutes a proximate opinion based on the evidence which Dr. Noojin never even saw.

Dr. Noojin himself testified in his deposition that he formed his opinions and opinion from the "best tools he had" but there were better tools readily available.

Claimant's counsel urged the Appellate Panel to remand the case or refer her directly to another orthopaedic surgeon for an independent evaluation so as to provide a complete picture of Claimant's condition. The Commission denied this request and supposedly based their decision to affirm the Hearing Commissioner on the "totality of the evidence." The totality of the evidence as far as Dr. Noojin was able to evaluate ended in December 2013. Updated evidence still within the parameters of

the change of condition petition time limits was made available in September 2014 and needed to be fully assessed in deciding Claimant's petition for change of condition.

A decision of the Workers' Compensation Commission may be reversed or modified if arbitrary or capricious or **characterized by abuse of discretion or clearly unwarranted exercise of discretion**, South Carolina Code § 1-23-380(A)(6)(f).

The present case is a classic example of this principle. The Workers' Compensation Commission clearly has the discretion to obtain an independent medical evaluation and failure to do so in this case constitutes an abuse of said discretion resulting in the imposition of an impossible burden upon Claimant to prove her case. This is especially applicable in view of the treating physician Dr. Noojin's essential reversal of his initial opinions in regard to Claimant's change of condition. The power of discretion awarded to the Commission under these circumstances is meaningless unless it is exercised prudently and in furtherance of the stated purposes of the Workers' Compensation Act.

CONCLUSION

There are numerous cases in this State that have held that the Workers' Compensation Act is remedial legislation which is entitled to a liberal construction in order to accomplish the ends and purposes for which the Act was enacted. Flemon v.

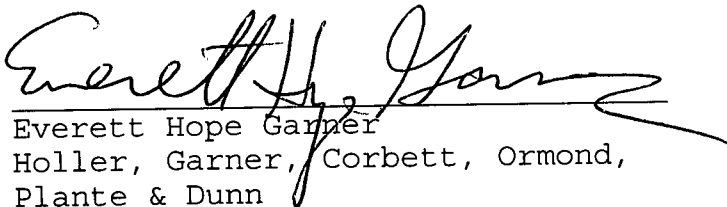
Dickert-Keowee, Inc., 259 S.C. 99, S.E.2d 751 (1972); Baldwin v. Pepsi Cola Bottling Co., 234 S.C. 320, 108 S.E.2d 409 (1959); Cokeley v. Robert E. Lee, Inc., 197 S.C. 157, 14 S.E.2d 889 (1941); Ham v. Mullins Lumber Co., 193 S.C. 66, 7 S.E.2d 712 (1940).

In the present case, the Workers' Compensation Commission has fomented a procedural impossibility for Claimant to prove her change of condition. Benefits are awarded pursuant to a change of condition that occurs within 1 year of the last Order of the Commission. Clearly the proximate medical evidence during this time period was completely discounted in favor of antiquated and essentially irrelevant untimely evidence. Dr. Noojin's opinion may have been justified based on the "best tools he had available to him;" however, the better tools as utilized by Dr. Jackson at least deserve an independent assessment.

Ultimately Claimant has been deprived of any real opportunity to present evidence to prove her change of condition including the opportunity to depose Dr. Noojin in light of the superceding evidence and this untenable dilemma can only be remedied by reversal of the Appellate Panel and remand to the

Workers' Compensation Commission with specific instructions for proper evaluation of the evidence.

Respectfully submitted,



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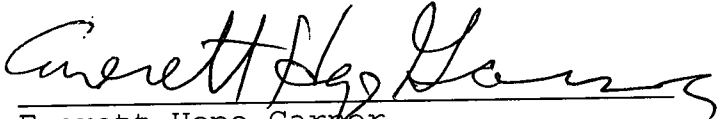
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CERTIFICATE OF COUNSEL

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

November 30, 2015


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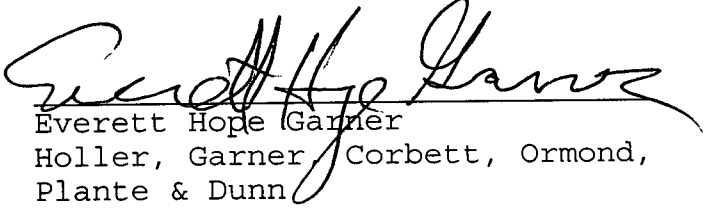
Zurich North America

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PROOF OF SERVICE

I certify that I have served the Appellant's Final Brief and Appellant's Final Reply Brief on Teleperformance Group, Inc., and Zurich North America by depositing a copy of it in the United States mail, postage prepaid, on November 30, 2015, addressed to their attorney of record, Helen F. Hiser, Esquire, McAngus Goudelock & Courie, P.O. Box 650007, Mt. Pleasant, SC 29465.

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