

ORIGINAL

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

APR 15 2016

SC Court of Appeals

APPEAL FROM THE SOUTH CAROLINA WORKERS'
COMPENSATION COMMISSION APPELLATE PANEL

Gene McCaskill, Commissioner
Melody L. James, Commissioner
R. Michael Campbell, Commissioner

W.C.C. File No. 0802605
Appellate Case No.2015-002120

Tommy G. Houston, Employee, Respondent,

v.

Garda World Security, Employer, and Gallagher Bassett Services, Inc., Carrier, . . . Appellants.

APPELLANTS' BRIEF

R. DANIEL ADDISON
LEE E. DIXON
Hedrick, Gardner, Kincheloe & Garofalo, L.L.P.
P.O. Box 11267
Columbia, SC 29211
(803) 727-1200
Attorneys for Appellants

April 15, 2016

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA WORKERS'
COMPENSATION COMMISSION APPELLATE PANEL

Gene McCaskill, Commissioner
Melody L. James, Commissioner
R. Michael Campbell, Commissioner

W.C.C. File No. 0802605
Appellate Case No.2015-002120

Tommy G. Houston, Claimant,

v.

Garda World Security, Employer/Defendant,

and

Gallagher Bassett Services, Inc., Carrier/Defendant,

Of Whom

Defendants areAppellants,

and

Claimant isRespondent.

APPELLANTS' BRIEF

R. DANIEL ADDISON
LEE E. DIXON
Hedrick, Gardner, Kincheloe & Garofalo, L.L.P.
P.O. Box 11267
Columbia, SC 29211
(803) 727-1200
Attorneys for Appellants

April 15, 2016

Table of Contents

TABLE OF AUTHORITIES	ii
STATEMENT OF ISSUES ON APPEAL	1
WHETHER THE APPELLATE PANEL ERRED IN FINDING THAT IT HAD JURISDICTION OVER RESPONDENT’S CLAIM FOR A CHANGE OF CONDITION TO THE RIGHT KNEE?	1
WHETHER THE APPELLATE PANEL ERRED IN FINDING THAT RESPONDENT SUSTAINED A COMPENSABLE CHANGE OF CONDITION TO THE RIGHT KNEE?	1
STATEMENT OF THE CASE	1
STANDARD OF REVIEW	3
STATEMENT OF THE FACTS	4
ARGUMENTS	13
I. The Commission erred in finding jurisdiction over the claim for a change of condition to the right knee.	14
II. The Commission erred in finding a change of condition to the right knee.	17
III. Conclusion.	19

TABLE OF AUTHORITIES

Cases

<u>Brown v. R.L. Jordan Oil Co.</u> , 291 S.C. 272, 353 S.E.2d 280 (1987).....	17
<u>Carter v. Verizon Wireless</u> , 407 S.C. 641, 757 S.E.2d 528 (Ct. App. 2014).....	17
<u>Causby v. Rock Hill Printing & Finishing Co.</u> , 249 S.C. 225, 153 S.E.2d 697 (1967).....	14
<u>Forrest v. A.S. Price Mech.</u> , 373 S.C. 303, 306, 644 S.E.2d 784, 785 (Ct. App. 2007).....	3
<u>Gattis v. Murrells Inlet VFW No. 10420</u> , 353 S.C. 100, 576 S.E.2d 191 (Ct. App. 2003).....	14, 17
<u>Krell v. S.C. State Highway Dep't</u> , 237 S.C. 584, 118 S.E.2d 322 (1961).....	17
<u>Lark v. Bi-Lo, Inc.</u> , 276 S.C. 130, 276 S.E.2d 304 (1981).....	3
<u>Robbins v. Walgreens & Broadspire Servs., Inc.</u> , 375 S.C. 259, 652 S.E.2d 90 (Ct. App. 2007).....	19
<u>Shealy v. Aiken County</u> , 341 S.C. 448, 535 S.E.2d 438 (2000).....	3
<u>Thompson v. S.C. Steel Erectors</u> , 369 S.C. 606, 632 S.E.2d 874 (Ct. App. 2006).....	3

Statutes

S.C. Code Ann. §1-23-380(A)(5)	3
S.C. Code Ann. §42-17-90	14, 16, 20

Regulations

S.C. Code Regs 67-602.....	16
S.C. Code Regs 67-602(C)	14, 15

STATEMENT OF ISSUES ON APPEAL

WHETHER THE APPELLATE PANEL ERRED IN FINDING THAT IT HAD JURISDICTION OVER RESPONDENT'S CLAIM FOR A CHANGE OF CONDITION TO THE RIGHT KNEE?

WHETHER THE APPELLATE PANEL ERRED IN FINDING THAT RESPONDENT SUSTAINED A COMPENSABLE CHANGE OF CONDITION TO THE RIGHT KNEE?

STATEMENT OF THE CASE

This workers compensation case arises out of an accepted March 11, 2008 motor vehicle accident. On February 4, 2010, Claimant executed a Form 16A, *Agreement for Permanent Disability*, to resolve his permanent disability for injuries sustained in that accident. (R. p. 434) The Form 16A identified injuries to the right shoulder and low back and listed affected body parts: ribs, right knee, right hand, left hip and left leg. Permanent disability was paid solely on the right shoulder and low back.

Approximately six months after the settlement of his permanent disability, Claimant filed a Form 50, *Notice of Claim for Change of Condition*, on July 13, 2010, seeking additional medical care. (R. p. 48) The Form 50 recited every body part referenced in the Form 16A; namely the right shoulder, back, ribs, right knee, right hand, left hip and left leg. Claimant filed an amended Form 50, *claim only*, on October 6, 2010 specifically alleging a change of condition for the worse but not specifying which body part(s) had sustained the alleged change of condition. (R. p. 49) On November 11, 2010, Claimant filed a Form 50, *Request for Hearing*. (R. p. 50) Attached to the hearing request was a signed questionnaire by Dr. Phillip H. Wessinger stating only "Tommy Houston has sustained a change of condition for the worse since I released him on July 1, 2009." (R. p. 51) This questionnaire contained no statement as to what body parts had sustained a change of condition.

Defendants filed a Form 51, *Employer's Answer*, denying the change of condition. (R. p. 52) Prior to a hearing, but after the expiration of the twelve-month period following the date of the Form 16A, the parties entered into a Consent Order, dated March 16, 2011, in which Defendants admitted that Claimant had sustained a change of condition for the worse to his low back and right shoulder. (R. p. 45) No other body parts were accepted. Defendants consented to authorize an evaluation of Claimant's low back and to provide temporary total-disability benefits. The Consent Order contained a general, boilerplate provision stating that all remaining issues would be held in abeyance. (*Id.*) The Consent Order contained no reference to any allegation regarding the right knee as none had been raised at that time. Defendants provided treatment for the shoulder and low back, including surgery to the back in December 2012. Thereafter, in mid-2013, Claimant began complaining of pain in his right knee.

On July 22, 2014, Claimant filed another Form 50, *Request for Hearing*. (R. p. 54) The hearing was held before the Single Commissioner on November 14, 2014. The principal issue for determination was Defendants' liability for treatment to Claimant's right knee, including past and future medical expenses. Defendants denied that the additional treatment for the right knee was compensable on two grounds: (1) that Claimant did not timely pursue a change of condition to the right knee as required by S.C. Code §42-17-90, and (2) the substantial evidence in the record does not support a finding that Claimant sustained a change of condition to the right knee related to his March 11, 2008 accident.

On February 18, 2015, the Single Commissioner issued an order finding that Claimant timely reported his change of condition to the right knee, properly preserved his claim for change of condition to the right knee and sustained a change of condition for the worse to his right knee. (R. p. 23) The Single Commission found that Claimant was not at maximum medical improvement and Defendants were responsible for all causally-related medical care.

Defendants filed a Form 30, *Application for Commission Review*, on March 4, 2015, assigning error to the Single Commissioner order on the basis that Single Commissioner erred in finding jurisdiction to review an award to the right knee and in finding that Claimant sustained a compensable change of condition to the right knee. (R. p. 56) The Appellate Panel of the South Carolina Workers' Compensation Commission ("Appellate Panel") heard Defendants appeal on June 15, 2015. On September 8, 2015, the Appellate Panel issued an order affirming the Decision and Order of the Single Commissioner. (R. p. 1) Defendants timely filed their Notice of Appeal to the Court of Appeals on October 8, 2015.. (R. p. 61)

STANDARD OF REVIEW

"The Administrative Procedures Act ("APA") establishes the standard of review for decisions by the South Carolina Workers' Compensation Commission." Forrest v. A.S. Price Mech., 373 S.C. 303, 306, 644 S.E.2d 784, 785 (Ct. App. 2007) (citing Lark v. Bi-Lo, Inc., 276 S.C. 130, 134-35, 276 S.E.2d 304, 306 (1981)). "In workers' compensation cases, the [Appellate Panel] is the ultimate fact finder." Shealy v. Aiken County, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000) (citation omitted). This court reviews facts based on the substantial evidence standard. Thompson v. S.C. Steel Erectors, 369 S.C. 606, 612, 632 S.E.2d 874, 877 (Ct. App. 2006). "Under the substantial evidence standard, the appellate court may not substitute its judgment for that of the [Appellate Panel] as to the weight of the evidence on questions of fact." Forrest, 373 S.C. at 306, 644 S.E.2d at 785 (citing S.C. Code Ann. §1-23-380(A)(5)). The appellate court may reverse or modify the Appellate Panel's decision only if Claimant's substantial rights have been prejudiced because the decision is affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence in the record. Id. at 306, 644 S.E.2d at 785-86.

STATEMENT OF THE FACTS

At the November 14, 2014 hearing, the parties submitted their evidence through their Form 58, *Pre-Hearing Briefs*, and APA submissions. (*See generally*, R. pp. 244 – 684) At the hearing, the only direct testimony presented was that of Claimant. As discussed above, Claimant entered into a settlement of his claim on a Form 16A on February 4, 2010 with indemnity paid for injuries to his back and right shoulder. (R. p. 434) In addition to the medical evidence related to Claimant's pre- and post-settlement treatment, the depositions of Drs. Paylor, Math, and Wessinger were submitted as to the issue of whether or not Claimant sustained a compensable change of condition to his right knee arising out of his 2008 injury. (*See generally*, R. pp. 132 – 184)

Medical Evidence – Pre-Settlement

On the day of his accident, March 11, 2008, Claimant was treated at the Greenville Hospital System. He was admitted following a motor vehicle accident complaining of right side pain. (R. p. 662) Claimant was noted as complaining of right chest pain, right flank pain and some left knee pain but he was able to move his knee. (*Id.*) A follow-up on March 21, 2008 revealed Claimant was still having right side pain. (R. p. 663) The records contain no reference to the right knee.

Claimant was then referred to Dr. Wessinger, Steadman Hawkins, on April 30, 2008. (R. p. 444) Dr. Wessinger noted that Claimant was involved in a March 11, 2008 motor vehicle accident. He noted that Claimant reported several rib fractures, that he initially had right knee pain and that those had improved. Claimant reported increased left shoulder pain and left hip pain that radiated down to the left knee. The shoulder pain was noted as constant. Dr.

Wessinger diagnosed him with subacromial impingement and bursitis of the hip. (R. p. 445). Following an MRI, Claimant was diagnosed with a rotator cuff tear and underwent a surgical repair. (R. pp. 451 – 52) On September 3, 2008, Claimant returned to Dr. Wessinger for a post-surgical follow-up and reported increased left hip pain. (R. p. 456) On October, 22, 2008, Claimant reported that his hip and low back had responded well to physical therapy. (R. p. 460) On February 4, 2009, Claimant reported his back continued to be better and Claimant was able to walk 2-3 hours without pain. (R. p. 468) On April 15, 2009, Dr. Wessinger noted that Claimant was doing well and able to cut his grass. (R. p. 470) On April 29, 2009, Claimant reported a problem with his right hand related to the IV he had inserted after the accident. (R. p. 472) Dr. Wessinger notes that Claimant reported the problem had occurred since the accident but this was the first time he reported it to Dr. Wessinger. Dr. Wessinger ordered a biopsy. On May 27, 2009, Dr. Wessinger added a diagnosis of a localized superficial swelling, mass or lump to Claimant's list of issues. (R. p. 476) On July 1, 2009, Dr. Wessinger found Claimant to be at maximum medical improvement with regard to his shoulder and back. (R. p. 482 – 81) Claimant was assigned a 15% impairment to the right shoulder and 7% impairment to the back. (Id.) Claimant did not receive any treatment to his right knee from Dr. Wessinger and no injury to his right knee was ever diagnosed during this period. Claimant settled his claim on a Form 16A on February 4, 2010. (R. p. 434)

Medical Evidence – Post-Settlement

Claimant returned to Dr. Wessinger on September 1, 2010 reporting increased pain in his right shoulder as well as left leg pain and low back pain. (R. p. 484) Dr. Wessinger ordered an MRI of the shoulder and noted an MRI of the back may be needed if his symptoms were not controlled. On October 6, 2010, Dr. Wessinger noted continued back and hip pain, primarily on the left. (R. p. 486) Claimant reported that this pain had been present since his accident but are

apparently getting worse. Dr. Wessinger ordered an MRI. A Patient Recheck Questionnaire filled out by Claimant on this date indicates the location of pain or problem as "Back-Shoulder-Knee", the box for right or left was unchecked. (R. p. 258) On October 27, 2010, Claimant returned to Dr. Wessinger following his MRI. Dr. Wessinger notes that Claimant is at MMI for his shoulder. (R. p. 488) He noted that Claimant's MRI revealed arthritic problems that could have been aggravated by the accident and ordered a referral to get a surgical evaluation. On November 3, 2010, Dr. Wessinger filled out a questionnaire indicating that Claimant had sustained a change of condition for the worse since his release on July 1, 2009 but did not specify what body parts had sustained the change of condition and did not make any reference to the right knee. (R. p. 490)

Claimant was referred to Dr. Michael Bucci, Piedmont Spine and Neurosurgical Group, on April 21, 2011. Dr. Bucci notes that Claimant complained of low back pain radiating to the left buttock, down the back of the left leg to the foot. (R. p. 492) He notes that Claimant reported occasionally having symptoms in the right groin region and leg. Dr. Bucci ordered a lumbar myelogram. Claimant's review of symptoms listed leg cramps and muscle pain. (R. p. 496) No reference to the right knee was noted.

Claimant was later evaluated by Dr. Jyoti Math, Upstate Medical Rehabilitation, on August 18, 2011 for pain management. Dr. Math notes the Claimant reporting that his job required heavy lifting and that aggravated his shoulder pain, as well as his back pain. (R. p. 505) She notes that his pain is worse with prolonged standing, and is located in the back of the thigh on the left side and occasionally up the heel. He reported numbness in the L5 distribution with some weakness secondary to pain. Dr. Math ordered physical therapy with possible trigger point injections in the future. On September 12, 2011, Claimant received trigger point injections. (R. p. 508) On October 10, 2011, Claimant returned and reported doing well with physical therapy

but reported some continued low back pain. (R. p. 511) Claimant received additional SI and medial branch block injections and radiofrequency ablation from Dr. Math. (R. p. 527)

Claimant was evaluated by Dr. Charles C. Kanos, SE Neuro & Spine Institute, on August 1, 2012. Claimant reported his pain was at the center of his back to the left hip and down the leg. (R. p. 547) Dr. Kanos ordered a new MRI. On August 24, 2012, Claimant reported low back and left leg pain. (R. p. 550) Dr. Kanos recommended an L5-S1 PLIF.

On August 27, 2012, Claimant returned to Dr. Math. She notes that he reported continued pain in his legs, as well as his back, that the pain was on the left-side and had not changed in quality or character. (R. p. 528)

On October 22, 2012, Dr. Kanos notes that Claimant was complaining of burning and pins and needles in his low back and down his left leg. (R. p. 553) Dr. Kanos further notes that Claimant has been having left hip pain into the thigh as well as needle sensation in his right foot. (R. p. 554) Claimant's main complaint was low back pain and left leg pain. On December 12, 2012, Claimant underwent back surgery with Dr. Kanos. (R. p. 556)

On March 8, 2013, Dr. Kanos notes that Claimant reported that his standing tolerance had improved, that his left leg pain had resolved and his low back pain was 50% improved since surgery. (R. p. 557) Claimant still reported left hip pain. On April 24, 2013, Dr. Kanos assigned Claimant permanent restrictions of no lifting over 35 pounds, no repetitive bending more than 60 degrees, and restricted his ability to sit for 8 hours a day or walk for 2 hours with breaks. (R. p. 561) Dr. Kanos placed him at maximum medical improvement for his back with a 25% impairment rating to the lumbar spine.

First medical record referencing significant right knee issues - On June 6, 2013, Claimant reported to Dr. Math's PA, Christopher Kelly, for a medication follow up. During that visit, Claimant reported having some right knee pain that had gotten worse. (R. p. 602)

Claimant advised the PA that he had been trying to walk more per Dr. Kanos' instructions, but his right knee was limiting him. Claimant also reported that the knee has been bothering him since his accident and that he saw Dr. Wessinger about it back in August, 2010. Claimant wanted to get his knee evaluated since it had given him so many problems. Claimant described the pain in the knee as not radiating but localized over the front of his kneecap. (R. p. 603) According to the note, Claimant advised he could not put his weight down on his knee and "[h]e has not been able to do that since the accident." (Id.) An x-ray and MRI of the knee were ordered. On July 10, 2013, Dr. Math notes that Claimant reported that his back pain was improved but he continued to have knee pain. (R. p. 537) Claimant reported occasional locking or clicking. She notes that a June 25, 2013 MRI showed an extensive tear in the lateral meniscus, possible bucket handle tear and lateral tibiofibular chondromalacia. (R. p. 537) She referred Claimant to Dr. Wessinger.

On an October 21, 2013 follow up, Dr. Kanos noted that Claimant used a cane because of right knee pain and a recent diagnosis of a meniscal tear. (R. p. 420)

On an October 9, 2013 recheck, Dr. Math noted Claimant continued to have right knee pain secondary to a meniscal tear. (R. p. 541) Dr. Math noted that Claimant had not yet been seen by an orthopedic surgeon and recommended a knee brace.

Claimant underwent an evaluation with Dr. Paylor for his right knee on November 5, 2013. Dr. Paylor noted the date of onset as March 11, 2008. (R. p. 633) He indicates that the knee had been painful since the initial injury. Dr. Paylor noted advanced grade chondromalacia as well as extensive tearing of the lateral meniscus. (R. p. 634). Dr. Paylor recommended a arthroscopy of the right knee with a lateral meniscectomy.

Claimant continued to receive pain management treatment from Dr. Math through July 2, 2014. In a June 13, 2014 questionnaire, Dr. Math indicated that it was her opinion that it is more

likely than not that the increased activity and walking that Claimant engaged in pursuant to his medical providers' advice following his back surgery aggravated his right knee pain causing the need for additional evaluation and treatment of his right knee. (R. p. 388)

In a questionnaire dated November 18, 2013, Dr. Paylor indicates that it was his opinion that Claimant sustained an injury to his right knee in a car accident on 3/11/08 and that the patient stated his current condition was from the accident. (R. p. 636)

In a June 26, 2014 statement, Dr. Paylor opined that it is more likely than not that Claimant suffered injury to his right knee as a result of his motor vehicle accident while working on or about March 11, 2008, that his right knee symptoms became less noticeable as he pursued treatment for other injuries and was less active, and then became more symptomatic again as treatment for his other injuries wound down and he increased his activity and began walking more following his back surgery. (R. p. 433)

Dr. John H. Paylor, III Deposition

Dr. Paylor was deposed on July 1, 2014. Dr. Paylor testified that he did not see Claimant until November 5, 2013. (R. p. 133, Depo. p. 7, ll. 12-14) Dr. Paylor testified that he did not review Claimant's prior medical records at that time. (R. p. 133, Depo. p. 8, ll. 23-25) Dr. Paylor testified that the June 26, 2013 statement he signed was prepared by Claimant's counsel but he agreed with its contents. (R. p. 134, Depo. p. 10, l. 17 – p. 11, l. 7) He testified that he conducted a limited review of Claimant's prior medical records at that time but primarily relied on statements from counsel as to Claimant's prior treatment. (R. p. 134; Depo. p. 11, l. 8 – p. 12, l. 10) He testified that he may have reviewed some records from the Greenville Hospital System but he did not review the records of Dr. Wessinger, Dr. Kanos, or Dr. Bucci.

Dr. Paylor agreed that Claimant's prior medical records do not reference any right knee pain until 2013. (See generally, R. pp. 135 – 136). Dr. Paylor testified that the only evidence he

has that Claimant's meniscal tear existed since 2008 was Claimant's statement to him that the problem had existed since his accident. (R. p. 142, Depo. p. 42, l. 3 – l. 19) Dr. Paylor opined that the medical records do not include reference to right knee pain because the prior physicians did not ask him directly about his right knee. (R. p. 137, Depo. p. 23, ll. 2 – 8) Dr. Paylor testified that his opinion that the knee injury occurred in 2008 is based solely on what the Claimant told him in 2013. (R. p. 139, Depo. p. 30, ll. 1 – 17) Dr. Paylor testified that he could not tell how old the injury was from the diagnostic imaging. (R. p. 140, Depo. p. 35, ll. 3 – 5) Dr. Paylor testified that he did not know of any reason why Claimant would not have been capable of complaining to his other doctors about his right knee if a problem existed. (R. p. 139, Depo. p. 31, ll. 18 – 22) Dr. Paylor did not ask and Claimant did not offer any explanation for why he waited until 2013 to seek treatment. (R. p. 140, Depo. p. 34, ll. 3 – 10) Dr. Paylor testified that Claimant's treatment records from 2013 indicate that Claimant reported that the problem had existed since his accident. (R. p. 141, Depo. p. 39, ll. 4 – 17)

Dr. Joyti K. Math Deposition

Dr. Math was deposed on September 3, 2014. Dr. Math testified that she did not see Claimant until August 18, 2011 and has seen him routinely since then. (R. p. 146, Depo. p. 6, ll. 15 – 20) In 2011, Claimant was a new patient being seen for a workers' comp injury. She testified Claimant was referred by Dr. Bucci for management of his low back pain. Dr. Math testified that knee pain was discussed very vaguely but Claimant's main issue was his back. (R. p. 147, Depo. p. 11, ll. 19 – 20) Dr. Math admits that her notes do not identify which knee was discussed. (R. p. 147, Depo. p. 12, ll. 1 – 8) Dr. Math testified that Claimant reported back problems going down his left leg and that working had aggravated his shoulder pain and back pain. (R. p. 148, Depo. p. 15, ll. 4 – 10) Dr. Math testified that Claimant's gait was normal at this initial visit. (R. p. 149, Depo. p. 17, ll. 15 – 19) She admits doing some leg testing with

normal results and put him on a medication for his back pain. (R. p. 149, Depo. p. 20, ll. 3 – 24) Dr. Math testified that the first specific reference to a right knee issue in her notes was on June 6, 2013 when it was noted by her PA. (R. p. 150, Depo. p. 24, ll. 17 – 25) Dr. Math testified that she felt that the motor vehicle accident most likely caused Claimant's right knee tear based on the history she received from Claimant. (R. p. 153, Depo. p. 35, ll. 1 – 8) Dr. Math explained the absence of references to the right knee prior to 2013 on the possibility that the initial tear may have been minor and gradually got worse. (R. pp. 153, Depo. p. 36, l. 20 – 154, Depo. p. 37, l. 2) She also admitted that there was no way of knowing if the injury occurred somewhere between the accident in 2008 and when it was diagnosed in 2013. Dr. Math testified that Claimant was tested routinely for gait and walking and she did not note any issues until 2013 and no specific reference to right knee pain until June 2013. (See generally, R. p. 153)

Upon diagnosing him with right knee problems in June 2013, Claimant was referred to an orthopedist. Dr. Math opined that Claimant became aware of right knee pain after his December 2012 back surgery because he was able to ambulate more and this aggravated his pre-existing right knee problem. (R. p. 158, Depo. pp. 55, ll. 12 – 56, l. 3) She opined that this aggravation is what caused Claimant to need to be evaluated and treated in 2013.

Dr. Philip H. Wessinger Deposition

Dr. Wessinger was deposed on October 10, 2014. Dr. Wessinger testified that he first treated Claimant on April 30, 2008. Dr. Wessinger testified that he noted in his initial report that Claimant had indicated he initially had right knee pain after the accident but it had improved. (R. p. 165, Depo. p. 5, ll. 10 – 25) Following that visit, Dr. Wessinger provided treatment primarily to Claimant's back, shoulder and left hip. Dr. Wessinger reviewed his treatment notes after that initial visit through his release at MMI on July 1, 2009 and testified that there was no

evidence of any complaints by Claimant for his right knee during that time. (R. p. 172, Depo. p. 36, ll. 16 – 21)

Dr. Wessinger testified that when Claimant returned to him on September 1, 2010, Claimant did not complain of any right knee pain. Claimant did report shoulder problems, as well as left leg pain and back pain. (R. p. 173, Depo. pp. 39, l. 8 – p. 40, l. 11) Dr. Wessinger testified that the November 3, 2010 questionnaire he filled out was intended to refer to a change of condition to the shoulder and/or back only, which were the only issues Claimant had identified to him. (R. p. 175, Depo. pp. 46, l. 11 – p. 47, l. 10) He testified that at no time during his treatment of Claimant did he document anything about Claimant's right knee beyond the initial note from 2008 indicated that the right knee had resolved before Dr. Wessinger had ever seen him.

Dr. Wessinger testified that, given the length of time and number of times he had treated Claimant, he felt it unlikely that Claimant has any kind of substantial right knee issue that occurred in the 2008 accident. (R. p. 176, Depo. pp. 50, l. 18 – p. 51, l. 20) Dr. Wessinger testified that a bucket-handle tear is a pretty significant tear and it would be unlikely for a person to have one and not bring it up for two and a half years. Dr. Wessinger testified that, based on his history of treating Claimant, it was not probable, to a reasonable degree of medical certainty, that Claimant was dealing with a meniscal tear from 2008 through 2010. (*Id.*) Dr. Wessinger testified that Claimant had become pretty active during his course of treatment and indicated he was able to walk two to three hours without pain and complete household activities, like mow the lawn. (R. p. 176, Depo. pp. 51, l. 21 – p. 52, l. 20)

Testimony of Claimant

At the hearing, Claimant testified that he was originally injured on March 11, 2008 while working as a driver/messenger for Garda World Security. (R. p. 119, Tr. p. 14) He testified that

the vehicle he was riding in that day was involved in a collision with another car and he was thrown around in the back of the armored truck. (R. p. 119, Tr. p. 15) Claimant testified that he injured his right shoulder, broke his ribs, punctured a kidney, injured his right knee, and lumbar spine. (R. p. 119, Tr. p. 15-16) Claimant testified that when he settled his claim in February 2010, he was still having problems with his back and his knee. (R. p. 120, Tr. p. 17) Claimant testified that when he returned to Dr. Wessinger in 2010, his chief complaints were his back and his knee. (R. p. 120, Tr. pp. 18-19) Claimant also testified that while he was treating with Dr. Wessinger, his right knee symptoms improved as he recovered from surgery but when he returned to work on May 11, 2009, his knee symptoms returned and slowly got worse. (R. p. 122, Tr. pp. 25-26) Claimant testified that he began to have problems with his right knee when he became more active following his back surgery. (R. p. 123, Tr. p. 32) Claimant testified that he reported his right knee problems to Dr. Wessinger but it was never treated. (R. p. 125, Tr. p. 38)

ARGUMENTS

As set forth above, Claimant sustained an admitted injury on March 11, 2008 when he was involved in a motor vehicle accident. Claimant's medical records show that on the day of the accident he complained of right side pain, right flank pain and some **left** knee pain. (R. p. 662) On **April 30, 2008**, Claimant reported to Dr. Wessinger that he initially had right knee pain following the accident but it had improved. (R. p. 44) Following those initial reports, Claimant's medical records do not contain **any references about Claimant's right knee until June 2013**. (R. p. 602)

As evidenced by the records, Claimant's post-accident treatment was focused entirely on his shoulder and back and he was released at MMI on July 1, 2009 with a 15% permanent impairment to his shoulder and 7% permanent impairment to his back. (R. pp. 482 – 83) No

other body parts were rated. It was at that point that Claimant elected to settle his case and accepted payment of \$37,018.89 on a Form 16A dated February 4, 2010. (R. p. 434) At no time prior to that was any **injury** to his right knee diagnosed or treated. Nevertheless, the Form 16A was paid on his shoulder and back and included reference to all body parts identified as potentially affected by the 2008 accident: ribs, right knee, right hand, left hip and left leg. (*Id.*)

I. The Commission erred in finding jurisdiction over the claim for a change of condition to the right knee.

Under S.C. Code Ann. §42-17-90, a review of an award on the grounds of a change in condition “must not be made after twelve months from the date of the last payment of compensation.” A change in condition occurs when the claimant experiences a change in “*physical condition*” as a result of his original injury, occurring after the first award. *Gattis v. Murrells Inlet VFW No. 10420*, 353 S.C. 100, 109, 576 S.E.2d 191, 196 (Ct. App. 2003) (citing *Causby v. Rock Hill Printing & Finishing Co.*, 249 S.C. 225, 227, 153 S.E.2d 697, 698 (1967) (emphasis added)). “Generally, an appeal of a workers' compensation order is concerned with the conditions prior to and at the time of the original award of the commission. Review for a change of condition is concerned with conditions that have arisen thereafter.” *Causby*, 249 S.C. at 228, 153 S.E.2d at 698-99. Pursuant to S.C. Code Regs 67-602(C), a claimant alleging a change of condition “must attach to the hearing request form a medical report(s) indicating a change in the claimant’s conditions.”

In this case, Claimant clearly settled his claim with Employer on Form 16A on February 4, 2010. The settlement involved paying permanent disability on the only two body parts that had been determined to have been injured and sustained permanent impairment (back and shoulder). As is routine, the Form 16A also listed every body part that had potentially been affected by the work-related accident but for which no permanency was paid, including the right

knee. When Claimant filed his Form 50 (claim only) on July 13, 2010, alleging a change of condition, he listed all affected body parts identified on the Form 16A without identifying the basis of the change of condition or the specific body parts alleged to have sustained the change of condition. (R. p. 48) No additional information was provided by Claimant when he filed an Amended Form 50 (claim only) on October 6, 2010. (r. p. 49) On November 11, 2010, Claimant filed his hearing request and attached the medical report required by S.C. Code Regs 67-602(C). (R. p. 51) That report was a single questionnaire executed by Dr. Wessinger that stated simply "Tommy G. Houston has sustained a change of condition for the worse since I released him on July 1, 2009." As Dr. Wessinger testified, at no time during his initial treatment following the accident, and at no time prior to his execution of this questionnaire, did he diagnose or treat Claimant with respect to his right knee. Dr. Wessinger specifically testified that the change of condition he was referring to in that November 3, 2010 questionnaire was the "issues that he complained to me about with regard to his shoulder and/or back." (R. p. 175, Depo. pp. 46, l. 11 – p. 47, l. 2)

Based on the foregoing, there is no competent medical evidence establishing the existence of a change of condition to the right knee during the twelve month period following his settlement and, as such, the right knee was not properly before the Commission for adjudication.

Claimant contends that the laundry list of affected body parts set forth in his Form 50 is sufficient to preserve the issue of the right knee despite the absence of contemporaneous medical evident. This argument fails to take into account the requirement to prove by competent medical evidence that a physical change of condition occurred within the twelve month period. It is disingenuous of Claimant to contend that he was putting Defendants on notice of the existence of a change of condition to the right knee when he also lists on the Form 50 his ribs, right hand, left hip and left leg. Much like the right knee until 2013, Claimant's medical records are completely

devoid of any reference to additional problems, treatments or changes of condition for these body parts. It is contrary to the intent of S.C. Code Ann. §42-17-90 and S.C. Code Regs 67-602 to allow the filing of a laundry list of body parts to preserve a claim for a change of condition that is not documented until nearly three years later. Surely Claimant could not show up tomorrow alleging a new change of condition to his right hand and rely on the Form 50 filed in 2010 as a basis for claiming that the issue is preserved. In this case, it is clear from the contemporaneous medical records that Claimant was seeking a change of condition to his back and shoulder when he filed his Form 50 in 2010. The discovery of an injury to his right knee in 2013 is untimely and not preserved for a review under S.C. Code §42-17-90.

This result is further supported by the Consent Order entered into between the parties on March 16, 2011. (R. p. 48) In that order, Defendants specifically agreed to accept a change of condition to the low back and right shoulder and to provide causally-related treatment. It is clear from the Dr. Wessinger's records that evidence existed to support a finding of a change of condition as to those body parts. The Consent Order is utterly silent as to any additional body parts that were at issue and were denied. If Claimant were also alleging a change of condition to his right knee that required treatment, he failed to raise it as an issue. If he had, the Consent Order would have addressed any additional denied body parts. Claimant seeks to rely on the boilerplate language in the Consent Order indicating that "all remaining issues shall be held in abeyance." This catch-all provision routinely included in consent orders does not and cannot preserve issues that were not known or contemplated at the time. Claimant's right knee was simply not an issue in the case or with his physicians at the time and did not become an issue until two years later.

For the above reasons, Defendants contend that Claimant's claim for a change of condition to the right knee was not properly raised in accordance with S.C. Code Ann. §42-17-90

and, consequently, the Single Commissioner did not have jurisdiction to adjudicate the claim as to the right knee.

II. The Commission erred in finding a change of condition to the right knee.

In order to establish a modification based on a change of condition, the claimant must show a change of condition, and the change must be based upon a causal connection to the original compensable accident. Krell v. S.C. State Highway Dep't, 237 S.C. 584, 588, 118 S.E.2d 322, 323 (1961). A change in condition occurs when the claimant experiences a change in *physical condition* as a result of his original injury, occurring after the first award. Gattis, 353 S.C. at 109, 576 S.E.2d at 196 (emphasis added). A change resulting from the natural progression of a pre-existing condition and not the result of the original injury is not compensable. Carter v. Verizon Wireless, 407 S.C. 641, 649, 757 S.E.2d 528, 532 (Ct. App. 2014) (citing Brown v. R.L. Jordan Oil Co., 291 S.C. 272, 275, 353 S.E.2d 280, 282 (1987)).

Notwithstanding the jurisdictional issue of the timeliness of the claim for a change of condition to the right knee, the medical evidence in this case is not sufficient to find that such a change has occurred in this case. Aside from one or two minor references in the month or two following his accident, the medical evidence is indisputable that no injury was ever diagnosed and Claimant never received any treatment whatsoever for his right knee until 2013. Admittedly, in 2013, Claimant's records contain a number of references that he has had right knee problems since 2008. It also undisputed that these reference are based solely on the subjective reports of Claimant to his physicians in 2013. These references are wholly self-serving and not corroborated by the competent medical records or the testimony of his authorized treating physician during the relevant time period. According to Dr. Wessinger, it was his opinion to a reasonable degree of medical certainty that Claimant did not have a meniscal tear during the

2008 to 2010 time period in which he treated him regularly for numerous problems resulting from the 2008 accident. (R. pp. 175 - 76, Depo. p. 48, l. 7 – p. 49, l. 7) Dr. Wessinger's opinions on this matter are particularly relevant as Claimant relies on Dr. Wessinger as his sole support for his position that he sustained a change of condition within the twelve months period after the settlement. While Dr. Math and Dr. Paylor certainly defer to Claimant's subjective reports of his history, both admitted that it is not their role to question a Claimant's medical history and neither of these physicians actually treated Claimant during the relevant time period. Defendants certainly do not dispute that Claimant had a right knee injury in 2013, however, the relevant, reliable, and contemporaneous medical evidence in this case is insufficient to support a finding that his condition in 2013 was causally-related to the 2008 accident.

Moreover, even if Claimant's position is assumed to be true, his claim for a change of condition must fail. Claimant argues that his right knee had been bothering him since the date of the accident but he was so focused on receiving treatment for his other issues he did not know the extent of the problem. Claimant contends that it was not until he was able to be more active after his back surgery in 2012 that his right knee became more symptomatic. In short, Claimant cannot prove a "physical change of condition" because there is no evidence that the meniscal tear that was diagnosed in 2013 was a change from his condition at the time of his settlement in 2010 because, according to him, the problem had been there since 2008.

In the case of Robbins v. Walgreens & Broadspire Servs., Inc., the Court of Appeals addressed a similar situation. In that case, the claimant settled his back injury claim but later sought a change of condition alleging his back pain had gotten "much worse" after his settlement. The claim was denied by the Commission finding no evidence of a physical change of condition. The Court of Appeals affirmed stating:

Thus, the evidence both before and after the settlement of his claim showed the same condition. Neither Dr. Chokshi nor Dr. Wingate opined that Robbins' condition had worsened; they only noted that his pain was continuing. Robbins testified at the hearing before the single commissioner that his pain never abated after his injury, he just failed to inform Walgreens prior to the settlement for fear of being terminated. It is irrelevant that Dr. Chokshi took Robbins out of work in April 2004 because the only evidence in the record regarding the state of Robbins' condition was that it was similar both before and after the settlement. Further, although the single commissioner's order stated that Robbins failed to prove he sustained a "significant change" in his condition, the commissioner used the correct standard in reviewing the evidence and found it did not support a finding that he suffered a "physical change of condition for the worse." Accordingly, there was substantial evidence in the record to support the finding that Robbins failed to prove a change or worsening of his condition.

Robbins v. Walgreens & Broadspire Servs., Inc., 375 S.C. 259, 265-66, 652 S.E.2d 90, 94 (Ct. App. 2007) (emphasis added). In this case, the only evidence of Claimant's condition prior to his settlement are his after-settlement statements in 2013 that this problem had persisted since 2008 but only became intolerable after he recovered from his back surgery and was able to move around more. Claimant's 2013 radiology exams show a defect in Claimant's knee but there is no testimony from which the Commission can determine whether this defect was present in 2008 or if it occurred at some later date. Thus, even if Claimant's testimony is believed, there is no substantial evidence from which the Commission can conclude that Claimant sustained a physical change of condition after his settlement that is causally-related to his 2008 accident.

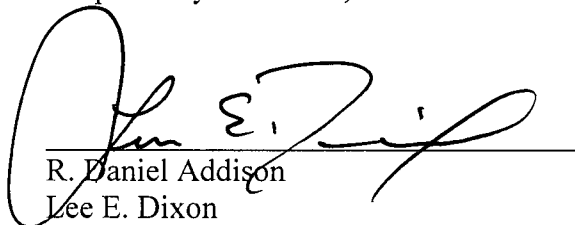
III. Conclusion.

The substantial evidence in this case demonstrates that Claimant settled his 2008 workers' comp claim in 2010 and that he later sustained an admitted change of condition to his shoulder and low back. At no time prior to 2013 was Claimant's right knee ever an issue in the case. Consequently, Claimant's right knee was not timely raised, and was not supported by competent medical evidence at the time the change of condition was asserted. As such the

Commission's order should be reversed as the Commission does not have jurisdiction, pursuant to S.C. Code Ann. §42-17-90 to hear a claim on a change of condition to the right knee.

The Commission's order should be reversed on the merits as well as there is insufficient credible medical evidence that Claimant's right knee problems that were diagnosed in 2013 were causally-related to his 2008 accident. Even taking the Claimant's testimony at face value that his knee has been a persistent problem since 2008, Claimant's position is that it only became apparent once he recovered from his back surgery. Claimant's testimony on this issue is, therefore, insufficient to prove a physical change of condition that must have occurred after the date of settlement. Claimant's testimony on this issue, even if believed, is susceptible of only one inference and that is that Claimant's problems were present at the time of his settlement and his pain symptoms increased as a result of the natural progression of those problems and increased use, not a physical change of condition for the worse that occurred after the date of the settlement.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "R. Daniel Addison", is written over a horizontal line.

R. Daniel Addison

Lee E. Dixon

Hedrick Gardner Kincheloe & Garofalo, LLP

Post Office Box 11267

Columbia, South Carolina 29211

Attorney for Respondent/Appellant

April 15, 2016

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA WORKERS'
COMPENSATION COMMISSION APPELLATE PANEL

Gene McCaskill, Commissioner
Melody L. James, Commissioner
R. Michael Campbell, Commissioner

RECEIVED

APR 15 2016

SC Court of Appeals

W.C.C. File No. 0802605
Appellate Case No.2015-002120

Tommy G. Houston, Claimant,

v.

Garda World Security, Employer/Defendant,

and

Gallagher Bassett Services, Inc., Carrier/Defendant,

Of Whom

Defendants areAppellants,

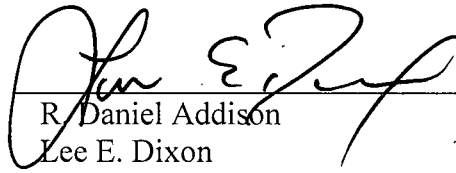
and

Claimant isRespondent.

CERTIFICATE OF COMPLIANCE

This is to certify that a copy of the foregoing **Appellants' Brief** complies with the provisions of SCACR, Rule 211(b).

[Signature on Next Page]



R. Daniel Addison

Lee E. Dixon

Hedrick Gardner Kincheloe & Garofalo

Post Office Box 11267

Columbia, South Carolina 29211

(803) 727-1200

Attorney for Appellants

April 15, 2016

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA WORKERS'
COMPENSATION COMMISSION APPELLATE PANEL

Gene McCaskill, Commissioner
Melody L. James, Commissioner
R. Michael Campbell, Commissioner

RECEIVED
APR 15 2016
SC Court of Appeals

W.C.C. File No. 0802605
Appellate Case No.2015-002120

Tommy G. Houston, Claimant,

v.

Garda World Security, Employer/Defendant,

and

Gallagher Bassett Services, Inc., Carrier/Defendant,

Of Whom

Defendants areAppellants,

and

Claimant isRespondent.

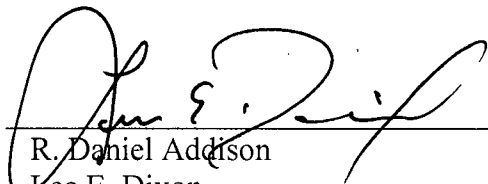
PROOF OF SERVICE

This is to certify that a copy of the foregoing **Appellants' Brief** has been served upon the
flowing by placing the same in the United States mail, first class postage pre-paid, addressed as
shown below on the 15th day of April, 2016.

South Carolina Workers' Compensation Commission
Attn: Amy Bracy, Judicial Director

P.O. Box 1715
Columbia, South Carolina 29202

Kathryn Williams
Kathryn Williams, P.A.
Post Office Box 10693
Greenville, SC 29603



R. Daniel Addison
Lee E. Dixon
Hedrick Gardner Kincheloe & Garofalo
Post Office Box 11267
Columbia, South Carolina 29211
(803) 727-1200
Attorney for Appellants