

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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AUG 09 2016

SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Hon. Tanya A. Gee, Circuit Court Judge

Case No. 2015-CP-40-00169

Gertrude Shiver,.....Employee, Appellant,

v.

Palmetto Health Richland, Employer,

Palmetto Health Trust, Carrier,.....Respondents.

FINAL REPLY BRIEF OF APPELLANT

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ARGUMENT IN REPLY

Without restating the issues which have been set forth in her Amended Initial Brief, Appellant offers the following points of clarification and rebuttal to arguments raised by Respondents.

1. **The Circuit Court and the Full Commission erred in not assessing the Defendants/Respondents Penalties and Sanctions for the withholding of Temporary Total Disability Benefits for twelve (12) years without any legal basis.**

Appellant asserts that sanctions and penalties should have been assessed against the Respondents starting from April of 2002, after Appellant had been out of work for fifteen (15) days. Respondents ignored S. C. Code Annotated Section 42-9-260 (Amended 1996), especially; (G) and they disregarded Regulations 67-504 through 67-507 by not following the mandated procedure of the Statute and Regulations. They never started giving the Appellant her temporary total disability benefits in April of 2002, nor did they file a Form 15 to stop her temporary total disability benefits. Respondents knew ever since April of 2002, that they should have started the Appellant's temporary total disability benefits since it was statutorily mandatory.

Respondents admitted and accepted the injury ever since March of 2002. With this claim that was consolidated with six other claims in 2007, Commissioner David W. Huffstetler erroneously concluded that Appellant had obtained unauthorized medical care and treatment for her back. (See R. Vol. I., Oct. 23, 2007, Ord. of the sing. Comm'r, pp. 56-84). Care had been authorized by the adjuster, Jodi Starnes, for the Carrier

Palmetto Health Trust at that time. (See R. Vol. II., Attorney Paula Stewart's LTR to the Appellant, p. 409). Because he was angry with the Appellant, Commissioner Huffstetler never spent adequate and sufficient time on any of the claims to ascertain the true facts. He never conducted a thorough hearing and he never ascertained that the medical treatment and authorized treating physician for Appellant's back had been authorized by the adjuster for the Carrier Palmetto Health Trust. Medical treatment for Appellant's neck injury had also been authorized but never paid for. Appellant had aggravated a prior injury to the lower back in addition to injuring several more discs in the lower spine. (See R. Vol. II., pp. 473-474, the MRI report of 8-14-02). Respondents never paid all of the medical bills even though the adjuster, Jodi Starnes had given authorization for treatment. Respondents had only paid some of the medical bills and the evidence that they submitted was not conclusive of all the bills for treatment and medical care. Commissioner Huffstetler was against the Appellant before the start of the hearing of September 4, 2007, and Appellant was set up before the hearing. Commissioner Huffstetler as well as the Appellant Panel of the Workers' Compensation Commission was biased against the Appellant as to her credibility. All claims were valid and came under worker's compensation. At the time of this accident of March 23, 2002, the employer-employee relationship existed, and the injury resulted from an accident which arose out of and in the course of the Appellant's employment.

This case is part of a history of abuse from Appellant's employers. Commissioner Roche was erroneous in finding that there was reasonable delay in paying Appellant the temporary total disability payment and Judge Tanya A. Gee erred in finding that the

delay in paying temporary total disability benefits to the Appellant was occasioned by the confusing procedural history of Appellant claims. (See R. Vol. I., pp. 211-236, Hr'g Tr.). Commissioner Roche and Judge Gee were protecting Commissioner Huffstetler. In addition, Commissioner Roche was one of the commissioners during the Full Commission Panel review hearing dated December 6, 2007, after the single commission hearing of September 4, 2007. (See R. Vol. I., p. 55, line. 21). Also, she was one of the commissioners that signed the Order from the Decision and Order of the Appellate Panel Review of the S. C. Workers' Compensation Commission dated May 3, 2011. (See R. Vol. I., p. 48, line 18). There was nothing confusing about paying the Appellant her temporary total disability benefits. The Respondents knew that legally, the temporary total benefits should have been started after April 8, 2002, after the fifteen days that the Appellant was unable to work.

In Judge Gee's Order that was signed November 9, 2015, she indicates that,

"The record indicates the reason the Employer did not immediately pay the temporary total disability benefits under the original Order was that the Order awarding these benefits was appealed by the claimant both to the Full Commission and then to the Circuit Court, and now to the Court of Appeals. The Commission found the Employer acted reasonable in delaying its payment of the temporary total disability benefits because of the Claimant's appeal. This Court agrees that the delay in paying the claimant was caused by good faith confusion on how to proceed. Accordingly, the Full Commission has not committed an error of law in declining to award to the Claimant the 25% penalty under Section 42-9-260(g). It is therefore ordered the December 17, 2014 Order of the South Carolina Workers' Compensation Commission is affirmed." (See R. Vol. I., pp. 9, line 3-11).

The Respondents should be made to pay the 25% penalty on the total amount of \$851.68 per year for twelve (12) years or more starting from April of 2002. The total sanctions and penalty amount should be approximately \$2,555.04.

Even though Palmetto Health Richland and its' carrier, Palmetto Health Trust never started the temporary total benefits after April 8, 2002, because they were angry at the Appellant for not going over to HealthWorks to a nurse practitioner when Appellant already had documented disabilities and a disability rating to her back and cervico-thoracic area. Appellant was already established with a pain management specialists and a physiatrist for previous back and neck injuries, spinal injuries, and musculoskeletal injuries. The nurse practitioners over at HealthWorks did not have the training nor the education to provide care to a worker's compensation claimant with spinal injuries. They previously did not provide adequate care to the Appellant's left heel and Achilles tendon injury.

Palmetto Health Richland and its carrier terminated the temporary total benefits or suspended them because they never started the benefits in April of 2002. The benefits were deliberately withheld for punishment for the Appellant for not going over to HealthWorks to the nurse practitioner where the nurse practitioner and occupational health nurse had previously mismanaged a left heel and Achilles tendon injury which contributed to subsequent falls by the Appellant.

Respondents claimed that Commissioner Huffstetler never ordered them to pay the Appellant temporary total disability benefits that was Appellant's substantive and legal right. Respondents should have heeded the Statutory Law of Section 42-9-260. Appellant could not find anywhere in the Code of Laws of South Carolina or the Regulations where a worker's compensation commissioner could disregard, ignore, or overrule a State Statute and dismissed all of a claimant's claims with prejudice because

he/she was angry with the claimant and not award him/her temporary total benefits which the claimant should have legally gotten in April of 2002. If Commissioner Huffstetler never ordered Respondents to pay temporary total benefits and the S. C. Statute Section 42-9-260 (G), (sup. 2005) states that it is mandatory that an employer pay a claimant, then this is an error of law. Penalties and sanctions should be assessed.

In the Order of October 23, 2007, under **STATEMENT OF THE CASE FOR WCC FILE NO. 0217755**, it is written, "This claim arises from an accident which occurred on March 23, 2002 and resulted in injuries to the Claimant's back and right side. The Claimant fell out of her chair while reaching for a pen on the ground and the chair fell on top of her. Defendants admit the Claimant suffered a minor injury to her lower back. The Claimant seeks and Defendants do not contest paying temporary total disability from March 23, 2002 through April 8, 2002 and all authorized medical treatment." Also, under **EVIDENCE OF THE CASE FROM WCC FILE NO. 0217755**, it is written that, "The Defendants do not contest the payment of temporary total benefits from March 23, 2002 through April 8, 2002 at this time. 'Additionally, the Defendants agree to pay all authorized medical treatment and submitted Exhibit A, Payment History for Related Bills, showing the Employer has paid all authorized medical costs.'" (See Ord. of Comm'r David W. Huffstetler dated October 23, 2007, R. Vol. I., pp. 63-65, line 16-21, line 4-8).

Here both times, the Respondents acknowledge that the temporary total disability benefits should be paid to the Appellant and they did not contest it. Even so, they never once bothered or attempted to pay it. The statutory law of Section 42-9-260

directs them to pay the temporary total benefits and Section (G) demands that they pay penalties and sanctions.

Under **CONCLUSIONS OF LAW** of Commissioner Huffstetler Order of October 23, 2007, at No. 12, indicates that, "With regard to WCC No. 0217755, Defendants do not contest the payment of temporary total disability from March 23, 2002 through April 8, 2002 pursuant to Section 42-9-10 and agree to pay all authorized medical treatment pursuant to Section 42-9-10 and agree to pay all authorized medical treatment pursuant to Section 42-15-60." (See R. Vol. I., pp. 81, Line 21-24).

Also in the transcript it is noted that "The defendants do not contest the payment of temporary total benefits from March 23, 2002 through April 8, 2002 at this time (T.p. 39, lines 20-23).

Under the **ORDER** section it is written, "**IT IS THEREFORE, ORDERED** that defendants have provided appropriate medical treatment and paid temporary total disability benefits where due Claimant and, as such, are not liable for any additional medical treatment or temporary compensation." (See R. Vol. I., p. 83, Line 19-21). "**IT IS FURTHER ORDERED** that no benefits are due for any of the above referenced claims and each is dismissed with prejudice." (See R. Vol. I., p. 84, line 5-6).

While Commissioner David Huffstetler's October 23, 2007 Order did not directly command the Respondents to pay Appellant total disability benefits from March 23, 2002 through April 8, 2002 and all related authorized medical bills, Commissioner Huffstetler's order, however, did implicitly ordered Respondents to pay Appellant disability benefits and all medical bills simply upon the basis that Respondents admitted

the claim and agreed to pay her according to statutory requirements. Commissioner Huffstetler's order approved Respondent's agreement.

Even so, if Appellant had not gone back to the Workers' Compensation Commission in 2014 and file a form 50 for a hearing, the temporary total disability benefits of \$851.68 would still be owed to the Appellant as of the date of this Initial Reply Brief and as to the fact that not all of the authorized medical bills have not been paid yet. Palmetto Health Richland and Palmetto Health Trust never had any intentions of paying the Appellant her temporary total disability benefits.

2. The Circuit Court and the Full Commission erred in not assessing the Defendants/Respondents Penalties and Sanctions for not paying all authorized medical bills and treatments.

Appellant still contends that the Respondents should be assessed penalties and sanctions for not paying all authorized medical bills and treatments because all of these bills have not been paid. Palmetto Health Richland and Palmetto Health Trust never had any intentions of paying the Appellant's medical bills and treatments even though the insurance adjuster had agreed to it as they had never had any intention of providing adequate care to her left Achilles tendon injury and her neck injury, or no other injury because they were angry with the Appellant. The Circuit Court never considered sanctions and penalties for not paying the authorized medical bills and neither did the Single or Full Commission approved of it.

Even though Respondents relies on the 2015 version of Section 42-9-260, Appellant still relies on *Martin v. Rapid Plumbing*, 369 S. C. 278, 631 S. E. 2d 547 (S.C.

App. 2006) and the South Carolina Court of Appeals interpretation of the language of Section 49-9-260 (g) to be mandatory and held:

Section 42-9-260 (g) of the South Carolina Code (sup. 2005) requires employers to pay temporary total disability to an employee who has "been out of work due to a reported work related injury" for eight days. The penalty language of Section 42-9-260 provides:

- (G) Failure to comply with this section **shall** result in a twenty-five percent penalty imposed upon the carrier or employer computed on the amount of benefits withheld in violation of this section, and the amount of penalty must be paid to the employee in addition to the amount of benefits withheld. However, the penalty does not apply if the employer or carrier has terminated or suspended benefits when the employee has returned to any employment at the same or similar wage.

The express language of this statute mandated the granting of appellant's motion for penalties and sanctions be imposed upon respondents and their carrier for their actions of suspending the payments of temporary total disability benefits for an extended time period of twelve (12) years while pursuing frivolous defenses devoid of a legal basis or justification to avoid liability of payments to appellant. The statute does not give the single commission, full commission, nor Circuit Court authority to excuse the untimely non-payment for twelve (12) years and not impose penalties and sanctions upon the Respondents and its' carrier.

As far as the imposition of penalties and sanctions for not paying all authorized medical bills and treatments, appellant asserts that this was an error on the part of the single commission, the full commission, and the Circuit Court. The Workers' Compensation Laws of South Carolina are patterned after the laws of North Carolina and they share synonymous statutory language in many of the statutes and North

Carolina Court decisions are instructive to South Carolina Courts. In *Childress v. Trion, Inc.*, 125 N. C. App. 588, 481 S. E. 2d 697 (N. C. App. 1997), the Court ruled that a workers' compensation claimant could recover interest on outstanding medical expenses under G. S. § 97-86.2. The Court affirmed the Full Commission and held that defendants were liable for all of appellant's medical expenses arising out of his injury.

The North Carolina Court relied on *Powe v. Odell*, 312 N. C. 410, 413, 322 S. E. 2d 762, 764 (1984), here, the North Carolina Supreme Court commended that, "The goals of awarding interest include the following: '(a) To compensate a plaintiff for loss of the use value of a damage award or compensation for delay in payment; (b) to prevent unjust enrichment to a defendant for the use value of the money, and (c) to promote settlement.' All of these goals are met by the payment of interest on an award of medical expenses to workers' compensation claimants. Accordingly we conclude that the Industrial Commission did not err in its award of interest on medical expenses pursuant to G. S. 97-86.2." The Appellant relies on these foregoing cases. The South Carolina Single and Full Commission and the Circuit Court was wrong in not awarding Appellant interest on outstanding medical expenses and not awarding payment for all outstanding medical bills that defendant insurance carrier did not pay even though the adjuster had given authorization for the medical procedures, treatments, x-rays, and MRI, etc. Some of the outstanding bills, especially, the EOB statements belonged to the subrogation liens for Blue Cross and Blue Shield for paying some of Appellant's medical bills relating to this accident.

In addition to the Respondents not timely paying the temporary total disability benefits and not paying all authorized medical bills, Palmetto Health Richland fired Appellant from her jobs and kept all of her Paid Time Off Days. Appellant essentially ended up with nothing except humiliation, nervous problems, and large medical bills to pay. Appellant had a very difficult time trying to find suitable employment and eventually had to obtain food stamps. She became partly a charge to society. Appellant had been working two jobs at the time of the accident at Palmetto Health Richland and two jobs at the time of her firing at Palmetto Health Richland. At the time of the accident, the Appellant was working in the Trauma Department as well as the Medical Records Department. Appellant does not know if both jobs were factored into her temporary total disability benefits. At the time of appellant's firing, she was working as a sitter in the Nursing Department as well as working in the Medical Records Department.

CONCLUSION

The denial of Appellant's Motion for Sanctions and Penalties was not proper. This injury was acknowledged and accepted by the Respondents ever since 2002. There was no legal basis for them not giving the Appellant her temporary total disability benefits and withholding the benefits. Benefits were held to punish the Appellant out of anger. The insurance carrier's adjuster had authorized the medical treatments and agreed to pay them. Also, the provider was authorized and the treatments, etc., were authorized. Sanctions and penalties should be assessed against the Respondents for

total disregarding the State Statute of Section 42-9-260 for selfish reasons. This type of conduct needs to be curtailed and the employee and claimant shouldn't have to suffer needlessly in addition to other problems that an injured worker have to endure as a result of a workers' compensation injury. There wasn't anything stopping the Respondents from telling Commissioner Huffstetler at the hearing in 2007, that they had not paid the Appellant the temporary total disability benefits yet.

This case should be remanded back to the Workers' Compensation Commission so that Sanctions and Penalties can be assessed against the Respondents starting from April of 2002 as it relates to the temporary total disability benefits and not paying all of Appellant's authorized medical and treatment bills and to ascertain if both jobs salaries had been factored into the temporary total disability benefits.

August 9, 2016

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Gertrude Shiver".

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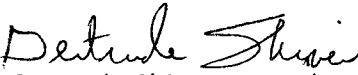
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PROOF OF SERVICE

I certify that I have served the Final Reply Brief on Palmetto Health Richland and Palmetto Health Trust, by hand-delivering a copy of it on August 9, 2016, to the attorneys of record, F. Earl Ellis, Jr, Kirby Darr Shealy, III, and Lyndey Ritz Zwingelberg at 1501 Main Street, 5th Floor, Columbia, S. C. 29201.

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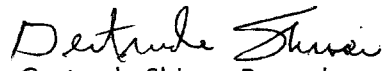
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CERTIFICATE OF COUNSEL

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

August 9, 2016


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