THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Aisha Taylor, Commissioner
T. Scott Beck, Commissioner
Avery B. Wilkerson, Jr., Commissioner

W.C.C. File No. 1102937
SC Court of Appeals Case No. 2016-000514

Barry Adickes, Claimant, Respondent,

v.

Philips Healthcare, Employer, and Fidelity and Guarantee Insurance Company, Carrier, Appellants.

FINAL REPLY BRIEF OF APPELLANTS

Brooke A. Payne (SC Bar #: 81085)
Ryan D. Oxford (SC Bar #: 101326)
503 Wando Park Blvd., Ste. 205
Mt. Pleasant, SC 29464
Telephone: 843-353-0796
Facsimile: 843-353-0796
Emails: BPayne@luederlaw.com
ROxford@luederlaw.com

Attorneys for Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

ISSUES PRESENTED IN REPLY

I. Did The Commission Err in Finding Respondent to be at Maximum Medical Improvement ("MMI") for All of his Work-Related Injuries?

   a. Did Respondent Misstate the Principle in Pearson v. JPS Converter & Industrial Corp.?

   b. Did Respondent Misstate the Facts of the Claim?

II. Did The Commission Err in Determining that Respondent Met His Burden of Proving Entitlement to Permanent Partial Disability Benefits Due to Loss of Earning Capacity?

   a. Respondent Misstates the Evidence in the Record and Improperly Places the Burden on Appellants.

III. Did the Commission Err in Awarding Wage Loss benefits in Contravention of S.C. Code Ann. § 42-9-20?

   a. Did Respondent Misstate and Misapply the holding in Bass v. Kenco?

   b. Is Respondent's Reliance on Lewis v. L.B. Dynasty Misplaced?

ARGUMENTS AND CITATION OF AUTHORITY IN REPLY

I. THE COMMISSION ERRED IN FINDING THE RESPONDENT REACHED MAXIMUM MEDICAL IMPROVEMENT FOR ALL WORK-RELATED INJURIES.

   a. Respondent Misstates The Principle In Pearson v. JPS Converter & Industrial Corp.

Appellants respectfully contend that Respondent must be at MMI for all of his accepted physical injuries to be entitled to permanency benefits. Respondent incorrectly argues that Pearson v. JPS Converter & Indus Corp. describes the principle that if surgery will not change the injury, but will nevertheless help alleviate the injury's symptoms, surgery will be proper even though the injured person is already at MMI. (Respondent Brief p. 7, citing Pearson v. JPS

Converter & Indus Corp., 489 S.E.2d 219, 327 S.C. 393 (1997)). While Appellants agree that Pearson is an influential case when it comes to which future medical treatment can be appropriately coupled with a finding of MMI, Appellants vehemently disagree that the holding in Pearson indicates that a future surgical recommendation will not prohibit a finding of MMI. Pearson sustained a closed head injury and his treating and rehabilitation physicians placed him at MMI and recommended additional medical treatment in the form of intensive rehabilitation, continued psychological care and treatment, referral to pain management/physical development program and center, supportive counseling and case management services. (Id. at pp. 398-399). There was no mention of surgery (Id.). The Pearson Court held that Pearson was at MMI since the recommended further medical care may improve his quality of life and ability to cope without improving his overall disability rating (Id.).

b. Respondent Misstates the Facts of the Claim.

In support of the argument that Respondent is not at MMI for all of his accepted injuries, Appellants argue that the substantial evidence in the record evidences that the Claimant is not at MMI for his right shoulder injury. Respondent replied by first misstating the facts of the claim, arguing that no physician opined that the Respondent is not at MMI, so there is no contrary opinion in the record. (Initial Brief of Respondent, p. 7). Further, Respondent argued that "The Appellants could have sent [Respondent] to Dr. James Rentz, the authorized treating physician for his shoulder. They did not." (Id.). This assertion is false, as the substantial evidence in the record shows that, at the request of the Appellants, Respondent returned to Dr. Rentz on September 14, 2014 for an assessment of whether he was at MMI and, if so, the appropriate rating. (R. p. 650). The office note specifically indicated that he was seen for a "Rate and Release of his right shoulder." (Id.). At this visit, Respondent reported continued pain in his right shoulder with

overhead activities and that his shoulder "**wants to pop and catch.**" (R. p. 652). As opposed to placing him at MMI and assigning a rating, Dr. Rentz **recommended that Respondent undergo a right shoulder MRI** scan due to his continued complaints. (Id.). The MRI scan of his right shoulder performed on October 10, 2014, revealed supraspinatus and infraspinatus tendinopathy, small tear in the infraspinatus tendon, moderate to severe AC joint arthropathy, inferior osteophytosis and subacromial spur, and biceps tenodesis. (R. p. 648).

Rather than return to Dr. Rentz following the MRI scan, Respondent chose to obtain an opinion from his prior IME physician, Dr. Barron, likely because it was not foreseeable that Dr. Rentz was going to place him at MMI. Dr. Barron completed a questionnaire on January 14, 2015, wherein he opined that Respondent had sustained an impairment rating of 15% to the right shoulder, 0% rating to the L shoulder and that the Respondent will "**most probably eventually require additional surgery to the right shoulder based on the MRI findings as well as ongoing symptoms.**" (R. p. 565). As such, the credible evidence reflects that the Appellants did, in fact, send Respondent back to Dr. Rentz for a rating, yet, Dr. Rentz's recommendations indicate his opinion that Respondent is not yet at MMI.

II. THE COMMISSION ERRED IN CONCLUDING THAT RESPONDENT MET HIS BURDEN OF PROVING ENTITLEMENT TO PERMANENT PARTIAL DISABILITY BENEFITS RESULTING FROM A LOSS OF EARNING CAPACITY.

a. Respondent Misstates the Evidence in the Record and Improperly Places the Burden on Appellants

Appellants argue that it is Respondent's burden to prove that his work injury has caused an incapacity in earning his pre-injury wages, and he is unable to meet same. In response, Respondent argues that Appellants' only evidentiary challenge to this award is that no wage loss exists," and "[h]ere again, the Appellants cannot carry their burden."

First, Appellants tendered ample evidence to prove that the Claimant has not suffered a loss in earning capacity related to his work injury, such as personnel documents showing his ability to continue working in his same position for 2.5 years following the injury and earning pre-injury wages, as well as medical records evidencing that not only does Respondent not suffer from cognitive issues, his neuropsychological evaluation revealed him to be a high-functioning individual with a high range of intellectual ability. Moreover, Appellants provided testimonial and documentary evidence proving that Respondent had the same employment issues prior to his injury, and that his termination was a business decision wholly unrelated to his work injury.

More importantly, Respondent incorrectly argues that the Appellants carry the burden in this regard, when it is well settled that it is the Employee's burden to prove an incapacity to work resulting from the work injury. Shealy v. Algernon Blair, Inc., 250 S.C. 106, 156 S.E.2d 646 (1967). In contrast to the aforementioned evidence provided by Appellants, Respondent provided no documentary or testimonial evidence in support of his alleged attempts at job searching, nor that he had problems securing jobs due to his work injury. Rather, Respondent merely tendered a vocational report which was wholly unsubstantiated and relied on inaccurate information provided by Respondent, so it should be granted no persuasive weight. Thus, the burden in this regard is on the Respondent, and the substantial evidence within the record proves that he is unable to meet same.

III. THE COMMISSION ERRED IN AWARDING PERMANENT WAGE LOSS BENEFITS FOR THREE HUNDRED FORTY (340) WEEKS COMMENCING ON JANUARY 17, 2014, IN CONTRAVENTION TO THE STATUTORY LANGUAGE OF S.C. CODE ANN. § 42-9-20.

a. Respondent Misstates and Misapplies the Court's Holding in Bass v. Kenco.

Appellants respectfully argue that the Commission erred in awarding permanent wage loss benefits for three hundred forty (340) weeks commencing on January 17, 2014, in contravention

to the statutory language of S.C. Code Ann. § 42-9-20, which reads in pertinent part, "**In no case shall the period covered by such compensation be greater than 340 weeks from the date of accident.**" (emphasis added).

Respondent boldly asserts that Bass v. Kenco stands for the proposition that S.C. Code Ann. § 42-9-20 operates to entitle Respondent to 340 weeks of permanent disability benefits, without limitations based on the number of weeks that had passed since the date of accident. (Respondent Brief p. 12, citing Bass v. Kenco, 366 S.C. 450, 465, 622 S.E.2d 577 (2005)). In Bass v. Kenco, the Court of Appeals noted that Kenco's argument on appeal was that the Commission should have given it credit for the temporary total benefits paid after the date of MMI. 366 S.C. 450, 465, 622 S.E.2d 577 (2005). The Bass court was limited to review of the last sentence in S.C. Code Ann. § 42-9-20, dealing with a TTD offset. (Id. at 466). In doing so, the Court of Appeals held and the Supreme Court agreed that, the statutory language of the statute barred Kenco from receiving a credit (Id.).

Here, Appellants are not arguing that the award should be reduced by the amount of TTD benefits the Claimant has received, as Appellants fully understand and comprehend the last sentence of the statute. Rather, Appellants focus on the limitation language within the statue, which prohibits receipt of lost wage benefits beyond 340 weeks from the date of accident. A careful reading of Bass v. Kenco reveals that the decision did not address whether a 340 week award is limited to weeks from the date of accident whatsoever. As such, the Bass court did not render a decision as to whether the Commission's award of 340 weeks without limitations based on the weeks that had passed since the date of accident was proper; thus, it is untenable for Respondent to suggest that the Bass v. Kenco provides guidance with regard to this issue.

b. Respondent's Reliance on Lewis v. L.B. Dynasty is Misplaced.

Appellants contend that S.C. Code Ann. § 42-9-20 is plain and unambiguous on its face and should be interpreted in accordance with its plain meaning. Explicitly, it states that a Respondent cannot receive wage loss benefits beyond 340 weeks from the date of accident; thus, the Order of 340 weeks of wage loss benefits commencing nearly 3 years after the date of accident is against the rules of construction. Respondent cites Lewis v. L.B. Dynasty, arguing that it stands for the proposition that the Act is read liberally, in contrast to the Appellants argument that the Act is read strictly. (Respondent Brief p. 13, citing Lewis v. L.B. Dynasty, 411 S.C. 637, 641, 770 S.E.2d 393 (2015)). We disagree. While the Supreme Court in Lewis did hold that the Workers' Compensation Act is read liberally in favor of coverage to further benefit the purpose of the Workers' Compensation Act, it further explained that only exceptions and restrictions to coverage are strictly construed (Id.). *citing* James v. Anne's, 390 S.C. 188, 198, 701 S.E.2d 730, 735 (2010). Here, we are dealing limitations and restrictions imposed by the Act which, according to Lewis and James, should be strictly construed. Thus, Respondent misapplied Lewis v. L.B. Dynasty, and a closer reading of the case evidences that the holding is more favorable for the Appellants.

CONCLUSION

For the foregoing reasons, Appellants respectfully request that this Court reverse the Commission Order, and find that Respondent is not at MMI and this case is not ripe for a permanency determination. Alternatively, if this Court finds Respondent to be at MMI for all work injuries, Appellants request that this Court reverse the Commission's Order and find Respondent not entitled to wage loss benefits. Should this Court find Respondent entitled to wage loss benefits, Appellants respectfully request that this Court modify or correct the Commission's Order to reflect the just and accurate amount due under S.C. Code Ann. § 42-9-20.

Respectfully submitted:

Lueder, Larkin & Hunter, LLC

Brooke A. Payne (SC Bar #: 81085)
Ryan D. Oxford (SC Bar #: 101326)
503 Wando Park Blvd., Ste. 205
Mt. Pleasant, SC 29464
Telephone: 843-353-0796
Facsimile: 843-353-0796
Emails: BPayne@luederlaw.com
ROxford@luederlaw.com

Attorneys for Appellants

Mt. Pleasant , South Carolina

Dated: 9.9.16

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Aisha Taylor, Commissioner
T. Scott Beck, Commissioner
Avery Wilkerson, Commissioner

W.C.C. File No. 1102937
SC Court of Appeals Case No. 2016-000514

Barry Adickes, Claimant, Respondent,

v.

Philips Healthcare, Employer, and Fidelity and Guarantee Insurance Company, Carrier, Appellants.

RULE 211(b) CERTIFICATE OF COMPLIANCE

Brooke A. Payne (SC Bar# 81085)
Ryan D. Oxford (SC Bar # 101326)
503 Wando Park Blvd., Ste. 205
Mt. Pleasant, SC 29464
Telephone: 843-353-0796
Facsimile: 843-353-0796
Email: BPayne@luederlaw.com
ROxford@luederlaw.com

Attorneys for Appellants

I, Brooke A. Payne, do hereby certify that the *Final Brief of Appellants* and *Final Reply Briefs of Appellants* comply with the provisions of Rule 211(b), *South Carolina Appellate Court Rules*, and with the August 13, 2007 Supreme Court Order regarding personal data identifiers.

Respectfully submitted:

Lueder, Larkin & Hunter, LLC

Brooke A. Payne (SC Bar #: 81085)
Ryan D. Oxford (SC Bar #: 101326)
503 Wando Park Blvd., Ste. 205
Mt. Pleasant, SC 29464
Telephone: 843-353-0796
Facsimile: 843-353-0796
Email: BPayne@luederlaw.com
ROxford@luederlaw.com
Attorneys for Appellants

Mt. Pleasant, South Carolina

Dated: 9.9.16