THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE WORKERS COMPENSATION COMMISSION
Susan S. Barden, Commissioner
Melody L. James, Commissioner
Aisha Taylor, Commissioner

WCC File No. 1321387 & 1407915
Appellate Case Nos. 2016-001339 and 2016-001340

Martha Perez, Claimant,..... Respondent,

v.

Alice Manufacturing Company, Inc. Employer, and Great American Alliance Insurance Company, Carrier..... Appellants.

INITIAL REPLY BRIEF OF APPELLANTS

September 12th, 2016

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In response to Respondent/Claimant's Initial Brief, the Employer/Carrier reply with the following:

Argument 1

The Single Commissioner erred in finding the back injuries compensable and awarding workers compensation benefits, the error being that this was not supported by the evidence and is an error of law.

The claimant's attorney in his brief relies on the testimony of the claimant to support his argument that the back claims are compensable. However, the claimant's own testimony as to how and when she injured her back is completely inconsistent in her Form 50, doctor's note of June 2014, and doctor's note of April 10, 2015. It is clear that the claimant's own testimony cannot be relied upon in determining whether an injury occurred (Form 50, APA p. 47, APA p. 6).

As to the alleged 2013 incident, the claimant's attorney contends on page 8 of his brief that the fact that the supervisor filled out an accident report is proof of the claimant's back injury. Once a worker/employee alleges an injury by accident, the employer/carrier is required to file a SC Workers' Compensation Commission Form 12A with the Commission; however, this is not proof of an injury by accident. However, this report is dated August 15, 2013 and is inconsistent with the claimant's own description of how the accident occurred as well as the accident date. The fact that the defendants sent the claimant to the doctor is not evidence of this injury. The claimant told the doctor that she strained her back in the last few days. However, this date is not consistent with the claimant's earlier dates. Moreover, the claimant told Dr. Welborn that she hurt her back while straining when lifting. This is inconsistent with the supervisors report that she hurt her lower back while sliding plastic sleeve cloth tubes.

Moreover, Dr. Welborn's referral to Stedman Hawkins is not evidence that the claimant sustained an injury by accident, but rather another example of the claimant changing her recollection of the accident. At her visit with Stedman Hawkins (Dr. Wilson) she claimed that

she was trying to move a roll when she had pain in her back. Even at her visit with Dr. Wilson, she states that she is not sure if the incident was in August of 2013. She also had lumbar x-rays taken on that date which were normal at that visit.

As to the 2014 alleged incident, the claimant's attorney again relies on the claimant's own testimony to support an injury by accident which is inconsistent. However, the claimant specifically states in her deposition that she can't recall when an accident happened to her back and thinks it might have been in the summer. (Cl's dep. p.34; lines 15-25). Moreover, the accident reports filled out by the supervisor state an even different mechanism of injury. The medical reports, accident reports, and testimony of the claimant are evidence of one thing—the claimant doesn't know how she injured her back. As such, it was error for the commissioner to find the back claims compensable.

Argument 2

The Appellant Panel did err as a matter of law and finding of fact that the respondent had two injuries by accident on August 8, 2013 and on May 19, 2014.

While the claimant's attorney, in his brief, sets this out as a separate argument, this argument is discussed above and will not be recited as the arguments are duplicitous.

Argument 3

The findings of fact 21,22,23,24,27,28,29, and 30 are conclusory and not supported by the evidence.

The Claimant's attorney contends that the appellants make a "conclusory" argument that the findings fact are not supported by the evidence because we do not address each finding to tell this court what is conclusory about each particular finding. A simple reading of these findings of facts show that they are conclusory. A discussion on each fact is not necessary.

While the claimant's attorney contends that the findings of fact and conclusions of law are appropriate, they alternatively argue that the findings of fact and conclusions of law are irrelevant because the Appellate Panel made its own findings of fact and conclusions of law. This argument is flawed for numerous reasons. First of all, the Appellate Panel relied on the findings of the Single Commissioner and those findings were conclusory and not compliant with the statute. Secondly, if this court were to rely only upon the findings of fact numbered 1-13 as outlined in the appellate panel order, they would not be sufficiently supported by the evidence and even some of those findings are conclusory.

In finding of fact number 6, the appellate panel found that the medical records are clearly treatment records, if Dr. Wilson did not believe the claimant had suffered a back injury or injuries, she would not have taken the claimant out of work pending the results of the MRI. This finding is clearly a conclusory argument made by the claimant's attorney as there is no evidence of the doctor's mental state with regard to the same.

The claimant's attorney points out that the defendants did not cite to the more recent decision of Moore v. S.C. Alcohol Beverage Control Commission, 304 S.C. 356, 404 S.E.2d 714 (S.C. App. 1991) to support its argument of the conclusory findings of fact. However, this is a distinction without a difference. The language used in Moore is routinely utilized by Workers Compensation professionals and appears in the Workers Compensation Procedure Manual.

Argument 4

Conclusions of law 2, 3, and 5 are not supported by the evidence.

The claimant's attorney contends that conclusion of law#2 is supported by the evidence because the claimant did "injury (sic) herself at work, did notify her supervisor, did receive treatment paid for by the company and did have medical records showing complaints consistent

with an injury at work." As discussed above, the supervisors statements as well as the medical records are unclear and inconsistent as to what happened and when. As such, conclusion of law #2 that the claimant sustained a compensable injury is erroneous.

The claimant's attorney contends that conclusion of law #3 is supported by the evidence that the claimant is entitled to medical care because Dr. Wilson wrote the claimant out of work. However, the statute is clear that the medical treatment has to be causally related to the injury. The evidence does not support this finding.

The claimant's attorney argues that the conclusion of law entitling the claimant to TTD is also not in error because Dr. Wilson wrote the claimant out of work. However, this is a denied claim. In a denied claim, the defendants are not responsible for payment of medicals (MRI). The claimant did not pay for her own MRI; therefore, her absence from the workforce was the result of her own conduct.

Argument 5

The Hearing Commissioner erred in ordering medical treatment and TTD benefits for the two (2) back claims.

The claimant's attorney contends that the claimant should be entitled to TTD as there is no law that requires the claimant to pay for her MRI and no law supports this statement. However, it is a fundamental tenant of workers compensation and South Carolina law that the employer is not responsible for treatment of injuries that are not causally related to the incident. Temporary disability is not paid for failure of the claimant to work; it is paid for loss of earning capacity. The Claimant has the burden of proof in a denied claim/accident to submit/provide evidence (including medical opinions) to support compensability of a claim and claimant failed to carry her burden of proof. She cannot meet the burden of proving loss of earning capacity and is not entitled to temporary total disability benefits. In 42-1-120, "disability" is the incapacity to

earn wages because of the work injury. In this instance, the work injury did not cause an incapacity for the claimant to earn wages, rather her failure to get an MRI is the cause. Therefore, the Commission's determination was erroneous.

CONCLUSION

For the reasons set forth above, Defendants respectfully request that the Commissioners Order be reversed.

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PROOF OF SERVICE

I certify that I have served the INITIAL REPLY BRIEF OF APPELLANTS by depositing a copy of the same in the United States Mail, postage prepaid, on September 12, 2016 to the following parties, and or their representatives:

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P. O. Box 1207
Easley, SC 29641

Amy Bracy, Judicial Director
S.C. Workers' Compensation Commission
Post Office Box 1715
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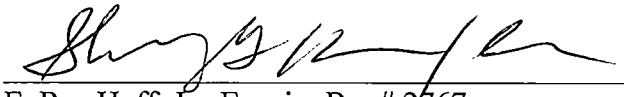
September 12, 2016



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September 12, 2016

Via Hand Delivery
The Honorable Jenny Kitchings
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Re: Martha Perez,.....Claimant, Respondent,
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Dear Ms. Kitchings:

Please find enclosed herewith the Appellant's Initial Reply Brief and Proof of Service.

By copy of this letter, I am hereby serving Martha Perez, through her attorney, W. Grady Jordan. If you have any further questions, please do not hesitate to contact me.

Sincerely,

E. Ros Huff, Jr.
Shelby G. Hapeshis
HUFF & HAPESHIS

ERHjr/eoa

Enclosures
cc: W. Grady Jordan, Esquire

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