

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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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 BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Whether The Circuit erred in affirming the Full Commission's erroneous Finding and Order of not assessing the Defendants/Respondents Penalties and Sanctions for the withholding of Temporary Total Disability Benefits for twelve (12) years without any legal basis.
2. Whether the Circuit Court erred in not assessing the Defendants/Respondents Penalties and Sanctions for not paying all authorized medical bills and treatments.

STATEMENT OF THE CASE

This action began with the filing of a Form 50 requesting a hearing at the Worker's Compensation Commission on or about March 21, 2004, along with a Motion for penalties and sanctions for noncompliance with payment of statutory benefits.

This hearing stemmed from a worker's compensation accident that happened on March 23, 2002, at the defendant hospital. Administration at the defendant hospital was angry at the Appellant for not going over to HealthWorks to receive care from a nurse practitioner even though the claimant had a prior documented disability to her back and had received instructions from her spinal specialist to return to him for any flare-ups to her back injury for continued care. Although nurse practitioners are advanced practice nurses, they do not have the education of a physician or a specialist who deals with the spine, or an orthopedic. Because administration was angry, they withheld appellant's TTD benefits from her and never instated it. Defendant hospital and carrier had accepted the injury and the appellant had been out of work about fifteen (15) days. An injured worker cannot be deprived of workers' compensation

benefits without due process of law. (See *U. S. CONST. amend. XIV.; Last v. MSI Const. Co., Inc.*, 305 S. C. 349, 409 S. E. 2d 334 (1991). Subsequently around four years later, appellant wrote a book about her life and how she was being treated under the Worker's Compensation Act by her employers. This made the administration at the defendant hospital angrier and upon Attorney Michael E. Chase urging, they fired the appellant and they never paid the appellant her TTD benefits that they were withholding, nor her Paid Time Off days that she had accrued. Appellant had a very difficult time finding and keeping gainful employment and she had to go on food stamps for a period of time.

South Carolina Legislature provided for a **mandatory 25%** penalty to be assessed against employers who do not comply with Section 42-9-260. This section requires employers to pay temporary total disability benefit to an employee who has been out of work due to a reported work related injury for eight days. (See S. C. Code Ann. §42-9-260 (1996). "Failure to comply with this section **shall** result in a twenty-five percent penalty which must be paid to the employee Id. (See Also Regs. 67-503 and 67-504).

In addition, the defendant hospital withheld the appellant's Paid Time Off days that she had accrued. Appellant incurred around two or three more herniated discs in her back from this accident as shown on a MRI done around August 14, 2002. (See MRI report R. Vol. II pp. 473, 474). On September 4, 2007, this accident was part of a hearing where seven claims were combined into one for a hearing before Commissioner Huffstetler. (See Ord. of Sing. Comm'r. R. Vol I. pp. 56-84). The defendants admitted

the injury and did not contest paying temporary total disability from March 23, 2002 through April 8, 2002, and all authorized medical treatment. Even though appellant was waiting, she never received a check from the defendant attorneys, nor did the attorneys pay for all authorized treatment which the appellant was not aware of at that time. The appellant had a right to temporary total benefits ever since around April 9, 2002. An injured workers' right to temporary compensation is a substantial right, arising to the level of a vested property interest. (See *Orszula v. Orszula*, 292 S. C. 264, 356 S. E. 2d 114 (1987)). Therefore, this action was started in 2014, twelve years since the accident happened.

On May 15, 2014, appellant filed a Pre-Hearing Brief, (Form 58), and presented part of Commissioner David W. Huffstetler Order dated October 23, 2007, pages 8-10. (See R. Vol. I. pp. 196-203). Claimant believed she was entitled to the following benefits pursuant to the S. C. Worker's Compensation Act of payment of all causally related medical bills, TTD compensations, prescription expense, reimbursement of out of pocket personal medical expense and days missed from work after each steroid injection, and sanctions as further directed by the Commission as may be deemed.

On Friday, May 16, 2014, a hearing was held before the single Commissioner Andrea C. Roche, but an award for sanctions and penalties was not granted and the defendant attorney was not made to pay all medical bills, etc., that were due. They were told to submit evidence that the bills were paid and that the appellant had indeed been paid the TTD benefits that were due.

Around Friday, June 20, 2014, Appellant wanted to submit a Counter Motion in response to a Motion and Proposed Order submitted by Attorney Fajardo before the Order was signed. Appellant was unable to submit a Counter Motion because the single Commissioner went ahead and signed the Order. After the hearing, the appellant had to double check with the treating physician to see if all the bills were indeed paid as the defense attorney had claimed. Appellant found out that the defense attorney had not told the truth and all the bills had not been paid. Therefore, the appellant had to appeal to the full commission.

On July 7, 2014, a Form 30, Request for Commission Review along with other documents were filed with the Worker's Compensation Commission. (See R. Vol. I pp. 175-195), and On September 10, 2014, Appellant's Brief was submitted along with a partial ledger and some financial statements, and on September 15, 2014, the rest of the financial ledger and medical bill statements were submitted. On October 6, 2014, some EOB statements and other documents related to the medical bills were submitted to the Workers' Compensation Commission.

On October 27, 2014, this case was heard before the Appellate Panel of the Workers' Compensation Commission. In their order, it was stated that, "Commissioner Huffstetler found that the Claimant had sought out unauthorized medical treatment, for which the Defendants were not responsible..." This was not so because Jodi Starnes, the insurance adjuster, had authorized Dr. Gregory Jones to treat the appellant. (See LTR of July 2, 2003, from Attorney Paula M. Stewart to Jodi Starnes, Claim adjuster for PHTS, R. Vol. II. p. 409). The defendants were not ordered to pay for the MRI nor all medical

treatments, nor were they assessed sanctions and penalties for not paying the appellant her TTD benefits in 2002, after the fifteen days when she out of work according to §42-9-260 (g) of the South Carolina Codes or the days in which she missed work because of the injections to her spine. The Order was filed on December 12, 2014.

Since the Appellate Panel of the Full Commission did not order any sanctions or penalties nor did they order the defendants to pay the rest of the medical bills that they owed, appellant filed her Notice of Appeal on January 12, 2015, to the Richland County Court of Common Pleas along with proof of service to Andrew W. Fajardo, Esquire, the Honorable Jeanette McBride, Clerk of Court, and Amy Bracy, Judicial Director of the Workers' Compensation Commission.

On February 4, 2015, appellant submitted her Brief and Memorandum of Law in support of her application for review to the Court of Common Pleas. On February 24, 2015, the Defendants/Respondents submitted a Notice and Motion to Dismiss Claimant's/Appellant's Complaint along with coversheet. They asserted that this claim along with six others, was currently pending in the South Carolina Court of Appeals, that the appeal was lacking in subject matter jurisdiction, and that the claim had already been adjudicated by the Circuit Court and that the Order was under active appeal to the South Carolina Court of Appeals. . . .(See R. Vol. II. P 363-364).

On March 4, 2015, Appellant submitted a Reply to the Defendants'/ Respondents' Notice and Motion to Dismiss Claimant's/Appellant's Complaint along with Proof of Service. The Court had jurisdiction over the subject matter underlying the Single Commission and The Full Commission's Order that denied Claimant's/Appellant's

Motion requesting to be awarded sanctions and penalties against Defendants/Respondents for (1) The suspension of over twelve (12) years-without a legal basis or justification-payments of Temporary Total Disability benefits and for (2) The Nonpayment of all claimant's/appellant's authorized medical bills causally related to the accidental injury. The appellant had never presented the issue of sanctions and penalties and the paying of all medical bills to the S. C. Court of Appeals for review regarding WCC File No. 0217755 in *Gertrude Shiver v. Palmetto Health and Trident Regional Medical Center*. The issue/question now before the S. C. Court of Appeals concerning WCC File No. 0217755, was whether the appellant experienced an aggravation of a preexisting injury. Appellant was still waiting for the defense attorneys to send her a check for her TTD benefits. Appellant believed that the defendants had paid all medical bills as stated. Appellant was not aware that she had to bring another hearing in order for her to ever receive her TTD benefits. Appellant is still lacking in much legal knowledge; especially, the Workers' Compensation Laws.

On April 24, 2015, this case came before The Honorable Perry H. Gravely and Honorable DeAndrea G. Benjamin on a Motion hearing to dismiss the case from appeal at the Circuit Court level. Judge Gravely ruled that,

In reviewing the file, it appears that the Claimant's/Appellant's request for Sanctions was addressed by the Order filed by Appellate Panel on December 12, 2014 which specifically states that it can consider matters which "are not affected by the appeal" which applies to the ruling on the Sanctions requested by the Claimant/Appellant. Therefore, Defendant's/Respondent's Motion to Dismiss is denied and this matter should be reset for the parties to argue and present any evidence or argument on whether the denial of Sanctions by the Appellate Panel was proper. (See R. Vol. I. p. 11, lines 1-11).

Appellant never abandon her issue on appeal for the payment of all medical bills related to this injury of March 23, 2002.

On November 6, 2015, the case came before Honorable Tanya A. Gee on the issues of Penalties and Sanctions and the Matter of all medical bills not being paid. Judge Tanya A. Gee and the defense attorney F. Earl Ellis switched the facts around and confused the appellant and Judge Gee upheld the Full Commission Ruling. The defense attorney was allowed to write up the Order. In the Order, the defense attorney wrote, "The Claimant contends that because of the delay, the Employer should be required to pay her, a 25% penalty in the amount of 212.92." (See R. Vol. I. p. 8 , lines 8-9). The claimant never made a statement about the amount she should be paid. The appellant believes she should be paid 25% of \$851.68 for each year that the TTD benefits were deliberately withheld from her as punishment starting from the fifteen (15th) day that she was disable. This should be approximately \$2,555.04 for the twelve (12) years.

Since the appellant was also aggrieved by Judge Tanya A. Gee, and the defendants were not ordered to pay for all medical bills which their insurance adjustor had authorized nor were they assessed sanctions and penalties, appellant filed a Notice of Appeal on November 30, 2015, with the S. C. Court of Appeals, The Court of Common Pleas, and the defense Attorney F. Earl Ellis, Jr. The issue of the defendant insurance carrier not paying for all medical bills was never abandoned.

ARGUMENTS

- 1. The Circuit Court erred in Affirming The Full Commission's erroneous Finding and Order of 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 the Circuit Court erred in affirming the Single and Full Commission Order that denied her penalties and sanctions for the withholding of Temporary Total Disability Benefits for (12) years without any legal basis. The Circuit Court also upheld The Full Commission Order denying Appellant's request for the imposition of mandatory penalties and sanctions against Respondents, Palmetto Health Richland, and their carrier, Palmetto Health Trust, as required because of their conduct in unlawfully withholding from appellant for a period of twelve (12) years, without any legal basis, overdue payments of temporary total disability benefits under the South Carolina Workers' Compensation Act. The purpose of imposition of workers' compensation penalties, sanctions, and interest is to discourage indifferences and undesirable conduct by employers and their insurers. Palmetto Health Richland and its' carrier, Palmetto Health Trust, was aware that appellant had fallen and was absent from work about fifteen (15) days. The claim was admitted, but defendant hospital refuse to give appellant any TTD benefits. The employer and insurance carrier was aware that the temporary total benefits were never started even though appellant was entitled to compensation. Therefore, claimant is entitled to a 25% interest and penalty because the employer did not pay the benefits when due. The defendants fail to acknowledge their responsibility to pay the temporary total disability benefits in April of 2002.

Penalties may be assessed under a workers' compensation act if an employer or insurer, without good cause, fails, neglects, or delays the payment of benefits or

interposes a defense to liability which is frivolous. (See *Corpus Juris Secundum Section* 1616).

Temporary disability benefits are triggered “[w]hen an employee has been out of work due to a reported work-related injury...for eight days[.]” S. C. Code Ann. §42-9-260(A) (Supp. 2011). See *Cranford v. Hutchinson Const.* 731 S. E. 2d 303 (S. C. App. 2012).

Appellant asserts that she did not have unauthorized medical bills and her benefits were not cut off as supposed by Judge Gee. (See R. Vol. I., Hr’g Tr. p.212 (p. 4) line 9-11). Appellant’s temporary total disability benefits were never started by Palmetto Health Richland or Palmetto Health Trust when the accident first occurred. The matter of all medicals bills being paid is not now before the Appellate Court in *Gertrude Shiver v. Palmetto Health and Trident Regional Medical Center*.

The Respondent said that they were confused about whether they needed to pay because this was still on appeal by Judge Gee’s understanding. (See R. Vol. 1. Hr’g. Tr. p. 213, (p. 5), line 7- 9). This was not on appeal. Appellant asserts Respondents’ argument, of which was accepted and approved by Commissioner David W. Huffstetler, constitutes an Order from Commissioner Huffstetler awarding appellant temporary total disability benefits from March 23, 2002, through April 8, 2002. Respondents and their carrier have violated that agreement by arbitrarily not paying appellant temporary total disability benefits until (7) years after Commissioner Huffstetler’s Order was issued on September 4, 2007. Appellant did not receive a payment of disability benefits until June 17, 2014.

In addition, appellant argues that under S. C. Code Ann. Section 42-9-260 (g), she was entitled to an award of penalties and sanctions for the wrongful suspension of payments of temporary total disability benefits for twelve (12) years without legal justification. When an employer, such as Respondents and their carrier under the Workers' Compensation Act, fails to comply with Section 49-9-260 (g), penalties must be assessed against them as should have been done in this case, based upon the facts of Respondents' and their carrier's conduct in this matter. The single Commissioner erred in not imposing penalties and sanction upon Respondents and their carrier. See *Martin v. Rapid Plumbing* 369 S. C. 278, 631 S. E. 2d 547 (Ct. App. 2006).

In *Martin V. Rapid Plumbing*, the South Carolina Court of Appeals interpreted 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 their carrier.

In enacting the 25% penalty provision, the legislature recognized that prompt continuing payment of temporary compensation is necessary to carry out the beneficent purposes of the Act.

As to the matter of the ordering of sanctions and penalties, the defense Attorney Ellis has admitted that they were ordered to pay about five weeks of temporary total disability benefits in the transcript of November 6, 2015. -----“We were ordered to pay about five weeks of temporary total disability benefits. Before we could do it, she appealed.” (See R. Vol. I. Hr’g Tr. P. 217, (p. 9) line 18-20). Here Attorney Ellis is talking about the hearing before Commissioner Huffstetler held on October 23, 2007. Commissioner Huffstetler told Appellant verbally to appeal to the Circuit Court while he was very angry.

From Judge Gee’s conduct during the hearing, she had gotten her facts wrong about the procedural history. She also got the appellant confused because she was also supposed to have ruled on the defendant’s not paying for all of appellant’s medical bills. One of her aims was to get rid of the appellant’s appeal. The Circuit Court didn’t ruled

correctly as a matter of law when it didn't order the 25% penalty to be assessed to the Defendants/Respondents.

The Appellate Panel had already dismissed the appellant's Appeal "With Prejudice."

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

Appellant asserts that the Circuit Court erred in not assessing the Defendants/Respondents Penalties and Sanctions for not paying all of the authorized medical bills with this claim. This part of appellant's appeal was never abandon. See Appellant's Brief and Memorandum of Law in Support Of Her Application for Review under Argument 2 and Conclusion to the Court of Common Pleas Fifth Judicial Circuit Civil Action No. 2015-CP-40-001109. (See R. Vol. 1. pp. 102-103). Defendant attorney and Judge Gee got off on a tandem during the hearing about appellant's case and got appellant confused. Appellant has trouble remembering when she gets confused or anxious. The hearing supposed to also have been about the requiring of the Respondents to pay all medical bills that stemmed from this injury.

The Workers' Compensation Laws of South Carolina is 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. 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 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' medical bills.

Likewise in *Bennett v. Grand*, 186 N. C. 257, 650 S. E. 2d 660, (N. C. App. 2007), the employer and its insurance carrier received sanctions for failing to comply with N. C. Gen. Stat. Section 97-18 for approximately five years.

The defendants' attorneys lied to Commissioner Huffstetler, Commissioner Roche, and The Full Commission that all medical bills with this claim had been paid. They were not paid, so therefore, sanctions should be applied.

In 2002, when appellant was represented by Attorney Paula Stewart and the insurance adjuster had authorized her treatment with Dr. Jones, the appellant had signed a waiver for mileage after she received the letter from Paula Stewart who was representing her at that time. (See LTR from Paula Stewart to Jodi Starnes and mileage waiver. R. Vol. II pp. 409, 410).

Respondents argued that a review of the record establishes a preponderance of evidence indicating Respondents have paid all authorized medical bills relating to injuries Appellant sustained on March 23, 2002 and thus, appellant was not entitled to be awarded penalties and sanctions imposed against them.

Dr. Jones has classified appellant as an eggshell patient. An MRI was done in August 14, 2002 related to this accident. There were two more bulging discs that she did not have before this accident. There is an annular tear at L5-S1. (See R. Vol. II pp. 473-474).

CONCLUSION

This Court should reverse the judgment of the Court of Common Pleas and remand the case back to the Court of Common Pleas or the Workers' Compensation Commission where the defendants should be ordered to pay all medical bills causally connected to this accident and assessed sanctions and penalties for withholding temporary total disability benefits without any legal basis and not paying all medical

bills. Appellant went for twelve (12) years without a check that she was legally entitled to. The defendant failed to commence payment of TTD benefits timely. Sanctions should accrue due to defendants' failure to comply with state statute for twelve (12) years and penalties and interest assessed doubled starting from April of 2002.

The intention of the Legislature in enacting the Workers' Compensation Laws were to relieve workers of the uncertainties of a trial for damages by providing sure, swift recovery for workplace injuries regardless of fault. This has not been so with this particular case. Deceit and trickery is continuously being used to keep appellant from obtaining this relief.

August 9, 2016

Respectfully submitted,



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PROOF OF SERVICE

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

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CERTIFICATE OF COUNSEL

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

August 9, 2016

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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.

August 9, 2016


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