

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE WORKERS COMPENSATION COMMISSION

Susan S. Barden, Commissioner
T. Scott Beck, Commissioner
Melody James, Commissioner

WCC File No. 1505905

Appellate Case No. 2016-002486

Jeffrey Miller, Employee, Claimant, Respondent,

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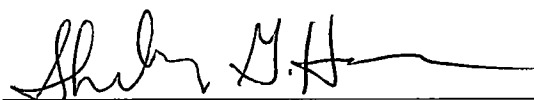
SC Court of Appeals

v.

Alice Manufacturing Co. and Great American Alliance Insurance Company, Appellants

INITIAL BRIEF

January 11th, 2017



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STATEMENT OF ISSUES ON APPEAL

The Commission erred in finding as fact, concluding as a matter of law and ordering that the claimant sustained an injury by accident, thus entitling him to workers compensation benefits, the error being that this ruling is not supported by the evidence and the claimant did not meet his burden of proof.

The Commission erred in finding as fact, concluding as a matter of law and ordering that Dr. Jacobus coordinate treatment, the error being that the defendants have the right to direct medical treatment in this instance.

STATEMENT OF THE CASE

This matter was heard before Commissioner Gene McCaskill on January 26, 2016 pursuant to the claimant's Form 50/51 hearing request. The claimant was represented by Monty D. Desai and the Defendants were represented by E. Ros Huff Jr., Esquire. Claimant alleged injury to his right upper extremity, right shoulder, right hand and neck as a result of an accident arising out of and in the course of his employment with Defendants on 02/25/2015. He contended that he is entitled to past due TTD benefits from 4/20/2015 to the present, and continuing forward until such time as benefits can be properly terminated. He contended that he is in need of further medical treatment for his injuries and that he is not at maximum medical improvement. Defendants contended that Claimant suffered no injury by accident while working for the employer. Defendants contended Claimant lacked credibility. An order was issued on June 1, 2016. In that order, the Commissioner found that the injury was compensable and ordered that the defendants pay temporary total disability benefits from April 20, 2015, through the present and continuing and provide causally related medical treatment at the direction of Dr. Dwight Jacobus. It is from that Order that Defendants appeal.

CLAIMANT'S TESTIMONY

Claimant testified that he is 43 years old and lives with his wife. He has four daughters. He is right hand dominant. His last grade completed in school was the seventh grade. He testified that he cannot read and write well, but can slowly read a newspaper. (Transcript p. 10-11) His wife handles the family finances. He was in "pretty good" health before his work injury. (Transcript p. 12)

Claimant described his work history. He worked in several mills and plants before spending about 20 years working in the logging business, cutting trees and driving a tractor. (Transcript p. 13-14) After his employer passed away, he hauled scrap metal until he got a job for the Employer at Ellison Mill, doffing cloth. (Transcript p. 16) He used a jack to move very large rolls of cloth and then unload them. (Transcript p. 18-19) He then moved to "warp rack hanging." He was moving 4500 to 5000 pound rolls of cloth. It was a better, higher paying job. He used a motorized jack to load and unload cloth and cloth waste. (Transcript p. 19-21)

Claimant testified that he told Dr. Jacobus that he was pulling 5000 to 6000 pounds of cloth with a partner. It was a "rough job." (Transcript p. 23-24) On the date of the injury, Claimant and Scott Raymond were pulling off the warp and something popped in his arm, and his whole arm started burning. (Transcript p. 24) He noticed his arm was swelling up. He went to see the mill nurse, who could not write him for light duty. He waited until the following Monday and saw his family doctor, who gave him a light duty note. His employer did not have light duty. However, he continued working. (Transcript p. 25-27) After a period of time, he discussed the injury with his employer, specifically with Kim LeCroy. Kim's response to his request for medical treatment was that he would be fired if he left the plant. (Transcript p. 24-30, 30) He was not asked to fill out an accident report. (Transcript p. 33)

Claimant testified that he stopped working at the mill after his doctor gave him restrictions and has not returned back to work because there is no light duty available for him at the plant. (Transcript p. 34) Prior to the injury, he was “pretty active” at work, and there is no way he could do his same job with his current symptoms. (Transcript p. 34-35) After his family doctor, he was seen at Palmetto Bone & Joint. He testified that he told the doctors he had one or two months of pain. (Transcript p. 38) He believed that he was being honest with his doctors about how long he had been hurting, including Dr. Jacobus, who spent a great deal of time with him. (Transcript p. 38-39) He testified he wants to go back to the doctor and return to work when his arm quits hurting. (Transcript p. 40)

On cross-examination, Claimant testified that he only had one work-related injury that resulted in his current problems. He did not recall any other workers’ compensation claims. (Transcript p. 41) When presented with evidence of a prior workers’ compensation claim, Claimant confirmed the evidence was related to a different “Jeffrey Miller,” and not him. (Transcript p. 45) When presented with evidence of his prior criminal record, Claimant admitted some of the convictions and did not recall some of the others. Regarding his medical treatment, Claimant testified that he was truthful with his doctors to the best of his knowledge and what he could recall. (Transcript p. 50)

Claimant testified that he did not recall why the Baptist Easley Hospital report of 5/10/2015 indicated his work injury occurred one month prior. He testified he “can’t remember dates.” (Transcript p. 52, 56-57) Claimant denied intentionally giving Dr. Jacobus any false information. (Transcript p. 54)

On re-direct, Claimant testified that he thought he had been truthful about his prior criminal record when he was questioned at his deposition. (Transcript p. 60-61) He also testified

that he was treated at Easley Baptist Hospital in 2012 not only for right arm numbness, but also for other symptoms that may have been due to a reaction to medication given to him by a doctor. (Transcript p. 62)

TESTIMONY OF KIM LECROY

Kim LeCroy testified that she has worked for Alice Manufacturing for forty-one years. She is a supervisor. She knows the Claimant. (Transcript p. 72-73) She testified that the Claimant left a voicemail message on 3/20/2015 that his elbow was hurting from where he pulled a warp down. She brought Claimant in the following Monday to discuss it. Claimant said he needed medical attention. He said the injury happened a few weeks ago, and that he thought it would get better on its own. She testified that Claimant said it could have happened at home. (Transcript p. 74-75) She denied that Claimant told her about the injury when they had spoken about his arm pain a week prior to the Monday meeting, so she did not do an accident report. (Transcript p. 76) She admitted that Claimant was terminated after 3/17/2015 for being out of work and not notifying anyone.

MEDICAL EVIDENCE

Claimant was seen on 4/20/15 at Easley Family Practice/Internal Medicine for reports of right elbow pain and anxiety. He reported a one month history of right lateral elbow pain with lifting heavy weights. The report indicates no known injury. He had x-rays and was ordered to follow up. (APA #6)

Claimant was seen at Palmetto Proactive Health Care on 6/3/15 and 7/6/15. On 6/3/15, the note indicates that he noticed burning in the right arm one month ago. He informed his supervisor but nothing was done. Claimant reported seeing a primary care doctor that did some

testing that made his pain worse. He reported problems moving his right arm and making a fist, numbness, and popping and swelling in the right shoulder and elbow. He was referred to a neurologist for his injury on 6/3/15. On 7/6/15, he returned to Palmetto Proactive Health Care, and had not yet been seen by a specialist. His pain ranged from mild to major throughout the day. Finger numbness was indicated. He was still unable to work. He was excused from work from 7/6/15 until he could be evaluated by a neurologist. (APA #4)

Claimant was seen at Upstate Bone & Joint by Dr. David Boyer on 5/13/15. The note details 1-2 months of right lateral elbow pain as well as right shoulder and wrist pain. He was examined and a right ultrasound guided common extensor tendon tenotomy procedure was performed. He was assessed with right lateral elbow pain and asked to follow up. He was written out of work until follow up with Dr. Boyer in 3 weeks. (APA #5)

Claimant first saw Dr. Dwight Jacobus at Oaktree Orthopaedics on 8/4/15. He reported a history of doing a job that required pulling 5-6000lbs of materials with his arms. He had significant pain in his right elbow around the middle of March, 2015, that occurred when pulling material. He tried to keep working but had increasing discomfort. He had been seen by Palmetto Proactive Health Care as well as by Dr. David Boyer at Upstate Bone & Joint. Claimant had already had ultrasound and injections. X-rays were normal. Claimant had been given light duty restrictions and also written out of work by his doctors. Dr. Jacobus diagnosed post-traumatic epicondylitis of the right elbow, C5 radiculopathy of the right upper extremity, and developing De Quervain's tendon bone insertional irritation. An EMG nerve conduction study was recommended. (APA #2) Claimant was seen by Carolina Neurology Associates on 9/1/15. His EMG/NCS study findings were "abnormal." (APA #3)

Claimant saw Dr. Jacobus again on 9/4/15 for follow up. Claimant had a lot of neck, right shoulder, and right elbow pain. The EMG/NCS was reviewed. An MRI was recommended. (APA #2) Claimant returned for follow up on 11/3/15. He was again assessed with cervical radiculitis. Medications were helping. Claimant saw Dr. Jacobus again on 12/29/15 for right hand, right arm, and right shoulder pain. There was right hand swelling and numbness. (APA #2)

On 1/11/16, Dr. Jacobus signed a medical questionnaire that indicated that Claimant sustained injury to his right arm, right shoulder, and neck, while at work on 3/17/15. Claimant was not at MMI, needed an MRI, and was scheduled for a follow up EMG on 1/26/15. Dr. Jacobus opined that Claimant had been unable to work since his injury of 3/17/15. The claimant told Dr. Jacobus that he was lifting 5,000 to 6,000 pounds and that he did not have any prior treatment for his arm complaints.

The claimant has received prior treatment for arm complaints. He was seen at Easley Baptist Hospital on 12/31/03 after being hit by a tree at work. On 10/24/04, he was seen at Easley Baptist Hospital for arm problems. Claimant was once again seen on 2/27/12 at Easley Baptist Hospital for right arm numbness (APA #7)

On 5/10/15, Claimant was seen at Easley Baptist Hospital for extremity pain. The note indicates pain in the right shoulder and elbow from a work injury one month ago. (APA #7)

ARGUMENTS

ARGUMENT I

The Commission erred in finding as fact, concluding as a matter of law and ordering that the claimant sustained an injury by accident, thus entitling him to workers compensation benefits, the error being that this ruling is not supported by the evidence and the claimant did not meet his burden of proof.

The claimant has the burden of proving his entitlement to benefits by the greater weight of the evidence. Hill v. Jones, 255 S.C. 219, 178 S.E.2d 142 (1970). In deciding whether substantial evidence supports a finding of causation, it is appropriate to consider both the lay and expert evidence. Sharpe v. Case Produce, Inc., 336 S.C. 154 (S.C. 1999).

The Claimant did not have an injury by accident while working for the employer. The date of accident is unclear and according to the records can range anywhere from April to May. The Claimant alleges injuries to his right upper extremity, right shoulder, right hand and neck arising out of and in the course and scope of his employment on or about 3/17/2015 when he pulled "something" in his arm.

The claimant visited Baptist Easley Hospital on May 10, 2015 and stated that an injury occurred one month ago (April 10th). In the June 3, 2015 report of Palmetto Proactive Health Care, the claimant's description of the injury and the date are again inconsistent. "He states he has to pull large objects weighing around 5,000 to 6,000 pounds at work. He states it happened one month ago. (May 3rd). The claimant was seen at Upstate Bone & Joint by Dr. David Boyer on 5/13/15. The note details 1-2 months of right lateral elbow pain as well as right shoulder and wrist pain. (either April 13, 2015 or March 13, 2015). According to the testimony of Kim Lecroy, the claimant's supervisor, the claimant left a voice message on March 20, 2015 and indicated that the accident occurred several weeks ago. (late February/early March). The claimant also told the supervisor that the incident "could have happened at home." It is clear that the claimant does not know when he injured his elbow, much less whether he injured his elbow at work therefore, the claimant did not meet his burden of proving an injury by accident arising out of his employment.

The claimant's description of the mechanism of injury is also inconsistent. Claimant was seen on 4/20/15 at Easley Family Practice/Internal Medicine for reports of right elbow pain and anxiety. While he does report that the injury occurred somewhat near the alleged injury date of one month prior, he indicates that there is **no known injury**. This medical report is in sharp contrast to the claimant's own testimony at his deposition and at the hearing that the injury occurred when "he and Scott Raymond were pulling off the warp and something popped in his arm, and his whole arm started burning." (Transcript p. 24). In the report of Dr. Jacobus, which, is their IME referred by the attorney on his behalf, it says, "he has to do a lot of pushing and pulling of significant weight equipment. The job requires him to pull between 5,000 and 6,000 pounds." He fails to mention to the doctor that a rope is used in this pulling and he in fact does not have to lift that much weight.

The claimant is not truthful and was impeached numerous times at the hearing. For instance, the claimant stated in his deposition that he had not received prior treatment for his arm. However, he went to Baptist Easley Hospital on February 27, 2012 complaining of right arm numbness. He also visited the doctor in 2004 for arm pain. This testimony was in direct contradiction to what he stated before. The Commissioner's finding that the claimant is credible and truthful was not supported by the evidence because the claimant also lied about prior convictions.

Defendants would also submit that the claimant did not meet his burden of proving entitlement to Temporary Total Disability benefits because the claimant voluntarily removed himself from the workforce. To show that one is entitled to temporary total disability benefits, one must prove that "the incapacity for work resulting from an injury is total." S.C. Code Ann. Section 42-9-10 (1976, as amended). South Carolina Cases have held compensation for total

disability “is based on loss of earning capacity.” Bateman v. Town and Country Furniture Co., 287 S.C. 158, 159, 336 S.E. 2d 890, 891 (Ct. App. 1985). The claimant did not have a loss of earning capacity, but rather he was terminated as a no call no show. As Kim LeCroy testified, Claimant was terminated after 3/17/2015 for being out of work and not notifying anyone. Defendants submit that because claimant failed to present evidence of loss of earning capacity because of any alleged injury, the Commissioner erred in awarding TTD benefits.

ARGUMENT II

The Commission erred in finding as fact, concluding as a matter of law and ordering that Dr. Jacobus coordinate treatment, the error being that the defendants have the right to direct medical treatment in this instance.

The Workers Compensation Commission committed an error of law when they appointed Dr. Jacobus as the authorized treating physician. There was no basis for this appointment and this was error because this is not a situation under 42-15-60(a), that calls for the Commission to appoint a treating physician because this is a denied case:

(A) The employer shall provide medical, surgical, hospital, and other treatment, including medical and surgical supplies as reasonably may be required, for a period not exceeding ten weeks from the date of an injury, to effect a cure or give relief and for an additional time as in the judgment of the commission will tend to lessen the period of disability as evidenced by expert medical evidence stated to a reasonable degree of medical certainty. In addition to it, the original artificial members as reasonably may be necessary must be provided by the employer. During any period of disability resulting from the injury, the employer, at his own option, may continue to furnish or cause to be furnished, free of charge to the employee, and the employee shall accept, an attending physician and any medical care or treatment that is considered necessary by the attending physician, unless otherwise ordered by the commission for good cause shown. The refusal of an employee to accept any medical, hospital, surgical, or other treatment or evaluation when provided by the employer or ordered by the commission bars the employee from further compensation

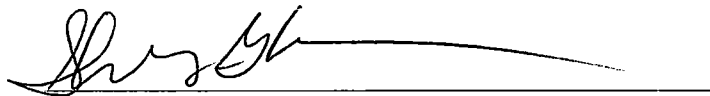
until the refusal ceases and compensation is not paid for the period of refusal unless in the opinion of the commission the circumstances justified the refusal, in which case the commission may order a change in the medical or hospital service. **If in an emergency, on account of the employer's failure to provide the medical care as specified in this section, a physician other than provided by the employer is called to treat the employee, the reasonable cost of the service must be paid by the employer, if ordered by the commission.**

The Employer did not fail to provide medical care as specified in this section because they were not obligated to do so under the statute. Therefore, there is no reason for the commission to now order treatment by a specific physician. Pursuant to McKinney v. Kimberly Clark Corp, 658 S.E.2d 112 (App. 2008), the defendants have the right to choose the physician. Therefore, the Commission committed an error of law in appointing a physician in this instance for treatment.

CONCLUSION

Based on the above cited arguments, the Defendants would respectfully request that the Order of South Carolina Workers Compensation Appellate Panel be reversed in its entirety.

Respectfully Submitted,



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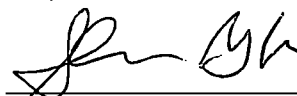
PROOF OF SERVICE

I certify that I have served the Initial Brief by depositing a copy of the same in the United States Mail, postage prepaid, on January 11, 2017 to the following parties, and or their representatives:

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Re: Jeffrey Miller, Employee, Claimant, Respondent v. Alice Manufacturing Co. and Great American Alliance Insurance Company, Appellants
Appellate Case No. 2016-002486

Dear Honorable Kitchings:

Please find enclosed herewith the Initial Brief, Proof of Service and Designation of Matter on appeal of appellants.

By copy of this letter, I am hereby serving Jeffrey Miller, through his counsel, Mitchell K. Byrd, Jr. and Monty D. Desai. If you have any questions, please do not hesitate to contact me.

Sincerely,

E. Ros Huff, Jr.
Shelby G. Hapeshis
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ERHjr/ea

Enclosure

cc: Mitchell K. Byrd, Jr., Esquire
Monty D. Desai, Esquire
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