THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE WORKERS COMPENSATION COMMISSION

T. Scott Beck, Commissioner
Susan S. Barden, Commissioner
Gene McCaskill, Commissioner

WCC File No. 1413546
Appellate Case No. 2016-002294

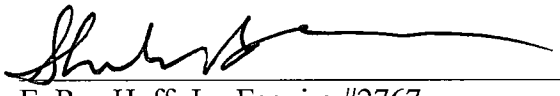
Timothy McDuffie, Employee, Claimant, Respondent,

v.

Johnson Food Services, LLC, Employer, and Great American Alliance Insurance Co./Strategic Comp., Carrier, Appellants.

INITIAL BRIEF

March 31st, 2017



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2. **Did the Commission err in determining that the claimant was entitled to temporary total disability benefits, the error being that temporary total disability benefits was not pled, raised or properly brought before the hearing Commissioner, thus denying the Defendant's notice/due process?**
3. **Did the Commission err in appointing Dr. Mazoue as the authorized treating physician as the defendants have the right to choose?**
4. **Is the Commission's order defective, improper and not enforceable because of numerous deficiencies?**

STATEMENT OF THE CASE

On September 19, 2014, Claimant, Timothy A. McDuffie, sustained a compensable accident while performing his job duties for Defendant, Johnson Food Services, LLC, in Richland County, South Carolina. As this Employer and its Carrier, Great American Alliance Insurance Company, acknowledged the compensability of a back injury component, they subsequently authorized Mr. McDuffie's receipt of certain medical treatment through several providers, primarily Drs. Michael W. Peelle of Moore Orthopaedics and Stewart Young of First Care. The claimant was ultimately released and found to be at MMI by Dr. Young on December 31, 2014. He was given a 0% rating to his lumbar spine.

Per Form 50 dated June 12, 2015, the claimant's attorney claimed an additional injury to the left leg and further medical treatment for the left leg and back and that the claimant had not yet reached maximum medical improvement. This Form 50 prompted Defendants' filing of a July 10, 2015 Form 51 through which Defendants again denied Mr. McDuffie's need for further medical care.

A hearing was held on October 29, 2014 on the Form 50/51.During the course of this hearing, the hearing commissioner considered testimony from the claimant and reviewed the medical evidence submitted by both parties. The Hearing Commissioner issued an order on May 16, 2016 finding Defendants: "(a) accept financial responsibility for all medical modalities previously provided/prescribed by any authorized healthcare specialists, as well as for the charges stemming from Dr. Mazoue's June 10, 2015 evaluation; (b) authorize the additional causally related medical treatment, medications, evaluations, diagnostic testing, evaluative procedures, physical therapy, surgical procedures, etc. provided/prescribed by Dr. Mazoue who is hereby designated as Mr. McDuffie's treating physician relative to the left knee injury component for the purposes of this claim; (c) accept financial responsibility for **treatment** of Mr. McDuffie's lumbar posttraumatic facet syndrome through an appropriate specialist of its choosing, who shall provide **treatment** for this condition as a causally related result of Mr. McDuffie's compensable accident; and (d) pay temporary total disability compensation (at the rate specified herein) effective the day following his last active work date until such time as this obligation is relieved by further Order of this Commission". It is from that order that Defendants appeal.

On September 19, 2014, Mr. McDuffie sustained a compensable injury to his back at the Johnson Food Services, LLC facility located at Fort Jackson military base in Richland County, South Carolina. He stated that he injured himself when he tripped after coming in contact with a pipe. Mr. McDuffie worked at Johnson food services for approximately sixteen (16) months.

Mr. McDuffie was directed by his Employer to Medcare Urgent Care Center (September 20, 2014). At that visit, the doctor performed an examination which was essentially normal wherein the claimant had normal range of motion, gait, stance, and posture. He also had a normal

exam of the back. An x ray of the spine was performed that was also normal and there was **no soft tissue swelling. He was assessed with a back sprain and he only complained of pain in his back and his calf.** (Cl's APA Nos. 7 & 8)

When his pain persisted, Mr. McDuffie sought further examination through the Palmetto Health Baptist Emergency Room (September 23, 2014), where he was diagnosed with left buttocks pain and sciatica. He had a normal full ROM at the left hip, knee, and ankle. (Cl's APA No. 14)

On the following day, Mr. McDuffie was examined, per Defendants' directive, by Dr. Stewart Young of First Care, who diagnosed the claimant with a lower back injury. Left knee sprain and left leg injury and stated that "all injuries are minor." By September 29, 2014, the claimants symptoms had subsided and Dr. Young agreed to return the claimant to work. Dr. Young noted the following:

> Normal gait, left knee is normal to palpation and has normal ROM; and crossing the left leg over the right he does have some MCL pain but there is no ligament instability. The patella is freely moveable, not ballotable and non-tender. The low back is non-tender and he has normal ROM in torso rotation, with some mild low back pain on full rotation to the right, negative straight leg raise. Left thigh musculature is non-tender and without spasm. The patient is vastly improved and has no residual findings that would suggest he is not able to work without restriction, with which he agrees. (Cl's APA No. 13 p. 101)

Even the claimant agreed that he was able to work at that visit. On October 13, 2014, the claimant again had a normal exam for his back and his knee and again his straight leg tests were negative. On December 31, 2014, the claimant was again released to work as he had no complaints. As the orthopaedist noted at the exam, December 31, 2014 follow-up visit, Dr. Peelle: (a) indicated the lumbar MRI scan did not reveal any disc pathology;

(b) offered no additional treatment; and (c) discharged him to resume full duty work activities effective January 5, 2015. In fact, the MRI findings on December 19, 2014 showed **no abnormalities to account for left-sided pain. The claimant then sought treatment on his own with numerous doctors for his subjective pain complaints.** (Cl's APA No. 13 pp. 101-115)

ARGUMENTS

ARGUMENT I

The Commission erred in determining that the claimant's injury to his right lower extremity was compensable, the error being that this finding is not supported by the preponderance of the evidence.

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.29, 142 (1970). Defendants provided treatment to the claimant for his alleged back injury. The claimant himself even stated that he was able to return to work and better when Dr. Young released him. There is no diagnostic testing to confirm the claimant's subjective pain complaints. Therefore, it was error for the Commissioner to award further medical treatment.

ARGUMENT II

The Commission erred in determining that the claimant was entitled to temporary total disability benefits, the error being that temporary total disability benefits was not pled, raised or properly brought before the hearing Commissioner, thus denying the Defendant's notice/due process.

While the issue of temporary total disability was ruled upon by the Commissioner, it was NEVER raised nor properly before the Commissioner. The Form 50 Request for Hearing under paragraph eight (8) is **BLANK**. Therefore, the issue of temporary total disability was not raised, noticed nor addressed at the hearing. The claimant's Form 58 is also devoid of any mention of TTD benefits. TTD was not raised at the hearing. (HT pp 4-17).

As such, the hearing Commissioner did not have the issue of TTD before her and she exceeded her authority in making a ruling with regard to the temporary total disability issue. Further, because the Defendants were never given notice of the TTD issue or the opportunity to be heard on the issue at the hearing, their due process rights were violated.

Under South Carolina's Constitution, due process in the administrative context is established by S.C. Const. Art. I, § 22. S.C. Ambulatory Surgery Ctr. Ass'n v. S.C. Workers' Comp. Comm'n, *389 S.C. 380, 699 S.E.2d 146,* (S.C. 2010). The fundamental requirements of due process under the United States Constitution and the South Carolina Constitution include notice, **an opportunity to be heard** in a meaningful way, and judicial review. S.C. Ambulatory Surgery Ctr. Ass'n v. S.C. Workers' Comp. Comm'n, *389 S.C. 380, 699 S.E.2d 146,* (S.C. 2010). Because Defendants due process rights were violated without notice and an opportunity to be heard on the issue of TTD, the commissioner's order is erroneous and should be reversed.

ARGUMENT III

The Commission erred in appointing Dr. Mazoue as the authorized treating physician as the defendants have the right to chose.

The Workers Compensation Commission committed an error of law when they appointed Dr. Mazoue 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 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.

ARGUMENT IV

The Commission's order is defective, improper and not enforceable because of numerous deficiencies.

Defendants contend that the order of the Hearing Commissioner is deficient in that conclusions of law 3,5,7,8, and 9 are not properly stated conclusions of law.

Section 42-17-40 and 1-23-350 outline the requirements for an order. Section 42-17-40 requires that an award have a statement of the findings of fact, rulings of law and other matters pertinent to the questions at issue. Statements not specifically designated as finding of fact or conclusion of law may not be considered and may results in at least a remand. Moore v. S.C.

Alcohol Beverage Control Commission, 304 S.C. 356, 404 S.e.2d 714 (S.C. App. 1991). Because the Order of the Hearing Commissioner is deficient, it should be reversed or the matter should be remanded in that respect.

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 March 31st, 2017 to the following parties, and or their representatives:

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March 31, 2017

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March 31, 2017

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Re: Timothy McDuffie, Employee, Claimant, Respondent v. Johnson Food Services, LLC, Employer, and Great American Alliance Insurance Co./Strategic Comp., Carrier, Appellants.
Appellate Case No. 2016-002294

Dear Honorable Kitchings:

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

By copy of this letter, I am hereby serving Timothy McDuffie, through his attorney, Andrew N. Safran. If you have any questions, please do not hesitate to contact me.

Sincerely,

E. Ros Huff, Jr.
Shelby G. Hapeshis
Huff & Hapeshis, LLC

ERHjr/eoa

Enclosure

cc: Andrew N. Safran, Esquire
Amy Bracy, SCWCC

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