

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

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MAY 01 2017

SC Court of Appeals

Appellate Case No.: 2017-000148

Kimberly Odom, Appellant,

vs.

Carolinas Hospital System, Employer, and
Indemnity Insurance Company of NA, Carrier, Respondents.

RETURN TO RESPONDENTS' MOTION TO DISMISS APPEAL

Appellants by and through their undersigned counsel hereby opposes the Respondents' Motion to Dismiss as follows:

STATEMENT OF THE CASE

This is a Workers' Compensation case. The Claimant sustained an admitted injury by accident on June 20, 2012. The Employer admitted injury to her back and left leg, paid Temporary Total Disability Benefits, and provided medical treatment including the insertion of a Spinal Cord Stimulator. By Consent Order of March 18, 2014, the parties resolved the Indemnity portion of the claim.

Thereafter, the Claimant filed a change of condition claim, pursuant to S.C. Code §42-17-90 and Estridge v. Joslyn Clark Controls, 325 S.C. 532 (Ct. App. 1997), alleging that the

Claimant was no longer at maximum medical improvement as her psychological condition had deteriorated as a result of the injury.

By Order of June 28, 2016, the Single Commissioner found that the Claimant had suffered a change in condition and was no longer at maximum medical improvement. (See Order p. 12, Rulings of Law No. 3 and No. 4).

With regard to temporary total disability benefits the Single Commissioner found:

23. **Given that no physician has removed the Claimant from work with regard to the worsening of her psychological condition,** the issue as to Claimant's entitlement to temporary total disability benefits due to and caused by the Claimant's change of condition is premature at this time and reserved for further determination.
(06/28/16 Order p. 12, Finding 23). (Emphasis added).

The Claimant appealed to the Workers' Compensation Commission Appellate Panel, which affirmed. (12/30/16 Order, pp. 10-11, Finding 23).

This appeal followed.

The Respondents Move to Dismiss the appeal, arguing that "Because the Commissioner reserved the issue of TTD for further determination, the Commission's order is not a final decision and therefore, is not immediately appealable." (Respondents' Brief, p. 4-5).

ARGUMENT

The Commission erroneously and finally denied the Appellant's current entitlement to temporary total benefits; refusing to consider her physical restrictions.

In her appeal the Appellant argues that the Commission erred in failing to find that the Claimant was entitled to Temporary Total Compensation given that the Claimant has not reached

Maximum Medical Improvement, and had suffered work-related restrictions that prevent her from performing her job.

In particular, by virtue of the Order of December 30, 2016, the law of the case is that the Claimant is not at maximum medical improvement. (12/30/16 Order p. 11, Ruling of Law No. 4). This Court, in Lee v. Bondex, Inc., 406 S.C. 97, (Ct. App. 2013), held that prior to maximum medical improvement when seeking temporary total disability benefits:

... a claimant must prove only that work restrictions prevent him from performing the job he had before the injury, and that his current employer has not offered him light duty employment.

Lee v. Bondex, Inc. 406 S.C. 97, 102(Ct. App. 2013).

Claimant has restrictions as a result of this accident outlined in her Functional Capacity Evaluation on July 19, 2013. (APA No. 3, pp. 000116-000123, 000126). That evidence is uncontradicted in the record. Those restrictions prevent her from performing her job with the Employer as a direct care nurse, resulting in her termination on November 5, 2012. (APA No. 4).

Indeed, as the Commission found:

5. Claimant underwent Vocational Evaluation on 10/28/13 and 01/07/14. J. Adger Brown, Jr. and Joel D. Leonard both indicated that Claimant would not be able to return to her previous employment as a nurse providing direct care.

(12/30/16 Order, Finding of Fact No. 5, p. 3).

Therefore, pursuant to the Order of the Commission, the Claimant is not at maximum medical improvement. Pursuant to Lee v. Bondex, a claimant seeking temporary total disability benefits prior to maximum medical improvement must prove only that work restrictions prevent her from working the job she had before the injury and that light duty was not offered. The undisputed evidence in the record is that she cannot perform the job she had before the injury

and that she has been terminated because of that inability. (APA No. 4, p. 148). Therefore, as a matter of law, pursuant to Lee v. Bondex, Claimant is entitled to temporary total disability benefits.

The Commission disagreed, finding that:

23. Given that no physician has removed the Claimant from work with regard to the worsening of her psychological condition, the issue as to Claimant's entitlement to temporary total disability benefits due to and caused by the Claimant's change of condition is premature at this time and reserved for further determination. (12/30/16 Order pp. 10-11, Finding 23). (Emphasis added).

There is no dispute that the Claimant's work restrictions are a product of her work-related injury. The Commission cites no law in support of the proposition that some restrictions should be considered and other restrictions discounted when judging a Claimant's ability to perform their job; and, therefore, their entitlement to temporary total disability benefits.

To the contrary, this Court has held in Lee v. Bondex, Inc. that prior to maximum medical improvement "for temporary total disability benefits Claimant must prove only that work restrictions prevent him from performing the job he had before the injury, and that his current employer has not offered him light duty employment." Lee, at 102. That is precisely the case here.

In sum, the Appellant argues that the Commission erred in refusing to consider the Claimant's physical restrictions when it denied the Appellant temporary total compensation benefits.

In their Motion to Dismiss the Appeal, the Respondents argue that the Appellant Panel's decision is not a final decision subject to review pursuant to S.C. Code Ann. §1-23-380 (Supp.

2014); and Bone v. U.S. Food Serv., 404 S.C. 67, 73, 744 S.E. 2d 552, 556 (2013). In support of that contention, the Respondents argue that “Because the Commission reserved the issue of TTD for further determination, the Commission’s order is not a final decision and, therefore, it is not immediately appealable.”

On the contrary, the Appellant Panel did not just simply hold the issue of temporary total disability benefits in abeyance.¹ Rather, the Commission held that “**Given that no physician has removed the Claimant from work with regard to the worsening of her psychological condition**, the issue as to Claimant’s entitlement to temporary total disability benefits due to and caused by the Claimant’s change of condition is premature at this time and reserved for further determination.” (06/28/16 Order p. 12, Finding 23).

In effect, the Commission found that the Claimant was not entitled to temporary total disability benefits because no physician had removed the Claimant from work with regard to the worsening of her psychological condition. The Commission refused to consider the Claimant’s physical restrictions which do qualify the Claimant for temporary total disability benefits.

The Commission reserved for future determination whether the Claimant might, in the future, have psychological restrictions that would qualify her for temporary total, in the future.²

¹ However, even if it had, the Commission may not simply hold issues before them in abeyance, avoid making decisions and, consequently, avoid having those decisions appealed. See Hilton v. Flakeboard AM. Ltd., 418 S.C. 245, 251-252 (2016) (holding Commission erred in ordering re-litigation of entire dispute without regard to matters raised by appealing party and without any explanation why such an extreme remedy is appropriate forcing the Claimant to face the possibility of “repeated unexplained ‘do overs’ before a final decision of the Commission”).

² With regard to the Claimant’s restrictions for psychological condition, the Respondents improperly attempts to insert, by way of Exhibit to their Motion, documents that are outside of the record. See S.C. Code §1-23-380 (A) (S) (providing that judicial review of agency decision shall be confirmed to the record). Respondent objects to that submission.

The Commission finally decided for now, and forever, that the Claimant would not be entitled to benefits based upon her physical restrictions. That decision is final, is in error, and is appealable.

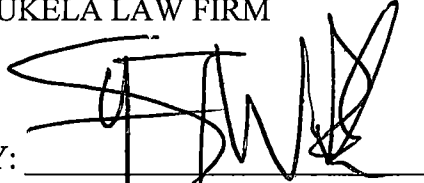
The crux of the issue before the Court of Appeals, which has been finally determined by the Workers' Compensation Commission, is whether the Claimant is entitled to temporary total disability benefits as a result of all of her work related condition; including her admittedly work related physical restrictions. That question has been finally determined by the Commission, and is ripe for appeal to this Court.

CONCLUSION

For the foregoing reasons, the Respondents' Motion to Dismiss Appeal should be denied.

Respectfully submitted,

WUKELA LAW FIRM


BY: _____
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April 28th, 2017

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APPEAL FROM THE SOUTH CAROLINA
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Appellant Case No. 2017-000148

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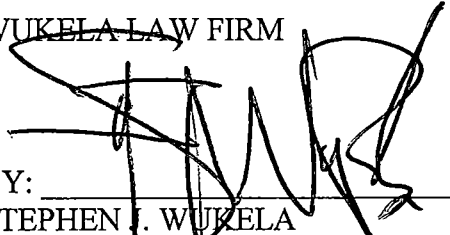
vs.

Carolinas Hospital System, Employer, and
Indemnity Insurance Company of NA, Carrier, Respondents.

PROOF OF SERVICE

I certify that I have served the Initial Brief of Appellant and Designation of Matter to be Included in the Record on Appeal on Respondents by depositing a copy of it in the United States Mail, postage prepaid, on April 28th, 2017, addressed to the Respondents' attorney of record, Christian Stegmaier, at his office at Collins & Lacy, 1330 Lady Street, 6th Floor, Columbia, S.C., 29201.

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SC Court of Appeals

Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
PO Box 11629
Columbia, SC 29211

Re: Kimberly Odom v. Carolinas Hospital System
WCC File No. 1208234
Appellate Case No. 2017-000148

Dear Ms. Kitchings:

Enclosed for filing, please find the original and six (6) copies of the Return to Respondents' Motion to Dismiss Appeal.

By copy of this letter, I am serving counsel for Respondents, Christian Stegmaier, with a copy of the Return to Respondents' Motion to Dismiss Appeal indicated by the enclosed Proof of Service. Thank you for your consideration in this manner. Please do not hesitate to contact me with any questions or if additional information is needed from our office.

With kind regards, I am

Yours truly,

WUKELA LAW FIRM

STEPHEN J. WUKELA

SJW:bjm

Enclosures

cc: Christian Stegmaier, Esquire



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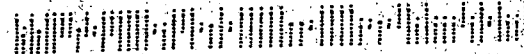
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