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THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

**ORIGINAL**

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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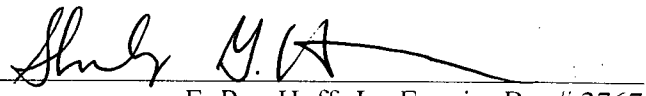
**SC Court of Appeals**

v.

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

**FINAL REPLY BRIEF**

April 3, 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.

## ARGUMENTS

In response to Respondent's Brief, Appellant/Employer submits the following 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.**

“Substantial evidence” is not a mere scintilla of evidence nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached or must have reached in order to justify its action. Lark v. Bilo, 276 S.C. 130, 276 S.E.2d 304 (1981).

The claimant’s attorney contends that substantial evidence supports a finding of compensability and relies on the medical opinion of Dr. Jacobus wherein the doctor determined that the claimant had been unable to work due to his injury. However, to rely upon Dr. Jacobus’ opinion entirely, the bulk of the evidence, including numerous hospital reports, would have to be ignored.

The date of accident is unclear and according to the medical records can range anywhere from April to May. Moreover, the description of the accident is unclear and inconsistent. There is no substantial evidence in the record to support a finding of compensability. In order to do so, the entire record with the exception of Dr. Jacobus’ opinion would have to be ignored.

The claimant’s attorney contends that the testimony of defendant’s witness is not reliable because she did not bring any documents to the hearing to support her testimony. This is irrelevant. Kim LeCroy, the defendant employer’s witness, testified that Claimant was terminated after 3/17/2015 for being out of work and not notifying anyone. (R. p 119 lines 1-7) It is not the employer’s burden to prove that the claimant is not entitled to TTD. The Employer met their burden through the sworn testimony of Kim LeCroy that it was error for the Commissioner to find that the claimant was entitled to TTD.

The claimant's attorney himself conceded that there were inconsistencies in terms of the timeline of the injury. However, he contends that the testimony of Kim Lecroy, medical records of Dr. Jacobus, medical records from Easley Family practice, and medical records from Palmetto Proactive Healthcare and Upstate Bone and Joint are evidence that an injury occurred. This is also untrue. The testimony and medical records from those actually support the employer's position as all of the claimant's recitation of the details is inconsistent.

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). (R. p 152). 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). (R. p 159-165). 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). (R. p 109 lines 2-5; p. 110 line 6). To ignore all of the inconsistencies in the claimant's testimony, the Commissioner would have to look blindly at one side of the evidence.

The claimant was not forthright in his testimony. The Commissioner speculates that the claimant did not intend to be deceptive. Therefore, his testimony was credible. This is error. A Commissioner's finding cannot be based upon speculation, conjecture or surmise. For a Commissioner to opine as to the claimant's mental state of his intention not to be deception, is improper.

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. Moreover, the substantial evidence does not support the commission's finding of compensability.

## 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.**

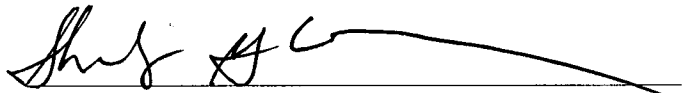
The claimant's attorney contends that the McKinney case is not applicable because it is not the Employer that wants to direct treatment but rather the Commissioner. This is a distinction without a difference. The McKinney case stands for the proposition that the employer has the right to choose the treating physician. If the Commissioner does not get to appoint the treating physician because they should not in the case as it is not an emergency circumstance under 42-15-60, then the Employer certainly would have the right to choose the 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.

## 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,

April 3, 2017

  
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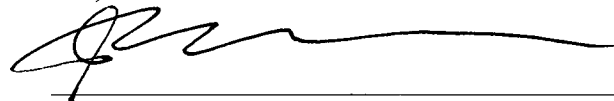
**PROOF OF SERVICE**

I certify that I have served the Appellate's Final Reply Brief by depositing a copy of the same in the United States Mail, postage prepaid, on April 3, 2017 to the following parties, and or their representatives:

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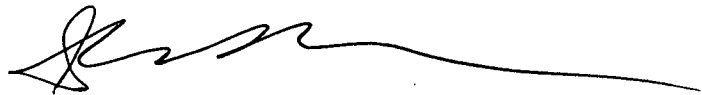
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**CERTIFICATE OF COUNSEL**

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In compliance with Rule 211, the Appellant's Final Reply Brief is identical to the brief previously served under Rule 208 with the exception that it now contains references to the record.

April 3, 2017



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