

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE WORKERS' COMPENSATION COMMISSION

Aisha Taylor, Commissioner
T. Scott Beck, Commissioner
Avery B. Wilkerson, Commissioner

W.C.C. FILE NO.: 1318602

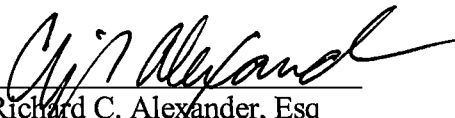
Appellate Case No. 2017-001246

DOROTHY MILLER.....RESPONDENT,

v.

Husqvarna, EMPLOYER, and Ace American Insurance Company.....APPELLANTS.

INITIAL BRIEF OF RESPONDENT


Richard C. Alexander, Esq
Shelby Leeke Law Firm, LLC
3614 Ashley Phosphate Rd.
North Charleston, South Carolina, 29418
Telephone: (843) 297-8485
Facsimile: (843) 297-8497
chip@leekelaw.com

Attorney for Respondent

Other Counsel of Record:
Shelby G. Hapeshis, Esq.
Huff & Hapeshis, L.L.C.
PO Box 1935
Irmo, South Carolina 29063
Telephone: (803) 252-2232

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SC Court of Appeals

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COUNTER-STATEMENT OF ISSUES ON APPEAL

1. Whether the Single Commissioner's findings of repetitive trauma injuries to the shoulders and an exacerbation of this preexisting condition in Claimant's shoulders due to bilateral rotator cuff tears should be upheld when it is amply supported by the greater weight of the evidence and applicable law.
2. Whether the Single Commissioner finding Claimant was entitled to temporary total disability benefits and medical benefits under S.C. Code Ann. § 42-9-10 must be upheld when it is amply supported by the greater weight of the evidence and applicable law.
3. Whether the Single Commissioner's determination that Dr. Nahigian would be the authorized treating physician for Claimant's future bilateral shoulder treatment must be upheld when it is amply supported by the greater weight of the evidence and applicable law.

STATEMENT OF THE CASE

This matter was before the Single Commissioner R. Michael Campbell, II (hereinafter "Single Commissioner") on August 17, 2016 in Columbia, South Carolina to determine issues set forth in Defendants' Form 21. The purpose of the hearing was to determine if Defendants were entitled to pay compensation to Claimant, if Defendants were entitled to a credit for temporary total disability benefits paid in excess of award, and if Claimant suffered compensable repetitive trauma injuries to her bilateral shoulders.

Claimant contended she injured her right wrist due to pulling down on an air gun while working an assembly line on October 8, 2013. Claimant also contended she sustained bilateral rotator cuff tears as a result of repetitive trauma injuries caused by years of overhead assembly line work while employed by Husqvarna. She sought a finding of compensability of her right and left shoulder injuries and a finding of entitlement to future medical treatment and reimbursement for past medical treatment. She further denied she had reached maximum medical improvement and denied

Defendants were entitled to stop payment of temporary total disability benefits. Claimant requested the issue of permanency be held in abeyance until a determination of compensability was made.

Defendants contended Claimant had been released at maximum medical improvement for her admitted right wrist injury with restrictions to the right elbow, wrist, and hand of no repetitive work and lifting less than one pound with the right upper extremity and that any finding of disability should be in line with the impairment rating of 7% given by Dr. William Muirhead. The Defendants denied compensability of the alleged right and left shoulder injuries.

ARGUMENTS

- I. **The Single Commissioner's finding of repetitive trauma injuries to the shoulders and an exacerbation of this preexisting condition in Claimant's shoulders due to bilateral rotator cuff tears is supported by the greater weight of the evidence and the applicable law and should be affirmed.**

Claimant has worked for Husqvarna off and on since 1994. Her position with Husqvarna is a machine operator. Claimant's bilateral shoulder complaints were not first brought into question when she saw Dr. Nahigian in November 2015. In fact, the claimant made repeated inquiries about her shoulders after her acute work injury in October 2013, but due to her shoulders not being authorized for treatment, nothing was done to address her complaints. That is, until May 13, 2015 through June 30, 2015 when Claimant attended therapy with Sports Plus Physical Therapy where she was treated for symptoms in her right arm in addition to symptoms in **both** shoulders. (Defendant's APA #12, pp. 860-81). She attended regular therapy appointments during this time and was treated for ongoing complaints in her shoulder. On June 30, 2015, Claimant was released from therapy because she was not making progress on her shoulder range of motion, was not making any functional gains from therapy, and had met her maximum rehab potential, NOT

maximum medical improvement. (Defendant's APA #12, pp. 882-83). She was released not because there was nothing more that could be done for her shoulders but because conservative measures had failed and surgery was necessary.

On September 22, 2015, Claimant presented to Dr. Buckaloo complaining of bilateral shoulder pain for multiple years. This visit was not covered by or at the direction of Defendants. Dr. Buckaloo noted decreased range of motion bilaterally in the shoulders, and he reviewed a July 17, 2015 MRI of the right shoulder and a July 28, 2015 MRI of the left shoulder that showed various tears and degenerative issues bilaterally. Dr. Buckaloo opined these were age indeterminate but certainly chronic based on the atrophy of the associated supraspinatus muscle belly of the shoulders (Defendant's APA #5, pp. 807-11).

On November 11, 2015, Claimant began treatment with Dr. Nahigian of Carolina Shoulder and Knee Specialists for her bilateral rotator cuff tears. Dr. Nahigian's treatment notes mentioned the cause of injury being overhead use of air guns (Claimant's APA #25, pp. 1923). His physical examination and review of radiology reports confirmed rotator cuff tears, and because she had exhausted conservative treatment, he proceeded with right shoulder arthroscopy, rotator cuff repair, distal clavicle resection, and subacromial decompression on December 8, 2015 (Claimant's APA #25, pp. 1923-27).

Dr. Nahigian has provided multiple consistent opinion statements since March 2016 where he has stated that Claimant's bilateral rotator cuff tears are work-related. On March 14, 2016, Dr. Nahigian completed a questionnaire at the request of Charles McCutchen, Esq. where he opined, to a reasonable degree of medical certainty, that the proximate cause of Claimant's bilateral rotator cuff tears was repetitive actions arising out of her employment. While Dr. Nahigian stated that no

additional medical treatment or surgeries would be needed and she has reached maximum medical improvement, he clarified during his deposition that he thought questions 3, 4, and 5 were pertaining only to the right shoulder, which he had already repaired (Claimant's APA #26, pp. 1941-42; Dr. Nahigian's Deposition, p. 48, ll. 17-25, p. 49, ll. 1-6).

On May 26, 2016, Counsel for Claimant sent a questionnaire to Dr. Nahigian where he responded, to a reasonable degree of medical certainty, that Claimant suffered bilateral rotator cuff tears due to repetitive trauma injuries and that there was a direct causal relationship between the condition under which the work was performed and the injuries sustained. He stated that his opinion was based on Claimant's history and symptoms reported as well as signs shown on physical examination. He opined that she would benefit from additional treatment (Claimant's APA #27, pp. 1943-45; #28, pp. 1946-47).

On June 27, 2016, Dr. Nahigian participated in a deposition where he testified that the damage in her right shoulder included severe changes to the right AC joint that are common with people doing her type of work (Dr. Nahigian Deposition, p. 31, ll. 1-2; p. 32, ll. 2-5; p. 34, ll. 6-11; p. 38, ll. 20-21; p. 45, ll. 18-23; p. 46, ll. 2-14). In a July 1, 2016 follow up questionnaire after the deposition, Dr. Nahigian opined, to a reasonable degree of medical certainty, that based on the facts and information presented at his deposition, that nothing had changed regarding his opinion from the May 26, 2016 questionnaire he completed. Additionally, Dr. Nahigian opined that the claimant would require future medical treatment for her left shoulder including but not limited to an MRI, surgery, and therapy. (Claimant's APA #28, pp. 1946-47).

Dr. Nahigian's opinion does not change back and forth, as Defendants claim. Dr. Nahigian was presented with questions about Claimant having prior shoulder complaints, and Defense Counsel

attempted to focus on a specific date of onset and whether Dr. Nahigian could state with a reasonable degree of medical certainty when her repetitive trauma injury occurred (Dr. Nahigian Deposition, pp. 13-26; p. 16, l. 8; p. 17, l. 8; p. 21, ll. 10-11; p. 23, l. 14). This focus on a specific date of injury is irrelevant in a repetitive trauma injury case under S.C. Code Ann. § 42-1-172, and Dr. Nahigian's inability to state to a reasonable degree of medical certainty what specific date her bilateral rotator cuff tears occurred on is moot.

Defendants have supplied a graph in their Initial Appellant Brief with various treatment dates in Claimant's past that are apparently related to her shoulder complaints. However, of the twenty-eight visits Defendants have referenced (and one questionnaire), nine of those visits make no mention of shoulder complaints and another nine were after the admitted right wrist injury. Of the visits Defendants have mentioned, exactly zero of those visits have a physician stating what the cause of Claimant's bilateral shoulder complaints are, except for Dr. Nahigian relating them to her work.

Dr. Buckaloo's opinion that the cause of the shoulder injuries predated the October 8, 2013 right wrist injury is, first, in direct contravention to his medical records noting they are age-indeterminate and, second, erroneous, as S.C. Code Ann. § 42-1-172(A) and South Carolina case law make no requirement of having a precise date. Under the statute, it clearly specifies the injury is **gradual** in onset. Because a repetitive trauma injury was disease-like in its gradual onset does not preclude it from coverage as an injury by accident, and a lack of definite time of injury is not dispositive. *Pee v. Avm, Inc.*, 352 S.C. 167 (2002). Moreover, Defendants have attempted to rely on Claimant complaining about shoulder pain after a motor vehicle accident as medical evidence or opinion that detracts from Dr. Nahigian's findings.

Defendants appear to make a claim of this being untimely although no specific argument for

that was made during the hearing and should be dismissed as not preserved. However, to address any issue, it is clear that the last day of exposure is the date from which the statute of limitations would begin running in a repetitive trauma injury case. *Schurlknight v. City of N. Charleston*, 352 S.C. 175 (2002). Claimant became aware of the bilateral rotator cuff tears from July 2015 MRIs and immediately amended her Form 50, which was well within two years.

Respondent respectfully contends that the Single Commissioner committed no legal or factual error in this regard. Regardless of finding that the Claimant alleged an exacerbation of a preexisting condition in the rotator cuff tears, he has relied on the medical evidence and opinions available to find repetitive trauma injuries that were directly caused by Claimant's work under S.C. Code Ann. § 42-1-172(B). Whether the injuries were repetitive trauma tears or whether there was osteoarthritis due to years of overhead work that culminated (at some point) with bilateral rotator cuff tears is inconsequential, as the preponderance of the evidence shows the bilateral shoulder injuries are compensable. As such, the November 9, 2016 Decision and Order should be affirmed.

II. The Single Commissioner properly found Claimant is entitled to temporary total disability benefits and medical benefits under S.C. Code Ann. § 42-9-10.

Employer has been unable to accommodate Claimant's restrictions. At the time of her release for the admitted injury, a dispute arose as to whether the Claimant's bilateral shoulder injuries were compensable, which has led to this extended period of continued temporary total disability benefits. To date, Defendants have not offered any alternative work, and Claimant has only sporadically been able to work a few days sitting with an elderly person. There is evidence through her hearing testimony that she has been unable to work. Claimant has attempted to complete vocational rehabilitation, but due to her injuries, she has been unable to maintain

competitive employment.

Through the medical evidence and opinions presented above, Claimant clearly met her burden of proof to show she has suffered compensable injuries that preclude her from working, and there is no evidence that she was offered alternative duty or that she has maintained subsequent employment. As such, Respondent respectfully contends that the Single Commissioner committed no legal or factual error in this regard and the November 9, 2016 Decision and Order should be affirmed.

III. The Single Commissioner properly determined Dr. Nahigian would be the authorized treating physician for Claimant's future bilateral shoulder treatment.

Defendants' failure to provide medical care under S.C. Code Ann. § 42-15-60(a) forced Claimant to seek treatment on her own. Claimant's desire to return to work as soon as possible led to a referral to Dr. Nahigian for the treatment of her shoulder injuries. Defendants effectively created an emergency for Claimant in needing to repair her shoulders so she could return to work. If Claimant had delayed the necessary surgical repair of her compensable shoulder injuries, Defendants could be arguing she delayed recovery in an attempt to stay out of work and would not be entitled to benefits.

Defendants have relied upon *McKinney v. Kimberly Clark Corp.*, 658 S.E.2d 112 (App. 2008) to argue the Single Commissioner does not have the authority to name a treating physician. However, the facts of *McKinney* differ from our case, as the claimant in *McKinney* sought treatment for injuries from a chiropractor that exceeded \$48,000 and retroactively wanted that provider appointed so the employer/carrier had to cover the bill. Here, Claimant sought treatment from a board-certified orthopaedic surgeon, who Defendant's co-counsel even admitted that he had read an unnamed number of reports from presumably related to prior Workers' Compensation claims, which is further

testament to his knowledge and prowess (Dr. Nahigian Deposition, p. 3, ll. 24-25). Defendants will not face prejudice in any regard related to the future cost of treatment, as it will be paid under the fee schedule and would be the same regardless of the surgeon. Fortunately, Defendants will also not face an unnecessary burden in reimbursing past medical treatment under Dr. Nahigian either, as Claimant's outstanding balance with Dr. Nahigian's office was only \$676.68.


The case relied upon by the claimant in *McKinney* sets the precedent here, as the appellate panel in that case designated a treating physician, and the defendants in that case refused to pay for additional treatment and sought further to have the claimant evaluated by another physician. *Risinger v. Knight Textiles*, 353 S.C. 69, 577 S.E.2d 222 (Ct.App.2002). *McKinney* has clearly stated S.C. Code Ann. § 42-15-60 and § 42-9-10 (1976) do not give a unilateral right to claimants to select their treating physician, but it also does not state that the Commissioner does not have the authority to order a treating physician. Dr. Nahigian has already begun treatment for her bilateral shoulder complaints with a repair of the right shoulder, and there is no reason for Claimant to be required to switch to a new surgeon in the middle of her treatment.

As such, the Single Commissioner is afforded the authority to appoint a treating physician. Respondent respectfully contends that the Hearing Commissioner committed no legal or factual error in this regard, and the November 9, 2016 Decision and Order should be affirmed.

CONCLUSION

Respondent respectfully contends the Single Commissioner's findings and conclusions that Respondent sustained compensable bilateral shoulder injuries is supported by the greater weight of the evidence and the applicable law. Therefore, Respondent seeks a full affirmation of the November 9, 2016 Decision and Order.

Respectfully submitted,


Richard C. Alexander, Esq
Shelby Leeke Law Firm, LLC
3614 Ashley Phosphate Rd.
North Charleston, South Carolina, 29418
Telephone: (843) 297-8485
Facsimile: (843) 297-8497
chip@leekelaw.com
Attorney for Dorothy Miller, Respondent

July 25, 2017
North Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE WORKERS' COMPENSATION COMMISSION

Aisha Taylor, Commissioner
T. Scott Beck, Commissioner
Avery B. Wilkerson, Commissioner

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v.

Husqvarna, EMPLOYER, and Ace American Insurance Company.....APPELLANTS.

PROOF OF SERVICE


The undersigned hereby certifies that on the date indicated below he served counsel for the Appellants with a copy of the Initial Brief of Respondent and Designation of Matter by mailing copies of the same by United State Mail with first class postage prepaid to the following address:

Shelby G. Hapeshis, Esq.
Huff & Hapeshis, LLC
P.O. Box 1935
Irmo, SC 29063

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SC Court of Appeals


Richard C. Alexander, Esq.
Shelly Leeke Law Firm, LLC
3614 Ashley Phosphate Rd.
North Charleston, South Carolina, 29418
Telephone: (843) 297-8485

July 25, 2017

Attorney for Respondent



SHELLY LEEKE
LAW FIRM, LLC

Main Office

3614 Ashley Phosphate Rd.
N. Charleston, SC 29418

Phone: 843.297.8485

Fax: 843.297.8497

www.LeekeLaw.com

Call For Additional Office Locations

July 25, 2017

The Honorable Jenny Kitchings
Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, South Carolina 29211

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SC Court of Appeals

RE: Dorothy Miller v. Husqvarna
Appellate Case No.: 2017-001246

Dear Ms. Bracy,

Please find enclosed for filing the original and one (1) copy of the Initial Brief of Respondent and Designation of Matter in the above matter. I have also enclosed proof of service upon Counsel for Appellants. Please return the additional filed copies to me in the enclosed self-addressed stamped envelope.

Thank you for your attention to this matter. If you have any questions or need any additional information, please do not hesitate to contact me.

Sincerely,

Richard C. Alexander
Attorney at Law

RCA/mmw

Enclosures

CC: Shelby G. Hapeshis, Esq. (w/encls)



SHELLY LEEKE
LAW FIRM, LLC

3614 Ashley Phosphate Road
North Charleston, SC 29418

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SC Court of Appeals

The Honorable Jenny Kitchings
Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, South Carolina 29211