STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
APPELLATE PANEL, WORKERS' COMPENSATION COMMISSION

WCC File No.: 1516896

Appellate Case No.: 2017-001483

Herbert Randall . . . . . Appellant

v.

Palmetto State Transportation and
Cherokee Insurance Company
are the . . . . . Respondents.

INITIAL BRIEF OF THE APPELLANT

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QUESTIONS PRESENTED

I. DID THE WORKERS' COMPENSATION COMMISSION ERR IN FINDING AND/OR CONCLUDING THAT THE RESPONDENTS WERE IN COMPLIANCE WITH REGULATION 67-504 AND/OR S.C. CODE SECTION 42-9-260(B)

STATEMENT OF THE CASE

Troy Herbert Randall, the Claimant in this action, sustained an admitted injury by accident on October 31, 2015. He was driving an 18-Wheeler tractor/trailer for the Defendant/Employer, and was stopped on a highway in Texas due to a wreck ahead of him.

While stopped on the highway with his brakes set and his hazard flashers engaged, he was struck violently from behind. The impact had enough force to break the frame of the tractor he was pulling and pin him against the dashboard of the cab in which he was sitting. (Tr., p. 39 & 23).

The Claimant sustained significant injuries to his back, neck, left leg, left arm and psyche. The Claimant had preexisting scoliosis and his injury and accident aggravated this preexisting condition. (APA #6, p. 59) The Claimant was treated and initially, albeit wrongfully, was given light duty restrictions. Based upon the evidence and testimony, no meaningful offer of light duty employment was ever made by the Defendants. To the contrary, the Defendants initially paid TTD benefits, but said benefits were grossly and wrongfully terminated.

The Claimant admittedly failed a post-accident drug screen, said screen showing a positive result for marijuana. That fact notwithstanding, there is ***absolutely no proof whatsoever*** that the Claimant was intoxicated in any form or fashion at the time of the accident, nor was there ***any*** allegation or proof that the marijuana was in any way the proximate cause of the Claimant's accident. As stated hereinabove, the Claimant was stopped on the highway and

struck from behind. As such, there was nothing whatsoever that the Claimant could have done to avoid the accident. (Tr. pp. 23 – 24, See also Finding of Fact #6)

Although the Defendants presented testimony that the Claimant was supposed to complete some sort of Substance Abuse Program (SAP), they produced no evidence to substantiate that the Claimant ever received notice of same. (Tr. p. 26 & 44) Furthermore, the Defendants' witness admitted that he made no personal contact with the Claimant about the SAP. (Tr. p. 55) Likewise, although the Defendants alleged that they sent the SAP information to the Claimant via certified mail, they failed to go so far as to submit into evidence ***any*** documentation of this allegation – as such, any such allegation is based entirely on hearsay. (Tr. p. 54 – 55, 61, 62)

The Defendant also tried to maintain that the Claimant was terminated because he failed to follow through with the alleged offer of the SAP, but their own witness candidly admitted that the Claimant did ***not*** need to complete the SAP to perform the light duty work they allegedly offered to him. (Tr. p. 60, 62, 65 – 66)

The Claimant never returned to work for the required 15 days before his TTD benefits were stopped (See SC Code Section 42-9-260(B)). The Claimant was never offered light duty work within his restrictions. (Tr. p. 46 – 48)

Furthermore, and much more problematically, the Defendants failed to comply with Regulation 67-504(A) in that the Defendants never served the Claimant with 2 copies of the Form 15 terminating his TTD benefits. (Tr. p. 28) The Claimant's TTD was stopped on December 5, 2015, and he was without any income whatsoever for that entire time, i.e., more than a year. At the time of the Hearing, due to being forced to go without income for over a

year, the Claimant had lost virtually everything he owned and was reduced to living in a camper in the back yard of the parents of one of his friends. (Tr. p. 33)

Although the Single Commissioner accurately found that the Defendants improperly terminated TTD benefits, the Claimant would argue that, in addition to the Single Commissioner's basis for the finding, i.e., that the Defendants failed to prove that the Claimant was made aware of the alleged necessity that he complete the SAP (See Finding of Fact #21), but also that the Defendants failed to comply with Regulation 67-504(A) such that the Claimant is not only entitled to TTD benefits from December 5, 2015, through the present and continuing. The Claimant would also assert that he is entitled to a 25% penalty on all back/past due benefits due to the Defendants' improper termination of TTD benefits. The Claimant contends that the Singe Commissioner erred in finding that the Defendants were in compliance with S.C. Code Section 43-9-260(B).

ARGUMENT

It is the position of the Claimant that the Court of Appeals should review the evidence and testimony presented, and make new Conclusions consistent with the substantial evidence on the record.

As is well settled law in South Carolina, the Workers' Compensation Act is to be construed liberally in favor of the Claimant. Carter v Penny Tire and Recapping Co., 261 S.C. 341, 200 S.E. 2d 64 (1973); Hall v. Desert Aire, Inc. 376 S.C. 338, 656 S.E. 2d 753 (S.C. App 2007).

The case currently before the Court is almost directly analogous to the case of Martin v. Rapid Plumbing, 369 S.C. 278, 631 S.E. 2d 547 (S.C. App. 2006). In Martin, the South Carolina Court of Appeals held that the Defendant/Employer was liable for improper termination of TTD

benefits because they did not follow the procedures set forth in Reg. 67-504. What is more notable, the Martin Court held that benefits were improperly stopped because the Defendant/Employer ***did not file AND serve*** the requisite Form 15 for ***18 days*** following the termination of TTD benefits ***and*** because the Defendant/Employer did not attach the supporting documentation to the Form 15.

In the instant case, the Defendants did not ***file*** the Form 15 for ***11 days***. More notably; however, the Defendants ***did not EVER serve the Form 15 on the Claimant***. Reg. 67-504(A) ***requires***:

> The employer's representative may terminate or suspend temporary Compensation during the first one hundred fifty days after the employer has notice of the injury according to Section 42-9-260. When compensation is terminated or suspended, the employer's representative ***shall*** complete Section 1 and Section II of the Form 15, Temporary Compensation Report. The employer's representative shall file the Form 15 immediately with The Claims Department ***and shall serve two copies of the Form 15 immediately on the Claimant, according to Reg. 67-211 with documentation attached as to the reason for termination or suspension***. (Emphasis added).

As stated above, the Defendants in the instant case ***never served any*** copies of the Form 15 on the Claimant. (See Finding of Fact #19 and Conclusion of Law #3). As such, they utterly and completely failed to comply with Reg. 67-504, and, are therefore responsible for all TTD benefits.

In this case, the Commission erred in finding that the Defendants were in compliance with S.C. Code Section 42-9-260. More specifically, the Commission's Conclusions of Law Numbers 3 and 4 are directly incongruent. While it is uncontroverted that the Claimant was ***never served with a copy of any Form 15***, the Commission found that the mere ***filing*** of a Form 15 on December 17, 2015, was sufficient to put the Defendants in compliance with Reg. 67-504. Such a finding/conclusion is legally incorrect and without merit.

More specifically, the Regulation is clear that the ***mere filing of a Form 15 with the Commission is only half of the requirements***. The operative and important portion of the applicable Regulation, Reg. 67-504, is "***and shall serve two copies of the Form 15 immediately on the Claimant.***" In the case currently before the Court, the Commission both found as a fact, and concluded as a matter of law that the Defendants never ***served*** the Claimant with either of the Forms 15 they prepared in this matter. As such, the Defendants absolutely did ***not*** comply with Reg. 67-504.

That having been established, Finding of Fact #20, and Conclusion of Law #4 must, of necessity, be overturned. More specifically, the Defendants could not be "in compliance" as the Commission reasoned, if the Claimant was never ***served immediately*** with two copies of either the of the Forms 15. If the Defendants were not "in compliance" with Reg. 67-504, they likewise, could not be "in compliance" with S.C. Code Section 42-9-260.

First of all, the Commission never specified in which component of Section 42-9-260 the Defendants were purportedly in compliance (i.e., (B)(1) - (B)(6)). The Commission did, in fact, find that the SAP issue was sufficiently disproven by the Claimant, so one must assume that he was not basing his decision upon (B)(5). All of the other subsections; however, do not apply, so the Claimant would contend that ***any*** alleged compliance with Section 42-9-260 is erroneous.

That having been established, the Claimant would further contend that the Commission erred in failing to impose a 25% penalty on the unpaid/improperly terminated TTD benefits. S.C. Code Section 42-9-260(G) specifically provides for such a penalty and, as such, the Defendants should be liable not only for the $45,196.95 improperly withheld, but also for the 25% penalty upon same.

Finally, the Commission's ruling that the applicable Regulation, Reg. 67-504, does not provide for the continued TTD because the Regulation "does not provide for any entitlement to TTD for failing to follow proper procedure pursuant to the regulation" is misguided. It only stands to reason that Reg. 67-504 provides the ***only lawful manner for the termination of TTD benefits.***

As such, if the Defendants failed to comply with the proper procedure for termination of benefits, ***any*** unlawful termination outside the mechanism(s) set forth in the Regulation would be improper. If benefits are not properly stopped, then, by necessity, any benefits accrued during a period of lawful termination ***would constitute benefits to which the Claimant is still lawfully entitled.*** To hold otherwise would give the Defendants no incentive whatsoever to follow proper procedures for the termination of benefits.

The Claimant would also contend that Finding of Fact No. 22, as amended by the Full Commission, is inaccurate and legally invalid. The Commission claims that the claim was initially denied in good faith as Claimant failed a post-accident drug screen and contemporaneous medical treatment placed him at modified duty. This is invalid as it is a blatant misconstruction of Section 42-9-260(B)(3). As stated hereinabove, there is ***no evidence of intoxication***. As such, there mere fact that the Claimant failed a post-accident drug screen does ***not*** provide a valid basis for the denial of the claim.

If some causative link could be made between the use of any illicit substance by the Claimant, and the Claimant's injury, then perhaps Finding of Fact No. 22 could be proper. As relates to the ***only evidence in the record***, however, there is no showing by the Defendants linking the failed post-accident drug screen and the Claimant's serious accident and resulting

serious injuries. As such, Finding of Fact No. 22, even as amended by the Full Commission, is legally invalid and is not supported by the substantial evidence on the record.

Accordingly, the Claimant would contend that he is entitled to TTD benefits from December 15, 2015, through the Hearing, and through the present and continuing, not only because, as was found by the Single Commissioner, the Defendant failed to properly make the Claimant aware of the SAP issue, but also because the Defendants clearly failed to comply with both Reg. 67-504 and S.C. Code Section 42-9-260. Likewise, pursuant to Section 42-9-260(G), the Claimant is entitled to a 25% penalty for the improper termination of benefits.

CONCLUSION

In this action, the Defendants clearly mishandled the Claimant's TTD benefits in a disturbing and unlawful way. While the Commission correctly found that the benefits were terminated improperly, the conclusion he arrived at overlooked the clear meaning and purpose of both SC Code Section 42-9-260 and Regulation 67-504. What the Single Commissioner failed to recognize is that these two pieces of legislation were clearly and specifically promulgated to protect claimants from the very type of misconduct which occurred in this case.

By failing to serve the Claimant in this case with the requisite two (2) copies of the Forms 15 allegedly prepared and filed in this case, the Defendants deprived the Claimant of the ability to promptly contest their improper termination of TTD benefits. This misconduct had the terrible effect of forcing the Claimant to go without income of any kind for well over a year. As a result, the Claimant has suffered not only medically, but also financially. This has had the impact of both physical disability and mental disability which has rendered this Claimant homeless and penniless.

Based upon the Defendant's failure to comply with ***both*** SC Code Section 42-9-260 ***and*** Reg. 67-504, the Claimant is entitled not only to back TTD benefits from the December 5, 2015 date of termination, but also to the 25% penalty provided for in the South Carolina Workers' Compensation Act. Said penalty was specifically provided to discourage the very type of unlawful conduct displayed by the Defendants in this matter. To hold otherwise would both defy the plain meaning of this Statute and Regulation, and deprive the Claimant of the benefits, and bonuses, to which he is lawfully entitled based upon these Defendants' unlawful conduct.

Respectfully submitted,

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9/25/17, 2017

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Respondents

PROOF OF SERVICE

I certify that I have served the Initial Brief of the Appellant and Designation of Matter to be Included in the Record on Appeal on George Gallagher by depositing a copy of it in the United States Mail, postage prepaid, on August 25, 2017, addressed to Mr. George Gallagher, Speed, Seta, Martin, Trivett & Stubley, LLC, PO Box 11669, Columbia, SC 29211.

August 25, 2017

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August 25, 2017

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
PO Box 11629
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RE: Herbert Randall v. Palmetto State Transportation
Appellate Case No.: 2017-001483

Dear Mrs. Kitchings:

Please find enclosed the original and one (1) copy of the Initial Brief of the Appellant and the Designation of Matter to be Included in the Record on Appeal in the above referenced matter.

Please advise if there are any questions or any additional documents required. Otherwise, I sincerely hope this letter finds you doing well and I look forward to hearing from you soon.

Sincerely yours,
EZELL LAW FIRM, LLC

Janet Spruell

Janet Spruell
Paralegal to Jeffrey D. Ezell

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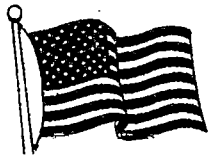
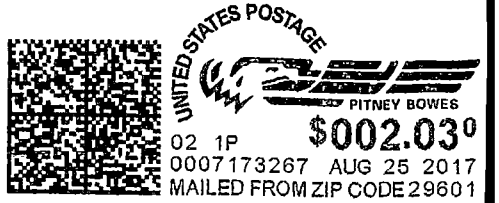
Enclosures
CC: Herbert Randall
George Gallagher, Esquire





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