

STATEMENT AND EVIDENCE OF THE CASE

This matter comes before the Full Commission Appellate Panel via Appeal from a Decision and Order from Commissioner Avery Wilkerson dated October 14, 2016. This is an admitted claim but the factual and procedural background is complicated and bears reciting recitation here.

Claimant sustained an admittedly compensable left shoulder injury on 12/13/14 while lifting a heavy cast iron table. Defendants initiated TTD benefits as of 12/14/14. Claimant's original attorney, Samuel Harm, filed a Form 50 Notice of Claims and entered a letter of representation. TTD benefits were initially suspended as of June 29, 2015 for Claimant's purported non-compliance with medical treatment but were ultimately resumed after 6 weeks later on August 10, 2015. TTD benefits have been running since August 10, 2015. Following the injury, Employer immediately referred Claimant to their company physician, Dr. Forrest Pomeranke with Doctors Care. He was diagnosed with a shoulder sprain and AC joint arthritis. He was initially referred for physical therapy, but Dr. Pommeranke quickly amended his order for an orthopedic evaluation. Defendants authorized Dr. John Vann with Piedmont Orthopedics to evaluate/treat Claimant. Dr. Vann ordered an MRI scan on 1/7/15. Dr. Vann's impression of the MRI was "left shoulder impingement and partial cuff tear." Dr. Vann recommended conservative treatment- PT, NSAIDs, and activity modification, including no lifting greater than 10 pounds overhead.

Thereafter, Claimant started PT but did not complete the course. By and through his then counsel, Ryan Montgomery, Claimant requested redirection of his medical care to a provider other than Dr. Vann. Claimant cited Dr. Vann's aloofness to his complaints as the reason for the

request. He specifically requested to be seen by Dr. Vann's partner, Dr. Paylor, with whom Claimant treated for a prior right shoulder injury. As a gesture of good faith, Defendants agreed to refer Claimant to another provider outside the Piedmont Orthopedics practice. Throughout February, March, and April of 2015 Defendants contacted multiple shoulder specialists in the Greenville area regarding assumption of Claimant's treatment, including, but not limited to the following well-known physicians: Drs. Posta, Lonergan, Brown, Hoenig, and Kissenberth. After reviewing records, all providers except Dr. Brown and Dr. Hoenig declined to see Claimant, however they could not see him for several more months. By that time Claimant had been without regular treatment since January 2015. Feeling they had exhausted all reasonable efforts to accommodate Claimant's request, Defendants insisted he return to Dr. Vann. Claimant declined to return to Dr. Vann.

A Hearing was scheduled before Commissioner Gene McCaskill on May 6, 2015 to adjudicate direction of Claimant's medical care. Ryan Montgomery was relieved as counsel just prior to the Hearing. In preparation for the Hearing, Claimant's newly retained counsel, John Holland and Rob Usry, suggested direction of treatment to Dr. John Keith of Orthopedic Specialists of Spartanburg. Defendants countered that return to Dr. Vann was the only reasonable option, given additional TTD liability incurred for periods where he was undergoing no active treatment to lessen his disability and decreased prospects for maximum recovery. By Order dated July 8, 2015 Commissioner McCaskill found, *inter alia*, that Claimant had shown "good cause" for redirection of his medical care to a provider other than Dr. Vann and ordered Defendants to continue efforts to designate a new authorized provider. Following receipt of Commissioner McCaskill's ruling and prior to entry of his Order, Defendants authorized Dr. Keith. Shortly thereafter, John Holland and Rob Usry requested to be relieved as counsel. PO

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Claimant saw Dr. Keith on May 14, 2015 (APA pp. 1-3). Dr. Keith noted that Claimant's MRI showed "some tendinosis of the left shoulder with AC joint spurring but no major rotator cuff tear." Dr. Keith further notes "On my exam today his pain seems to be out of proportion to his MRI findings. For that reason, I am reluctant at this point to proceed with surgery." Dr. Keith recommends referral to a neurosurgeon to see if his alleged severe pain may be stemming from cervical disc pathology. Finally, Dr. Keith notes that Claimant requested pain medications, which he declined to prescribe, and Claimant "seemed to be very upset" that he would not prescribe narcotics based on a relatively benign MRI finding. Claimant followed up with Dr. Keith on May 22, 2015 "demanding" pain medicine. (APA p. 8). Claimant also "demanded" that Dr. Keith proceed with surgery immediately. Dr. Keith again concluded that he was not comfortable proceeding with surgery or prescribing narcotics. Dr. Keith dismissed Claimant from his practice.

Following discussions with Claimant's new counsel, Stephen Garcia, Defendants ultimately authorized Claimant to see Dr. Paylor with Piedmont Orthopedics on August 17, 2015. Dr. Paylor noted "this shoulder seems very similar to the problem with his right shoulder that necessitated pain management to get him over it." (APA p. 15) (emphasis added). Dr. Paylor goes on to say, "I really do not see anything on the MRI scans that would indicate that he needs surgery on the shoulder today." On 8/31/15 Dr. Paylor stated, "There is really nothing else to do for him from an orthopedic standpoint. I would recommend pain management." (APA p. 16).

A Hearing was scheduled before Commissioner Beck on October 22, 2105 pursuant to Form 50 filed by Mr. Garcia. Claimant sought reinstatement of TTD benefits for the period between June 29, 2015 and August 10, 2015, plus a 25% penalty on same. Claimant also

requested pain management referral to Dr. Eric Loudermilk, the pain management provider with whom he treated previously for his right shoulder. Defendants agreed to refer Claimant to Dr. David Shallcross for pain management. An appointment with Dr. Shallcross was scheduled for October 8, 2015 and Mr. Garcia was notified of same. Claimant did not appear for the appointment. Just prior to the 10/22/15 Hearing, Mr. Garcia was relieved as counsel.

Following an extended pre-Hearing conference with Commissioner Beck and prior to convening the Hearing, Claimant's new counsel, Spencer Langley, and defense counsel reached a purported agreement (Defense Exhibit A) to resolve the issues for Hearing. Defendants agreed to reinstate the 6 weeks of suspended TTD benefits with 25% interest, in exchange for Claimant's agreement to see Dr. Shallcross. The Consent Order memorializing same was never executed.

FOUR DAYS after the Hearing was cancelled upon notification by counsel that the issues had been resolved via Consent, Claimant returned to Dr. Paylor on October 26, 2015. He advised Dr. Paylor "he was not able to go to pain management." (APA p. 21). As a result of this representation, Dr. Paylor recommended arthroscopic surgery and Claimant agreed to proceed. Just ONE DAY before the last appointment with Dr. Paylor, Mr. Langley wrote Claimant a letter ^{NS} confirming his withdrawal as counsel (Defense Exhibit A). This letter also confirmed the purported agreement that resulted in disposition of the 10/22/15 Hearing, including Claimant's agreement to treat with Dr. Shallcross.

Claimant thereafter re-hired Stephen Garcia as his counsel and the parties conducted Dr. Paylor's deposition on November 24, 2015 to address the status of Claimant's treatment. Regarding the basis of his recommendation for surgery on 10/26/15 after he had previously insisted on pain management, Dr. Paylor testified "I got the impression from Mr. Alston that they

were not going to allow him to go to pain management, but that came from him.” (Paylor Depo. P. 18 ll. 2-9). In response to his understanding that the Carrier would not authorize pain management, Dr. Paylor recommended surgery. Specifically, Dr. Paylor stated:

Well, that’s what he wanted me to do, because he said that he did do that and eventually he did will with his right shoulder, so he’s the one that initiated that. I was—since he did not do as well as I would have liked with his right shoulder, I was wanting him to not have surgery yet and do more conservative treatment. (Paylor Depo. P. 18 ll.13-21).

Dr. Paylor later stated that, assuming pain management was indeed authorized by Carrier, it was a much better option since Claimant had not responded as well to his previous right shoulder surgery as he did to the pain management- “my reasoning there... why don’t we just skip the surgery and let him do pain management.” (Paylor Depo. P. 21 ll. 10-25 – P. 22 ll. 1-12. Dr. Paylor concludes by noting that he “didn’t have a preference” as to the pain management provider.” (Paylor Depo. P. 24 .4). Under examination by Mr. Garcia, Dr. Paylor again confirmed that pain management in lieu of surgery was a more reasonable option. (See Paylor Depo. P. 32 ll. 15-25- P. 33 ll. 1-3.). Thereafter, Claimant never saw Dr. Shallcross despite several rescheduled appointments and attempts by defense counsel to arrange same via Claimant’s counsel.

Consequently, Defendants again refiled their Form 21 to terminate Claimant’s TTD for Claimant’s refusal to comply with recommended medical treatment from Dr. Paylor. Mr. Garcia ultimately withdrew as counsel again. A Hearing was initially scheduled before Commissioner Beck on March 2, 2016. Claimant retained Kathryn Williams shortly before the Hearing. Ms. Williams and defense counsel agreed to continue the Hearing until April to allow her to “get up to speed” on the case. Shortly thereafter, Ms. Williams was relieved as counsel.

Claimant then retained Tom Gagne. Mr. Gagne filed a Form 50 Notice of Claim but did not request a Hearing. Defendants withdrew the Form 21 following Mr. Gagne’s appearance.

Defense counsel advised Mr. Gagne that Dr. Shallcross would no longer see Claimant due to missed appointments. Defendants then refiled their Form 21. Defendants scheduled Claimant an appointment with another pain management provider, Dr. Behr, for July 13, 2016. Mr. Gagne then was relieved as counsel.

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Claimant presented to the St. Francis Hospital Emergency Room on March 10, 2106 complaining of low back pain attributable to his work accident with Employer on 12/13/14. He had a follow up appointment with St. Francis on April 11, 2016. Claimant began treating on his own initiative with Dr. Loudermilk with Piedmont Pain Management on May 20, 2016. Claimant presented to Dr. Loudermilk with complaints of left shoulder and low back pain attributable the 12/13/14 work accident.

This matter was initially scheduled to be heard before the Commissioner Wilkerson on June 29, 2016. At the Hearing Claimant advised that he wanted another opportunity to seek new counsel. Commissioner Wilkerson agreed to continue the Hearing, but advised Claimant that he must appear for the appointment with Dr. Behr and that the Hearing would not be continued again for any reason, regardless of whether he retained a new attorney or not. Commissioner Wilkerson also agreed to accept the record from Claimant's appointment with Dr. Behr on July 13 into the Record, if it was dictated and available.

The Hearing per Defendants Form 21 was finally convened on July 29, 2016. Claimant did indeed appear for the July 13 appointment with Dr. Behr. Dr. Behr notes that he has nothing to offer because it his understanding based on Claimant's history to him that surgery has been recommended. (See Dr. Behr report submitted at Hearing and APA # 4).

Defendants requested an Order finding Claimant that refused authorized medical treatment per § 42-15-60- specifically, pain management recommended by Dr. Paylor- and

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thereby forfeited entitlement to all TTD benefits for the period of refusal. Defendants contend the period of Claimant's refusal ranges from November, 25, 2015 (when Dr. Paylor confirmed via deposition his recommendation for pain management in lieu of surgery) and July 13, 2016 (when Claimant saw the new designated pain management provider, Dr. Behr) for a total of 33 weeks. Defendants seek an Order for credit for benefits paid during the 11/24/15-7/13/16 refusal period, to be applied as either a suspension of TTD going forward for 33 weeks, or as a credit against any future PPD award on the back end of the claim. Defendants finally seek an Order Compelling Claimant to comply with all treatment recommendations from Dr. Behr.

Regarding Claimant's alleged lower back condition, the parties stipulated to adjudication of that issue before Commissioner Wilkerson. Defendants deny that Claimant sustained injury to his lower back in the 12/13/14 accident, pointing out that the initial record from Dr. Pommeranke following this accident did not reference a back injury (APA p. 23-25). Defendants also note that Claimant was recently awarded Social Security Disability benefits, due at least in part, for his prior right shoulder condition AND for spine injuries stemming from a previous work accident. For these reasons, Defendants submit that all benefits relative to the alleged low back injury should be denied.

In response, Claimant first counters that he has never failed to comply with medical treatment and therefore Defendants are not entitled to suspend his weekly TTD or assert credits against a future award. Claimant only seeks medical treatment with a provider who will fairly assess his condition and not be dismissive or aloof to his problems. Claimant vehemently and emotionally testified that he has been treated unfairly by the doctors authorized by Carrier. Claimant also testified that none of his prior seven attorneys ever advised him of the issues presented in his claim. Claimant further stated his belief that none of his attorneys were looking

out for his best interests. Claimant acknowledged that he liked Dr. Behr and would be willing to treat with him.

Regarding his lower back, Claimant seeks a finding of compensability and further medical evaluation, including an MRI, and necessary treatment. In response to Defendants arguments that there is no mention of an alleged back injury in the contemporaneous medical records, Claimant counters that he reported back issues to Dr. Keith in 2015, as evidenced by his recommendation for an MRI. In reply, Defendants contend that Dr. Keith's reference to spinal pathology was specifically confined to possible *cervical spine issues*, not lumbar issues, since it is well accepted that cervical pathology can produce referred symptoms and dysfunction in the shoulder. In sum, other than Claimant's self-serving history to medical providers nearly a year and half after the accident, there is no evidence of a compensable back injury stemming from the 12/13/14 accident.

By Order dated October 14, 2016, Commissioner Wilkerson makes the following findings for fact, conclusions of law, and Orders (*in italics*):

- 1) *The undersigned Commissioner issued his ruling August 3, 2016 and mailed to the parties on the same day.*
- 2) *The parties stipulated to have compensability of the alleged low back injury determined at this Hearing.*
- 3) *Based on the greater weight of the evidence, this is a left shoulder claim only. Compensability of the alleged lower back injury is DENIED, in part, because there is no medical opinion stated to a degree of medical certainty that his current back condition and need for treatment is due to the 12/13/14 work accident.*

- 4) Claimant is ordered to return to Dr. Behr for pain management, contingent upon clarification from Dr. Paylor that pain management is best course and that surgery is still not indicated at this time.
- 5) Given Claimant's clear misunderstandings with the numerous medical appointments and doctors, nurse case management services are ordered to be provided to ensure that all relevant information in accordance with this Order is communicated correctly to the treating providers.
- 6) Giving Claimant the benefit of the doubt that he truly did not understand the medical compliance and carrier direction issues presented in his claim because his attorneys never advised him appropriately, Claimant has not "refused" medical treatment in violation of S.C. Code § 42-15-60 and has therefore not forfeited entitlement to TTD benefits for same.
- 7) Defendants request to suspend TTD going forward and/or as a credit against any future PPD award is DENIED.
- 8) All other issues not specifically addressed shall be held on abeyance.

CONCLUSIONS OF LAW

The aforementioned findings are governed by, or have otherwise been made in light of, the following principles of South Carolina law:

- 1) S.C. Code § 42-15-60 generally vests the Employer/Carrier with the authority to designate a medical provider to serve as Claimant's attending physician, and Claimant shall accept such attending physician.
- 2) The Employer/Carrier's right to designate a treating provider is not unfettered. In case of controversy, the Commission has considerable discretion to order or award

additional medical evaluation/treatment/services or changes to the treating provider upon a showing of "good cause." See Clark v. Aiken County, 371 S.C. 69 (Ct. App. 2006).

- 3) *S.C. Code § 42-15-60 also states in pertinent part that "the refusal of an employee to accept any medical treatment or evaluation 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 the refusal." (emphasis added)*
- 4) *S.C. Code § 42-9-210 allows an Employer/Carrier to take credit for all compensation benefits paid when not due to be applied against future compensation.*
- 5) *S.C. Code § 42-1-160 governs compensability of alleged injuries by accident and requires medical evidence stating causal relation between an alleged injury/condition and accident to within a reasonable degree of medical certainty in medically complex cases.*

ORDER

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that all claims for compensation and/or medical benefits under the Act secondary to Claimant's alleged lower back injury are ***DENIED***.

IT IS FURTHER ORDERED that Claimant shall submit to further pain management evaluation and treatment with Dr. Behr contingent upon the conditions set forth herein, including confirmation from Dr. Paylor that Claimant is not a surgical candidate until conservative measures are exhausted.

IT IS FURTHER ORDERED that Defendants shall assign nurse case management services to ensure compliance with this Order.

IT IS FINALLY ORDERED that Defendants request to suspend Claimant's TTD benefits and/or assertions for credit against future compensation is **DENIED**.

Thereafter, Claimant appealed to the Full Commission Appellate Panel alleging numerous errors, but Claimant's primary exception is denial of his back claim. This matter was reviewed by the undersigned Panel on April 19, 2017 in Columbia, SC.

Based on the Panel's review of the evidentiary Record, Commission's file, and consideration of Oral Arguments presented by the parties, the Panel hereby finds, based on the preponderance of the evidence and applicable law, that Commissioner Wilkerson's findings, conclusions, and Orders are correct as stated in his Order. As such, the Panel **AFFIRMS** Commissioner Wilkerson's Order in its entirety and it hereby becomes the Decision and Order of the Full Commission.

IT IS SO ORDERED!

Aisha Taylor, Commissioner for the Panel

WE CONCUR:

Gene McCaskill, Commissioner

Melody L. James, Commissioner