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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

RECEIVED

JAN 25 2018

SC Court of Appeals

Appellate File No.: 2015-02093

Robert L. Harrison, Employee,.....Appellant,

v.

Owen Steel Company, Inc., Employer, and
Old Republic Insurance Company
c/o Gallagher Bassett Services, Inc., Carrier,.....Respondents.

PETITION FOR REHEARING

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ATTORNEY FOR THE APPELLANT

INTRODUCTION

This is an appeal of a workers compensation claim for an accident which occurred on September 17, 2008. The Appellant sought compensation for permanent loss of use of the spine and continuing medical treatment. The Full Commission of the South Carolina Workers Compensation Commission denied the claim of Appellant based upon the grounds of laches and intervening accidents. On appeal, this Court did not address Appellant's arguments in regard to those issues. In its Opinion Number 5528, filed January 10, 2018, this Court determined the pursuit of this claim by Appellant was barred because he settled a compensation claim for a subsequent injury to the same area. The Court concluded the settlement of the second claim, prior to the pursuit of the initial (this) claim, barred pursuit of Appellant's initial workers compensation claim of September 17, 2008.

Appellant respectfully petitions the Court for a rehearing for reconsideration of this appeal on the grounds the Court overlooked or misapprehended the facts and law applicable to this appeal as follows:

ARGUMENT I

**THE COURT MISAPPREHENDED OR OVERLOOKED
THE CONTROLLING LAW AND FACTS IN CONCLUDING THE
SETTLEMENT OF APPELLANT'S CLAIM OF OCTOBER 4, 2010,
PRECLUDED THE SUBSEQUENT PURSUIT OF HIS CLAIM FOR
THE FIRST ACCIDENT OF SEPTEMBER 17, 2008.**

As the Court is aware Appellant Robert Harrison suffered an on the job injury with Owen Steel Company on September 17, 2008, when he suffered an injury to his

spine. This resulted in an anterior cervical discectomy with fusion and instrumentation at C5-C6, performed by the authorized treating physician on Dr. Holbrook on Nov 10, 2009. Subsequently, on July 21, 2010, Dr. Holbrook determined Appellant had reached maximum medical improvement with a fifty (50) pound lifting restriction, and a twenty-five percent (25%) impairment to the whole person. Thereafter, an independent medical evaluation was conducted by Dr. Johnson on September 29, 2010, also resulting in a determination Appellant had reached MMI with a twenty-five percent (25%) impairment rating to the whole body.

On October 4, 2010, Appellant reinjured the same body part while working for the same Employer. After conservative treatment with no further surgery, Dr. Sweet, the authorized treating physician for the October 2010 accident, by Form 14 dated November 23, 2010, stated Appellant had reached maximum medical improvement and assigned a fifteen percent (15%) impairment to the total body. Dr. Sweet also changed Appellant's lifting restrictions from not over fifty (50) pounds to not over thirty (30) pounds. Furthermore, the statement noted that the date of injury or illness was October 4, 2010. The Appellant settled the claim for the second injury of October 4, 2010, prior to pursuing the claim for the injury which occurred on September 17, 2008, and is the subject of this appeal.

At oral argument Court raised the question as to whether or not the Form 14 of Dr. Sweet was intended to be an impairment rating of Appellant's spine for both accidents. Furthermore, the Court questioned if the settlement of the second injury prior to resolution of the first injury precluded recovery on the first injury. Appellant would respectfully submit neither of these issues were addressed by either party in their briefs as

these were not issues raised in the last hearing before the Workers Compensation Commission.

Initially, Appellant would point out the purpose of the Form 14, as completed by Dr. Sweet, is to provide an impairment rating for a specific accident to allow resolution of a claim. The Form 14 specifically referred to the workers compensation accident of October 4, 2010. Although the Court concluded the impairment rating provided by Dr. Sweet included an overall impairment rating for the spine, including the initial accident of September 17, 2008, Appellant respectfully submits the Court misconstrued the purpose of the Form.

The Form 14 is used for purposes of resolving workers compensation claims as a result of an injury. If the Form provided an assessment of a current, overall lifetime impairment of a claimant's spine, it would be worthless. For instance, assume a claimant had a pre-existing 15% impairment of his spine, for an automobile accident which was totally unrelated to work. Then that claimant suffered an on-the-job injury to the spine and the treating physician completed a Form 14 indicating the claimant had a 20% impairment of the spine. The Form would simply be providing an overall impairment rating for the claimant's entire life, without specificity to the workers compensation accident which the physician was treating. This would make the Form totally useless for purposes of the workers compensation claim.

In its Opinion the Court referred to the AMA Guide, which provides a treating physician should deduct any prior impairments before arriving an impairment rating for an accidental injury. This would mean the impairment rating provided by the treating physician would provide an impairment rating for a specific accident. Appellant would

respectfully submit that is what the Form 14 is intended to do, and that is exactly what Dr. Sweet did.

Appellant respectfully submits even Employer did not take the position the rating of Dr. Sweet was a rating for both of Appellant's workers compensation accidents. It is important to note Appellant's lifting restrictions went from a maximum of 50 pounds for the first accident to a limit of 30 pounds, given by Dr. Sweet after the second accident. This was not an indication his condition improved. His lifting ability was significantly decreased by the second accident. Although theoretically an injury can improve over time and an impairment rating could lessen over time, the report of Dr. Sweet shows a significant decrease in Appellant's lifting abilities.

The report of Dr. Holbrook establishing an impairment rating as of July 21, 2010. The report of Dr. Johnson established an impairment rating as of September 29, 2010. Those were impairment ratings for the first workers compensation accident. Dr. Sweet's report was issued on November 23, 2010, just two months later. Although theoretically, an injury can improve over time, it is very unlikely such a dramatic improvement could occur over a period of less than two months. This is especially true in view of the fact a second accidental injury occurred to the same body area less than a week after Dr. Johnson's report was issued.

The above particular issues raised in oral argument and in the Court's Opinion were not addressed in the parties' briefs on appeal as they were not raised before the Commission. Even the Employer did not take the position below the impairment rating by Dr. Sweet was intended to include impairment from the first accident. The Employer did not take the position before the Commission that Appellant's spine condition

improved from September 29, 2010, through November 23, 2010. This is especially true in view of the fact an additional injury had occurred to the spine within days of the report of September 29, 2010. Furthermore, the Form 14 prepared by Dr. Sweet showed a significant diminution in Appellant's lifting strength.

Appellant respectfully submits the Form 14 was created by the Commission to provide specific impairment ratings for specific workers compensation accidents. That is exactly what the report of Dr. Sweet did and it was not intended to include any impairment from the first workers compensation accident.

Additionally, the Court concluded the settlement of the second accident prior to the conclusion of the first accident precluded Appellant from pursuing the current workers compensation claim. Again, this issue was not argued in the briefs of the parties as it was not in any manner addressed by the Full Commission. The Court is aware, however, there were two hearings before a Single Commissioner and two appeals to the Full Commission in this claim. As the issue of the settlement of the second accident was tangentially raised in the first hearing, the transcript of the hearing putting the settlement of the second claim on the record was submitted at the initial hearing. The transcript set forth exactly what was being settled in that claim.

If the Court believes the settlement of the second claim effected the current claim Appellant would respectfully request the Court allow the current record be supplemented to allow the Court to see exactly what was said at the settlement hearing. Again, this particular issue was not raised on appeal because it was not addressed in the final Commission Decision which is currently under appeal. For that reason portions of the record below which may have been relevant to this issue were not included in this appeal.

In reaching its decision the Court determined the scheme of the Workers Compensation Act did not allow a claimant to have a double recovery for an injury to the same body part. It therefore concluded Appellant was not entitled to recover on his first workers compensation claim because he settled the second compensation claim prior to resolution of this, the first claim. The Appellant respectfully submits the Court erred in reaching this conclusion.

Section 42-9-170 specifically provides that in cases in which an employee has one or more injuries while employed with the same employer, the employer is entitled to a credit for disability compensation paid in the first claim. In other words, if an employee was compensated for 250 weeks of disability payments for an initial injury, the most employee could recover for a second injury with the same employer would be 250 weeks of disability payments for a maximum of 500 weeks. The statute is intended to ensure an employer is not required to pay more than the 500 week maximum for more than one injury when it elects to retain an injured employee.

S.C. Code Section 42-9-150 also addresses workers compensation injuries to employees who had pre-existing permanent injuries. This Section provides that an employer is only responsible for additional impairment specifically resulting from the workers compensation accident. The scheme of the Workers Compensation Act shows the employer should only be responsible for permanent injuries specifically caused by a workers compensation accident without requiring payment for prior permanent injuries or impairments.

In its Opinion, the Court noted in a footnote counsel for Appellant admitted at oral argument prior counsel for Appellant sought to circumvent Sections 42-9-150 and

42-9-170. The use of the word “circumvent” is not entirely appropriate. At oral argument current counsel did state he believed prior counsel, who is deceased, had a reason for settling the second claim first. Current counsel believed the strategy may have been to settle the second injury first because there would be no credit or limit of award for the first accident under Section 42-9-170 based upon the settlement of the second claim. This was not an attempt to “circumvent” the two Sections, but to comply with the Sections, use them, and recover the maximum and legally proper amount due the Appellate.

Appellant respectfully submits the scheme of the Workers Compensation Act does not prohibit the current Claimant from pursuing his first workers compensation accident after settling the second workers compensation accident of October 4, 2010.

ARGUMENT II

THE COURT MISAPPREHENDED OR OVERLOOKED THE CONTROLLING LAW AND FACTS IN NOT RULING UPON THE ISSUES RAISED IN APPELLANT’S BRIEF.

As the Court relied on other issues to affirm the Full Commission it did not address the issues raised in Appellant’s Brief. The Court in a footnote did briefly acknowledge laches and intervening accidents, as relied upon by the Full Commission, were not applicable based upon the timely reports of Dr. Holbrook and Dr. Johnson. Appellant would respectfully request, however, the Court reconsider and issue an opinion addressing the issues of failure to plead laches, error in applying laches, and error in denying the claim based upon intervening accidents.

CONCLUSION

Appellant respectfully submits the Court misconstrued the facts and law in reaching its decision. The Form 14 completed by Dr. Sweet was intended to address only impairment resulting from the accident of October 4, 2010. The common practice and use of the Form is to provide impairment ratings only for the injury resulting from the specific accident for which the position is treating a claimant. Any other interpretation of the Form would render it useless.

Although it is theoretically possible for a spinal injury to improve the evidence does not support a finding of any improvement to Appellant's spinal injury after the reports of Dr. Holbrook and Dr. Johnson were issued. Employer did not argue Appellant's condition had improved before the Commission. Furthermore, there was no showing and no reason to believe Appellant's spine condition actually improved between September 29, 2010, and November 23, 2010. This is especially true in view of the fact there was an additional injury involving spine within that time. Also, the Form 14 completed by Dr. Sweet actually placed additional lifting restrictions on Appellate. That was not an indication of physical improvement in Appellant's spine condition.

For all of the above reasons Appellant would respectfully request the Court reconsider its Opinion in this matter to conclude Appellant is entitled to pursue his workers compensation injury of September 17, 2008. Appellant also requests the Court address

the issues raised in the Brief of Appellant.

January 25, 2018

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'F. A. Barton', written over a horizontal line.

Frank A. Barton

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ATTORNEY FOR THE APPELLANT

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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WORKERS' COMPENSATION COMMISSION

W.C.C. File No.: 0824526

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SC Court of Appeals

Robert L. Harrison, Employee,Appellant,

v.

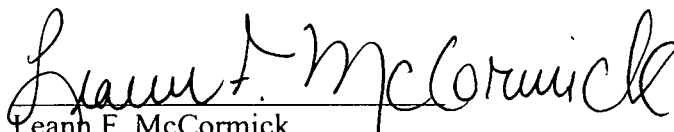
Owen Steel Company, Inc., Employer, and
Old Republic Insurance Company
c/o Gallagher Bassett Services, Inc., Carrier,Respondents.

CERTIFICATE OF SERVICE

The undersigned does hereby certify one copy of the **APPELLANT'S**
PETITION FOR REHEARING was served in the foregoing action by regular mail on
January 25, 2018, to the following address:

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January 25, 2018
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January 25, 2018

VIA HAND DELIVERY

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JAN 25 2018
SC Court of Appeals

RE: Robert L. Harrison v. Owen Steel Company
Appellate Case No.: 2015-02093

Dear Clerk Kitchings:

Enclosed for filing please find the original and six copies of the Petition for Rehearing in the above referenced matter. Also enclosed is a Certificate of Service showing service upon opposing counsel.

Truly Yours,



Frank A. Barton

FAB/lfm

cc: Helen F. Hiser, Esquire