

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

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

W.C.C. File No. 1102937
SC Court of Appeals Case No. 2016-000514

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FEB 14 2018
SC Court of Appeals

Barry Adickes, Claimant,

Respondent,

v.

Philips Healthcare, Employer, and Fidelity and
Guarantee Insurance Company, Carrier,

Appellants.

RETURN TO RESPONDENT'S PETITION FOR REHEARING

Pursuant to Rule 240(e), Philips Healthcare and Fidelity Guarantee Insurance Company ("Appellants") respond in opposition to Respondent Barry Adickes Petition for Rehearing.

On January 17, 2018, the Court issued Unpublished Opinion No. 2018-UP-027, which addressed three issues on appeal: (1) whether Respondent was at MMI for all of his work related injuries, (2) whether Respondent was entitled to permanent partial disability benefits due to loss of earning capacity, and (3) if so, the accurate award of wage loss benefits pursuant to S.C. Code Ann. § 42-9-20. The Court held that the Claimant is at MMI for all of his work related injuries and entitled to wage loss benefits, but disagreed with the Commission's calculation of the award.

Specifically, this Court held that the Full Commission erred in its interpretation and application of S.C. Codes Ann. § 42-9-20, reversed the award of 340 weeks of PPD benefits and remanded for a new calculation of benefits consistent with the plain language of the statute.

Respondent has now advanced four arguments in support of its Petition that were allegedly overlooked or misapprehended by this Court: the Workers' Compensation Act is read liberally, the word "injury" is a debatable term and its application to these circumstances is unclear, precedent supports that this Court should defer to the Commission's interpretation of the statute and, lastly, there is no good reason for a limitation on Respondent's wage loss award.

I. THIS COURT DID NOT OVERLOOK OR MISAPPREHEND ANY ISSUES RELATED TO THE LIMITATION OF WEEKS AWARDED UNDER A § 42-9-20 AWARD:

This Court evaluated the language of S.C. Code Ann. § 42-9-20 which reads in pertinent part, "In no case shall the period covered by such compensation be greater than 340 weeks from the date of injury," and properly held that it contains a limiting clause that restricts the timeframe and amount of coverage, which should be strictly construed. Emphasizing the restrictive limitations contained within, such as the phrase "in no case," this Court held that the statute provides an explicit mandate which is in accord with the legislature's intent.

As such, this Court held that PPD benefits are intended to compensate an injured claimant for the loss of earning capacity over the designated 340 weeks from the date of injury, rather than compensate an injured claimant with a 340-week "award" of PPD benefits for specific injuries, and Appellants agree.

a. The Workers' Compensation Act is Not Read Liberally.

Turning a blind eye to the phrase “in no case shall,” Respondent maintains that S.C. Code Ann. § 42-9-20 should be read liberally, as it is no different from and no more a limit than any other statute in the Workers' Compensation Act. (Pet. for Rhr'g 2). Respondent cites numerous cases in support of his argument, all of which involve statutes that contain ambiguities. Although Respondent continuously uses the word interpretation, this word is misplaced, as a statute that is plain and unambiguous need only be applied, not interpreted.

When it comes to application of a statute unequivocally containing exceptions or restrictions to coverage, South Carolina courts have been very clear about strict construction. As indicated by the South Carolina Supreme Court in Owens v. Hemdon, “[t]he rights and liabilities of employee and employer under the Workmen's Compensation Act are purely statutory and are to be judged by the terms of the Act. Policy consideration as to what benefits should be conferred or obligations imposed are strictly for the legislature.” 252 SC 166, 168, 165 S.E.2d 696, 698 (1969). Since workers' compensation statutes provide an exclusive compensatory system in derogation of common law rights, courts must strictly construe such statutes, leaving it to the legislature to amend and define any ambiguities. Cox v. Bellsouth, 356 S.C. 468, 472 589 S.E.2d 766, 768 (Ct. App. 2003). Further, as the Supreme Court held in Lewis v. L.B. Dynasty, workers' compensation law is construed liberally in favor of coverage to further the beneficent purpose of the Workers' Compensation Act, accordingly, only exceptions and restrictions to coverage are strictly construed. 411 S.C. 637, 641, 770 S.E.2d 393, 395 (2015).

Here, as this Court pointed out, S.C. Ann. § 42-9-20 is unambiguous and contains a limiting restriction; thus, it is not the court's place to change the meaning.

b. The Word “Injury” is Not a Debatable Term.

Respondent disagrees with this Court’s holding that the Act otherwise prohibits a 340-week award for someone like the Respondent, by arguing that “injury” is a debatable term and its application to these circumstances is unclear. (Pet for Rehr’g 3).

Respondent contends that his case involves an “unusual circumstance” of a Claimant whose cognitive injury does not have a definitive time of occurrence and revealed itself gradually. (Pet for Rhr’g 4). Analogizing his mental injury to an occupational disease injury, Respondent argues that “pinpointing when his cognitive abilities were injured is elusive and may be impossible.” (Id.). This is not an occupational disease case and mental injuries are not treated similarly when it comes to determining the date of injury. Respondent drove off of a mountain on one specific day in March of 2012, which has non-coincidentally always been listed as his “date of injury” due to Respondent’s allegations that all of his injuries stemmed from that particular accident.

“Injury” is not a debatable term when it comes to application of the statute. Rather, the word “injury” is used throughout the South Carolina Workers’ Compensation Act as a benchmark for several claim events. As a few examples: employer representatives are required to file the first Form 18 Periodic Report six months after the date of **injury**; medical, surgical, hospital and other treatment including medical and surgical supplies are allowed from the first day of **injury**; temporary benefits may be suspended if the Claimant reaches MMI within one hundred fifty days from the employer’s notice of **injury**. S.C. Code Regs. §§ 67-503, 67-413, 67-504(a).

In actuality, there is nothing “unclear” about the application of § 42-9-20.

c. Precedent Does Not Support the Assertion that the Court should Defer to the Commission's Interpretation of the Statute.

Respondent points out that Appellants and their amicus noted that the Full Commission award was based on the Commission's long standing interpretation of the wage loss statute, arguing that this Court should defer to same. (Pet for Rhr'g 4). While it is true that Appellants and their amicus made note of this, it was done for the purpose of showing this Court the extent of injustices suffered by Employers and Insurers as a result of the misapplication of the plain language of § 42-9-20 over the past few decades. Respondent's argument that something that has been done for a long period of time, even if wrongly so, should remain the precedent ... is not precedent.

d. There is Good Reason for Respondent's Wage Loss to be Limited to 340 weeks from the Date of Injury.

Respondent argues that "at the end of the day, Barry is getting less in disability benefits, and Philips is getting to pay less in benefits, without good reason." (Pet for Rhr'g 5). There are good reasons, several of them. All of these reasons have been documented throughout Respondent's briefings along with citations to pertinent case law and statutory authority in support. In contrast, Appellant's main argument of "but it's always been done this way!" has no such support.

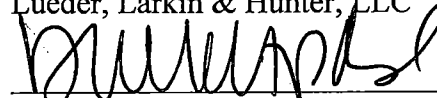
II. CONCLUSION

S.C. Code Ann. § 42-9-20 unambiguously prohibits a Claimant from receiving permanent partial disability benefits beyond 340 weeks from the date of the accident; thus, the Full Commission Order of 340 weeks of wage loss benefits commencing nearly 3 years after the date of injury is against the rules of construction and this Court correctly reversed same. There is no

need for rehearing and certainly no reason to provide Respondent with a second opportunity to argue his case to this Court.

Respectfully submitted:

Lueder, Larkin & Hunter, LLC



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Attorney for Appellants

Mt. Pleasant , South Carolina

Dated: 2.12.18

CERTIFICATE OF SERVICE

I, the undersigned employee of Lueder, Larkin & Hunter, LLC, attorney for the Appellants, do hereby certify that on this **12^h Day of February, 2018**, I served the following parties with the foregoing:

Return to Respondent's Petition for Rehearing

on behalf of the Appellants by causing it to be placed in the U.S. Postal system, postage prepaid, and transmitted via 1ST Class Mail, to the Respondent as indicated below:

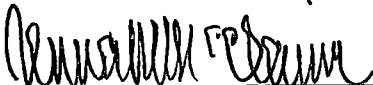
**William L. Smith, II, Esquire
Chappell, Smith & Arden
P.O. Box 12330
Columbia, SC 29211**

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**Blake A. Hewitt, Esquire
Bluestein, Nichols, Thompson & Delgado, LLC
P.O. Box 7965
Columbia, SC 29202**

SC Court of Appeals



Jenna McClain

February 12, 2018

Mt. Pleasant, South Carolina

LUEDER, LARKIN & HUNTER, LLC

ATTORNEYS AT LAW

February 12, 2018

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VIA US MAIL

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

RE: Barry Adickes v. Phillips Healthcare and Fidelity & Guaranty Ins.
Co. c/o Gallagher Bassett Services, Inc.
SCWCC No. : 1102937
DOI : 03/22/2011
GBS Clm No. : 002380-009116-WC-01
LLH File No. : WC-109-0001
SC COA File No. : 2016-000514

Dear Ms. Kitchings:

Please find enclosed for filing the original and seven (7) copies of our Return to Respondent's Petition for Rehearing in reference to the above matter. I have also enclosed the proof of service of this document on counsel for the Respondent.

Kindly return one clocked copy to me in the self-addressed stamped envelope provided. If you have any questions, please do not hesitate to contact me.

Thank you, in advance, for your assistance with this matter.

Sincerely,



Brooke A. Payne

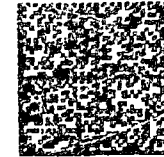
BAP/jmm

Encl: As Stated

cc: William L. Smith, II, Esquire
Blake A. Hewitt, Esquire
Grady L. Beard, Esquire
Nicolas L. Haigler, Esquire

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