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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

APPELLATE CASE No. 2017-002126
SCWCC File No. 1419738

Nathaniel Alston,.....Appellant.

v.

All My Son's Moving & Storage, Employer,
and Vanliner Insurance Company,
Carrier..... Respondents.

**RESPONDENTS MOTION TO DISMISS APPELLANT'S APPEAL
AND MEMORANDUM IN SUPPORT OF SAME**

Pursuant to SCACR 240 and other applicable law, Respondents in the above-captioned matter hereby Move to Dismiss Appellant's appeal to this Court from the Decision and Order of the South Carolina Workers Compensation Commission Appellate Panel ("Full Commission"). Respondents submit the Court lacks appellate jurisdiction over this matter and/or the Appellant's appeal is otherwise interlocutory. Respondents offer the following in support of their Motion:

1) After a tumultuous procedural history, a Hearing in this matter was heard before Commissioner Avery Wilkerson on July 27, 2016 pursuant to Defendants Form 21 request to suspend Appellant's temporary total disability ("TTD") benefits in accordance with S.C. Code § 42-15-60. This request was based on Appellant's alleged refusal of medical treatment recommended by authorized treating physicians designated by Respondents. In addition, Respondents petitioned for an award of credit for benefits paid when not due under S.C. Code

§42-9-210, specifically, all TTD paid during periods in which Appellant refused medical treatment to be applied against Appellant's entitlement to future benefits. In his pre-Hearing filings, Appellant also alleged a compensable back condition which had not previously been formally pled. At the Hearing, the parties stipulated that Commissioner Wilkerson should also decide the newly alleged back claims in the interests of judicial economy.

2) Commissioner Wilkerson issued his ruling and instructions for defense counsel to prepare his formal Order on August 3, 2016. In sum, he denied the Respondents' petitions for relief, as well as denied compensability/causal relation of Appellant's alleged back condition. Defense counsel submitted the proposed Order to Commissioner Wilkerson and copied Appellant. Appellant then submitted a letter to Commissioner Wilkerson dated October 10, 2016 objecting to the Order as written and requesting revisions. **(See Exhibit # 1 to Motion)**. The October 10 letter also raised new irrelevant issues and allegations not raised at the Hearing, including, but not limited to, an allegation that defense counsel and/or the carrier engaged agents to spy on and harass Appellant. Defense counsel simply responded with his belief that the proposed Order as prepared fully memorialized Commissioner's Wilkerson's ruling/findings, accurately recited the relevant evidence in the Record, and fairly characterized the issues presented and the positions of the parties.

3) Commissioner Wilkerson executed the proposed Order without revisions or amendments. The Order's certificate of service on the parties was dated October 14, 2016. **(See Exhibit #2 to the Motion)**. Allowing for a five day "mailbox rule" for receipt of the Order via first class U.S. Mail, service was deemed completed on October 19, 2016 per WCC Regulation 67-213 (A) (2).

4) Pursuant to S.C. Code §42-17-50 and WCC Regulation 67-701, a party has fourteen (14) days from notice of the Order to file an Appeal from the single commissioner's ruling to the Full Commission. The Regulation further provides that the time to Appeal to the Full Commission is a jurisdictional requirement- "[t]he fourteen-day period is *jurisdictional*." WCC Regulation 67-

701 (emphasis added). Beginning with the day after service of the Order was completed- October 20, 2016- any Appeal to the Full Commission should have been filed by November 2, 2016.

5) Thereafter, Appellant purportedly filed a WCC Form 30 Request for Full Commission Review dated November 14, 2016 incorporating by reference and attaching his October 10 letter to Commissioner Wilkerson as the basis of his Appeal. **(See Exhibit #3 to Motion).**

6) Via Email Notice dated November 29, 2016 the Commission's Judicial Director served the Form 30 and attachments on defense counsel for Respondents. This Notice again confirms that Appellant's purported Appeal is untimely, BUT the Commission will nevertheless treat his filing as a "Motion to Reinstate" his appeal. **(See Exhibit # 4 to Motion).**

7) Respondents filed a Reply to the Full Commission's decision to consider the purported Motion to Reinstate. On December 12, 2016, the Full Commission issued a form order "reinstating" Appellant's appeal. **(See Exhibit # 5).** The Full Commission thereafter heard this matter on April 19, 2017 and issued its Order on September 25, 2017 affirming Commissioner Wilkerson's ruling that is the subject of Appellant's purported appeal to this Court. **(See Exhibit # 6).**

8) It is an undisputed fact that Appellant's appeal from Commissioner Wilkerson's Order to the Full Commission was not filed timely- the deadline for filing such appeal was November 2, 2016 and no semblance of an Appeal was filed by Appellant until November 14, 2016. Again, the Full Commission acknowledges this fact. Moreover, Defendants did not receive notice of the purported appeal until 15 days thereafter on November 29, 2016. **(See Exhibit # 4).**

9) It is an elementary matter of law that the statutory deadline to appeal a single commissioner's Order to the Full Commission is jurisdictional. Specifically, the Full Commission has absolutely no authority or discretion to extend the time to appeal for any reason whatsoever. Allison v. W.L. Gore & Associates, 394 S.C. 185, 714 S.E.2d 547 (SC 2011). The

Supreme Court's holding is unequivocal: "*the Commission lacks the authority to extend the fourteen days permitted for the filing of an appeal from the decision of a single commissioner.*"

Id at 394 S.C. p. 188-189 (*emphasis added*).

10) Respondents respectfully submit the Full Commission likewise has no authority or jurisdiction to treat an untimely appeal as a purported "Motion to Reinstate." The fallacy of proceeding under this procedural guise is self-evident- an appeal cannot be reinstated that was never properly filed in the first place as an end-run around the Regulation's jurisdictional requirements. The Full Commission, therefore, lacked appellate jurisdiction to consider Appellant's attempted appeal from Commissioner Wilkerson's Order.

11) Because the Full Commission lacked appellate jurisdiction to review the single commissioner's ruling, its Order dated September 25, 2016 is void *ab initio*. See Turner v. Malone, 24 S.C. 398 (SC 1886). ("a judgement entered without jurisdiction is void ab initio). As such, Commissioner Wilkerson's Order is the law of the case and is not subject to further review by the Court. See Judy v. Martin, 381 S.C. 455, 674 S.E.2d 151 (SC 2009) (under the law-of-the-case doctrine, a party is precluded from relitigating matters on appeal that were either not raised on appeal, but should have been, or raised on appeal, but expressly rejected by the appellate court). Since the Full Commission Order is void and Commissioner Wilkerson's Order is the law of the case, this Court necessarily lacks appellate jurisdiction over this matter.

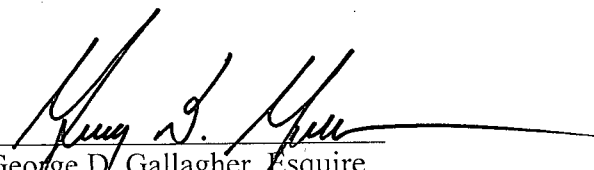
12) In the alternative, Respondents submit the Full Commission Order is interlocutory and not subject to review by the Court at this time. In Bone v. U.S. Food Services, 404 S.C. 455, 748 S.E.2d 229 (SC 2013), the Supreme Court held that "an agency decision that does not decide the merits of a contested case is not a final agency decision that is subject to judicial review." Moreover, the Court noted that "a final judgement disposes of the whole subject matter of the action, or terminates the particular proceeding or action, leaving nothing to be done but to enforce by execution what has been determined." *Id.* The Full Commission Order in this case is

clearly not a “final agency decision.” Although the substance of Appellant’s grounds for appeal to this Court are not clear, the Full Commission Order simply denies compensability of Claimant’s alleged back condition. Respondent’s compensation claim for his admitted shoulder injury remains open and ongoing, including TTD benefits and Appellant’s pursuit of medical treatment.

13) The South Carolina Administrative Procedures Act (“APA”) provides that a “preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy.” S.C. Code § 1-23-380. In this case, Claimant has an adequate remedy for the Commission’s denial of his alleged back claim; specifically, he may appeal that decision to this Court once there has been a final adjudication and award of his admitted claims by the Full Commission. In other words, Appellant has not been substantially prejudiced by the denial of his back claim to the extent warranting immediate judicial review of such denial when a) he continues to receive TTD benefits for his admitted compensable claims and b) he has pursued medical treatment for his alleged back condition under his group health coverage.

For all the aforementioned reasons, Respondents pray for an Order from the Court dismissing Appellant’s current Appeal with Remittitur back to the Commission for further proceedings as necessary.

February 19, 2018


George D. Gallagher, Esquire
Speed, Seta, Martin, Trivett & Stublely, LLC
PO Box 11669
Columbia, SC 29211
(803) 748-2919
Attorney for Respondents

10-10-16

-1-
Hearing Date: July 27, 2016
WCC File No: 1419738

Claimant: Nathaniel Alston
Carrier: VANliner Insurance Co.
Employer: All My Son's Moving Storage

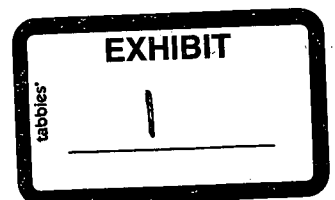
Attorney: (P) Pro Se

Attorney: (D) George D. Gallagher

I am writing to appeal the Decision and order that was written by George D. Gallagher. The Decision and Order was poorly written. It was written almost entirely of the defendants submission and Exhibits.

It's barely anything that was submitted by the Plaintiff or Claimants that was submitted with no objection, It was also instructed by the judge to admit all As list in the order as well as to number them, the Defendant is totally taken advantage of the fact that the Plaintiff has no attorney. There for I also am

1)



2-

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requesting that the code to be appeal
or rewritten by the board of workers
compensation to assure fairness and
justice to the order.

Claimant is disabled in fact the
social security A.L.J has deemed
me to be retired disability Title II
I have submitted final decision and
order to Commissioner A. Wilkerson
to confirm all that matters.

- The Directives part of order.

Commissioner's instruction #3. -

The part about the defense trying to
bully and harass me into settling my claim
with little to no treatment, which is
not written in the Decision and Order
at all.

#6 pg 21, lines 5-20 - pg 29, lines 22-25
pg 30 lines 8-17 of the Deposition also
not in the Decision and Order.

In the commissioner's instruction
he requested two appointments to
be schedule one with Dr. Paylor

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and Dr. Bure. In the order where it says it is final and so order the Defence is try to pull one over on Plaintiff Clement. that also shows that the Defence can not be trusted with guided instruction by the Commissioner. Clement wants to keep his appointment with Dr. Taylor.

So that leaves me to ask what was the plan of the Defence with me going to Dr. Bure, I no longer trust that agreement any more and was to stay with Dr. Erick Handermilk who I have been with for pain management for about 6 mo.

I have A Complaint to make about the Defence having plants up stairs above my apartment I live in #10 the plants live in #15 we are being bullied and harass in our own home this is the second group of plants we call the police on the first group and they disappear over night I have an affidavit with together to prove we are be bullied and harassed.

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- 4/-

what the Commissioner instructed him to do. The Commissioner also instructed him to include biographical information, information regarding the client's work history and previous medical

In the statement and evidence of the case Dr. Pommerake ordered the MRI not Dr. Van I only saw Dr. Van once and he did only an X-ray did not do anything else and in George Gallen Defendant submission he does not even list Dr. Van and there is an order concerning my wife for a second opinion and that I appealed his order and the judge never signed the order the unsigned order for the hearing concerning Dr. Van. Also he stated that I did not complete the course and the physical therapist stop my PT feeling what the MRI I show because it was too painful.

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he also stated on page # 5 that John Holland and Rob Usher ~~and~~ requested to be relieved that also is not true. I terminated them from my claim, them and just like all the other lawyers I terminated but Bothern Lullims. All the lawyers were against me and with George Gallego. he has manipulated all my lawyers with lies and false statements about me.

Then on page # 5 where he talks about Dr. Keith was also a lie like I said in court I have a full recording of my visit with Dr. Keith and it was not about pain meds it was about my surgery that what John Holland told me and my wife that we ~~were~~ and I will be getting my surgery from the Dr. Keith so that's what was told to us so I ask him when am I going to have my surgery I got the recording it has to be submitted and heard.

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And on page 7 I never
 told Dr. Taylor anything about not
~~going~~ going to pain management my
 wife was with me at the appointment
 when all I said was lets just
 go with the surgery nothing else
 was said from me or my wife he agreed
 because we talk about getting first
 before pain management. ~~he starts an assumption~~
 Mr. Longway was clearly your do
 boy he was only my lawyer for
 four days thats it. On page 8
 where he talks about McBaine he
 leaves out that we did go back
 in front of Commissioner T. Scott Beck
 and Commissioner Beck told me to
 pull my 50 and file a new 50
 but George Gallager filed a 21 before
 I could file my 50 he never speaks
 of Beck because that consent order
 was not a factor because Beck
 the Commissioner that was to enforce
 that consent order told Gallager that
 he is not going in further with this and

7028

-7-

for me to give the paperwork
to the next judge along with
my SO but George Gallagher filed
a 21 so that he can get the head
start over me.

And on page 13 order

where he has it saying it's
further ordered that Claimant
shall submit to further pain management
evaluation and treatment with Dr Behr.
The rest of it is object to I'm
requesting to also keep my appointment
with Dr Taylor as well

Your Truly
Nathaniel Alston

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Tags of the case that follow
US and goes to Apt # 15

Georgia Tag # RDD4558

South Carolina Tag # LSK 703

Georgia Tag # PWQ 2005

South Carolina Tag # GYW 891

South Carolina Tag # ZZG 550

South Carolina Tag # XCA 619

South Carolina Tag # EGQ 597

South Carolina Tag # FVZ 746

Illinois Tag # V30 2468

South Carolina Tag # MQR 184



andrea alston <andrea.alston0683@gmail.com>

(no subject)

George Gallagher <ggallagher@speed-seta.com>

Mon, Oct 10, 2016 at 9:20 AM

To: "Boyd, Elaine" <EBoyd@wcc.sc.gov>, andrea alston <andrea.alston0683@gmail.com>

Elaine- I have no response to Mr. Alston's allegations, other than to point out that the proposed Order complies fully with the Commissioner's ruling/instructions and accurately quotes the medical records submitted.

From: Boyd, Elaine [mailto:EBoyd@wcc.sc.gov]

Sent: Monday, October 10, 2016 9:16 AM

To: andrea alston <andrea.alston0683@gmail.com>

Cc: George Gallagher <ggallagher@speed-seta.com>

Subject: RE: Fwd:

[Quoted text hidden]

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

Nathaniel Alston,
Claimant,

vs.

All My Son's Moving & Storage,
Employer,

and

Vanliner Insurance Company,
Carrier,

Defendants.

) BEFORE THE SOUTH CAROLINA
) WORKERS' COMPENSATION
) COMMISSION

) WCC FILE NO. 1419738

) DECISION & ORDER

HEARING:

Held on July 27, 2016, Greenville, South Carolina.

APPEARANCES:

Mr. Nathaniel Alston, of 105 Cavalier Dr., Apt. 11, Greenville, SC 29607, appeared *pro se*.

The Defendants, All My Son's Moving & Storage, Employer, and Vanliner Insurance Company, Carrier, were represented by, George D. Gallagher, Esq., of Speed, Seta, Martin, Trivett & Stublely, LLC, PO Box 11669, Columbia, SC 29211.

PURPOSE:

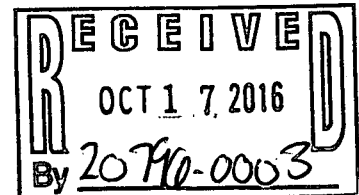
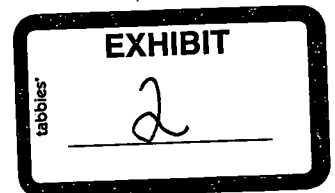
To determine the issues set forth on the Defendants Form 21.

DECISION AND ORDER BY:

The Honorable Avery B. Wilkerson, Jr., Commissioner.

FILED:

October 14, 2016



STIPULATIONS

The parties stipulated to the following at the Hearing:

- 1) Nathaniel Alston ("Claimant") sustained an admittedly compensable injury by accident to his left shoulder arising out of and in the course of his employment with All My Sons's Moving ("Employer") on December 13, 2014 in Greenville County, SC. Medical and compensation benefits have been provided/paid by Vanliner Insurance Company ("Carrier"); therefore, the South Carolina Worker's Compensation Commission ("Commission") has jurisdiction over all issues presented in this claim.
- 2) The purpose of this Hearing is to determine all issues pursuant to WCC Form 21 filed by the Defendants; specifically, termination/suspension of TTD benefits under § 42-15-60 for Claimant's purported refusal to comply with medical treatment recommended by the authorized providers, and Defendant's request for credit for all benefits to which Claimant forfeited entitlement during the period of such refusal.
- 3) Claimant, who is appearing *pro se*, also alleges that he sustained a compensable lower back injury as a result of the 12/13/14 accident and Defendants deny same. Although Claimant has not filed a Form 50 Notice of Claim/Request for Hearing pleading entitlement to benefits under the Act for a back injury, he has nevertheless submitted medical records in support of the alleged back injury for the undersigned Commissioner's consideration. **Defendants waive requirement of formal pleading of the alleged back injury and stipulate that they were on notice of this alleged injury.** As such, the parties stipulate that adjudication of the alleged back injury is ripe at this time and request that the undersigned Commissioner issue a ruling thereon.
- 4) All parties of interest received timely and proper notice of the Hearing.

- 5) Venue is proper in Greenville, South Carolina.
- 6) Claimant's Average Weekly Wage and applicable Compensation rate are \$448.16 and \$298.79, respectively.

EVIDENTIARY SUBMISSIONS

Pursuant to the SC Administrative Procedures Act - § 1-23-330- and WCC Regulation 67-612, the following medical reports and other documentary evidence were admitted into the evidentiary Record of this matter without objection:

DEFENDANTS SUBMISSIONS

TAB	NAME OF PHYSICIAN/OTHER	DATE OF REPORTS	NO.
1.	Orthopaedic Specialists of Spartanburg, Dr. John Keith	05/14/2015-05/22/2015	1-13
2.	Piedmont Orthopaedic Assoc., Dr. John Paylor	08/17/2015-10/26/2015	14-21
3.	Doctors Care, Dr. Forrest Pommeranke	12/21/2014	22-25
4.	Orthopaedic Associates, PA, Dr. John Behr	7/13/16	26-29

EXH.#	EXHIBIT	DATED	PAGE NOS.
A.	WCC File No. 141973		
B.	Correspondence from Spencer Langley to Claimant with proposed Consent Order	10/27/2015	

CLAIMANT'S SUBMISSIONS

Claimant presented over 200 pages of non-numbered/indexed medical records and other documentary exhibits. Defendants did not object to these submissions and their inclusion in the evidentiary Record.

STATEMENT AND EVIDENCE OF THE CASE

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 Harms, 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 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 provides 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.

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 based on agreement of the parties for Claimant to see Dr. Shallcross, 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 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 following Dr. Paylor’s deposition. 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.

Claimant presented to the St. Francis Hospital Emergency Room on March 10, 2016 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 undersigned on June 29, 2016. At the Hearing Claimant advised that he wanted another opportunity to seek new counsel. The undersigned agreed to continue the Hearing, but advised Claimant that he must appear for the appointment with Dr. Behr. The undersigned further ordered that the July Hearing would not be continued again for any reason, regardless of whether he retained a new attorney or not. The undersigned Commissioner 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 of 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 seek an Order finding Claimant has "refused" authorized medical treatment per § 42-15-60 (specifically pain management recommended by Dr. Paylor), and thereby forfeited entitlement to 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)- 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 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.

As noted previously in the "STIPULATIONS", **DEFENDANTS CONSENT TO ADJUDICATION OF CLAIMANT'S RECENTLY ALLEGED LOWER BACK INJURY.**

They 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 do not reference a LOWER 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.

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.

FINDINGS OF FACT

After careful consideration of able arguments by the parties, review of the medical records and other documentary evidence submitted, and lay testimony presented at the Hearing, the undersigned Commissioner makes the following findings:

- 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 medical 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.

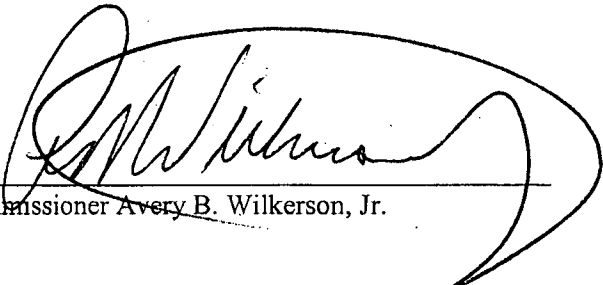
IT IS FURTHER ORDERED that Defendants shall assign nurse case management services to ensure compliance with this Order.

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

AND IT IS SO ORDERED.

COPIES TO: Nathaniel Alston; George D. Gallagher, Esq.

**SOUTH CAROLINA WORKERS'
COMPENSATION COMMISSION**



Commissioner Avery B. Wilkerson, Jr.

CERTIFICATE OF SERVICE

This is to certify the undersigned has on this date served a copy of this order in the above entitled action upon all parties to this case by sending an electronic copy hereof by electronic mail addressed to the attorneys for said parties; or if there is an unrepresented party(ies), by depositing a copy hereof, postage paid in the United States mail, first class, addressed to the unrepresented party(ies) and to the attorney(s) for the represented party(ies).

October 14, 2016

By: Elaine Boyd, Administrative Assistant to Commissioner Wilkerson

South Carolina Workers' Compensation Commission
1333 Main Street, Suite 500
P.O. BOX 1715
Columbia, SC 29202-1715
803-737-5675 www.wcc.sc.gov



WCC File #: 1419738
Carrier File #: _____
Carrier Code #: _____
Employer FEIN #: _____

Claimant's Name: Nathaniel Alston SSN: 047-21-4044 Employer's Name: All my Sons
Address: 105 Cavalier Dr Apt #11 Address: 1102 Old Stage Rd
City: Greenville State: SC Zip: 29607 City: Simpsonville State: SC Zip: 29681
Home Phone: 864 593-3427 Work Phone: _____ Insurance Carrier: Vanliner Inc
Preparer's Name: Self Law Firm: _____ Preparer's Phone #: _____

REQUEST FOR COMMISSION REVIEW

Request for Commission Review by Claimant Employer (check one) Date of Injury or Illness: 12-13-14 (m/d/yyyy)

The undersigned makes application for review of the findings of the Commissioner in the above-captioned case. The request for review is based on the following grounds: (State the grounds of your appeal in the form of questions presented. Each question presented must contain a concise statement of one proposition of law or fact. Refer to evidence by title and exhibit number. Use additional pages if necessary).

I am requesting in appeal on the last hearing. I have written a letter to the A.L.J. requesting an appeal. I found out that I needed to fill out a form 30 to move an appeal submitted. I represent my self and I had no idea on what I need to do to file an appeal. I am submitting the letter requesting my appeal was written in a time rec matter. So I ask you to please help me with this matter. the letter attach will show that I did write to appeal in the correct time frame.

(Check one) Oral argument is is not requested. Appellant's request for oral argument is waived if not indicated on this form.

Mediation
 Mediation is requested by consent of the Parties pursuant to Reg. 67-1803.

Questions regarding mediation may be submitted to mediation@wcc.sc.gov.

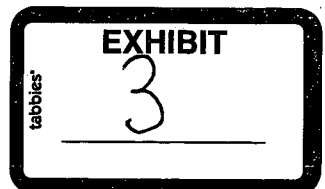
SCWCC
NOV 14 2016
JUDICIAL

I certify I have served this document pursuant to Reg. 67-211 by delivering a copy to George Gallagher
address _____ on the 14 day of Nov 2016
by first class postage certified mail personal service.

Nathaniel Alston _____ 12-14-2016
Preparer's Signature Title Email Date

Check this box if you are not represented by an attorney

Questions about the use of this form should be directed to the Judicial Department at 803.737.5675 or appeals@wcc.sc.gov. If the claimant appeals and is not represented by counsel, the Judicial Department will properly serve this form pursuant to Reg. 67-607 C. Pursuant to Reg. 67-205 and Reg. 701, the appeal must be postmarked no later than 14 days from the date of service of the Decision and Order of the Hearing Commissioner along with the filing fee. Attach a Form 32, if you are unable to pay the filing fee. Refer to Reg. 67-211 and Reg. 67-701 through 711.





Claimant's Name: Nathanial A. Hinton SSN: 247-21-4046 Employer's Name: All my Sons
Address: 105 Cavalier Dr Apt # 11 Address: 1102 old Stage Rd
City: Greenville State: S.C. Zip: 29607 City: Simpsonville State: S.C. Zip: 29691
Home Phone: 864-593-7424 Work Phone: () Carrier: Vanliner Inc
Preparer's Name: Self Preparer's Phone #: ()

REQUEST TO WAIVE APPEAL FILING FEE

- Are you presently employed? Yes No
 - If yes, state the name and address of your employer and wages below.

 - If no, where did you last work, when did you stop working, and what were your wages?
All my Sons, 12-13-14 - \$12.75/hr
 - Is your spouse employed? Yes No If yes, where? _____
What are your spouse's wages? \$296.78/wk
 - What is the total income of all working members of your household?

- How many people are dependent on you for their support (include children and relatives)? 3
How much do you spend weekly for their support? \$100.00
- List any money you have received in the past year other than that listed above and state from what source that money came (gift, inheritance, insurance, other). N/A
- Do you have a checking or savings account? Yes No
If yes, what is the balance in each account? Checking: \$200.00 Savings: \$10.00
- Do you rent or own your home? Rent Own Rent or mortgage payment: \$ _____
- Do you own a car? Yes No Payments: \$ _____
- List the names of your creditors and amount of debt.
F.B.S 2000.00, Rent 648.00 mo, Cabel 143.43 mo, light 100.00 mo

To the best of my knowledge, the information above is true and accurate. I have made no attempt to misrepresent my financial condition. I request that the filing fee be waived.

Nathanial A. Hinton
Signature

SCWCC

11-14-2016
Date

or official use only. Fee Waived Waiver Rejected Other Disposition

NOV 14 2016

JUDICIAL

Chair, S.C. Workers' Compensation Commission

File this form with a Form 30, Application for Commission Review. Refer to R.67-701 through R.67-711 for additional information. File this form with a Form 50, 2, 54, Requests for Motions, Consents and Settlements. Refer to R.67-207, R.67-208, R.67-215, R.67-803 and R.67-805.

George Gallagher

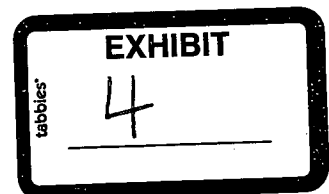
From: Falls, Kim <kfalls@wcc.sc.gov>
Sent: Tuesday, November 29, 2016 11:12 AM
To: George Gallagher
Cc: Debra Wallace
Subject: Nathaniel Alston (1419738)
Attachments: q1wa0wvuoq1.pdf; rw4gjhq5hg3.tif

Please see the attached.

Kim Falls
SC Workers' Compensation Commission
Judicial Analyst – Appeals Division
Claims Mediator
Hearing Site Coordinator
1333 Main Street, Suite 500
Post Office Box 1715
Columbia, SC 29202-1715
Phone: 803-737-5739
kfalls@wcc.sc.gov

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South Carolina Workers' Compensation Commission

1333 Main Street, Suite 500
P.O. BOX 1715
Columbia, SC 29202-1715
(803) 737-5723

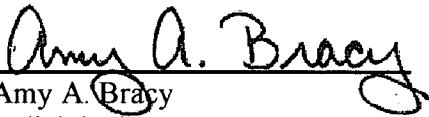


WCC File #: 1419738

Date of Injury: 12/13/2014

NATHANIEL ALSTON v. All My Son's Moving & Storage
WCC File No. 1419738

The Commission is hereby providing you a copy of the Form 30 filed by the unrepresented claimant pursuant to R.67-701 B. The Appeal is untimely however, we will be treating this as a Motion to Reinstate based on the information provided on the form and the attached letter. This issue will be addressed at Judicial Conference on December 12th, 2016. If the Appeal is reinstated, the attached will be used as the formal appeal request.


Amy A. Bracy
Judicial Director

Date: November 29, 2016

CERTIFICATE OF SERVICE

I hereby certify on November 29, 2016, I served this document on the parties listed below by electronic mail or depositing a copy hereof, postage prepaid, in the United States mail and addressed as follows:

NATHANIEL ALSTON
105 CAVALIER DR APT 11
GREENVILLE, SC 29607

George D. Gallagher
ggallagher@speed-seta.com
Speed, Seta, Martin, Trivett & Stublely, LLC
PO Box 11669
Columbia, SC 29211

By: Kim S. Falls, Judicial Department

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
JUDICIAL CONFERENCE DECISION AND ORDER

Nathaniel Alston v All My Son's Moving & Storage
SCWCC: 1419738
Commissioner: Wilkerson

This matter was heard before the South Carolina Workers' Compensation Full Commission in Judicial Conference on a **Motion to Reinstate**. The Commissioners considered the matter and ordered the matter handled in the following manner:

IT IS, THEREFORE, ORDERED the pending appeal of the Administrative Order of the Commission is hereby;
 _____ Dismissed as Interlocutory. _____ Set for Oral Argument.

IT IS, THEREFORE, ORDERED the pending motion be, and hereby is;
 _____ Granted. _____ Denied. _____ Dismissed _____ Preserved for hearing

BEFORE THE;
 _____ Hearing Comm. _____ Jurisdictional Comm. _____ Full Commission.

✓ Reinstate Appeal

IT IS, THEREFORE, ORDERED this matter be, and hereby is; remanded to take such action and enter an Order consistent with the Court's directive.

_____ Remand to Panel as indicated below.
 _____ Barden _____ James _____ Taylor
 _____ Beck _____ Campbell _____ Wilkerson
 _____ McCaskill

_____ Remand for Order consistent with the Order of the Court.
 _____ Remand to the Hearing Commissioner.
 _____ Remand to the Jurisdictional Commissioner.
 _____ Other: _____

_____ Remand: _____ Panel Oral Argument. _____ En Banc Oral Argument.

AND IT IS SO ORDERED.

T. Scott Beck
T. Scott Beck, Chair
For the Commission

Columbia, South Carolina

12/12 2016

CONCURRING:

Commissioner Susan S. Barden
 Commissioner Melody James
 Commissioner Aisha Taylor
 Commissioner Avery Wilkerson
 Commissioner Michael Campbell
 Commissioner Gene McCaskill

NOT PARTICIPATING:

DISSENTING:

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY THE UNDERSIGNED HAS THIS DATE SERVED THIS ORDER IN THE ABOVE-ENTITLED ACTION UPON ALL PARTIES ELECTRONICALLY OR BY DEPOSITING A COPY HEREOF, POSTAGE PAID, IN THE UNITED STATES MAIL.

This *12* day of *December*, 2016.

By: *[Signature]*
 SCWCC Judicial Department

EXHIBIT
 5

RECEIVED
 DEC 14 2016
 By *20790-0003*

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

Nathaniel Alston,

Claimant,

vs.

All My Son's Moving & Storage,

Employer,

and

Vanliner Insurance Company,

Carrier,

Defendants.

) BEFORE THE SOUTH CAROLINA
) WORKERS' COMPENSATION
) COMMISSION

) WCC FILE NO. 1419738

) **FULL COMMISSION ORDER**

HEARING:

Held in Columbia, South Carolina on April 19, 2017.

APPEARANCES:

The Claimant, Nathaniel Alston, appeared, not represented.

The Defendants, All My Sons Moving & Storage, Employer and Vanliner Insurance Company, Carrier, were represented by George D. Gallagher of Speed, Seta, Martin, Trivett & Stublely, LLC of Columbia.

PURPOSE:

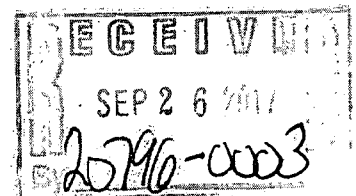
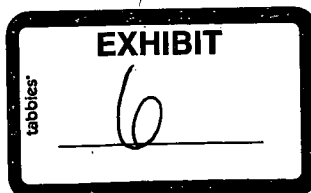
To determine issues set forth on Claimant's Form 30 Request for Full Commission Review and Rehearing

DECISION AND ORDER BY:

Commissioners James, McCaskill, and Taylor
SC Workers' Compensation Commission
(Order Assigned to Commissioner Taylor)

FILED:

9/10, 2017
9/25/2017



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 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 Pomcranke 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.

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 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.

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

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 (Cl. 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.

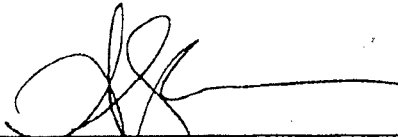
IT IS FURTHER ORDERED that Defendants shall assign nurse case management services to ensure compliance with this Order.

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 and incorporated herein by reference.

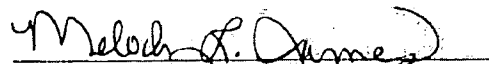
IT IS SO ORDERED!



Aisha Taylor, Commissioner for the Panel

WE CONCUR:



Gene McCaskill, Commissioner

Melody L. James, Commissioner

CERTIFICATE OF SERVICE

This is to certify that the undersigned has on this date served a copy of this order in the above entitled action upon all parties to this case by sending an electronic copy hereof by electronic mail addressed to the attorneys for said parties; or if there is an unrepresented party(ies), by depositing a copy hereof, postage paid in the United States mail, first class, addressed to the unrepresented party(ies) and to the attorney(s) for the represented party(ies).

By Eugenia on September 25, 2017

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

APPELLATE CASE No. 2017-002126
SCWCC File No. 1419738

Nathaniel Alston,.....Appellant.

v.

All My Son's Moving & Storage, Employer,
and Vanliner Insurance Company,
Carrier..... Respondents.

PROOF OF SERVICE

I certify that I have served the Respondents Motion to Dismiss Appellant's Appeal an Memorandum in Support of Same on Nathaniel Alston, *Pro Se* Claimant by depositing a copy of it in the United States Mail, postage prepaid, on February 15, 2018, addressed as follows:

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

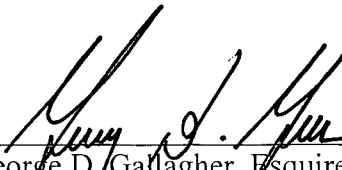
Nathaniel Alston
105 Cavalier Drive, Apt. 11
Greenville, SC 29607

RECEIVED

FEB 21 2018

SC Court of Appeals

February 19, 2018


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Columbia, SC 29211
(803) 748-2919
Attorney for Respondents

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STEPHANIE A. ROCKWELL (GA & TN)
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LILY D. WILKERSON (GA & FL)
∞
GEORGE D. GALLAGHER (SC), of counsel
ROBERT E. HORNER (SC & NC), of counsel

February 19, 2018

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1015 Sumter Street, Suite 200
Columbia, SC 29201

RE: *Nathaniel Alston v. All My Sons Business*
Appellate Case No. 2017-002126
WCC No.: 1418755
Claim No.: 830000140072
DOA: 12/13/2014
Our File No.: 20796-0003

RECEIVED

FEB 21 2018

SC Court of Appeals

Dear Ms. Kitchings:

Enclosed for filing are the original and six copies of the Respondents Motion to Dismiss Appellant's Appeal an Memorandum in Support of Same and a check in the amount of \$25.00 to cover the filing fee. Please return a clocked copy of the Respondents Motion to Dismiss Appellant's Appeal an Memorandum in Support of Same to me in the enclosed self-addressed stamped envelope.

By copy of this letter to Pro Se Claimant, Nathaniel Alston, I am serving him with the same.

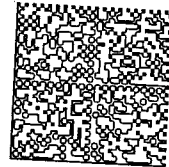
Sincerely,


George D. Gallagher

GDG/ecs

Enclosures

cc: Nathaniel Alston (w/encl) (Certified Mail, RRR)
Jennifer Quigley



UNITED STATES POSTAGE



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FEB 19 2018

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SPEED, SETA, MARTIN, TRIVETT & STUBLEY, LLC

ATTORNEYS AT LAW

P.O. BOX 11669

COLUMBIA, SOUTH CAROLINA 29211

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FEB 21 2018
SC Court of Appeals

The Honorable Jenny Abbott Kitchings
Clerk; South Carolina Court of Appeals
1015 Sumter Street, Suite 200
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