

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA WORKERS COMPENSATION COMMISSION
FULL COMMISSION

Case No.: 2018-002152

RECEIVED
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SC Court of Appeals

Willie Carroll Powell, Employee

Appellant,

v.

Johnsonville Mechanical Contractors, Inc., Employer,
and
Bridgefield Casualty Insurance Company c/o Summit, Carrier,

Respondents.

INITIAL BRIEF APPELLANT

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January 21, 2019

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STATEMENT OF ISSUES

1. DID THE APPELLATE PANEL ERR IN FAILING TO FIND THAT AN IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALINGS EXISTED AS PART OF THE WORKERS' COMPENSATION INSURANCE CONTRACT BETWEEN THE EMPLOYER, THE CARRIER AND THE APPELLANT?
2. DID THE APPELLATE PANEL ERR IN FAILING TO FIND THAT THE RESPONDENTS INSURANCE ADJUSTER REPEATEDLY VIOLATED THIS COVENANT BY REFUSING TO AUTHORIZE REFERRALS AND DIAGNOSTIC STUDIES REQUESTED BY APPELLANT'S AUTHORIZED TREATING PHYSICIANS?
3. DID THE APPELLATE PANEL ERR IN REFUSING TO REQUIRE THE RESPONDENTS TO REIMBURSE THE APPELLANT FOR BEING FORCED TO PAY FOR THE MRI ORDERED BY AN AUTHORIZED PHYSICIAN AND THE COST OF SEEING A NEUROSURGEON WHEN THE REFERRAL WAS MADE BY AN AUTHORIZED TREATING PHYSICIAN?
4. DID THE APPELLATE PANEL ERR IN FAILING TO FIND THAT THE RESPONDENTS BY AND THROUGH THEIR ADJUSTER VIOLATED S.C. CODE ANN. SEC. 42-3-175 AND FAILED TO IMPOSE THE PENALTIES PROVIDED THEREIN?
5. DID THE APPELLATE PANEL ERR IN FAILING TO FIND THAT THE RESPONDENTS BY AND THROUGH THEIR ADJUSTER VIOLATED S.C. CODE ANN. SEC. 42-15-60 (2007) IN REFUSING TO AUTHORIZE REFERRALS MADE BY AN AUTHORIZED TREATING PHYSICIAN WHEN THE REFERRALS WERE CONSIDERED NECESSARY BY THE AUTHORIZED PHYSICIANS?
6. DID THE APPELLATE PANEL ERR IN FAILING TO DESIGNATE NEUROSURGEON, WILLIAM NASO, M.D., OR ANOTHER QUALIFIED PHYSICIAN TO BECOME RESPONSIBLE FOR APPELLANT'S CARE NOT SUBJECT TO INTERFERENCE BY THE INSURANCE ADJUSTER?
7. DID THE APPELLATE PANEL ERR IN FINDING THAT APPELLANT'S INJURY WAS LIMITED TO HIS RIGHT LOWER EXTREMITY IN VIEW OF THE FACT THAT THE WORKERS' COMPENSATION CARRIER BY AND THROUGH ITS ADJUSTER, KIEMA LEWIS, DELIBERATELY INTERFERED WITH HIS MEDICAL CARE SO AS TO PREVENT A FAIR DETERMINATION AS TO THE EXTENT OF HIS INJURIES?

8. THE PROMISE OF THE EMPLOYER TO PROVIDE MEDICAL TO AN INJURED WORKER, "TO EFFECT A CURE OR GIVE RELIEF" IS SUCH AN ESSENTIAL PART OF CONTRACT BETWEEN THE EMPLOYER AND ITS WORKERS THAT THE ACTIONS OF THE CARRIER BY AND THRU ITS ADJUSTER CAN ONLY BE RECTIFIED BY GRANTING APPELLANT A DE NOVO HEARING AND NAMING DR. WILLIAM NASO AS APPELLANT'S AUTHORIZED PHYSICIAN

STATEMENT OF THE CASE

The above claim was heard by the Honorable Aisha Taylor in Hartsville, South Carolina, on November 30, 2017. The Hearing was set upon the Form 50 of the Claimant seeking a finding that on May 3, 2016, he injured his back and right leg with radiculopathy, numbness and tingling in his foot and toes. Claimant also requested additional medical care for his back and right leg and requested a designation of William Naso, M.D., as his authorized treating physician. In addition Claimant sought imposition of penalties for adjusters denial of medical care to which the Claimant was entitled under the Act and reimbursement for the cost of the MRI and appointment with Dr. Naso both ordered by the authorized treating physician.

By Order dated May 22, [2017] 2018, Commissioner Aisha Taylor found that the Appellant's injury was limited to his right lower extremity and did not address the various issues raised by the Appellant, thereby, denying any of the relief sought by the Appellant. In due time Appellant appealed the decision of the Hearing Commissioner to and Appellant Panel of the Workers' Compensation Commission which by order dated November 30, 2018, adopted the decision of the Single Commissioner in its entirety. Thereafter, Appellant on December 3, 2018, filed his notice of intention to appeal to the South Carolina Court of Appeals.

STATEMENT OF RELEVANT FACTS

The Claimant, Carroll Powell, was injured on May 3, 2016. At that time he had worked for the Employer a total of 18 years. At the time of his injury he was 51 years old and he is a pipe fitter by trade. On the day he was injured he was

working at elevation and he had his legs hooked under a pipe leaning back to assist another worker. When he pulled up utilizing his legs for leverage, "... he felt something pop in the back of his right calf. He subsequently developed pain in his leg, both in his calf and his posterior thigh, some numbness down into his foot." (As reported on 5/27/16, to authorized treating physician, Daniel E. DeCamps, M.D. (DeCamps p.28)) When he was seen on June 8, 2016, by Dr. DeCamps he reported, "...pain in RLE with a history that he is no better, and in fact, he is now having some discomfort up into his back and even down into his left leg." (DeCamps p.29)

On July 21, 2016, Claimant was seen by David Stickler, M.D., a neurologist in Charleston, South Carolina. This appointment was authorized by Kiema Lewis. On his first visit he reported pain in his lower back radiating into his right leg. On August 9, 2016, Dr. Stickler said in the first paragraph of his office note, "**The specific question is to evaluate for lower extremity neuropathy versus lumbar radiculopathy.**" (Emphasis added) (Dr.Stickler p.31-A) In an attempt to answer the question posed he ordered an MRI of the lumbar spine. On August 19, 2016, Dr. Stickler said, "Mr. Willie Carroll Powell was referred for possible nerve injury secondary to changes on the MRI of the leg. I could not confirm that he has a clear tibial neuropathy in his recent EMG/NCS. **These changes could be secondary to neurogenic process involving his lumbar spine and an MRI of the lumbar spine has been requested to evaluate further.**"(Emphasis added) (Dr.Stickler)

After Kiema Lewis refused to authorize the MRI, Claimant obtained the MRI on October 3, 2016, at a cost of \$2,521.25. (Lake City Hospital p.35) The Hearing Commissioner did not order the Carrier to reimburse Appellant. This issue was not addressed and thus not ordered as requested.

On October 20, 2016, Claimant was seen for an IME by Steven C. Poletti, M.D., who is a spine surgeon with Southeastern Spine Institute in Mount Pleasant, South Carolina. (Dr. Poletti p.37) Dr. Poletti's note states, "He describes himself as having severe pain into the back, pain into the buttocks, into the hip, and into the

right leg and has pain 10/10. He has some pain and swelling in his right lower extremity." Dr. Poletti further states, "He has also had some complaints of some chronic back pain. Even had an episode of low back pain in the past but has not had any kind of MRI scans or other studies until this most recent injury." Under the heading "Imaging Findings" it states, "He has diagnostic imaging studies to include an MRI scan of the lumbar spine dated 10/3/2016, which shows evidence of posterior disc bulging with lateral recess and neural foraminal narrowing." Under "Treatment Plan" Dr. Poletti opined, "... I suspect that he has had some direct injury to his right knee and to his back and that this disc disruption at L5-S1 level most likely was a direct result of his work related accident in 2016." Dr. Poletti then recommended that he consider treatment to include epidural injections at the L5-S1 disc space. As later discussed the same recommendation was made by William Naso, M.D., who is a neurosurgeon. (Dr. Naso p.48) These recommendations were ignored by Kiema Lewis.

The next specialist to be authorized by the adjuster, Kiema Lewis, was Patrick K. Denton, M.D., orthopedist, with Pee Dee Orthopedic Associates, PA, in Florence, SC, who saw Appellant for the first time on May 9, 2016. Under "History" it is stated, "He states that his lateral three toes are numb. He states that he has difficulty elevating his foot. He has had a lumbar MRI scan which showed some degenerative changes at L5-S1. He tried to have an EMG nerve conduction study of the right lower extremity which was not tolerable secondary to his anxiety and pain." (Dr. Denton p.39) In conclusion Dr. Denton stated, "... in general has a neurologic injury most likely to the peroneal nerve or at the tibial nerve perineal nerve junction... I believe he continues to have a radicular pain in his lower extremity but has no internal knee pathology. He may benefit from selective nerve blocks to see if this would lessen his symptoms... I think his workup should be continued with either neurology or possibly neurosurgery for peripheral nerve injury." (Dr. Denton p.44)

He was seen again on August 9, 2017, where it was noted that he was scheduled to go undergo an EMG/NCS next Monday. Incidentally this was never

approved by the adjuster, Kiema Lewis. Under the heading "Assessment" it stated, "Injury of unspecified nerve at hip and thigh level, unspecified leg, sequelae." (Dr. Denton p.41) Dr. Denton thereafter referred the Claimant to Dr. William Naso with Florence Neurosurgery. Also it is noted that the Claimant was referred to Florence Neurosurgery for "evaluation and treatment". (Dr. Denton p.42)

On Wednesday, August 16, 2017, the undersigned sent an email to the Attorney for the Carrier, Brandon Hilton, stating, "I have just learned that August 9, 2017, Dr. Patrick Denton, an authorized treating physician pursuant to Commission Order, made a referral for Mr. Powell to Dr. William Naso, neurosurgeon,.... I've also been advised by Dr. Denton's office that when your adjuster Kiema Lewis was called to obtain authorization for the referral she stated that she would not authorize an appointment with Dr. Naso. I would appreciate your confirming whether not this is in fact true." (Email to Attorney for Respondents p.45) The referral was attached to the email. On Friday, August 18, 2017, the undersigned again wrote to the Respondent's attorney stating, "Two days ago I sent you information with reference to Dr. Denton's referral for Mr. Powell to Dr. Naso. I asked you to please confirm whether or not it was accurate that Kiema Lewis told Dr. Denton's office that she was not going to refer him to Dr. Naso.... If I do not receive a response by the end of business today I will assume that the information I received from Dr. Denton's office is correct". The information was not refuted and, in fact, was correct that Kiema Lewis had refused to authorize the referral from Dr. Denton.

When it became clear that the adjuster, Kiema Lewis, was not going to authorize the appointment with Dr. Naso pursuant to Dr. Denton's referral, Claimant paid \$300 so that he could be seen by Dr. Naso. (Appellant's check to Dr. Naso p.46) It should be kept in mind that it had been a year and a half since Mr. Powell's injury. Dr. Naso's office note states, "Since that time (job injury) he has had shooting pains from his right side of his low back radiating into his foot. He described his pain predominantly in his right buttock radiating posteriorly down the side and posterior laterally into his calf. He also says he has dysesthesias throughout his right leg but predominantly in his right calf. He has numbness in his

third, fourth, and fifth toe of his right foot and numbness in the dorsal surface of the foot and radiating into his posterior calf." Under the heading "Assessments" it is stated, " (1) Spinal stenosis of lumbar region without neurogenic claudication, (2) Right lumbar radiculopathy, (3) Lumbar degenerative disc disease." (Dr. Naso p.48)

Dr. Naso recommended completing a course of physical therapy for 4 to 6 weeks. (Claimant has never received any physical therapy even though it has been ordered by more than one physician.) He also recommended aL5/S1 ESI which is to be done under anesthesia. The insurance adjuster, Kim Lewis, never authorized any of the treatment recommended by all of the doctors that have seen Appellant.

ARGUMENT I

THE COVENANT OF GOOD FAITH AND FAIR DEALING EXISTS IN EVERY CONTRACT OF WORKERS' COMPENSATION INSURANCE

In *Nichols V. State Farm Mut. Auto. Ins. Co.*, 279 S.C. 336, 306 S.E.2d 616 (1983), the South Carolina Supreme Court recognized the existence of a cause of action against an insurance company for bad faith refusal to pay first party benefits due under an insurance contract. The Court said, "In so doing we cited with approval the reasoning used in the seminal case of *Gruenberg v. Aetna Ins.Co.*, 108 Cal.Rptr.480, 510 P.2d 1032 (1973), that there is an implied covenant of good faith and fair dealings in every insurance contract , 'that neither party will do anything to impair the others rights to receive benefits under the contract' ". *Nichols*, 279 S.C. at 339, 306 S.E.2d at 618.

In *Corbett v. City of Columbia*, 290 S.C.71, 348 S.E.2d 191,193(1986) the South Carolina Court of Appeals said, "It is a matter of common knowledge that our Workers' Compensation Act was fashioned after North Carolina and our Supreme Court has repeatedly held that opinions of the Supreme Court of North Carolina construing North Carolina's Act are entitled to great weight."

In *Gallimore v. Daniel Construction Company, Employer, U.S. Fidelity & Guarantee Insurance Co., Carrier*, 78 N.C. App.747,338 S.E.2d 317 (1986),

pursuant to a compromise agreement, the workers' compensation carrier, Fidelity, had entered into an agreement whereby they were only responsible for Claimant's medical expenses if they occurred before May 31, 1983. Its adjuster received a letter on May 16, 1983, from claimant's doctor stating that claimant urgently needed to be hospitalized. He testified also that the insurance company took no action after receiving the letter because the company knew it would not have to pay for the hospitalization if such hospitalization occurred after May 31, 1983. The Court said, "However, the issue in this case is neither the validity of the agreement nor whether all bills incurred prior to 31 May 1983 have been paid, but rather the conduct of the defendants in view of the intent of the compromise agreement. Every contract or agreement implies good faith and fair dealing between the parties to it, and a duty of cooperation on the part of both parties." *338 S.E.2d 317 at 319*. The Court went on to say, "We find defendants have breached their duty of good faith and fair dealing by acting to delay the treatment until after 31 May 1983. Therefore, defendants may not now claim that plaintiff cannot recover the expenses incurred after that date." *338 S.E.2d 317 at 320*.

ARGUMENT II

WORKERS' COMPENSATION ADJUSTERS AND REHABILITATION PROFESSIONALS OCCUPY TWO DIFFERENT ROLES IN A WORKERS' COMPENSATION CASE

SC Code Ann. 38-47-50 (1993), provides that , " Adjusters are declared to be acting as the agents for the company or companies represented by them in the adjustment of any loss ." On the other hand R.67-1307 provides, "Rehabilitation professionals or coordinators of medical rehabilitation services, including but not limited to state, private, or carrier based , whether on site , telephonic , and are out-of-state . The role of a rehabilitation professional is to ensure the primary concern and commitment in each Workers' Compensation case is to advance the medical rehabilitation of the injured worker ."

In South Carolina an injured worker does not have the right to choose his or her physician. The choice of physician and the treatment rendered is controlled by the employer's Workers' Compensation carrier. A search of the statutes and cases pertaining to Workers' Compensation is void of any mention pertaining to the behavior of Workers' Compensation adjusters with the exception of the above statute and regulation and SC Code Ann. 42-3-175 (2007) which provides for penalties when an adjuster or insurer without good cause fails to authorize medical treatment "**when ordered to do so by the commission.**"

Dr. Denton, was designated an authorized treating physician by Order of Commissioner Scott Beck dated May 12, 2017, in an attempt to determine the full extent and nature of Appellant's injuries who referred him to Dr. William Naso, who is a neurosurgeon. The adjuster refused to authorize the referral consistent with her behavior throughout this case which was designed to limit Appellant's injury to a "single member", of which, prevented him from having the opportunity to make a claim under section 42-9-10 and/or 42-9-20.

From the very beginning of this case the adjuster made sure that any attempt to establish that Appellant's back was affected by his injury was prevented from being developed through her denial of Dr. Stickler's request for an MRI of Appellant's back and Dr. Denton's referral to Dr. Naso .

ARGUMENT III

EXPECTING A WORKERS' COMPENSATION INSURANCE ADJUSTER TO ACT AS THE AGENT OF THE COMPANY HE OR SHE REPRESENTS AND AT THE SAME TIME EXPECTING THE AGENT HANDLING THE INJURED WORKERS MEDICAL TREATMENT TO "ADVANCE THE MEDICAL REHABILITATION OF THE INJURED WORKER " AND TO " AFFECT A CURE OR GIVE RELIEF" FOR THE INJURIES IS THE SAME AS ASKING THE FOX TO BE KIND TO THE HENS IN THE HEN HOUSE.

One cannot serve both masters with the due diligence that both jobs require. Medical cost eat into the bottom line for insurance companies which exist to make a profit. The South Carolina legislature has at least recognized the potential for abuse by enacting SC Code Ann. 42-3-175 (2007). In the final analysis it is up to the Legislature to pass legislation that will address this conflict of interest . Also, South Carolina Workers' Compensation Commission should have already addressed this conflict by regulation case but until that occurs is important for this Court to address a situation like the present where the misconduct of the adjuster has basically deprived the injured worker of the benefits of the Workers' Compensation Act.

ARGUMENT IV

THE SINGLE COMMISSIONER AND THE APPELLATE PANEL OF THE COMMISSION SHOULD HAVE TAKEN ACTION TO PROVIDE THE APPELLANT WITH A NEW HEARING WITH SAFEGUARDS TO PREVENT FURTHER INTERFERENCE BY THE INSURANCE ADJUSTER AND TO ALLOWED THE APPELLANT TO FULLY DEVELOP THE EXTENT OF HIS JOB INJURY

Patrick Denton, M.D., was designated an authorized treating physicians by Order of Commissioner Scott Beck dated May 12, 2017, in an attempt to determining the full extent and nature of Appellant's injuries. He referred him to Dr. William Naso, who is a neurosurgeon. The adjuster refused to authorize the

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From the very beginning of this case the adjuster made sure that any attempt to establish that Appellant's back was affected by his injury was prevented from being developed through her denial of Dr. Stickler's request for an MRI of Appellant's back and Dr. Denton's referral to Dr. Naso .

CONCLUSION

It has been approximately two years and nine months since the Appellant's injury and, notwithstanding the fact that multiple doctors have recommended physical therapy and epidural injections , the Appellant has received absolutely no treatment to lessen his disability or to give him relief from his pain. It is respectfully requested that this Court find that the adjuster in this case is in violation of section 42-3-175 and that in addition that her interference in the medical treatment of the Appellant is in violation of the Workers' Compensation Act and that the decision of the Appellate Panel be reversed and that the Appellant be awarded a new hearing de novo and that Dr. William Naso be designated as the authorized treating physician for Appellant.



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January 21, 2019


CERTIFICATE OF MAILING

The undersigned certifies that she is an employee of Thomas W. Greene, GREENE LAW FIRM and that the attached Designation of Matter and Initial Brief was served upon counsel for the employer-carrier, this 22nd day of January, 2019, by depositing a copy of same in the United States Mail, postage prepaid, addressed to:

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January 21, 2019

The Hon. Jenny Abbott Kitchings, Clerk
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JAN 24 2019

SC Court of Appeals

Re: Willie Carroll Powell, Employee/Appellant

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Johnsonville Mechanical Contractors, Inc., Employer,
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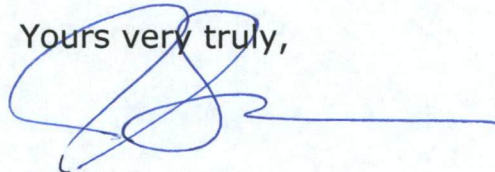
Case No.: 2018-002152

Dear Ms. Kitchings:

Please find enclosed Designation of Matter to be Included in the Record on Appeal and Initial Brief of Appellant in the above case.

I have also enclosed a certificate of mailing as proof of service upon opposing counsel.

Yours very truly,



Thomas W. Greene

TWG/mdt

Enclosures

cc: Carroll Powell
J. Brandon Hylton, Esquire
Helen F. Hiser, Esquire

