

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
WCC FILE No. 1103709

Appellate Panel

Appellate Case No: 2012-213392

Vickey D. Vennekamp,

Appellant,

v.

Schaffler Group, USA, and the Phoenix
Insurance Company,

Respondent.

FINAL BRIEF OF APPELLANT

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SC Court of Appeals

TABLE OF CONTENTS

Table of Authorities.....3

Statement of Issue on Appeal.....4

Statement of the Case.....4

Standard or Review.....5

Arguments.....6

The South Carolina Workers' Compensation Commission erred when it ordered termination of Appellant's Temporary Total Disability benefits when no Form 21 had been filed to request a hearing for permission to terminate temporary compensation.....6

Conclusion11

TABLE OF AUTHORITIES

CASES

Fredrick v. Wellman, Inc., 385 S.C. 8, 15-16, 682 S.E.2d 516, 519 (Ct. App. 2009).....5
Morgan v. JPS Automotives, 321 S.C. 201, 467 S.E.2d 457 (Ct. App. 1996).....6-7
United States v. Burke, 504 U.S. 229, 246 (1992) (Souter, J. concurring).....10

STATUTES

S.C. Code Ann. § 1-23-380(5) (Supp. 2010).....5,11
S.C. Code Ann. § 42-9-260.....6
S.C. Code Ann. Regulation 67-201.....11
S.C. Code Ann. Regulation 67-203.....9
S.C. Code Ann. Regulation 67-506.....7-9

STATEMENT OF ISSUE ON APPEAL

Whether the South Carolina Workers' Compensation Commission erred when it ordered termination of Appellant's Temporary Total Disability benefits when no Form 21 had been filed to request a hearing for permission to terminate temporary compensation?

STATEMENT OF THE CASE

This appeal of a Workers' Compensation case presents the question of whether the issue of termination of temporary total disability benefits is properly before the Workers' Compensation Commission (the Commission) when no Form 21 has been filed with the Judicial Department.

This claim involves an admitted repetitive injury to the right hand and arm of Appellant Ms. Vickey Vennekamp, and this injury was reported on March 25, 2011. **(R. p. 3)**. There is no dispute regarding injury causation. **(R. p. 4)**. On or about October 14, 2011, a Form 50 hearing request was filed on Appellant's behalf seeking an Order for compensability of her left hand and left arm injuries and causally related treatment. **(R. p. 26)**. A Form 51 was then filed by the Defendants. **(R. p. 27)**. A hearing was subsequently scheduled before Commissioner Andrea C. Roche to determine issues as set forth on Forms 50 and 51 respectively. **(R. p. 3)**.

Following the hearing, Commissioner Roche issued an Order on May 3, 2012. That order states: 1) the Claimant failed to prove a compensable injury to her left arm, left elbow, left wrist or left hand; 2) the Defendants' are entitled to terminate temporary total disability benefits as of October 3, 2011; and 3) the Claimant reached maximum medical improvement on October 3, 2011. **(R. p. 13-14)**.

On or about May 16, 2012, the Claimant timely filed a Form 30, Request for Commission Review, asserting approximately seventeen (17) grounds for review. **(R. p. 34)**. In response to this request, a three member Appellate Panel of the Commission conducted a hearing on August 28, 2012. **(R. p. 97)**. On October 11, 2012, the Commission issued an order affirming the single commissioner in full. **(R. p. 15)**.

On November 9, 2012, Appellant timely filed notice of this appeal upon the Court. **(R. p. 61)**.

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act (APA) establishes the standard for judicial review of decisions by the Appellate Panel of the Workers' Compensation Commission: Frederick v. Wellman, Inc., 385 S.C. 8, 15-16, 682 S.E.2d 516, 519 (Ct. App. 2009). Under the scope of review established in the APA, "The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) affected by other error of law; (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." S.C. Code Ann. § 1-23-380(5) (Supp. 2010).

ARGUMENTS

In its October 11, 2012 Order, the Commission affirmed the May 3, 2012 Single Commissioner's Order which stated that Ms. Vennekamp had reached maximum medical improvement (MMI) as of October 3, 2011 and terminated her temporary total disability benefits as of that date. **(R. p. 24)**. Each order goes on to state: "Under Morgan v. JPS Automotives, 321 S.C. 201, 467 S.E.2d 457 (Ct. App. 1996), Claimant's [Appellant's] temporary total disability benefits are properly terminated as of the date of maximum medical improvement." **(R. p. 13, 24)**. Interestingly, the Morgan case also states: "Morgan argues the Commission erred in granting JPS's application to stop payment of temporary total disability benefits." Id. at 460 (**emphasis added**). This statement is on point, and brings Appellant to her argument regarding the error of law committed by the Commission.

Section 42-9-260 of the South Carolina Code Annotated entitled "Notice to Commission when payments have begun; suspension or termination of payments," states in pertinent part:

(D) If an employee has been declared as having reached maximum medical improvement, the employer may request a hearing to address the termination of temporary disability payments. The hearing must be held within sixty days of the date of the employer's request for a hearing.

(E) An employer may request a hearing at any time to address termination or reduction of temporary disability payments.

(F) After the one hundred fifty day period has expired, the commission shall provide by regulation the method and procedure by which benefits may be suspended or terminated for any cause, but the regulation must provide for an evidentiary hearing and commission approval prior to termination or suspension unless such prior hearing is

expressly waived in writing by the recipient or the circumstances identified in Section 42-9-260(B)(1) or (B)(2) are present. Further, the commission may not entertain any application to terminate or suspend benefits unless and until the employer or carrier is current with all payments due.

Further clarifying this statutorily required procedure is Regulation 67-506 of the South Carolina Code Annotated entitled "Terminating Temporary Compensation after the First One Hundred Fifty Days after the Employer's Notice of the Injury" which states in pertinent part:

B. After the one hundred fifty day period, when the claimant is receiving temporary compensation and the authorized health care provider reports the claimant has reached maximum medical improvement, the employer's representative shall continue payment of temporary compensation until the Commission finds the employer's representative may terminate compensation unless compensation has been suspended according to R.67-505.

E. To request a hearing for permission to terminate temporary compensation, the employer's representative **shall** file a Form 21 with the Judicial Department. (1) The employer's representative **shall** serve a copy of the Form 21 on the claimant according to R.67-211. (2) The employer's representative **shall** certify temporary compensation is current or no hearing will be set. ()

(emphasis added). In this matter now before the Court, no Form 21 has ever been filed.

This is in direct contrast to the Morgan case cited by the Commission where an "application to stop payment of temporary total disability benefits" was properly filed. Appellant is unable to locate any prior case where temporary total disability benefits were terminated in the absence of the filing of an application to stop payment. It is important to note the use of the word "Shall" in the requirement that a Form 21 be filed. As can be observed in the two code sections cited above, the words "may" and

“shall” are both utilized for different instructions within the statutes. This differentiation is not unintentional by the legislature in formulating these statutes. In determining legislative intent, it is clear the use of “may” is permissive, but the use of “shall” constitutes an imperative to be followed. The employer **may** request a hearing at any time, however, the employer **shall** file a Form 21 with the Judicial Department. The use of “shall” clearly indicates the statutory requirement from the legislature that this procedure of filing a Form 21 must be followed. Further, the word “shall” is again utilized in Regulation 67-506 to express the statutory requirements that the Form 21 be served on the claimant and that the employer certify that temporary compensation is current or no hearing will be set. None of these strict statutory requirements were followed in this matter. A Form 21 has never been filed by the employer, a copy of Form 21 has never been served on the claimant, and there has been no certification by the employer that temporary compensation was current. There is no way to misconstrue the statutory requirement to “certify temporary compensation is current or no hearing will be set.” That section alone would prohibit the Commission from holding a hearing on terminating Appellant’s temporary compensation benefits in this matter because no such certification was ever provided. Not only was this certification not provided in the Form 21 as required by statute, but also Respondent could not even argue that the certification was provided in his Form 51, Form 58, or in evidence admitted before the single commissioner or Appellate Panel. There simply was no such certification provided by the employer.

In oral argument before the Appellate Panel, Respondent argued that he complied with statutory and notice requirements because his Form 51 and Form 58 raised the issues

of MMI and termination of temporary compensation benefits. (R. p. 107-08). It is instructive to note the titles to these forms provided by statute. In Regulation 67-203 of the South Carolina Code Annotated, Form 51 is entitled "Employer's Answer to Request for Hearing," Form 58 is entitled "Pre-Hearing Brief," and Form 21 is entitled "Employer's Request for a Hearing." This further illuminates the reason for the Regulation 67-506 statutory requirement that "To request a hearing for permission to terminate temporary compensation, the employer's representative shall file a Form 21 with the Judicial Department." Without a filed and served Form 21, it would not matter what other forms the employer filed. The statute specifically requires the filing of a Form 21. Simply because some other incorrect form states an intention to seek termination of temporary disability benefits does not in any way comply with the statutory requirements or result in any cause for concern by an opposing party. As a civil defense attorney who represented governmental entities, I would routinely receive complaints intending to prove punitive damages against my client. Because the S.C. Tort Claims Act generally prohibits punitive damages against governmental entities, I would not bother to formulate an argument against those claims. Similarly, in a workers' compensation matter a mere statement of an intention to terminate temporary compensation benefits on a Form 51 or Form 58, would not suggest an argument on that issue would be entertained by the Commission in violation of the statutory requirements. Without a Form 21 and a certification by the employer that temporary compensation is current, a claimant would not believe the issue of termination of temporary compensation benefits would be addressed by the Commission as that would be an error of law. A review of the transcript from the hearing before the single commissioner reveals that neither party nor the

Commissioner spoke a single word regarding termination of temporary compensation. “The rule that points not argued will not be considered is more than just a prudential rule of convenience; its observance, at least in the vast majority of cases, distinguishes our adversary system of justice from the inquisitional one.” See United States v. Burke, 504 U.S. 229, 246 (1992) (Souter, J. concurring).

In fact, the single commissioner in this matter specifically stated in her Order: “Claimant was not requesting a determination of permanency, and the hearing was not set on a Form 21 filed by the Defendants; therefore, any determination of permanency is held in abeyance.” (R. p. 12). This exact language is also present in the Appellate Panel’s Order. (R. p. 23). The Commission was correct in this portion of the order, but somehow went off the tracks and decided to terminate temporary compensation benefits without the Form 21 in violation of statutory requirements. A possible explanation for this error could be explained by looking to the order directives issued by the single commissioner. These directives were addressed to Respondent’s attorney to draft an order consistent with the noted findings. In this directive, the Commissioner notes “Based on the medical records, I find the claimant reached MMI on 10/3/11.” (R. p. 125). However, nowhere in the directives does she state that the employer is permitted to terminate temporary total disability benefits of the Claimant. It appears counsel for the employer added this portion of the order. Perhaps, this additional item was overlooked by the Commissioner prior to signing off on the order. It would otherwise be difficult to reconcile the inconsistencies between noting the absence of a Form 21 while simultaneously terminating temporary compensation benefits.

Lastly, Appellant would note the purpose of workers’ compensation is to provide

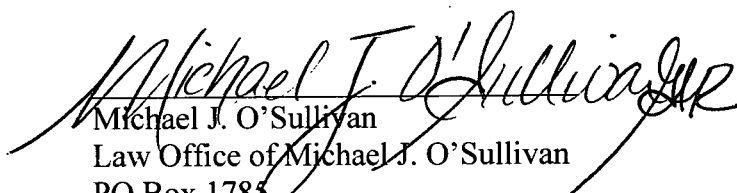
greater protection and security to the worker against injury, illness and death occurring in the course of employment. Our government has taken away an employee's right to sue his or her employer and allow the workers' compensation award to, in nearly all situations, be the employee's exclusive remedy against the employer. It is through the establishment of statutory procedures and requirements that the government attempts to ensure balance, fairness and equality for every injured worker. Without these procedures or in this case the enforcement of these statutory requirements, the balance shifts and fairness is eliminated. In fact, Regulation 67-201 entitled "Application of Regulations" states: "A. These regulations are entitled to a liberal construction in the furtherance of the purpose for which the South Carolina Workers' Compensation Law is intended. □□B. In doubtful cases, the application of these regulations shall be in favor of the injured employee."

CONCLUSION

In conclusion, a review of the previously cited grounds for reversing under South Carolina Code Annotated Section 1-23-380(5) (Supp. 2010) illustrates that reversal in this matter could be based upon four of the six possible choices. This Court could reverse the Commission's decision to terminate temporary compensation because the decision was: (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) affected by other error of law. For the above stated reasons, Appellant requests that this Court reverse the Commission and find the Respondent is not entitled to terminate temporary total disability benefits as of October 3, 2011, and to order those

benefits continue to the present.

Respectfully submitted, this, the 15th day of August, 2013.


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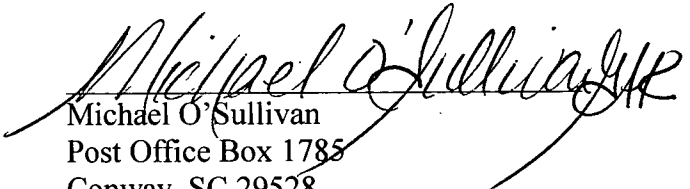
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CERTIFICATE OF COUNSEL

SCACR. The undersigned certifies this Final Brief complies with Rule 211 (b),


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