

ORIGINAL

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

W.C.C. File No. 1103709
Appellate Case No. 2012-213392

Vickey D. Vennekamp, Employee/Claimant Appellant,

v.

Schaeffler Group USA, Inc., Employer
And The Phoenix Insurance Company, Carrier Respondents.

FINAL BRIEF OF RESPONDENTS

Steady in 1103709
AUG 19 2013
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STATEMENT OF ISSUES ON APPEAL

- I. **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

Appellant filed a Form 50 Request for Hearing on October 14, 2011, alleging repetitive trauma injuries to the right hand, right arm, left hand, and left arm. Appellant sought additional medical treatment for the right arm/hand, and she sought authorization of treatment for her left arm/hand. Appellant also asserted she was entitled to temporary total disability benefits. Respondents filed a Form 51 on October 20, 2011, admitting an injury to the right hand, but denying all other alleged body parts. Respondents also maintained in the Form 51 that Appellant had reached maximum medical improvement (MMI) for her injuries, and that Appellant was entitled to no additional temporary total disability benefits. A hearing was held before Commissioner Andrea C. Roche on January 25, 2012.

The Single Commissioner issued an Order on May 3, 2012, whereby she held that Appellant had reached MMI for her right hand/arm injuries, and that Appellant was entitled to no additional temporary total disability benefits. The Single Commissioner also held that Appellant could not carry her burden of proving a compensable injury to her left hand/arm. Appellant appealed the Order to the Appellate Panel of the Commission, who issued a full affirmation of the Single Commissioner's Order on October 11, 2012. On November 9, 2012, Appellant filed a Notice of Appeal with this Court, which stated no specific grounds for the appeal. On February 4, 2013, Respondents filed a Motion to Dismiss Appellant's appeal, alleging that the Notice of Appeal was defective as a matter of law and failed to preserve any issue for review by the Court, and that Motion was denied. Appellant filed her Initial Brief on Respondents on May 17, 2013, whereby Appellant alleges a single issue/error 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." (Appellant's Brief, p. 4)

STANDARD OF REVIEW

The Administrative Procedures Act establishes the standard for judicial review of decisions of the Workers' Compensation Commission. (*Hargrove v. Titan Textile Co.*, 360 S.C. 276, 599 S.E.2d 604 (Ct. App. 2004).) Upon review, appellate courts have the power to reverse or modify a decision if the findings and conclusions of the administrative agency are affected by an error of law, clearly erroneous in view of the reliable and substantial evidence on the whole record, arbitrary or capricious, characterized by an abuse of discretion, or a clearly unwarranted exercise of discretion. (*Gray v. Club Group, Ltd.*, 339 S.C. 173, 528 S.E.2d 435 (Ct. App. 2000).) The substantial evidence rule of the Administrative Procedures Act governs the standard of review in a workers' compensation decision. (*Frame v. Resort Servs., Inc.*, 357 S.C. 520, 593 S.E.2d 491 (Ct. App. 2004).) This Court must affirm the findings of fact made by the Full Commission if they are supported by substantial evidence. (*Jordan v. Kelly Co.*, 381 S.C. 483, 486, 674 S.E.2d 166, 168 (2009).) Substantial evidence is neither a mere scintilla of evidence, nor evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the administrative agency reached in order to justify its action. (*Pratt v. Morris Roofing, Inc.*, 357 S.C. 619, 594 S.E.2d 272 (2004).) Thus, substantial evidence is a lesser standard than by a preponderance of the evidence. (*Id.*)

ARGUMENT/DISCUSSION

I. THE COMMISSION DID NOT ERR IN ITS DECISION TO TERMINATE APPELLANT'S TEMPORARY TOTAL DISABILITY BENEFITS.

a. APPELLANT HAS REACHED MMI, WHICH ENDS APPELLANT'S ENTITLEMENT TO TEMPORARY TOTAL DISABILITY BENEFITS AS A MATTER OF LAW.

The proper analysis in this case is not whether Respondents filed a Form 21, but whether the Appellant has reached MMI. In what has become an often-cited decision, the Supreme Court stated the following summation of workers' compensation benefits in South Carolina:

Essentially, workers' compensation benefits accrue along a time continuum: temporary total disability benefits are available from the date of injury through the date of maximum medical improvement; post-MMI benefits may then be awarded either as a permanent total or partial disability, or as a percentage of impairment to a scheduled member. *Smith v. NCCI, Inc.*, 369 S.C. 236, 631 S.E.2d 268 (Ct.App.2006). **Accordingly, the date of maximum medical improvement signals the end of entitlement to temporary total benefits.**

(*Curiel v. Environmental Management Services (MS)*, 376 S.C. 23, 655 S.E.2d 482 (2007) (emphasis added).) (See also *Smith v. South Carolina Dep't of Mental Health*, 335 S.C. 396, 517 S.E.2d 694 (1999) (finding employer was entitled to stop payment of temporary total disability benefits upon a showing that the claimant had reached maximum medical improvement); *Morgan v. JPS Automotives*, 321 S.C. 2012, 467 S.E.2d 457 (Ct.App.1996) (benefits properly terminated on showing employee reached MMI).) It is undisputed that a workers' compensation claimant's entitlement to temporary total disability benefits is terminated as of the date that she reaches MMI, as she is no longer *temporarily* disabled. An award of permanency cannot be determined until the claimant reaches MMI. Therefore, "[t]he rationale for ceasing temporary benefits upon a finding of MMI is to permit entry of a permanent award." (*Smith*, at 399, 517 S.E.2d at 695 (citing *Hines v. Hendricks Canning, Co.*, 263 S.C. 399, 211 S.E.2d 220 (1975).))

Appellant has failed to appeal the Commission's finding of MMI. The finding of MMI is now the law of the case. (See *ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche*, 327 S.C.

238, 241, 489 S.E.2d 470, 472 (1997) (holding an unappealed ruling is the law of the case and should not be reconsidered by the appellate court); *McClurg v. Deaton*, 395 S.C. 85, 87 n.2, 716 S.E.2d 887, 888 n.2 (2011) (holding that “an issue cannot be raised for the first time in a reply brief”).) Without an appeal on the issue of MMI, Appellant’s current appeal lacks any basis. Furthermore, if Appellant’s appeal is successful, it would create an absurd result by requiring the Respondents to continue temporary benefits after the date of MMI, which is contrary to well-established case law.

b. APPELLANT’S ARGUMENT THAT TEMPORARY TOTAL DISABILITY BENEFITS MAY ONLY BE TERMINATED WHERE A FORM 21 HAS BEEN FILED IS INCORRECT, AND THE ISSUE OF TERMINATION WAS PROPERLY BEFORE THE COMMISSION.

Appellant’s primary argument is that the Commission improperly terminated temporary total disability benefits because the Respondents failed to file a Form 21, Employer’s Request for Hearing. Appellant notes that the applicable statutory and regulatory sections (§42-9-260, R. 67-506) mandate that a Form 21 be filed in order to terminate benefits. However, the sections cited in Appellant’s Initial Brief are only applicable when the Defendants request a hearing. Section 42-9-260 (D), states in pertinent part:

If an employee has been declared as having reached maximum medical improvement, the employer may request a hearing to address the termination of temporary benefits.

Regulation 67-506 (E) states in pertinent part:

To request a hearing for permission to terminate temporary compensation, the employer’s representative shall file a Form 21 with the Judicial Department.

Here, the hearing was requested by the filing of Appellant’s Form 50. Therefore, Section 42-9-260 and Regulation 67-506 do not apply.¹

¹ Appellant also argues that, pursuant to R. 67-506, Respondents failed to certify that temporary total disability benefits were current prior to the hearing, and that the Commission could not have properly heard the issue of termination of temporary benefits. This requirement only applies to cases where an employer/carrier is requesting a hearing, and again, the requirement is inapplicable to this appeal.

Appellant notes that she “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.” (Appellant’s Brief, p. 7) Contrary to this assertion, the Commission terminates temporary disability benefits in every single case where a claimant is receiving temporary benefits, files a Form 50, and the Commission awards permanency. In every case where a claimant is receiving temporary benefits and files a Form 50 seeking permanency, the claimant is in essence requesting a termination of temporary benefits. Temporary benefits are terminated upon a finding of MMI, which in turn permits entry of a permanent award. Permanent disability cannot be determined until the claimant has reached MMI. (*Smith*, at 399, 517 S.E.2d at 695 (citing *Hines v. Hendricks Canning, Co.*, 263 S.C. 399, 211 S.E.2d 220 (1975).)) Therefore, when a Claimant is on a running award of temporary benefits, any finding of MMI and award of permanency *must* be accompanied by a termination of temporary benefits.

Here, Appellant had already filed a Form 50, Request for Hearing, so Respondents did not file an additional hearing request. In Appellant’s Form 50, she specifically alleged that she was entitled to temporary total disability benefits; therefore, Appellant’s entitlement to temporary total disability benefits was directly at issue. In response to the Appellant’s Form 50, Respondents filed a Form 51, which specifically denied Appellant’s entitlement to temporary benefits on the basis that “Claimant has reached maximum medical improvement.” (R. p. 27) Although the hearing was requested by the filing of Appellant’s Form 50, the Notice of Hearing specifically states that the purpose of the hearing was “To determine issues as set forth on the Forms 50 and 51.” (R. p. 123)

Respondents’ Form 58, Pre-Hearing Brief, listed one of the Facts in Controversy as: “credit owed to the Defendants for overpayment of TTD since the date of MMI on 10/3/11.” (R. p. 33) Furthermore, Appellant submitted an independent medical evaluation (IME) from Dr. Timothy Zgleszewski into evidence at the hearing. Dr. Zgleszewski opined that Appellant had

reached MMI as a result of the admitted right hand injury. (R. pp. 126-129) Not only was the issue of termination of temporary benefits clearly before the Single Commissioner, but Appellant's own IME physician found her at MMI for the admitted injury.

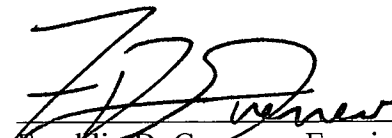
Therefore, the Commission's decision should be affirmed because the Claimant has reached MMI and the issue of termination of benefits on the basis of MMI was properly before the Commission.

CONCLUSION

The South Carolina Workers' Compensation Commission properly terminated Appellant's temporary total disability benefits because Appellant has reached maximum medical improvement, thereby ending Appellant's entitlement to temporary disability compensation. Respondents maintain that Appellant's arguments are based on an inaccurate interpretation of the South Carolina Workers' Compensation Act, in that a Form 21 is not a mandatory prerequisite to a termination of temporary total disability benefits. Appellant was placed on notice by the Form 51, the Notice of Hearing, and the Form 58, that MMI and termination of benefits were issues to be addressed at the hearing. Therefore, Respondents respectfully request that the Court affirm the South Carolina Workers' Compensation Commission.

Respectfully submitted,

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Date: August 16, 2013

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CERTIFICATE OF COUNSEL

The undersigned certifies that the FINAL BRIEF OF RESPONDENTS complies with Rule 211(b), SCACR, as well as the South Carolina Supreme Court's Order dated August 13, 2007.

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