

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 REPLY BRIEF OF APPELLANT

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August 15, 2013

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ARGUMENTS

I. The Commission erred in its order to terminate Appellant's temporary total disability benefits without Respondents filing a Form 21.

In their brief, Respondents assert “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.” (Respondents’ Initial Brief, p. 6). Of course, when Appellant asserted that she was “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,” she was referring to occasions where the claimant themselves had not requested to terminate said benefits. Of course, just as a criminal defendant may waive presentment of his indictment to the grand jury, a workers compensation claimant could waive the continuance of temporary total disability benefits when seeking a permanency award. In this matter, it is clear that claimant, in her Form 50, had not sought to terminate her temporary total disability benefits. In fact, the single commissioner herself 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**).

Respondents continue to assert that their circumventing of Regulation 67-506 of the South Carolina Code Annotated by failing to ever file a Form 21 is permitted because Claimant was found to be at Maximum Medical Improvement (MMI). (Respondents’ Initial Brief, p. 4). However, it is telling that in each of the cases Respondents cite to

support this assertion, an application to stop payment was properly filed in accordance with the requirements of the Workers Compensation Act.

Respondent cites Curiel v. Environmental Management Services (MS), 376 S.C. 23, 655 S.E.2d 482 (2007) for the premise that the payment of temporary total disability benefits are automatically stopped upon MMI without the filing of an application to stop such payment. (Respondents' Initial Brief, p. 4). While this case does not specify whether or not an application to stop payment was filed, the case which first posited the case law cited by Respondents, Hendricks v. Pickens County, 335 S.C. 405, 414 n.2 (Ct. App. 1999), clearly states an application to stop payment was filed. "On April 15, 1996, Respondents filed an application to stop payment of Hendricks's temporary total disability (TTD) benefits, alleging he had reached MMI." Hendricks v. Pickens County, 335 S.C. 405, 517 S.E.2d 698 (Ct. App. 1999).

Respondents further seek support for their argument in citing Smith v. South Carolina Department of Mental Health, 335 S.C. 396, 517 S.E.2d 694 (1999), however, this case states: "In Dec. 1992, DMH filed an application to stop payment of compensation based on a physician's report that Smith had reached maximum medical improvement (MMI) on Nov. 11, 1992." (Respondents' Initial Brief, p. 4). Lastly, Respondents cite Morgan v. JPS Automotives, 321 S.C. 2012, 467 S.E.2d 457 (Ct. App. 1996). (Respondents' Initial Brief, p. 4). As noted in Appellant's Final Brief, this case states: "Morgan argues the Commission erred in granting JPS's **application to stop payment of temporary total disability benefits.**" Id. at 460 (**emphasis added**). Evidently, Respondents also were 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 (or by a claimant seeking permanency).

Respondents again cite the Smith case for the assertion “[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. (Respondents’ Initial Brief, p. 4). Again, as the single commissioner noted in her order and as was echoed in the Appellate Panel’s 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) (R. p. 23).

Respondents argue Appellant’s appeal is baseless, and if successful, “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.” (Respondents’ Initial Brief, p. 5). Since Respondents have produced case law which shows termination of temporary benefits after the date of MMI only where a Form 21 (application to stop payment) has been properly filed in accordance with the Workers Compensation Act, Appellant is unaware as to which “well established case law” Respondents refer. However, Appellant is keenly aware of the statutory law of Regulation 67-510 of the South Carolina Code Annotated which is entitled “Unauthorized Suspension or Termination of Temporary Compensation Benefits” and states:

A. If the employer's representative suspends, terminates, or reduces temporary total or temporary partial compensation benefits without first complying with the procedures in this Article, the claimant may be entitled to additional compensation and penalty as provided in this Chapter and the Act.

B. The claimant may request a hearing as provided in R.67-207 for the relief in section A above.

It is simply impossible to argue that Regulation 67-506 of the South Carolina Code Annotated does not constitute “procedures in this article” with which there must be compliance prior to the termination of temporary compensation benefits. Again, as more thoroughly noted in Appellant’s Initial Brief, Regulation 67-506 clearly requires 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. □□(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). Respondents’ failure to comply with any of the above noted “procedures in this article” is the basis for this appeal, and Respondents should therefore be subject to the consequences outlined in Regulation 67-510 of the South Carolina Code Annotated, which provide for **additional** compensation. The “absurd result” would be to allow Respondents to ignore the procedures in the Workers Compensation Act and still simply stop payment as of the date of Appellant reaching MMI.

II. The issue of termination was not properly before the Commission.

Respondents’ argument that Regulation 67-506 does not apply because Respondents didn’t request a hearing is simply untenable. (Respondents’ Initial Brief, p. 5). Essentially, Respondents are arguing that since they didn’t follow the procedures of the Workers Compensation Act in requesting a hearing to terminate payment of temporary compensation benefits, the other procedures required under the Act (such as

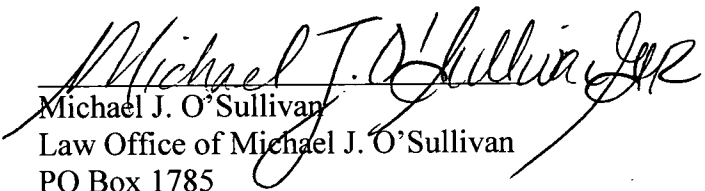
certifying the payment of benefits is current) are inapplicable. In other words, if I violate one law, none of the other laws apply. That is the equivalent of an individual charged with failure to stop for a blue light for leading police on a high speed chase stating he can't be charged with speeding when he is finally stopped. It is an attempt by Respondents to avoid the requirements of the act and take a short cut to termination of a claimant's temporary compensation benefits. Respondents' argument that their response on a Form 51 was sufficient to put the issue of termination of temporary compensation benefits before the Commission would have merit if Appellant had been seeking a permanency award, but she did not seek a permanency award. Appellant's Form 50 did not seek an award of permanency and therefore, did not request a hearing to terminate temporary compensation. Again, as the single commissioner and the Appellate Panel both stated in their orders "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) (R. p. 23). Respondents have failed to cite any legal authority nor is there any provision in the Workers Compensation Act for a defendant to request a hearing to terminate temporary compensation benefits on a Form 51. Per Regulation 67-506, that request "SHALL" and must be put forth in a Form 21 along with the certification that payment of such benefits is current. Respondents state "any finding of MMI **AND** award of permanency must be accompanied by a termination of temporary benefits." (**EMPHASIS ADDED**) (Respondents' Initial Brief, p. 6). Appellant neither sought nor received an award of permanency. Once again, this is indisputable as the single commissioner and the Appellate Panel both stated in their orders "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) (R. p. 23).

CONCLUSION

In conclusion, Respondents have not complied with the law and procedures set forth by the South Carolina Workers Compensation Act for terminating payment of temporary compensation benefits, and accordingly, the issue of such termination of payment of temporary compensation benefits was not properly before the commission. Appellant requests continued payments of temporary compensation benefits until the proper procedures are followed and any other relief applicable and appropriate under the Act.

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


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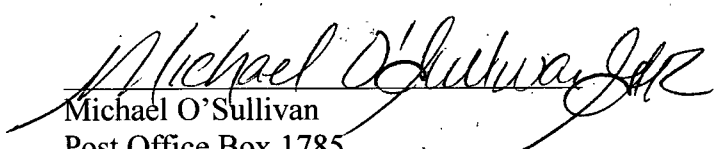
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CERTIFICATE OF COUNSEL

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


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