

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
WCC FILE No. 1118397

Appellate Panel

Appellate Case No: 2013-000727

William D. Rhodes, claimant,		Appellant,
	v.	
M. B. Kahn Construction Company, Inc., Employer and Self-Insurer, and Hewitt Coleman & Associates, Inc. TPA.,		Respondent.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

- I. Whether the South Carolina Workers' Compensation Commission erred when it found that Mr. Rhodes' left shoulder and right elbow injuries were not compensable?
- II. Whether the South Carolina Workers' Compensation Commission erred when it found that Mr. Rhodes had reached maximum medical improvement and was entitled to only a 10% award of permanent disability benefits?

STATEMENT OF THE CASE

This case involves an admitted claim involving injuries the Appellant, Mr. William Rhodes sustained to his right shoulder as a result of a November 28, 2011 work-related accident. There is no dispute regarding causal relationship of Mr. Rhodes' right shoulder injury to his work-related accident, however there is a dispute regarding the causal relationship of Mr. Rhodes' left shoulder and right elbow injuries. **(R. p. 32)**. On or about May 17, 2012, the Respondent filed a Form 21 "Request to Stop Payment of Temporary Benefits" requesting an evidentiary hearing. **(App. R. p. 1)**. A hearing was subsequently scheduled before Commissioner Susan S. Barden. At the hearing, the Respondent argued that based upon the report of the authorized treating physician, Dr. Earl McFadden, that Mr. Rhodes had reached maximum medical improvement as of April 30, 2012. They further sought an Order addressing permanent disability benefits pursuant to Dr. McFadden's 16% impairment rating to the right shoulder as well as a credit for temporary total compensation payments made to Mr. Rhodes after April 30, 2012. In response, Mr. Rhodes asserted that he had not reached maximum medical improvement on the basis that he had sustained compensable and causally related injuries to his left shoulder and right elbow due to overuse while under light duty restrictions. He sought a

formal finding of compensability with regard to the left shoulder and right elbow as well as additional medical treatment per the recommendations of Dr. Timothy M. Zgleszewski.

Following the hearing, Commissioner Barden issued an Order on August 15, 2012 which in pertinent part found that Mr. Rhodes: 1) did not sustain compensable injuries to his left shoulder or right elbow; 2) had reached maximum medical improvement with regard to his right shoulder as of April 30, 2012; 3) sustained a 10% permanent partial disability to the right shoulder; and 4) owed a credit for temporary total compensation payments made after April 30, 2012. **(R. p. 1).**

On or about August 17, 2012, Mr. Rhodes timely filed a Form 30 “Request for Commission Review” asserting approximately twenty-two (22) grounds for review. **(R. p. 108).** In response to his request, a three member Appellate Panel of the Workers’ Compensation Commission conducted a hearing on December 18, 2012. On March 11, 2013, the Commission issued an Order affirming Commissioner Barden’s Order in full. **(R. p. 15).** On April 5, 2013, Mr. Rhodes timely filed notice of this appeal upon this Court. **(R. p. 124).**

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. 2012).

ARGUMENTS

I. The Commission erred in finding that Mr. Rhodes’ left shoulder and right elbow injuries were not compensable.

In its March 11, 2013 Order, the Appellate Panel affirmed Commissioner Barden’s Order which stated that Mr. Rhodes did not sustain compensable injuries to his left shoulder or right elbow directly or by overuse. **(R. p. 15)**. Mr. Rhodes contends that the reliable, probative, and substantial evidence of the record is wholly inconsistent with this finding and therefore the Commission committed an error of law. First, it is well settled that in a workers’ compensation action, new injuries resulting indirectly from treatment or the original injury are also compensable. Mullinax v. Winn-Dixie Stores, Inc., 318 S.C. 431, 458 S.E.2d 76 (S.C.App. 1995). As defined by the Act, “medical evidence” is expert opinions or testimony stated to a reasonable degree of medical certainty offered by a licensed and qualified medical physician. S.C. Code Ann. § 42-1-172(D) (2012). In the present matter, the medical evidence from both the authorized treating physician as well as an independent medical evaluator unequivocally supports that Mr. Rhodes’ left shoulder and right elbow injuries are causally related work injury.

Immediately following the work injury, the Respondent authorized Mr. Rhodes to treat at Doctors Care. Per the instructions of the physicians at Doctors Care, Mr. Rhodes' right arm was placed in a sling and he was placed under light duty work restrictions of no use of the right shoulder. **(R. p. 73)**. Testimony was provided by both Mr. Rhodes as well as the Respondent's witness Mr. James Smith; that confirmed that Mr. Rhodes was immediately provided light duty work which consisted of "one-arm" work. **(R. p. 140-142; 177-178)**. On November 30, 2011, Dr. McFadden noted that Mr. Rhodes had "...been working, doing light duty using his left arm..." Dr. McFadden recommended that he continue to work light duty with no overhead work of his right arm and use of the left arm "as tolerated." **(R. p. 77)**. Dr. McFadden continued to recommend that Mr. Rhodes remain under light duty until he underwent surgery to his right shoulder on January 31, 2012. Mr. Rhodes subsequently remained out of work until he was released to return to light duty work on February 13, 2012. **(R. p. 88)**.

In his dictated report of March 26, 2012, Dr. McFadden noted that Mr. Rhodes was complaining of left shoulder pain after using a sledge hammer while on light duty work. **(R. p. 92)**. Treatment for Mr. Rhodes' left shoulder was not provided at that time, however. On April 30, 2012, Dr. McFadden documented that "...he has had some issues with his left shoulder and right elbow since he had to return to work with light duties." At that time, Dr. McFadden stated, "However, we have not been authorized to see him for the left shoulder or the right elbow at this point." He further noted, "So, we will have to wait on authorization for those." **(R. p. 94)**.

As a result of the ongoing symptoms in his left shoulder and right elbow, Mr. Rhodes sought an evaluation on his own accord with Dr. Timothy Zgleszewski, a physician board certified in physical medicine rehabilitation in May, 2012. **(R. p. 99)**. Following an examination of Mr. Rhodes, Dr. Zgleszewski opined within a reasonable degree of medical certainty that Mr.

Rhodes suffered from overuse of the left shoulder secondary to impingement syndrome of the right shoulder condition as well as medial epicondylitis of the right arm secondary to impingement syndrome of the right shoulder. Dr. Zgleszewski noted that Mr. Rhodes had not reached maximum medical improvement for these injuries and recommended that he undergo additional medical treatment that would tend to lessen the extent of his disability. (**R. p. 101**).

Despite the overwhelming evidence of the record, the Commission did not find Mr. Rhodes' left shoulder or right arm injuries compensable. However, there is nothing in the record to support the Commission's finding, which clearly constitutes an error of law. For these reasons, Mr. Rhodes respectfully requests that the Court of Appeals reverse the Commission's finding that his left shoulder and right arm conditions are not compensable.

II. The Commission erred in finding that Mr. Rhodes had reached maximum medical improvement and awarded only a 10% loss of permanent disability benefits for his right shoulder.

a. Maximum Medical Improvement (MMI):

MMI "is a term used to indicate that a person has reached such a plateau that in the physician's opinion there is no further medical care or treatment which will lessen the degree of impairment. O'Banner v. Westinghouse Elec. Corp., 319 S.C. 24, 28, 459 S.E.2d 324, 327 (Ct. App. 1995). In assessing what type of evidence is required when addressing a question of MMI, our courts have noted, "whether an individual has achieved MMI is clearly a medical question." Williams v. South Carolina Department of Mental Retardation, 308 S.C. 438, 413 S.E. 2d 555 (Ct. App. 1992). Accord, Clark v. Wal-mart, 163 N.C. 686, 594 S.E. 2d 433, 439 (2004), rev'd on other grounds, 360 N.C. 41, 619 S.E.2d, 491 (2005) ("MMI is purely medical

determination”).¹ As such, Mr. Rhodes contends that the Commission must rely on the medical evidence in the record when making this determination. Mr. Rhodes does not dispute that with regard to his right shoulder injury only, he was placed at MMI by both Dr. McFadden and Dr. Zgleszewski. However, he maintains that a determination of permanent partial disability is premature based on Dr. McFadden and Dr. Zgleszewski’s opinions. In a questionnaire completed by Dr. McFadden, he confirmed that, “Taking into consideration Mr. Rhodes’ left shoulder complaints coupled with the fact that I was only authorized to provide treatment to his right shoulder only, it is my expert medical opinion, within a reasonable degree of medical probability, that Mr. Rhodes has not reached MMI until he at the very least is re-evaluated by me for his left shoulder complaints.”(R. p. 97). Additionally, Mr. Rhodes relies on the May 29, 2012 Independent Medical Evaluation of Dr. Zgleszewski who noted that he had not reached MMI with regard to his causally related injuries to his left shoulder and right elbow and recommended further treatment which would tend to lessen the extent of his disability in the form of medications; therapy; diagnostic testing and injections. (R. p. 101).

For these reasons, Mr. Rhodes contends that the Commission was required to rely on the expert medical opinions of both the treating physician and Dr. Zgleszewski. Disregarding the uncontroverted opinions of the only two physicians in the record resulted in a blatant error of law. As such, Mr. Rhodes respectfully asks this Court to reverse the Commission’s finding.

b. Permanent Disability Benefits:

¹ Our courts give great weight to North Carolina’s decisions in workers’ compensation cases because South Carolina adopted large portions of North Carolina’s workers’ compensation legislation. Munn v. Nucor Steel, Div. of Nucor Corp., 336 S.C. 28, 31, 518 S.E.2d 289, 290 (Ct. App. 1999).

There are three forms of permanent disability benefits under the South Carolina Workers' Compensation Act: 1) permanent total disability; 2) permanent partial disability benefits based on a loss of earning capacity; and 3) permanent partial disability benefits which compensates injuries for certain "scheduled members." In the matter now before the Court, Section 42-9-30 of the South Carolina Code Annotated is the applicable statutory section for review when strictly looking at the extent of disability that Mr. Rhodes sustained to his right shoulder only. S.C. Code Ann. § 42-9-30(14) (2012). Under this section, it is not required to show a loss of earnings in order to recover for scheduled injuries. G.E. Moore Co. v. Walker, 232 S.C. 320, 102 S.E.2d 106 (1958). Rather, "compensation is based on the character of the injury." Therrell v. Jerry's Inc., 633 S.E.2d 893, 370 S.C. 22 (S.C. 2006).

Because Mr. Rhodes' injury did not result in complete loss (or loss of use) of a scheduled member (his right shoulder), only one question needs to be addressed. What extent of impairment, if any, did Mr. Rhodes sustain to his right shoulder? "Impairment" has been defined as the anatomical or functional loss of the injured body part at the time that a physician has indicated that maximum medical improvement has been reached. It is well established that impairment is purely a medical condition and therefore must be addressed by medical evidence.

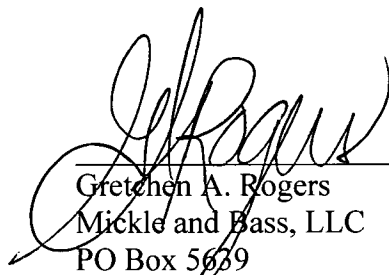
In the case at bar, the medical evidence supported that Mr. Rhodes sustained permanent impairment to his right shoulder as a result of his work injury. When Dr. McFadden placed Mr. Rhodes at maximum medical improvement for his right shoulder injury (only) he assigned a 16% impairment to the right shoulder. (**R. p. 94**). Additionally, Dr. Zgleszewski also opined that Mr. Rhodes had reached maximum medical improvement and assigned a 20% impairment to Mr. Rhodes' right shoulder. (**R. p. 102**). Yet, despite these impairment ratings, the Commission assigned only a 10% disability. It is acknowledged that the courts have determined that expert

testimony is not necessarily binding upon the fact-finding body if there is competent substantial evidence, yet in matters of such kind which are not common knowledge, the fact-finding body must accept opinion of experts. Herndon v. Morgan Mill, Inc., 246 S.C. 201, 143 S.E.2d 376 (S.C. 1965). The courts have further noted, that when the Commission in effect disregards expert testimony, it must perforce find other competent evidence in the record upon which to base its findings. Id. Yet, despite the fact that both physicians opined that Mr. Rhodes had sustained permanent impairment to his right shoulder of at least a 16% loss, the Commission surmised that he only sustained a permanent disability of 10%. A review of the record does not support such a finding and therefore was based on surmise, speculation and conjecture and therefore it must be reversed.

CONCLUSION

In conclusion, the reliable, probative and substantial evidence of the entire record clearly shows: (a) that Mr. Rhodes' left shoulder and right elbow injuries are causally related and compensable injuries; (b) that the Commission's finding that Mr. Rhodes had reached MMI is erroneous based on the uncontroverted evidence; and (c) that an award of 10% disability to the right shoulder is not supported by the evidence in the record and based on an arbitrary and capricious finding that constituted an abuse of discretion. Accordingly, Mr. Rhodes respectfully requests that this Court reverse the Commission and find that the Respondent must reinstate temporary total disability benefits and provide causally-related medical treatment for Mr. Rhodes left shoulder and right elbow injuries.

Respectfully submitted, this, the 10th day of October 2013.

A handwritten signature in black ink, appearing to read 'G. Rogers', is written over a horizontal line.

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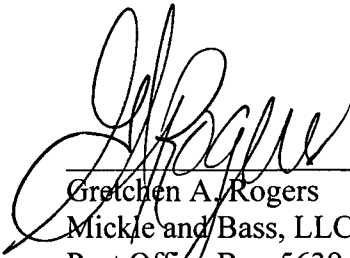
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CERTIFICATE OF COUNSEL

The undersigned certifies this Final Brief complies with Rule 211 (b),
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PROOF OF SERVICE

I certify that I have served the Appellant's Final Brief and the Appellant's Final Reply Brief on the parties in the above referenced claim by depositing a copy of it in the United States Mail to their attorney of record, postage prepaid, on October 9, 2013 addressed as follows:

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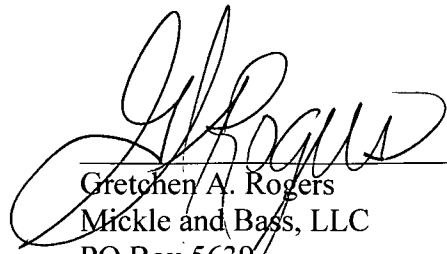
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