

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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MAR 25 2019

SC Court of Appeals

SOUTH CAROLINA WORKERS' COMPENSATION COMISSION

Appellate Case No. 2016-001992

O'Shea L. BrownClaimant,

v.

Steel Technologies, Employer, and
Twin City Fire Ins. Co., CarrierDefendants.

APPELLANT'S RETURN TO PETITION FOR REHEARING
AND MEMORANDUM IN OPPOSITION

Pursuant to Rule 221(a) and Rule 240€. SCACR. Appellant, O'Shea L. Brown ("Appellant") respectfully returns the Respondents', Steel Technologies and Twin City Fire Insurance Company ("Respondents") Petition for rehearing of Unpublished Opinion No. 2019-UP-070, filed February 13, 2019. Rehearing is appropriate where the Court has overlooked or misapprehended an argument. *Kennedy v. S.C. Ret. Sys.*, 349 S.C. 531, 532, 564 S.E.2d 322. 322 (2001). The purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the petition for rehearing to have the case tried in the appellate court a second time. Jean H. Toal, Shahin Vafai & Robert Muckenfuss, *Appellate Practice in South Carolina* 309 (1999) (citing *Arnold v. Carolina Power & Light Co.*, 168 S.C. 163, 167 S.E. 234 (1933)). The Petition for Rehearing should not be granted because the Court's Opinion does not misapprehend the argument being

made by Respondents as to the issue of their entitlement to credit for overpayment. Appellant hereby incorporate by reference their previously filed brief and the Record on Appeal for a substantive review of the facts and procedural history relevant to this matter.

I. Background Facts.

On April 30, 2012, Appellant sustained an injury to his right knee as he was climbing a ladder to get atop the bed of his trailer. Respondents accepted the right knee injury as compensable and thereafter provided him benefits as required by the South Carolina Workers' Compensation Act. Medical treatment included surgical correction of a torn medial meniscus. The surgery assisted in repairing Appellant's medial meniscus tear. Following the surgery, Appellant began experiencing an issue with his right lower extremity that resulted in swelling. Appellant argued that the swelling was causally related to the injury and/or resulting treatment. Appellant further contended that, not only was the lymphedema compensable, but it caused an alteration of his gait effecting his hip and lower back rendering him permanently and totally disabled pursuant to S.C. Code Ann. §42-9-10. The parties engaged in discovery to address the issue of causation between the lymphedema and the compensable accident. During the deposition of Appellant's vascular surgeon, Dr. Edward Morrison, he concluded the vascular condition did not occur as a result of or caused to be aggravated by the injury or necessary treatment related thereto. The Appellant's recovery was confined to S.C. Code Ann. §42-9-30 and Appellant filed his Notice of Appeal on September 21, 2016.

II. Procedural Posture.

A Hearing took place before Commissioner R. Michael Campbell, II, on February 6, 2015, in Isle of Palms, South Carolina. Commissioner Campbell, on November 9, 2015, issued his order

and instructions in this matter. Specifically, Commissioner Campbell concluded Appellant sustained a compensable injury to his right knee, which necessitated in a partial medial meniscectomy. Commissioner Campbell further found that Appellant had, as to the compensable injury, reached maximum medical improvement on February 19, 2014. Commissioner Campbell concluded that Appellant had sustained a 12% permanent partial disability to his right lower extremity and ordered no required future medical treatment. Based upon these conclusions, Commissioner Campbell found Appellant was not permanently and totally disabled and further ruled that Respondents were not entitled to a credit for overpayment of temporary total disability benefits paid from February 6, 2015 until November 9, 2015. The Appellate Panel of the South Carolina Workers' Compensation Commission, upon hearing oral arguments by the parties, affirmed in part and reversed in part. The Appellate Panel found, without substantial evidence, Respondents continued to pay benefits that were not due and payable as contemplated by S.C. Code Ann. §42-9-210. Appellant filed Notice of Appeal on September 21, 2016.

III. The Court of Appeals Did Not Misapprehend the legal issues and arguments regarding Respondents' continued payment of temporary total disability from the date of hearing until the date of the Single Commissioner's ruling.

In reversing the decision of the Appellate Panel as to Respondents' proposed entitlement to a credit for overpayment of temporary total disability compensation, the Court of Appeals did not misapprehend the legal issue and arguments presented by the Respondents. The Court's conclusion that Respondents are not entitled to a credit for temporary total disability compensation paid is not in error. The decision rendered by the Appellate Panel was not supported by substantial evidence and was affected by an error of law.

The issue raised by Respondents is governed by S.C. Code Ann. § 42-9-210, which addresses the deduction from compensation of payments made by employers. Specifically, S.C. Code Ann. § 42-9-210 states,

[a]ny payments made by an employer to an injured employee during the period of his disability...which...were not due and payable when made may, subject to the approval of the commission, be deducted from the amount to be paid as compensation, provided, that in the case of disability such deductions shall be made by shortening the period during which compensation must be paid and not by reducing the amount of the weekly payment.

In the Single Commissioner's Decision and Order he concluded Claimant had reached maximum medical improvement on February 19, 2014. In a workers' compensation proceeding, the employer and its carrier were not entitled to credit for temporary total disability benefits paid to the employee after the date he reached maximum medial improvement, pursuant to §42-9-210, since a finding of maximum medical improvement did not establish that the employee was no longer disabled, and without such finding, his disability was presumed to continue. *Swinton v. S.C. Dept. of Mental Health* (S.C. App. 1994) 314 S.C. 202, 442 S.E.2d 215. Respondents continued payment of temporary total disability compensation until November 9, 2015 and in accordance with S.C. Code Ann. § 42-9-210 the Single Commissioner held that Respondents were not entitled to a credit.

In Unpublished Opinion No. 2019-UP-070 this Court held Respondents are not entitled to a credit because the additional payments made were not caused by any fault of Appellant. The Court's reliance on this point does not reflect a misapprehension that should give rise to Respondents' Petition for Rehearing.

Respondents rely on the ruling in *Sanders v. MeadWestvaco Corp.* wherein the issue of a credit for overpayment was at issue. 371 S.C. 284, 638 S.E.2d 66 (Ct.App. 2006). The Court, in

Sanders, turned its attention to S.C. Code Ann. §42-9-260 and held that Westvaco was entitled to have its request to terminate temporary total benefits heard within 60 days of filing the request. In *Sanders*, the delay in having a timely hearing fell squarely on both parties, thus, there was no substantial evidence supporting the Appellate Panel's decision to overpay benefits to Sanders. *Id.* at 72. In the instant case, as the Court has noted in its opinion, the delay in the adjudication was not occasioned by fault of either party. To keep in accordance with precedent, if neither parties are at fault for a delay, the employer should not be entitled to a credit. Therefore, there was no substantial evidence supporting the Appellate Panel's decision to award a credit.

Moreover, Respondents wrongfully submit that their credit for overpayment is controlled by principles of equity. The equitable doctrine of unjust enrichment was neither overlooked or misapprehended by the Court. Unjust enrichment is an equitable doctrine that permits one party to recover an amount unjustly enriched at the expense of the party seeking recovery. *Chase Home Finance, LLC v. Risher*, 405 S.C. 202, 746 S.E.2d 471 (Ct.App. 2013); (quoting *Regions Bank v. Wingard Props., Inc.*, 349 S.C. 241, 256-57, 715 S.E.2d 348, 256 (Ct.App. 2011)). "One seeking to recover for unjust enrichment must show: (1) a benefit conferred by the plaintiff upon the defendant; (2) realization of that benefit by the defendant; and (3) retention of the benefit by the defendant under circumstances that make it inequitable for him to retain it without paying its value." *Id.*, 405 S.C. at 212; (quoting *Myrtle Beach Hosp., Inc. v. City of Myrtle Beach*, 341 S.C. 1, 8-9, 532 S.E.2d 868, 872 (2000)).

In the instant case, the doctrine of unjust enrichment is inapplicable. In order for unjust enrichment to be applicable, one seeking to recover for unjust enrichment must meet all of the elements. Here, a benefit was not conferred upon or realized by the Appellant. Appellant was found to be at maximum medical improvement but a finding of maximum medical improvement

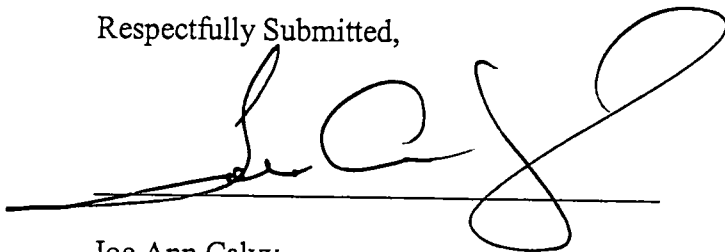
did not establish that the employee was no longer disabled, and without such finding, his disability was presumed to continue. *Swinton v. S.C. Dept. of Mental Health* (S.C. App. 1994) 314 S.C. 202, 442 S.E.2d 215.

Furthermore, the Appellant's main argument for reversal of credit awarded by the Appellate Panel rested on the substantial evidence that Respondents did not file a Form 21, Request for Hearing to stop payment of benefits.

IV. Conclusion

Appellant prays that the Court makes findings consistent with the above arguments and denies the Respondent's Petition for Rehearing.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Joe Ann Calvy", is written over a horizontal line. The signature is stylized and cursive.

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Attorney for Appellant

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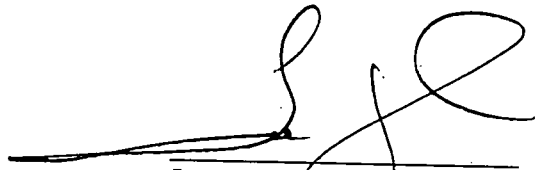
STATE OF SOUTH CAROLINA
BEFORE THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

O'Shea Brown)
Claimant,)
)
)
vs.)
)
)
Steel Technologies)
)
Defendant (s),)
_____)

CERTIFICATE OF SERVICE

I, Joe Ann Calvy, hereby certify that I mailed a copy of the Return to Respondent's
Petition of Rehearing to Matthew LaFave, Esquire by placing a copy of the same in the United
States mail with sufficient postage attached this 22nd day of March, 2019.

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VIA U.S. MAIL

Friday, March 22, 2019

Att'n: The Honorable Jenny Abbott Kitchings
Clerk of Court
The South Carolina Court of Appeals
P. O. Box 11629
Columbia, S. C. 29211

Re: O'Shea Brown vs. Steel Technologies
Date of Injury: 04/30/2012
WCC File No.: 1205647
Appellate Case No.: 2016-001992

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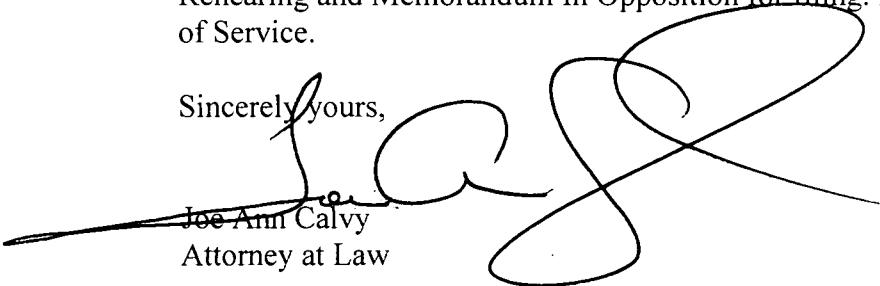
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Court of Appeals

Dear Ms. Kitchings:

Enclosed please find original 6 copies of the Appellant's Return to Petition For Rehearing and Memorandum In Opposition for filing. Please return a copy of the Proof of Service.

Sincerely yours,


Joe Ann Calvy
Attorney at Law

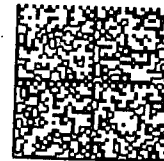
JMC/itc


cc: Matthew C. Lafave, Esquire (w/copy of Appellant's Return to Petition for Rehearing and Memorandum In Opposition)



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