9013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Commissioners Melody L. James, T. Scott Beck, and Aisha Taylor

---

W.C.C. File No. 0908371

Timothy Hannah, Employee, Claimant ..... Respondent,

v.

MJV, Inc./Butler Trucking, Employer, and
Palmetto Timber S.I. Fund c/o
Walker, Hunter & Associates, Inc., Carrier, ... Appellants.

PETITION FOR REHEARING

Pursuant to Rules 221 and 240, SCACR, Appellants MJV, Inc./Butler Trucking and Palmetto Timber S.I. Fund c/o Walker, Hunter & Associates, Inc., hereby petition this Court for rehearing of its June 12, 2019 Opinion, No. 2019-UP-213. In reaching its conclusions, this Court overlooked and/or misapprehended several key facts and arguments. As a result, this Court should rehear its Opinion No. 2019-UP-213 and grant the relief requested herein.

I. This Court overlooked and/or misapprehended key factual and legal points in concluding Claimant's current claim is not barred by *res judicata*.

In finding that the South Carolina Workers' Compensation Commission did not err in finding that the doctrine of *res judicata* did not bar Claimant's claim for permanent disability benefits, this Court concluded that Claimant was not barred because he had

alleged a valid claim for change of condition for the worse. Section 42-17-90(A) provides, in pertinent part, that the Commission may award benefits on the basis of a change of condition for the worse "on proof by a **preponderance of the evidence** that there has been a change of condition caused by the original injury, after the last payment of compensation." However, "[t]he review does not affect the award as regards any monies paid and the review **must not be made after twelve months from the date of the last payment of compensation** pursuant to an award provided by this title." S.C. Code Ann. 42-17-90(A).

First, Claimant did not prove by a preponderance of the evidence that his condition had worsened. Logically, if, as this Court concluded with respect to laches, the "treatment [Claimant] received was the treatment recommended by the original authorized treating physician," then his condition did not worsen but, instead, he was receiving the same treatment Dr. Triana recommended originally.[1]

Second, and equally important, Claimant did not file for a change of condition within 12 months of his last payment of benefits. It is uncontested that Claimant signed two Form 17s in August 2011 agreeing he could work as of February 10, 2010. It is also uncontested that Appellants paid Claimant temporary total disability ("TTD") benefits from the date of the July 14, 2009 accident through August 16, 2011. (R. p. 228, lines 21-23) (R. pp. 99-100). Twelve months from August 16, 2011 is August 16 2012. Claimant did not file his Amended Form 50 until January 8, 2013, (R. pp. 159-166),

[1] While Appellants do not concede the point that the surgery Dr. Brennan performed to the C6-7 vertebrae was the same surgery Dr. Triana discussed to the C5-6 vertebrae, there is a contradiction in this Court's finding that Claimant established a change of condition for the worse and its conclusion that Appellants were not prejudiced by the fact Claimant sought surgery on his own because it was the same surgery Dr. Triana mentioned.

which plainly is more than twelve months after the last payment of TTD benefits. As a result, this Court erred in finding that Claimant's Amended Form 50 constituted a valid claim for a change of condition.

This Court cites Clark v. Aiken County, 366 S.C. 102, 620 S.E.2d 99 (Ct. App. 2005), for the proposition that Claimant did not know whether the surgery would improve his condition and, as a result, the degree of change of condition was not yet ripe. The facts in Clark are substantively and meaningfully distinguishable from the case at hand. First, in Clark, the claimant asked for permission to be treated by Dr. Greenburg, which the employer refused to grant. Here, Claimant did not ask Appellants for any additional medical treatment before choosing his own physician and proceeding to surgery. Appellants did not refuse any requested medical treatment for Claimant's compensable injury. Second, in Clark, the claimant accepted payment of benefits on August 10, 2001 and filed his Form 50 alleging a change of condition for the worse in January 2002, less than twelve months after the last payment of benefits. In contrast, here, Claimant filed his Amended Form 50 well over twelve months after the last payment of benefits. As a result, the claimant in Clark had a valid claim for change of condition whereas, here, Claimant does not.

The language from Clark quoted by this Court, that the claimant "had no way of knowing if [a] surgery would improve his condition, and, therefore, the degree of change in condition was not yet ripe for review by the full commission," 366 S.C. at 110, 620 S.E.2d at 103, dealt with the fact that there, the change occurred while the claimant's appeal between the Hearing Commissioner and the Full Commission was pending. Nothing in Clark, including the language cited by this Court, permits a claim to be filed

under Section 42-17-90(A) more than twelve months after the last payment of benefits. Gattis v. Murrells Inlet VFW #10420, 353 S.C. 100, 114 S.E.2d 191 (Ct. App. 2003) does not provide any differently.

Instead, as was discussed in more detail in Appellants' Briefs, because the 2011 Commission Decision finding that "Claimant has received all proper medical care that will tend to lessen his period of disability," (R. p. 73), which Decision this Court affirmed, (R. pp. 49-51), it became the law of this case. If Claimant believed he needed additional medical treatment, his recourse was to request it initially from Appellants. It is undisputed that he did not. With respect to this fact, it is important to keep in mind that Claimant was represented throughout by experienced counsel. This is not an employee without resources to determine his rights and options under the Workers' Compensation Act.

Appellants have demonstrated that the parties to this proceeding and the prior proceeding are the same, the subject matter is the same, and there was a prior adjudication of the issue. *See* Johnson v. Greenwood Mills, 317 S.C. 248, 250-251, 452 S.E.2d 832, 833 (1994). Consequently, Claimant's current claim is barred by *res judicata.*

Because he does not have a valid claim for a change of condition for the worse, Claimant's Amended Form 50 can only be characterized as raising the same claim to his back that he litigated previously. As such, it is barred by *res judicata* and this Court should so hold.

II. This Court overlooked and/or misapprehended key factual and legal points in concluding Claimant's current claim is not barred by laches.

This Court overlooked and/or misapprehended key factual and legal points in concluding that Claimant's claim is not barred by laches. First, this Court held that "Claimant did not act negligently or unreasonably in seeking medical treatment and filing his claim when he did." However, the fact that Claimant misunderstood whether he could seek additional medical treatment for his neck because he had lost the claim regarding his lower back, particularly where he has represented throughout by legal counsel, does not preclude laches.

It is the rule in South Carolina that, "[g]enerally, a claimant may obtain compensation only by accepting services from the employer's choice of providers." Hall v. United Rentals, Inc., 371 S.C. 69, 86, 636 S.E.2d 876, 885 (Ct. App. 2006). The exceptions to this general rule – an emergency, or where the parties dispute whether additional treatment is warranted and/or the employer refuses to provide needed care – are not even arguably present in this case.[2] Here, instead, the "circumstances," including the fact that he had competent legal counsel, afforded Claimant the "opportunity for diligence, to do what in law should have been done." Muir v. C.R. Bard, Inc., 336 S.C. 266, 296, 519 S.E.2d 583, 598 (Ct. App. 1999).

As to prejudice, it is nothing more than speculation that the surgery Dr. Brennan performed was the same surgery that Dr. Triana suggested might be helpful. It is uncontroverted that Dr. Triana's medical notes reference treatment to C5-6, (*see* R. pp.

---

[2] Although Claimant's counsel asserted that Appellants had "*twice* refused to pay for treatment recommended by his doctors," (Resp. Br. pp. 3, 4, 18, 19, 20), as Appellants have pointed out, those refusals went to treatment for Claimant's lower back which is not compensable, and not for his cervical spine. (Reply Br. pp. 2, 11).

181-184, 189), whereas the surgery Dr. Brennan performed was to C6-7. Although Dr. Brennan suggested that Dr. Triana's notes were the result of a typographical error or a simple mistake, (R. p. 338, lines 4-20; p. 340, lines 8-10; p. 342, lines 6-14), that is nothing more than mere speculation. Furthermore, Dr. Triana did not recommend or state that surgery was inevitable, but merely stated that the fact that the injections had "helped quite a bit," indicated "that the symptoms can be reversed which is a better indication he ***may*** respond to surgical intervention in the form of a fusion of his ***C5-6 disc*** protrusion." (R. p. 185) (emphasis added). Dr. Brennan operated on the C6-7 vertebrae. As a result the disability award to Claimant's cervical spine based on Dr. Brennan's surgical intervention is speculative, resulting in prejudice to Appellants. *See* Tiller v. Nat'l Health Care Ctr., 334 S.C. 333, 339, 513 S.E.2d 843, 845 (1999) (workers' compensation awards "must not be based on surmise, conjecture or speculation"). Having an award based on speculation, when Appellants had no idea Claimant was seeking or in need of additional treatment to his neck, constitutes substantial prejudice.

This Court concludes, however, that Appellants cannot claim prejudice because they had knowledge of the pertinent facts that was as full as if written notice had been provided. The facts of this case do not support any such conclusion. In fact, Claimant's counsel conceded that Claimant "sought treatment for his neck injury without consulting his former Employer or his attorney." (Resp. Br. p. 4, *see also* p. 13) (R. p. 261, lines 13-24 (Claimant testifying that he first told his own counsel about the surgery and signed an affidavit attached to his Amended Form 50 in January 2013)) (R. pp. 165-166 (Claimant's affidavit stating he did not report the medical treatment, including surgery, with Dr. Brennan to his own attorney until January 2013)). If Claimant's own attorney

had no idea he was seeking additional medical treatment to his neck, including surgery, it is both illogical and untenable to hold that Appellants had "knowledge of the pertinent facts [that] was as full as would be disclosed by the written notice, had such been given." Dawkins v. Capitol Constr. Co., 252 S.C. 536, 539, 167 S.E.2d 439, 440 (1969).

As a result, this Court should grant rehearing and hold that Claimant's claim is barred by laches because he waited an unreasonable amount of time under the circumstances and Appellants were materially prejudiced thereby.

III. This Court overlooked and/or misapprehended key factual and legal points in affirming the Commission's award of permanent disability based on unauthorized surgery and resulting impairment rating.

As noted above, "[g]enerally, a claimant may obtain compensation only by accepting services from the employer's choice of providers." Hall, 371 S.C. at 86, 636 S.E.2d at 885. The Act "does not give a unilateral right to claimants to select their treating physician, and such an unencumbered right undermines the authority of the commission, as prescribed by the legislature." Turner v. South Carolina Dept. of Health & Envtl. Control, 377 S.C. 540, 546, 661 S.E.2d 118, 121 (Ct. App. 2008). And, while Appellants do not dispute that a claimant need not forgo necessary medical care where it has been requested and denied by the employer, here, there was no request and no denial or refusal to provide.[3] Although the Commission is empowered "to order further medical care and payment for that medical care when controversies arise between a claimant and the employer," Hall, 371 S.C. at 86, 636 S.E.2d at 885, here there was no controversy between Claimant and Appellants concerning medical care or treatment for his cervical spine.

[3] *See* Footnote No. 2, above.

The pertinent parts of Section 42-15-60 provide that, "[d]uring any period of disability resulting from the injury, the employer, at his own option, may continue to furnish or cause to be furnished, free of charge to the employee, ***and the employee shall accept,*** *an attending physician and any medical care or treatment that is considered necessary by the attending physician* ... If ***in an emergency, on account of the employer's failure to provide the medical care as specified in this section***, a physician other than provided by the employer is called to treat the employee, the reasonable cost of the service must be paid by the employer, if ordered by the commission." S.C. Code Ann. 42-15-60(A) (emphasis added). The word "shall" in in the Act means the action is mandatory. Wigfall v. Tidelands Utils., Inc., 354 S.C. 100, 111, 580 S.E.2d 100, 105 (2003). Thus, an injured worker ***shall*** accept medical treatment by the designated physician ***unless*** there is an ***emergency*** or the employer ***fails*** to provide adequate or appropriate medical care. Here, there was no emergency or failure to provide appropriate medical treatment to Claimant's compensable injury. There never was a request for additional medical treatment to Claimant's cervical spine. As a result, by seeking medical treatment on his own, without even notifying Appellants or, for that matter, his own counsel, Claimant took himself out from under the Act's coverage.

"[I]t is inescapable that the obligation of an employer to pay grows solely out of statutory law. Except for the Workers' Compensation Act no benefits whatever would be paid except perhaps by reason of a common law tort action." Bartley v. Bartley Logging Co., 293 S.C. 88, 91, 359 S.E.2d 55, 56 (1987). In other words, the employer's duty to pay benefits arises solely out of the Act, and the Act specifically mandates that the

employer chooses the medical provider except in certain limited circumstances, none of which apply here.

As a result, this Court should grant rehearing and hold that, by seeking additional medical care for his compensable injury without first requesting it from Appellants or even notifying Appellants that he was in need of same, Claimant took himself out from under the Act's coverage. Any other finding will send a clear signal to claimants and their attorneys that they are free to seek medical treatment on their own, without notice to the employer, for any compensable injury. This clearly is not what is provided by the Act and, although it may produce an unfortunate outcome in this case for Claimant, it is mandated by the language in Section 42-15-60 of the Act. Wigfall, 354 S.C. at 110-111, 580 S.E.2d at 105; *see also id.* at 116, 580 S.E.2d at 109 (courts "are not at liberty to extend by construction the meaning implicit in the language found in the *Workmen's [sic] Compensation Act* in order to provide a more liberal rule of compensation than that which the legislature has seen fit to adopt," *quoting Singleton v. Young Lumber Co.*, 236 S.C. 454, 473, 114 S.E.2d 837, 846 (1960)).

IV. This Court overlooked and/or misapprehended key factual and legal points in affirming the Commission's denial of a credit to Appellants.

This Court erroneously determined that no credit was due to Appellants because neither the Hearing Commissioner nor the Full Commission determined that Claimant reached MMI until July 25, 2011, and because Claimant signed his Form 17s in August 2011. While the Commission's findings and conclusions are binding on appeal, that is only "***unless*** there is an absence of competent evidence to support them." Brittle v. Raybestos-Manhattan, Inc., 241 S.C. 255, 257, 127 S.E.2d 884, 885 (1962) (emphasis added). Here, the Commission pointed to no evidence and made no findings of fact

whatsoever to support its determination that Appellants are not entitled to a credit for TTD paid during the period February10, 2010 through August 16, 2011.

Section 42-9-210 provides, in pertinent part, that "[a]ny payments made by an employer to an injured employee during the period of his disability, or to his dependents, which by the terms of this Title 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." S.C. Code Ann. § 42-9-210. It is the date of MMI that determines the end of Claimant's eligibility to TTD, not the date of the order affirming he has reached MMI. In fact, that is the ruling in Hendricks v. Pickens County, 335 S.C. 405, 517 S.E.2d 698 (Ct. App. 1999), cited by the Court. There, the claimant specifically challenged the Commission's determination that the employer was entitled to a credit from the date he reached MMI to the date of the Commission decision. This Court affirmed the Commission, explaining that the claimant's "eligibility for temporary disability benefits ended as of that date," the date the claimant reached MMI. 335 S.C. at 413, 517 S.E.2d at 702-703. Thus, it is not the date of the hearing or the order in which a claimant is determined to have reached MMI, but the date of MMI that ends a claimant's entitlement to TTD. *See, e.g.*, Curiel v. Environmental Mgmt. Servs., 376 S.C. 23, 29, 655 S.E.2d 482, 485 (2007) ("temporary total disability benefits are available from the date of injury through the date of maximum medical improvement .... Accordingly, the date of maximum medical improvement signals the ***end of entitlement to temporary total benefits***") (emphasis added); Watson v. Xtra Mile Driver Training, Inc., 399 S.C. 455, 465-466, 732 S.E.2d 190, 195-196 (Ct. App. 2012) (employer entitled to a credit for all TTD paid after the date her treating physician determined she had reached MMI).

In addition, in Smith v. South Carolina Dep't of Mental Health, 329 S.C. 485, 494, 494 S.E.2d 630, 634 (Ct. App. 1997), this Court pointed out that the provisions of former S.C. Code Ann. Regs § 67-507(C)(3) are disjunctive and that "temporary benefits may be terminated if the employer complies with any one of its requirements." As this Court pointed out in Hendricks, "by signing a Form 17 to terminate TTD, [an] employee agrees the benefits cease as of the day of return to work." 335 S.C. at 415, 517 S.E.2d at 704. Here, Claimant signed a Form 17 stating, unequivocally, that he could return to work as of February 2, 2010. (R. p. 100). Consequently, his entitlement to TTD ended on that date, February 2, 2010, and Appellants should have been awarded a credit for overpayment since that date.

Finally, because the Commission simply found, as a matter of fact, that Appellants "are not entitled to a credit for Temporary Total Disability benefits paid to the Claimant during the period of February 10, 2010 through August 16, 2011," with no explanation or factual support, it is impossible for this Court to determine whether the Commission abused its discretion. In short, the Commission failed to make sufficiently detailed findings of fact to support this determination. *See, e.g.*, Grant v. Grant Textiles, 372 S.C. 196, 202-203, 641 S.E.2d 869, 872 (2007) (reversible error where the Commission fails "to clearly set forth the underlying facts upon which it relied to support its conclusion"); Gray v. Laurens Mills, 231 S.C. 488, 492, 99 S.E.2d 36, 38 (1957) (requiring Commission to "make such specific and definite findings upon the evidence reported as will enable this court to determine whether the general finding or conclusion should stand").

As a result, this Court should grant rehearing and hold the Commission's denial of a credit to Appellants for overpayment of TTD is legal error and award the credit or, at a minimum, remand to the Commission for detailed findings of fact to support its conclusion.

CONCLUSION

For all the reasons stated herein, this Court should grant rehearing, reverse the Commission Decision and hold that Claimant's claim for permanent disability benefits is barred by the doctrines of *res judicata* and/or laches, and that claimants cannot unilaterally seek out medical treatment for admitted injuries without first requesting the same from the employer, and then effectively bootstrap a disability award on ratings provided by the unauthorized treating physician. Finally, this Court should either award Appellants a credit for overpayment of TTD benefits paid from February 10, 2010 through August 16, 2011 or remand to the Commission for proper findings of fact on this issue.

Respectfully submitted,

July 25, 2019

R. Mark Davis, S.C. Bar No.: 15522
Helen Hiser, S.C. Bar No.: 76124
McANGUS, GOUDELOCK & COURIE, LLC
Post Office Box 650007
Mt. Pleasant, South Carolina 29465
(843) 576-2900
Attorneys for Appellants

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Commissioners Melody L. James, T. Scott Beck, and Aisha Taylor

---

W.C.C. File No. 0908371

Timothy Hannah, Employee, Claimant ..... Respondent,

v.

MJV, Inc./Butler Trucking, Employer, and
Palmetto Timber S.I. Fund c/o
Walker, Hunter & Associates, Inc., Carrier, ... Appellants.

PROOF OF SERVICE

I certify that I have served the Appellants' **Petition for Rehearing** on Respondent Timothy Hannah by depositing a copy of it in the United States Mail, postage prepaid, on the 25th day of June, 2019, addressed to his counsel of record as follows:

W.E. Jenkinson, III, Esquire
Jenkinson, Jarrett & Kellahan, PA
Post Office Drawer 669
Kingstree, South Carolina 29556

Mackenzie Broughton
Legal Assistant to Helen F. Hiser
McAngus, Goudelock & Courie LLC
735 Johnnie Dodds Blvd., Suite 200
P.O. Box 650007
Mount Pleasant, South Carolina 29465
(843) 576-2900

Attorneys for Appellants MJV, Inc./Butler Trucking and Palmetto Timber S.I. Fund c/o Walker, Hunter & Associates, Inc.

mgc | INSURANCE DEFENSE

Reply To
HELEN F. HISER
Direct Dial: (843) 576-2930
helen.hiser@mgclaw.com

June 25, 2019

Via Overnight Delivery
The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

RE: Timothy Hannah v. MJV/Butler Trucking, Inc. and Palmetto Timber S.I. Fund c/o Walker, Hunter, and Associates
Date of Accident: July 14, 2009
WCC File No.: 0908371
Our File No.: 2069.10005
Claim No.: 0001-0593-09-0002
Appeal No.: 2016-001643

Dear Ms. Kitchings:

Enclosed please find the original and seven (7) copies of Appellants' Petition for Rehearing, and the original and one copy of the Proof of Service in the above-referenced matter. Please file the originals and return a clocked-in copy in the enclosed self-addressed, stamped envelope. Also enclosed is our firm's check in the amount of $50 for filing the petition.

If you have any questions, please do not hesitate to contact me.

Sincerely,
McAngus Goudelock & Courie, LLC

Helen F. Hiser

Enclosures

cc: W.E. Jenkinson, III, Esquire

FRANCESCA BEST
843-576-2918
MCANGUS GOUDELOCK & COURIE, LL
735 JOHNNIE DODDS BLVD
MT. PLEASANT SC 29464

2 LBS

1 OF 1

SHIP TO:
THE HONORABLE JENNY ABBOTT KITCHING
SOUTH CAROLINA COURT OF APPEALS
1220 SENATE ST.
COLUMBIA SC 29201-3769

SC 292 9-01

UPS NEXT DAY AIR
TRACKING #: 1Z RA7 348 01 9263 0105

1

BILLING: P/P

Client . Matter: 6.96001

CS 21.2.09. WNTNV50 12.0A 04/2019