

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Aisha G. Taylor, Commissioner
Susan S. Barden, Commissioner
H. Gene McCaskill, Commissioner

W.C.C. FILE NOS.: 0725221 and 0921225

APPELLATE CASE NO.: 2019-000393

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SEP 16 2019
SC Court of Appeals

Deborah G. Duggans, Employee,APPELLANT.

v.

South Carolina Department of Mental Health, Employer, and State Accident
Fund, Carrier,RESPONDENTS.

APPELLANT'S INITIAL BRIEF

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STATEMENT OF ISSUE ON APPEAL

1) Did the South Carolina Workers' Compensation Commission (Appellate Panel) err in concluding as a matter of law that the parties' agreement to consolidate Appellant's Deborah G. Duggans', 2007 and 2009 workers' compensation claims for hearing purposes, while maintaining their distinct characteristics, entitled Respondents, South Carolina Department of Mental Health and State Accident Fund, to a credit paid for temporary total disability compensation paid in connection with the 2007 claim when the law of this case establishes: (a) Ms. Duggans' respective claims retained their separate identities, notwithstanding the agreement to consolidate them for hearing purposes; (b) her permanent and total disability award was based solely upon the consequences of her 2009 accident; (c) no degree of permanent disability was attributed to the 2007 accident by the Commission (Appellate Panel); and (d) the absence of any permanent injury/disability ascribed to her 2007 accident precluded assessment of a credit for the prior payment of temporary total disability compensation per this Court's ruling in Eaddy v. Smurfit-Stone Container Corporation, 355 S.C. 154, 584 S.E. 2d 390 (Ct. App. 2003)?

STATEMENT OF THE CASE

This is an appeal from the February 5, 2019 Order of the South Carolina Workers' Compensation Commission (Appellate Panel), which: (a) affirmed the single commissioner's April 25, 2018 rulings relative to the degree of disability Appellant, Deborah G. Duggans, had sustained as a result of compensable accidents occurring on July 16, 2007 and December 7, 2009, respectively, including the determination her permanent disability solely resulted from the consequences of her 2009 compensable injuries; while (b) affording Respondents, South Carolina Department of Mental Health and State Accident Fund, a credit for temporary total disability compensation paid in connection with her 2007 accident simply "because the parties agreed that the respective claims were consolidated for consideration through one hearing". Ms. Duggans also appeals the July 16, 2019 denial of her Motion for Reconsideration.

In 2007, Ms. Duggans developed symptoms that were attributed to a compensable right carpal tunnel syndrome, for which she: (a) underwent a June 12, 2008 "right carpal tunnel release"; (b) received 17.57 weeks of **temporary** total disability compensation during the period this condition prohibited unrestricted performance of her job duties; and (c) was ultimately medically discharged to resume "work without restriction" effective October 1, 2008. (See, Record on Appeal, pp. __). While her treating physician assigned a 1% physical impairment rating, Ms. Duggans was neither awarded permanent disability nor determined to have sustained a permanent injury within the meaning of S.C. Code Ann. Section 42-9-30 (2015) or the second paragraph of S.C. Code Ann. Section 42-9-10 (2015) as a result of this condition. (See, Record on Appeal, pp. __).

When she continued to manifest symptoms involving her arm and neck, Ms. Duggans underwent an authorized second opinion orthopaedic evaluation through Dr. Joseph P. Jackson,

Jr., who: (a) obtained additional diagnostic studies; and (b) felt “assessment of her cervical symptoms by ‘Dr. Johnson down at Southeastern Spine . . . in Charleston’ was warranted.” (See, Record on Appeal, pp. __).

Pending scheduling of this appointment, Ms. Duggans, who continued working without restriction, sustained the second December 7, 2009 compensable accident. (See, Record on Appeal, pp. __). Approximately three weeks following this new injury, she underwent the recommended evaluation through Southeastern Spine Institute, which led to a recommendation for treatment (cervical injection). (See, Record on Appeal, pp. __).

Several months later, Ms. Duggans began a lengthy course of treatment through Dr. Ezra B. Riber, of Palmetto Pain Management, LLC, who: (a) identified both lumbar and cervical symptoms during his initial examination; (b) performed “several injections aimed toward addressing her low back and radiating right leg pain”, but was able to adequately control her cervical symptoms through medication management; (c) ultimately determined she had “sustained a 17% whole person impairment due to her causally related lumbar spine component, as well as a 6% whole person impairment as a result of her cervical injury component”; (d) permanently restricted her to the performance of limited sedentary - limited light work activities; and (e) indicated she would “require continued medication management and interventional treatment for her lumbosacral radicular syndrome . . . [, while] her cervical injury . . . [would continue to be treated] with medical management” (See, Record on Appeal, pp. __).

After considering all evidence of record, the single commissioner found: (a) “despite the presence of ongoing cervical symptoms identified by Dr. Jackson, . . . [Ms. Duggans] had resumed/maintained performance of full duty work activities until experiencing the December 7, 2009 accident”; (b) “this trauma not only created lumbar symptoms, but also

aggravated/increased the previously-diagnosed cervical symptoms”; and (c) while her lumbar symptoms had been the focus of Dr. Riber’s treatment, she continued to encounter persistent cervical symptoms that favorably responded to ongoing medical pain management.” (See, Record on Appeal, pp. __).

The single commissioner further determined:

(a) “. . . [a]fter resuming full duty work activities, Ms. Duggans **sustained additional injuries** to her back (lumbar **and cervical**) within the meaning of . . . [S.C. Code Ann.] Section 42-1-160 . . . [(2015)] on December 7, 2009 while performing duties arising out of and within the course and scope of her employment with the South Carolina Department of Mental Health” (See, Record on Appeal, pp. __);

(b) “. . . [f]ollowing her December 7, 2009 compensable trauma, Ms. Duggans . . . [not only] developed lumbar symptoms that have necessitated her receipt of extended treatment through Dr. Riber, . . . [but] also consistently reported . . . cervical symptoms that were noticeably impacted by this trauma” (See, Record on Appeal, pp. __);

(c) she “has sustained a 50% (+) permanent partial disability to (loss of use of) her back within the meaning of S.C. Code Section 42-9-30 (21) (2015) as a result of her December 7, 2009 compensable accident” (See, Record on Appeal, pp. __);

(d) **this degree of residual disability to the back per Section 42-9-30 (21) exceeds 50% regardless of the presence of her neck injury component**” (See, Record on Appeal, pp. __);

(e) “she has likewise been rendered permanently and totally disabled within the meaning of Section 42-9-10 by the combined consequences of her December 7, 2009 compensable injuries, **particularly the back and right leg symptoms**” (See, Record on Appeal, pp. __); and

(f) “the nature/degree of the back (lumbar) injury component resulting from this injury (affecting both her back and right leg) **are sufficient to, in and of themselves, produce a total loss of earning capacity warranting an award of permanent and total disability compensation per Section 42-9-10**” (See, Record on Appeal, pp. __).

In this connection, inspection of the remaining unappealed contents of the single commissioner’s Order reveals: (a) the consistent delineation between Ms. Duggans’ respective claims in virtually every relevant aspect (retention of separate claim numbers, recognition of aggravating impact of 2009 accident, segregation of disabling consequences of subsequent

accident, etc.); and (b) the absence of any suggestion the parties had agreed to nullify the separate identities of these factually distinct claims.

This continued separation/independence of Ms. Duggans' respective claims was likewise acknowledged through Respondents' May 9, 2018 W.C.C. Form 30 Request for Commission Review, which asserted error based upon the single commissioner's: (a) "failing to take into account a creditor offset for benefits paid on **a prior claim against Defendants (WCC Claim #0725221)**"; and (b) "awarding Claimant greater than 500 weeks of benefits for **successive claims within the same employment**". (See, Record on Appeal, pp. ___).

Despite these facts, the Appellate Panel: (a) ruled, as a matter of law, that the mere consolidation of Ms. Duggans' claims for hearing purposes entitled Respondents to the asserted credit/offset; and (b) failed to address this Court's governing ruling in Eaddy. While these points were raised to the Appellate Panel through Ms. Duggans' February 11, 2009 Motion for Reconsideration, it ultimately denied her request without comment. This appeal followed.

ARGUMENT

I. THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION (APPELLATE PANEL) ERRED IN CONCLUDING AS A MATTER OF LAW THAT THE PARTIES' AGREEMENT TO CONSOLIDATE APPELLANT'S DEBORAH G. DUGGANS', 2007 AND 2009 WORKERS' COMPENSATION CLAIMS FOR HEARING PURPOSES, WHILE MAINTAINING THEIR DISTINCT CHARACTERISTICS, ENTITLED RESPONDENTS, SOUTH CAROLINA DEPARTMENT OF MENETAL HEALTH AND STATE ACCIDENT FUND, TO A CREDIT PAID FOR TEMPORARY TOTAL DISABILITY COMPENSATION PAID IN CONNECTION WITH THE 2007 CLAIM WHEN THE LAW OF THIS CASE ESTABLISHES: (A) MS. DUGGANS' RESPECTIVE CLAIMS RETAINED THEIR SEPARATE IDENTITIES, NOTWITHSTANDING THE AGREEMENT TO CONSOLIDATE THEM FOR HEARING PURPOSES; (B) HER PERMANENT AND TOTAL DISABILITY AWARD WAS BASED SOLELY ON THE CONSEQUENCES OF HER 2009 ACCIDENT; (C) NO DEGREE OF PERMANENT DISABILITY WAS ATTRIBUTED TO THE 2007 ACCIDENT BY THE COMMISSION (APPELLATE PANEL); AND (D) THE ABSENCE OF ANY PERMANENT INJURY/DISABILITY ASCRIBED TO HER 2007 ACCIDENT PRECLUDED ASSESSMENT OF A CREDIT FOR THE PRIOR PAYMENT OF

TEMPORARY TOTAL DISABILITY COMPENSATION PER THIS COURT'S RULING IN EADY V. SMURFIT-STONE CONTAINER CORPORATION, 355 S.C. 154, 584 S.E. 2D 390 (CT. APP. 2003)?

S.C. Code Ann. Section 1-23-380 (5) (2018), which governs judicial review in this context, states in pertinent part:

. . . The court may reverse or modify the decision as 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; [or] . . .
- (d) affected by other error of law

While the parties agreed to allow the single commissioner to determine the issues incidental to Ms. Duggans' respective claims in the context of one hearing, their effort to promote judicial economy and convenience did not result in the merger of these claims into one. This fact is verified by not only the repeated/consistent identification of independently viable claims throughout the single commissioner's April 25, 2018 Order, but also Respondent's Form 30 assertions: (a) of purported entitlement to credit/offset "for benefits paid on a **prior claim** against" them - - specifically identifying Ms. Duggans' 2007 injury claim; and (b) the underlying award granted her "greater than 500 weeks of benefits for **successive claims** within the same employment".

"There is a marked distinction between an actual consolidation, and an order that cases merely be tried together for convenience". Kennedy v. Empire State Underwriters of Watertown N.Y., 202 S.C. 38, 24 S.E. 2d 78, 79 (1943); McKinney v. Greenville Ice and Fuel Company,

232 S.C. 257, 101 S.E. 2d 659, 660 (1958). “Where actions are simply tried together for convenience, without an actual consolidation, the order ‘does not merge the several actions into one; each case retains its distinctive characteristics and remains separate in respect of docket entries, verdicts, findings, judgments, proceedings to obtain appellate review, and all other matters except the one of joint trial’” . Kennedy, supra.

Consistent with the parties’ request, the single commissioner ruled on all pending issues, while explicitly preserving the individual integrity of each of Ms. Duggans’ separate claims. The nature of Respondents’ W.C.C. Form 30 assertions, which unequivocally recognize the continued viability of Ms. Duggans’ “prior claim”, belies any notion of their merger into a single action. Give these facts, the Appellate Panel erred as a matter of law in holding the simple adjudication of these claims through one hearing provided any basis for affording Respondents with a credit/offset.

“ . . . [A]ll Findings of Fact and law by the Hearing Commissioner became and are the law of this case, except only those within the scope of the exception[s] . . . of” the May 9, 2018 Form 30. Ham v. Mullins Lumber Co., 193 S.C. 66, 7 S.E. 2d 712, 716 (1940); Hilton v. Flakeboard America Limited, 418 S.C. 245, 71 S.E. 2d 719, 721 (2016). Application of the law of the case doctrine results in “a party [being] . . . precluded from re-litigating issues decided in . . . [the prior] order. . . .” Hudson ex. rel. Hudson v. Lancaster Convalescence Center, 407 S.C. 112, 754 S.E. 2d 486, 490 (2014).

Additionally, as recognized by this Court in Eaddy, an employer/carrier’s entitlement to credit/offset for disability compensation in the current context requires either the presence of a prior “permanent” injury/disability or the absence of “permanent injury” associated with the subsequent accident claim. Specifically, inspection of the governing statutes verifies:

(a) pursuant to the plain language of S.C. Code Ann. Section 42-9-150 (2015), “an employer would only be entitled to credit for previous awards of workers’ compensation benefits involving permanent disability . . . [or in instances where the employee had] sustained a previous injury in service in the Army or Navy or in another employment besides that” in which the subsequent injury arose (Eaddy, 584 S.E. 2d at 396);

(b) the clear terms of S.C. Code Ann. Section 42-9-160 (2015) not only require that the injured employee “is still receiving or entitled to compensation for a previous injury”, but also the **absence** of “a permanent injury such as specified in § 42-9-30 or the second paragraph of § 42-9-10” associated with the subsequent claim (Eaddy, *supra.*); and

(c) the pertinent language of S.C. Code Ann. Section 42-9-170 (2015) demands a scenario involving the occurrence of “a permanent injury as specified in § 42-9-30 or the second paragraph of § 42-9-10 after having sustained **another permanent injury in the same employment**” (Id.).

Given the limited nature of Respondents’ exceptions, the law of this case firmly establishes: (a) the **2009** accident produced back, **neck** and right leg injury components; (b) Ms. Duggans “has sustained a 50% (+) permanent partial disability to (loss of use of) her back within the meaning of . . . Section 42-9-30 (21) . . . as a result of her December 7, 2009 compensable accident **regardless of the presence of her neck injury component**”; (c) “she has likewise been rendered permanently and totally disabled within the meaning of Section 42-9-10 by the **combined consequences of her December 7, 2009 compensable injuries, particularly the back and right leg symptoms**”; and (d) “the nature/degree of **the back (lumbar) injury component resulting from this injury (affecting both her back and right leg) are sufficient to, in and of themselves, produce a total loss of earning capacity warranting an award of permanent and total disability compensation per Section 42-9-10.**”

Based upon the law of this case, it is equally certain: (a) there was **neither permanent injury ascribed to or permanent disability paid for any aspect of the 2007 claim**; and (b) all permanent disability compensation Ms. Duggans received stemmed from the back (lumbar) and

right leg injury components that **were the exclusive products of her December 7, 2009 accident.**

In this regard, consideration of Commissioner Wilkerson's rulings, in light of the South Carolina Workers' Compensation Act, further confirms the absence of any statutory basis for Respondents' credit claim, as: (a) Ms. Duggans sustained neither permanent disability nor permanent injury through military service or other employment (Section 42-9-150); (b) the permanent nature of her December 7, 2009 injury excludes her from the purview of Section 42-9-160); and (c) the absence of any determination of permanent injury in connection with the 2007 claim renders Section 42-9-170 "immaterial." Eaddy, 584 S.E. 2d at 397. See also, Harrison v. Owens Steel Company, Inc., 422 S.C. 132, 810 S.E. 2d 433, 439 (Ct. App. 2018) (noting provisions of "sections 42-9-150 to – 170 of the South Carolina Code (2015) . . . would have entitled [employer] . . . to credit for the **permanent disability benefits** it would have paid for [claimant's] . . . first injury") (Emphasis added).

Further, inspection of the Eaddy decision verifies: (a) this Court's acknowledgement of previously paid temporary total disability compensation in connection with prior claims, as well as the employee's award of permanent and total disability compensation as a result of a later injury of similar nature; (b) affirmance of this subsequent 500 week award, notwithstanding employer's credit claim for prior temporary total disability compensation paid toward the prior claim, **which resulted in an aggregate receipt of compensation from one employer in excess of 500 weeks**; and (c) the absence of any legal foundation for the Appellate Panel's current ruling.

CONCLUSION

In this instance, the Appellate Panel: (a) presumed the presence of a consolidation of claims that is wholly inconsistent with the contents of the appellate record; and (b) ignored this Court's governing holding in Eaddy. These errors, which led to the inappropriate assessment of a credit/offset, warrant reversal of the Panel's February 5, 2019 Order and reinstatement of the single commissioner's April 25, 2018 determinations.

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA
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Aisha G. Taylor, Commissioner
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W.C.C. FILE NOS.: 0725221 and 0921225
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Deborah G. Duggans, Employee,APPELLANT.

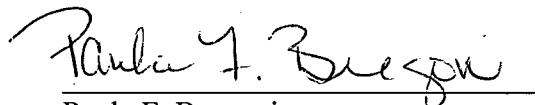
v.

South Carolina Department of Mental Health, Employer, and State Accident
Fund, Carrier,RESPONDENTS.

CERTIFICATE OF SERVICE

I, Paula Bregovi, do hereby certify that on the 16th day of September, 2019, I filed, via hand delivery, the original of Appellant's Initial Brief and Designation of Matter with the Clerk of the South Carolina Court of Appeals, while serving one (1) copy of the Appellant's Initial Brief and Designation of Matter on counsel for Respondents via first class mail at the following address:

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**THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

**APPEAL FROM THE SOUTH CAROLINA
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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Initial Brief complies with Rule 209, SCACR.



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September 16, 2019

HAND DELIVERED

The Honorable Jenny Abbott Kitchings
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RECEIVED
SEP 16 2019
SC Court of Appeals

RE: Deborah G. Duggans v. South Carolina Department of Mental Health
and State Accident Fund
Appellate Case No.: 2019-000393

Dear Ms. Kitchings:

Enclosed please find an original and one copy of Appellant's Initial Brief and Designation of Matter to be Included in the Record on Appeal relative to the above-captioned case. At this time, I would appreciate your filing these documents and returning one clocked copy to my courier.

By copy of this letter, I am serving a copy of these documents on David Keller, counsel for Appellants. As always, in the event he has any questions or comments concerning this matter, I invite him to contact me.

Thank you for your cooperation.

With kindest regards, I am

Very truly yours,


Andrew N. Safran

ANS/pfb

cc: David Hill Keller, Esquire