

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

ORIGINAL

APPEAL FROM THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Appellate Panel
Susan S. Barden, Commissioner
T. Scott Beck, Commissioner
Melody James, Commissioner

RECEIVED

WCC File No. 1505905
Appellate Case No. 2016-002486

MAY 02 2017
SC Court of Appeals

Jeffrey Miller, Employee, Claimant, Respondent
v.
Alice Manufacturing Co. and Great American Alliance Insurance Company, Appellants

FINAL BRIEF OF RESPONDENT

April 28, 2017

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STATEMENT OF ISSUES ON APPEAL

- I. DOES SUBSTANTIAL EVIDENCE SUPPORT THE COMMISSION'S DECISION AND ORDER FINDING THAT RESPONDENT SUFFERED A COMPENSABLE INJURY BY ACCIDENT AND IS THUS ENTITLED TO WORKERS' COMPENSATION BENEFITS?**
- II. DID THE COMMISSION HAVE AUTHORITY TO SELECT RESPONDENT'S TREATING PHYSICIAN?**

STATEMENT OF THE CASE

The initial hearing on this matter came was held on January 26, 2016 by way of Respondent's Form 50 hearing request. Respondent, Jeffrey Allen Miller (hereinafter "Respondent"), alleged injury to his right upper extremity, right shoulder, right hand and neck as a result of an accident arising out of and in the course of his employment with Appellants on or about March 17, 2015. He contended that he was entitled to past due temporary total disability ("TTD") benefits starting April 20, 2015 and continuing forward until such time as benefits could be properly suspended or terminated. Respondent also contended that he was in need of further medical treatment for his injuries and that he was not at maximum medical improvement ("MMI"), per the medical evidence.

Appellants timely filed a Form 51 and denied the claim in its entirety and dedicated a large portion of their defense to attacking Respondent's credibility as a witness. The Hearing Commissioner rejected Appellants' argument and found the claim compensable. Per the June 1, 2016 Decision and Order of the Hearing Commissioner, the Respondent was entitled to TTD from April 20, 2015 to the present and continuing, as Respondent was unable to work and not at MMI per the medical evidence. The Commissioner found that Respondent was entitled to continued medical care and treatment at the direction of Dr. Dwight Jacobus, the physician who had largely treated Respondent's injuries and

continued to provide ongoing care. (R. pp. 12-25) The Decision and Order of the Hearing Commissioner was affirmed in full by the Appellate Panel of the South Carolina Workers' Compensation Commission on November 15, 2016. (R. pp. 1-11)

STATEMENT OF FACTS

Respondent was 43 years old at the time of his hearing testimony. He lives with his wife. He has four daughters. He is right hand dominant. His last grade completed in school was the seventh grade. He cannot read and write well, but can slowly read a newspaper. (R. pp. 45-46) His wife handles the family finances. He was in "pretty good" health before his work injury. (R. p. 47, lines 1-2, 16-19)

Respondent described his work history at the hearing. He worked in several mills and plants before spending about 20 years working in the logging business, cutting trees and driving a tractor. (R. pp. 48-50) After his logging company employer passed away, he hauled scrap metal until he got a job at Ellison Mill, doffing cloth. (R. pp. 50-51) He used a jack to move very large rolls of cloth and then unload them. (R. pp. 53-54) He then moved to "warp rack hanging." He was moving 4500 to 5000 pound rolls of cloth. It was a better, higher paying job. He used a motorized jack to load and unload cloth and cloth waste. (R. pp. 57-58)

Respondent told Dr. Dwight Jacobus that he was pulling 5000 to 6000 pounds of cloth with a partner. It was a "rough job." (R. p. 58, lines 2-4-p. 59, line 8) On the date of the injury¹, Respondent and Scott Raymond were pulling off the warp and something popped in his arm, and his whole arm started burning. (R. p. 59, lines 16-19) He noticed his arm was swelling up. He went to see the mill nurse, who could not write him for light

¹ Respondent has never alleged that he knew the exact date of his injury. He has alleged injury on or about March 17, 2015.

duty. He waited until the following Monday and saw his family doctor, who gave him a light duty note. Appellants did not have light duty. However, Respondent continued working. (R. pp. 59-61) Respondent discussed the injury with his employer; specifically, with Kim LeCroy. Kim's response to his request for medical treatment was that he would be fired if he left the plant. (R. p. 62) He was not asked to fill out an accident report. (R. p. 68, lines 22-24)

Respondent testified that he stopped working at the mill after a doctor gave him restrictions and has not returned back to work. (R. p. 69, lines 3-6) Prior to the injury, he was "pretty active" at work, and there is no way he could do his same job with his current symptoms. (R. p. 69, lines 18-25 p. 70, lines 1-4) After his family doctor, Respondent was seen at Palmetto Bone & Joint. He testified that he told the doctors he had one or two months of pain. (R. p. 70 line 25 p. 71, lines 1-4-p. 73, lines 17-20) He believed that he was being honest with his doctors about how long he had been hurting, including Dr. Dwight Jacobus, who spent a great deal of time with him. (R. pp. 73-74) Respondent testified he wants to go back to the doctor and return to work when his arm quits hurting. (R. p. 75, lines 17-19)

Respondent testified at the hearing that this injury was the only work-related injury that resulted in his current problems. He did not recall any other workers' compensation claims. (R. p. 76, lines 15-17) When presented with purported impeachment evidence of a prior workers' compensation claim, Respondent confirmed the evidence was related to a different "Jeffrey Miller," and not him. (R. p. 80, lines 8-21) When presented with evidence of his prior criminal record, Respondent freely admitted prior convictions and did not recall some of the others. Regarding his medical treatment, Respondent testified that he was

truthful with his doctors to the best of his knowledge and what he could recall. (R. pp. 80-81-p. 82 lines 13-18; p. 85, lines 10-18)

Respondent did not know why the Baptist Easley Hospital report of May 10, 2015 indicated his work injury occurred one month prior. He testified he “can’t remember dates.” (R. p. 87, lines 7-15) Respondent also denied intentionally giving Dr. Jacobus any false information. (R. pp. 88-89) Respondent acknowledged being seen at Easley Baptist Hospital in 2012, not only for right arm numbness, but also for other accompanying symptoms including facial numbness, dizziness, and headaches that may have been due to a reaction to medication given to him by a doctor. (R. p. 97, lines 19-25-p. 98, lines 1-2)

Appellant’s witness was Kim LeCroy. She has worked for Alice Manufacturing for forty-one years. She is a supervisor. She knows the Respondent. (R. p. 107, lines 6-21) She testified that the Respondent left a voicemail message on March 20, 2015 that his elbow was hurting from where he pulled a warp down. (R. p. 109) She brought Respondent in to discuss the matter. Respondent said he needed medical attention. (R. p. 109) She did not do an accident report. (R. p. 112, lines 5-8)

Ms. LeCroy did not bring any documents to the hearing, including Respondent’s employment file or documentation of her conversations with Respondent. According to LeCroy, Respondent is still employed by the Appellant employer. However, she admitted that Respondent was actually terminated after reporting his injury. When asked why Respondent had been apparently re-hired after that date, LeCroy had no response. (R. pp. 115-119)

Respondent was seen on April 20, 2015 at Easley Family Practice/Internal Medicine for reports of right elbow pain and anxiety. The report indicates a one month

history of right lateral elbow pain with lifting heavy weights. The report indicates Respondent does a lot of heavy lifting at work. He had x-rays and was ordered to follow up. (R. pp. 174-175) Respondent returned on May 4, 2015 for right wrist and shoulder pain. The right elbow was still painful. Range of motion was restricted. He had intermittent tingling and numbness in his right thumb and fingers. More x-rays were ordered of the right shoulder and right wrist. (R. pp. 179-181) On May 26, 2015, Respondent was seen for a follow up related to anxiety. It was noted that he had seen Dr. Boyer for his right elbow pain..(R. pp. 184-186) During this time period, Respondent was written out of work and given work restrictions by his physicians. (R. p. 166)

Respondent was seen at Palmetto Proactive Health Care on June 3, 2015 and July 16, 2015. On June 3, 2015, the note indicates that he noticed burning in the right arm one month ago. He informed his supervisor but nothing was done. A primary care doctor did some testing that made his pain worse. He had problems moving his right arm and making a fist, numbness, and popping and swelling in the right shoulder and elbow. He was recommended to see a neurologist (R. p. 152). On July 6, 2015, Respondent returned to Palmetto Proactive Health Care but had not yet been seen by a specialist. His pain ranged from mild to major throughout the day. Finger numbness was indicated. He was still unable to work. He was excused from work from July 6, 2015 until he could be evaluated by a neurologist. (R. pp. 156-157)

Respondent was seen at Upstate Bone & Joint by Dr. David Boyer on May 13, 2015. The note details a one to two month history of right lateral elbow pain as well as right shoulder and wrist pain. He was examined and a right ultrasound guided common extensor tendon tenotomy procedure was performed. He was assessed with right lateral

elbow pain and asked to follow up. He was written out of work until follow up with Dr. Boyer. (R. pp. 159-161)

Respondent first saw Dr. Dwight Jacobus at Oaktree Orthopaedics on August 4, 2015. He reported a history of doing a job that required pulling 5-6000lbs of material with his arms. He had significant pain in his right elbow around the middle of March 2015 that occurred when pulling material. He tried to keep working but had increasing discomfort. Respondent had been seen by Palmetto Proactive Health Care as well as by Dr. David Boyer at Upstate Bone & Joint, per Dr. Jacobus's report. Respondent had already had ultrasound and injections. Respondent had been given light duty restrictions and also written out of work by his doctors. Dr. Jacobus diagnosed post-traumatic epicondylitis of the right elbow, C5 radiculopathy of the right upper extremity, and developing De Quervain's tendon bone insertional irritation. An EMG/nerve conduction study was recommended. (R. pp. 125-128) Respondent was seen by Carolina Neurology Associates on September 1, 2015. His EMG/nerve conduction study findings were "abnormal." (R. p. 149)

Respondent saw Dr. Jacobus again on September 4, 2015 for follow up. Respondent had a lot of neck, right shoulder, and right elbow pain. The EMG/nerve conduction study was reviewed. An MRI was recommended. (R. p. 131) Respondent returned for follow up on November 3, 2015. He was again assessed with cervical radiculitis. Medications were helping. (R. pp. 139-142) Respondent saw Dr. Jacobus again on December 29, 2015 for right hand, right arm, and right shoulder pain. There was right hand swelling and numbness. (R. pp. 144-147)

On January 11, 2016, Dr. Jacobus signed a medical questionnaire that indicated that

Respondent sustained injury to his right arm, right shoulder, and neck, while at work on or about March 17, 2015. According to Dr. Jacobus, Respondent was not at maximum medical improvement; needed additional medical care including an MRI; and was scheduled for a follow up EMG study on January 26, 2016. Dr. Jacobus opined that Respondent had been unable to work since his injury of March 17, 2015. All of Dr. Jacobus's opinions were stated to a reasonable degree of medical certainty and he had been given the opportunity to add or redact anything he wished from the questionnaire. (R. pp.121-122).

Medical records submitted by Appellants indicate that Respondent was seen at Easley Baptist Hospital on December 31, 2003 after being hit by a tree at work. (R. p. 207) On October 24, 2004, he was seen at Easley Baptist Hospital for chest pains and arm numbness. (R. p. 215) On May 27, 2010, he was seen at Easley Baptist Hospital for chest pains and dizziness. (R.p. 231) Respondent was seen on February 27, 2012 at Easley Baptist Hospital for right arm numbness, right facial numbness onset with dizziness, and headache onset at 4:00am. He had right sided chest pain. He had a CT scan of his head for the right sided parasthesias to the face and arm. He was instructed to have an MRI if the symptoms persisted. (R. p. 318)

ARGUMENTS

I. SUBSTANTIAL EVIDENCE SUPPORTS THE COMMISSION'S DECISION THAT RESPONDENT SUFFERED A COMPENSABLE INJURY AND IS ENTITLED TO WORKERS' COMPENSATION BENEFITS.

This is a claim focused on an uneducated, "blue collar" Respondent who worked for Alice Manufacturing Co., at the Ellison Mill, doing such jobs as doffing cloth. He was

injured on or about March 17, 2015. The Commission awarded benefits. Regarding compensability, the question is whether substantial evidence exists to support the Decision and Order of the Commission. "An appellate court's review is limited to the determination of whether or not the Commission's decision is supported by substantial evidence or is controlled by an error of law." Hartzell v. Palmetto Collision, LLC, 415 S.C. 617, 784 S.E. 2d 194 (2016).

The record contains substantial evidence to support the Decision and Order of the Commission. Respondent testified regarding the circumstances of his injury and his subsequent treatment with medical providers on his own, including the treatment with Dr. Dwight Jacobus. He testified regarding his notice to the employer of his injury and of the refusal of the employer to provide medical care and treatment. When Respondent was given work restrictions, the employer did not accommodate them. In fact, the Respondent was fired. As his symptoms progressed, he remained unable to work.

Dr. Jacobus gave a medical opinion, to a reasonable degree of medical certainty that Respondent had been unable to work due to his injury. (R. pp. 121-122) This was unrefuted by Appellants and supports the Commission's award of medical care and treatment as well as temporary total disability benefits. Appellants called a witness to testify as to Respondent's reporting of the injury and separation from the company. However, that witness brought not one single document to the hearing to support her testimony. (R. p. 115, lines 6-8) Appellants tried to impeach Respondent's credibility by alleging that he lied about having a prior workers' compensation claim. Appellants' argument fell completely flat, when they realized at the hearing that they were presenting prior claims evidence from the wrong Jeffrey Miller. (R. p. 80, lines 8-21)

The evidence in this case has some minor inconsistencies in terms of the timeline of the injury. However, the evidence as a whole indicates that Respondent reported his claim timely; his claim was denied and he sought medical treatment on his own, including the treatment from Dr. Jacobus; and that Respondent has been unable to work and is owed temporary total disability benefits and is in need of additional medical care. This is borne out by the evidence in the Record on Appeal, including Respondent's testimony; the testimony of Kim LeCroy; the medical records of Dr. Jacobus; Dr. Jacobus's questionnaire, given to a reasonable degree of medical certainty; and the medical records from Easley Family Practice/Internal Medicine, Palmetto Proactive Healthcare, and Upstate Bone and Joint. None of the above referenced medical records are inconsistent with Respondent's allegation of injury, even if they do not specifically pinpoint an exact date of Respondent's injury. Coupled with Respondent's testimony that he does not remember dates well, there is substantial evidence in the record to support the Commission's decision on compensability and the award of benefits.

Appellants basically contended that the Respondent was a liar, but they presented no real evidence in support of their case. The Appellants' case consisted of cross examination of the Respondent regarding the minor inconsistent details in the medical records; however, the Appellants deposed no doctors nor presented any medical evidence of their own to dispute causation of Respondent's injuries. The Appellants presented a witness, Kim LeCroy, who essentially confirmed that Respondent did report an injury to her. However, she did not do an accident report; she brought none of her alleged written documentation about her conversations with Respondent to the hearing, nor did she bring his personnel file, nor could she offer any explanation as to why Respondent had been

allegedly re-hired *after* he had been fired following the reporting of his injury. (R. p. 119, lines 2-7) The Appellants' case further consisted of assertions that Respondent was hiding his criminal history; however, Respondent was forthright in admitting any criminal history to the best of his memory and ability. (R. pp. 80-82) Interestingly, the Appellants' case also consisted of an attempt to impeach the Respondent by alleging that he lied about not having a prior workers' compensation claim. Appellants were left with "egg on their face" when they realized at the hearing that their evidence of an alleged prior claim was actually related to a completely different person, not the Respondent (R. p. 80)

The Commission rightly disregarded these credibility attacks. Substantial evidence supports the Commission's Decision, including the Commission's finding that Respondent was a credible witness. The Hearing Commissioner had ample opportunity to assess the Respondent. Here is his description:

I found the Claimant to be very credible. It was clear that the Claimant has a limited communication skill set. He testified that while he can read and write, he has trouble spelling and reads slowly. His speech was stilted and he spoke in a staccato pattern. He was clearly nervous and had some difficulty verbalizing his responses to questions. That being said, I found him to be candid and truthful. I did not find any intent on behalf of Claimant to be deceptive...

(R. pp. 20-21) Furthermore, the Hearing Commissioner rejected the Appellants' attempt to turn minor details into a major credibility argument against Respondent:

The Claimant suffered a work-related accident, resulting in injury, on or about March 17, 2015. We must be mindful that workers do not live in our

world of workers' compensation parlance nor do they grasp that specific descriptions and chronology have the importance that attaches in workers' compensation. That being said, just because a worker does not have the vocabulary or specificity of recall we seek does not void their case if they can present a prima facie case which can be proved compensable by a preponderance of the evidence. That is the case here. This finding of fact is based on the testimony of the witnesses, including the Claimant, the medical records, and the evidence in the record as a whole.

(R. p. 22)

"In worker's compensation cases, the Commission is the ultimate fact finder." Hartzell, *supra*, at 622. Respondent submits that he met his burden of proof. Respondent presented testimony and substantial medical evidence that he had been unable to work as a result of his injuries and was in need of further care. Appellants presented nothing. The record contains substantial evidence to support the Commission's decision on compensability and benefits.

II. THE COMMISSION HAS THE AUTHORITY TO SELECT RESPONDENT'S TREATING PHYSICIAN.

Respondent provided much of his own medical treatment with Dr. Dwight Jacobus as a result of Appellants' denial of this claim. Respondent does not dispute the workers' compensation laws and regulations of South Carolina that customarily give the Appellants the right to provide the medical treatment during a workers' compensation claim; however, Appellants have never provided anything to the Respondent. They denied the claim from the outset. The Commission found the claim compensable. Additionally, the Commission

directed the Appellants to continue Respondent's ongoing medical care with Dr. Jacobus when the claim was found compensable. (R. pp. 1-11) The Commission had the legal and factual authority to do so.

Appellants' argument is that the Commission is without authority to designate Respondent's treating physician. Appellants cite McKinney v. Kimberly Clark Corp., 376 SC 636, 658 S.E.2d 112 (Ct. App. 2008) in support of their argument that the Commission is without authority to select Respondent's treating physician. However, the McKinney case involved a Claimant who contended that she was entitled under § 42-15-60 to select her *own* treating physicians after having been found permanently and totally disabled. The Court of Appeals rejected McKinney's argument.² See McKinney, 376 SC 636, 658 S.E.2d 112 (Ct. App. 2008).

The facts here are different. In the instant case, the Respondent does not seek to select his own treating physician. Rather, it is the Commission that has Ordered that Dr. Jacobus serve as Respondent's treating physician because of the already ongoing medical treatment relationship, and the McKinney case has very little, if any, applicability.

S.C. Code Ann. § 42-15-60(A) states, in pertinent part, that "[d]uring any period of disability resulting from the injury, the employer, at his own option, may continue to furnish ... an attending physician and any medical care or treatment that is considered necessary by the attending physician, unless otherwise ordered by the commission for good cause shown." S.C. Code Ann. § 42-15-60(A)(emphasis added). In this particular case, the Appellants denied the claim and never provided any medical treatment whatsoever. The

² Interestingly, in rejecting McKinney's argument, the Court of Appeals relied on Risinger v. Knight Textiles, 577SE2d 222 (2002), a case that specifically references the Commission's authority to designate a Claimant's authorized treating physician. See McKinney at p. 638-639 (In Risinger, the appellate panel designated a treating physician for the claimant in its order.)

Commission has the authority to order medical treatment for Respondent pursuant to § 42-15-60 and that includes directing Dr. Jacobus to treat the Respondent.

Additionally, South Carolina case law has frequently held that the Commission has wide discretion under § 42-15-60 to make decisions regarding a Claimant's medical care and treatment. *See* § 42-15-60; Martin v. Rapid Plumbing, 369 SC 278 (Ct App 2006)("The appellate panel is afforded discretion to order medical treatment under section 42-15-60..."); Hall v. United Rentals, Inc., 371 SC 369 (Ct App 2006)("We hold section 42-15-60 authorized the Appellate Panel, in its discretion: (1) to order additional medical care that tended to lessen the claimant's period of disability, and (2) to order treatment, when necessary, from medical providers not previously authorized by the employer."); Clark v. Aiken County Government, 366 SC 102 (Ct. App. 2003)(The full commission is empowered to order further medical care when controversies arise between a claimant and the employer).

South Carolina Appellate Courts have interpreted § 42-15-60's language with regard to the Commission's ability to select a Claimant's physician to support the premise that giving one party the unencumbered right to select the treating physician undermines the authority of the Appellate Panel. *See* McKinney v. Kimberly Clark Corp., 376 SC 636, 658 S.E.2d 112 (Ct. App. 2008)(McKinney's argument is inconsistent with S.C. Code Ann. § 42-15-60 and § 42-9-10 (1976), which establishes the rights of the employer and the employee with regards to payment for treatments, and ultimately gives great deference to the appellate panel. This statute does not give a unilateral right to claimants to select their treating physician, and such an unencumbered right undermines the authority of the appellate panel, as prescribed by the legislature)(emphasis added). Respondent submits that

the authority of the Appellate Panel pursuant to § 42-15-60 includes the latitude to select Respondent's treating physician, especially in a denied claim situation such as this one, where Appellants refused to provide any benefits at all and had to be ordered to provide medical treatment to Respondent.

Respondent submits he is entitled to causally-related medical treatment for his injuries at the direction of Dr. Dwight Jacobus, pursuant to the Order of the Commission. In addition to the legal grounds cited above, Respondent contends that substantial evidence also supports the decision to use Dr. Jacobus as the treating physician in this case. Dr. Jacobus is familiar with Respondent's care and is in the best position to treat him and get him to maximum medical improvement. Dr. Jacobus's records and questionnaire provide unrefuted evidence that Respondent is in need of additional medical treatment to lessen the period of disability. The Commission relied on substantial evidence, as well as their authority under § 42-15-60, to Order additional medical care and treatment with Dr. Jacobus.

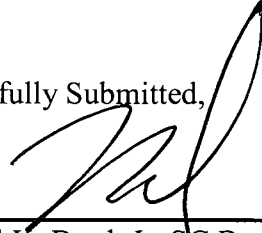
CONCLUSION

Substantial evidence exists in the record to support the Commission's decision on compensability and related benefits. Appellants' defense has been based almost entirely on red herrings and "smoke and mirrors" arguments about Respondent's credibility. Those arguments were rejected by the Commission and substantial evidence supports the Commission's finding that Respondent was a credible witness. Substantial evidence supports the Commission's decision that Respondent's claim is compensable and he is entitled to TTD from April 20, 2015, to the present and continuing, per Dr. Jacobus's unrefuted expert medical opinion, as well as medical care and treatment at the direction of

Dr. Jacobus. Selecting Dr. Jacobus to be Respondent's treating doctor was not an error of law. This Honorable Court should AFFIRM the Decision and Order of the South Carolina Workers' Compensation Commission.

April 28, 2017

Respectfully Submitted,



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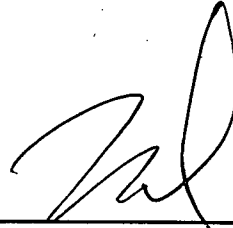
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CERTIFICATE OF COUNSEL

The undersigned certifies that the Final Brief of Respondent complies with Rule 211(b),
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