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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

ORIGINAL

APPEAL FROM THE WORKERS COMPENSATION COMMISSION

Gene McCaskill, Commissioner
T. Scott Beck, Commissioner
Susan S. Barden, Commissioner

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SC Court of Appeals

WCC File No. 1510187
Appellate Case No. 2016-002297

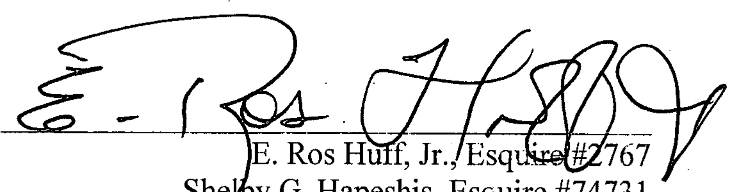
Shawn Wier, Employee, Claimant, Respondent,

v.

AGY Holdings Corporation, Employer, and Great American Alliance Insurance Company, Carrier, Appellants.

FINAL BRIEF OF APPELLANTS

June 30, 2017



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STATEMENT OF ISSUES ON APPEAL

1. Did the Commission err in finding as fact, concluding as a matter of law and ordering that the claimant sustained an injury by accident, thus entitling him to workers compensation benefits, the error being that this ruling is not supported by the evidence and the claimant did not meet his burden of proof?

2. Did the Commission err in finding as fact, concluding as a matter of law and ordering that Dr. Plymale coordinate treatment, the error being that the defendants have the right to direct medical treatment in this instance?

STATEMENT OF THE CASE

Claimant contends he suffered a compensable injury on June 5, 2015 when his left elbow struck the creel while doffing a frame. Claimant worked light duty for a period of time until his case was denied. His attorney filed a Form 50 request for a hearing on August 31, 2015 seeking a determination of compensability, request for medical treatment, and temporary total disability for the period of August 19, 2015 to the present and continuing.

This was an unwitnessed accident whereby Defendants, deny that Claimant sustained a compensable injury. They allege that Claimant is not credible and they should not be responsible for payment of any medical expenses or payment of temporary total disability (TTD). Specifically defendants claim that they are not responsible for TTD as the claimant voluntarily removed himself from the workforce. Defendants deny any benefits are due under the Workers' Compensation Act.

Claimant is represented by William L. Smith, II of Columbia, SC and Defendants are represented by E. Ros Huff, Jr., of Columbia, SC. The Commission file was made a part of the record. This case was heard by the hearing commissioner on February 1, 2016, at which time the parties and their representatives appeared. The Commissioner issued an order finding the claim for claimant's elbow compensable and ordering Defendants to pay temporary total disability

compensation benefits from August 19, 2015 to the present and continuing and payment of ALL causally related medical expenses from June 5, 2015 to the present and continuing.

Claimant is a 28 year old married male with six dependent children. Claimant has a GED and served in the United States Army for eight years until he was medically discharged as a result of a head injury. Following Claimant's discharge, he worked for G4S Security until he obtained his job with AGY in the spring of 2015.

Claimant testified that he suffered his injury on June 5, 2015 when he was doffing a frame and attempted to pick up a bobbin that was stuck. He testified that his hand slipped off the bobbin and his elbow hit the creel above it. However the claimant's Form 50 states that he injured himself by "**LEFT ARM HIT THE MOVING CREEL IN THE MACHINE**".

The reports of Aiken Regional Medical Center show the claimant was seen the next day on June 6, 2015 "complaining of left elbow pain that began when he picked up an item at work tonight and hit his elbow on a hard piece of plastic".

Dr. Plymale first saw Claimant on June 15, 2015. His first visit was approximately ten days after the date of injury. The diagnosis by Dr. Plymale was simply a contusion to the elbow. Dr. Plymale performed a physical examination of the claimant and upon physical examination, the claimant had a normal exam and he did not even note bruising on the claimant. Dr. Plymale further stated that the x-rays were normal. (R. Vol. I p. 159-161) Dr. Plymale also took a history of Claimant injuring his elbow at work on June 5, 2015 when he hit his elbow on a piece of equipment. Dr. Plymale originally diagnosed Claimant with a left elbow contusion and placed him on light duty status for the next three weeks with no lifting over 10 pounds. Claimant returned to Dr. Plymale on July 6, 2015 for follow up of his left elbow injury. At that time, Dr. Plymale assessed continued left elbow pain and the claimant contended that he cannot lift

anything over 8lbs. As a result of this statement, Dr. Plymale requested that an MRI be performed.

On August 4, 2015, the claimant continued to work at this job with little or no complaints, but visited the onsite clinic at AGY. At that visit, the nurse Ann Tyler noted that the claimant inquired about the MRI being approved and stated: "I can't pick up anything heavy at all." The nurse also notated that the employee was again leaning on a dutch door with both elbows bearing weight as he leans in to talk. He further stated that he could do his whole job as long as it is not over 8 pounds because lifting anything else with the arm hurts.

On August 6, 2015, just two days after this visit to the clinic, and prior to an MRI being performed, the claimant visited the YMCA pool and surveillance footage shows him doing numerous strenuous activities with his elbow including lifting and throwing his 8 or 9 year old son in the pool using both arms and doing activities such as raising his back lift of his van and lifting a heavy travel stroller. All of these activities he denied doing at his deposition taken on November 16, 2015 and many activities depicted in the video showed him not complying with his lifting restrictions and contradicted his statement that he could not lift more than 8 pounds. **AT THE HEARING, THE CLAIMANT ADMITS THAT HE LIED IN HIS DEPOSITION ABOUT NOT LIFTING ANYTHING HEAVY, AND SIMPLY SITTING AROUND THE KIDDIE POOL WHEN VISITING THE YMCA.**

An MRI was performed after this pool visit at the VA hospital on September 21, 2015. This MRI was taken three months after the alleged date of injury, and after the footage was taken of the claimant performing strenuous activities at the pool. The MRI revealed "diffuse signal or abnormality noted at the extensor tendon attachment to the lateral epicondyles likely representing tendinopathy or possible partial tear" (R. Vol. II p. 199).

After reviewing the MRI, Dr. Plymale initially issued a causation statement relating the changes on the MRI to the accident in December 2015 (R. Vol. II p. 237). On January 20, 2016, after this opinion was rendered, Dr. Plymale viewed surveillance footage of the claimant doing numerous strenuous activities with his elbow and changed his opinion of causation at the deposition. In fact, Dr. Plymale stated that he wasn't even sure if the claimant is entitled to any medical treatment. Dr. Mickey Plymale further testified in his deposition that he didn't know whether the equipment was located and can't remember what level it was at. He doesn't know what degree of force the claimant hit the equipment with or if it were physically possible for him to even strike the elbow or if the equipment was stationary or moving. (R. Vol. I p. 156-157)

Dr. Plymale's opinion as to causation and necessity of medical treatment is stated as follows:

Dr. Plymale-Page 15, Lines 12-19

12	Q	Inflammation. Based upon what you saw on the last
13		time that you saw him in July 2015, did you
14		anticipate any permanent restrictions?
15	A	No.
16	Q	Any permanent injury?
17	A	No.
18	Q	Any permanent impairment?
19	A	No.

Dr. Plymale-Page 16, Lines 17-25

17	Q	Okay. After you last saw him, are you in a
18		position to give any opinion, to a reasonable
19		degree of certainty, what his physical capabilities
20		were?
21	A	No.
22	Q	After you last saw him, can you give any opinion as
23		to what he was physically capable of doing? I
24		think the last time -- I think you saw him in
25		June, and then you saw him July 6th. Can you give

Dr. Plymale-Page 17, Lines 1-2

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1       any opinion after that date?
2   A.  No.
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Dr. Plymale-Page 25, Lines 4-19, 24-25

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24  Q   Can you still give the same opinion that he --
25      Since you don't know, can you give an opinion that
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Dr. Plymale-Page 26, Line 1-2

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1       he does need the treatment?
2   A   No.
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Defendants contend that the evidence viewed as whole do not support the Commissioner's finding of compensability and entitlement to medical benefits and this appeal followed.

ARGUMENTS

ARGUMENT I

The Commission erred in finding as fact, concluding as a matter of law and ordering that the claimant sustained an injury by accident, thus entitling him to workers compensation benefits, the error being that this ruling is not supported by the evidence and the claimant did not meet his burden of proof.

The claimant has the burden of proving his entitlement to benefits by the greater weight of the evidence. Hill v. Jones, 255 S.C. 219, 178 S.E.29, 142 (1970). In deciding whether substantial evidence supports a finding of causation, it is appropriate to consider both the lay and expert evidence. Sharpe v. Case Produce, Inc., 336 S.C. 154 (S.C. 1999).

The lay evidence in the form of the Claimant's testimony does not support an injury by accident. This is an unwitnessed accident. The claimant contends in his Form 50 that the accident occurred to his left arm when it hit a **moving creel** (R. Vol. I p. 23). However, the claimant contends that this is wrong because he was really trying to remove thread on the bobbin when his elbow came up and hit the machine (R. Vol. I p. 59 lines 7-11), and thus the creel could not be

moving. The claimant, while using the bobbin for demonstration at the hearing, stated that he would pick up the bobbin with one hand by the very top, not touching the yarn and once off the spindle is when you reach other hand underneath the bobbin itself to pull the bobbin out and put it onto a cart. However, the claimant was right hand dominant and standing to the left side of the creel. Therefore, he would have had to reach over his body to use his left hand and injure the left elbow. At the hearing, he testified that the accident occurred when his hand slipped off a machine and his elbow hit a creel. (R. Vol. I p. 60 lines 1-2, 6-25). When asked at the hearing whether the creel was moving as stated in his Form 50, claimant testified that he didn't actually hit the machine that spins. The claimant admitted at the hearing that he doesn't know how his left arm hit a moving creel if the machine is moving and running. Because of the numerous inaccurate statements in the claimant's testimony, the accident could not have happened in the way that he described. The claimant was also not forthright about his complaints regarding his injury.

Even if you assume the claimant's accident did occur, the claimant suffered no injury by accident. The medical evidence when viewed as a whole does not support an injury. At the first doctor's visit on June 6, 2015, a day after the accident, claimant was simply diagnosed with a contusion to the elbow at Aiken Regional Medical Center. The claimant was then seen at the clinic onsite at AGY where the nurse noted no swelling and normal range of motion in the hands or fingers.

The claimant was ultimately referred to an orthopaedist Dr. Mickey Plymale. His first visit was approximately ten days after the date of injury on June 15, 2016. The diagnosis by Dr. Plymale was simply a <u>contusion to the elbow</u>. At the second and last visit with Dr. Plymale on July 6, 2015, the claimant complained of pain and stated that he could not lift over eight pounds.

As a result, Dr. Plymale requested that an MRI be taken of the claimant's elbow. However, the claimant was impeached numerous times from his deposition testimony when confronted with the surveillance materials at the hearing. He said in his deposition that the heaviest he had lifted since the accident was his babies. However, he admitted at the hearing that this statement was not true as the surveillance footage showed him tossing one of his larger children (either 8 or 9 years old) in a pool. This lifting was certainly greater than the eight pounds that he contended that he couldn't lift and was in violation of his lifting restriction of no greater than ten pounds. He also stated at the deposition that all he did was go to the pool and stand in the pool. However, he admitted at this hearing that this was a false statement. The claimant also admitted to carrying and lifting a travel stroller into his van which was approximately 10-15 pounds according to the claimant.

The claimant did not meet his burden of proving causation by medical evidence. Even if the court were to give more weight to the testimony of the claimant, which has been proven not credible, the claimant still cannot meet his burden of proof.

Defendants would also submit that the claimant did not meet his burden of proving entitlement to Temporary Total Disability benefits because the claimant voluntarily removed himself from the workforce. To show that one is entitled to temporary total disability benefits, one must prove that "the incapacity for work resulting from an injury is total." S.C. Code Ann. Section 42-9-10 (1976, as amended). South Carolina Cases have held compensation for total disability "is based on loss of earning capacity." Bateman v. Town and Country Furniture Co., 287 S.C. 158, 159, 336 S.E. 2d 890, 891 (Ct. App. 1985). The claimant did not have a loss of earning capacity, but rather quit his job and voluntarily removed himself from the workforce.

Defendants submit that because claimant failed to present evidence of loss of earning capacity, the Commissioner erred in awarding TTD benefits.

ARGUMENT II

The Commission erred in finding as fact, concluding as a matter of law and ordering that Dr. Plymale coordinate treatment, the error being that the defendants have the right to direct medical treatment in this instance.

The Workers Compensation Commission committed an error of law when they appointed Southeastern Spine Institute as the authorized treating facility. There was no basis for this appointment and this was error because this is not a situation under 42-15-60(a), that calls for the Commission to appoint a treating physician because this is a denied case:

> (A) The employer shall provide medical, surgical, hospital, and other treatment, including medical and surgical supplies as reasonably may be required, for a period not exceeding ten weeks from the date of an injury, to effect a cure or give relief and for an additional time as in the judgment of the commission will tend to lessen the period of disability as evidenced by expert medical evidence stated to a reasonable degree of medical certainty. In addition to it, the original artificial members as reasonably may be necessary must be provided by the employer. During 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, unless otherwise ordered by the commission for good cause shown. The refusal of an employee to accept any medical, hospital, surgical, or other treatment or evaluation when provided by the employer or ordered by the commission bars the employee from further compensation until the refusal ceases and compensation is not paid for the period of refusal unless in the opinion of the commission the circumstances justified the refusal, in which case the commission may order a change in the medical or hospital service. **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.**

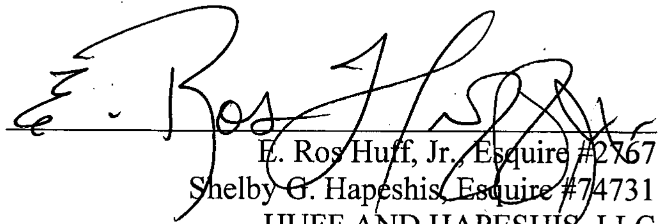
The Employer did not fail to provide medical care as specified in this section because they were not obligated to do so under the statute. Therefore, there is no reason for the commission to now order treatment by a specific physician. Pursuant to McKinney v. Kimberly Clark Corp, 658 S.E.2d 112 (App. 2008), the defendants have the right to choose the physician. Therefore, the Commission committed an error of law in appointing a physician in this instance for treatment.

CONCLUSION

Based on the above cited arguments, the Defendants would respectfully request that the Order of South Carolina Workers Compensation Appellate Panel be reversed in its entirety.

Respectfully Submitted,

June 30, 2017



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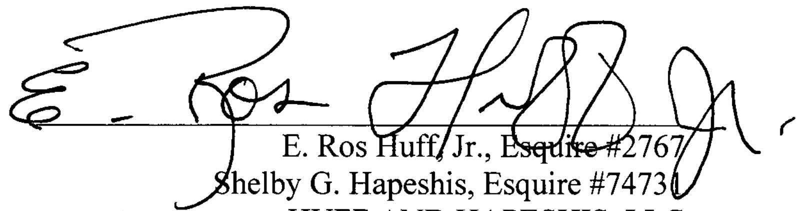
CERTIFICATE OF COUNSEL

In compliance with Rule 211, the Appellant's Final Brief is identical to the brief previously served under Rule 208 with the exception that it now contains references to the record.

June 30 2017



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