THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Appellate Case No.: 2019-000393
WCC File No.: 0725221 and 0921225

Deborah G. Duggans, ... Appellant,

v.

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

FINAL BRIEF OF RESPONDENTS

David H. Keller, Esquire, SC Bar No. 3345
Turner Padget Graham & Laney, PA
PO Box 1509
Greenville, SC 29602
Telephone: (864) 552-4622
Facsimile: (864) 552-4620
Email: dkeller@turnerpadget.com

ATTORNEYS FOR RESPONDENTS

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STATEMENT OF THE CASE

This is a Workers' Compensation Claim involving Claimant/Appellant Deborah G. Duggans. The Appellant in this case initially alleged right carpel tunnel syndrome due to repetitive trauma occurring on or about July 16, 2007. She also alleged cervical radiculopathy as a result of her injury of July 16, 2007. Respondents provided medical care and treatment in accordance with the South Carolina Workers' Compensation Act first with Dr. David B. Fulton and, subsequently, with Dr. Joseph P. Jackson, Jr. On October 1, 2008, Dr. Fulton placed Duggans at maximum medical improvement for her right carpel tunnel syndrome and assigned a 1% impairment rating. Later, on September 8, 2009, Dr. Jackson recommended Duggans undergo an evaluation with Dr. Johnson at Southeastern Spine for her continuing cervical symptoms.

While the referral was pending, Duggans alleged additional injuries to her cervical and lumbar spine as a result of a work-related injury on December 17, 2009. Respondents authorized the spine evaluation with Dr. Johnson who recommended physical therapy and medications. Thereafter, Respondents provided further treatment for both the cervical and lumbar spines with Dr. Ezra B. Riber of Palmetto Pain Management, which included intermittent injections and medications, as needed.

Ultimately, on July 1, 2016, Dr. Riber placed Duggans at maximum medical improvement assigning a 17% impairment to the whole person for the lumbar spine injury and a 6% impairment to the whole person for her cervical spine injury. A

hearing was held on December 14, 2017 before Commissioner Avery Wilkerson. At the hearing, the parties agreed that the claimant had reached maximum medical improvement and a determination of her permanent disability, if any, was appropriate.

After the first injury, and while Duggans was awaiting the appointment with Dr. Johnson, Respondents paid Temporary Total Disability Compensation in accordance with the Act. Respondents paid Temporary Total Disability Benefits from June 13, 2008 to October 13, 2008 totaling 17.5714 weeks of benefits. Subsequently, for the second injury, Respondents paid Temporary Total benefits to Duggans from May 3, 2010 to July 9, 2018 totaling 427.1428 weeks of benefits. Altogether, Respondents paid Duggans 444.7142 weeks of Temporary Total Disability benefits in excess of $130,000.00.

Following Appellant's placement at maximum medical improvement her attorney filed for a hearing alleging permanent and total disability under South Carolina Code of Laws Annotated §42-9-10 for total wage loss or alternately, under §42-9-30 (21) for total disability, alleging a greater than 50% loss to the back.

At the request of Appellant's attorney, the parties agreed to consolidate Duggans' 2007 claim and 2009 claims into one hearing to address ***all issues***. On April 25, 2018 Commissioner Wilkerson issued an opinion and award in which he found that Duggans was permanently and totally disabled under §42-9-30 (21) due to a loss of use of the spine in excess of 50% as a result of her spine injuries. Commissioner Wilkerson further concluded that Appellant was permanently and

totally disabled under §42-9-10 due to total loss of earning capacity as a result of the ***combined*** consequences of her two injuries. Commissioner Wilkerson ordered Respondents to remain financially responsible for Duggans' medical care for her lifetime due to her spine condition as a result of the combined effects of her two injuries. Commissioner Wilkerson concluded that the payment of the remaining disability compensation award should be in a lump sum, that the same was in Duggans' best interest, and that Defendants were not entitled to pay the award based on the Commission's "commuted" value tables. He also ordered that Duggans could receive 500 weeks of compensation for the second injury even though she had received in excess of 17 weeks of benefits for the 2007 injury. As a result, Commissioner Wilkerson ordered Respondents to pay Duggans a lump sum award of $28,840.73, which represents 81 weeks of benefits, undiscounted, at Duggans' compensation rate of $294.33.

Subsequently, Respondents filed a South Carolina Workers' Compensation Form 30/Request for Judicial Review by the Full South Carolina Workers' Compensation Commission. On September 18, 2018, oral argument was held before an appellate panel of the Full South Carolina Workers' Compensation Commission, which affirmed in part and reversed in part. The Commission first determined that the Form 30 filed by Respondents did not preserve the issue of payment of a lump sum award in a non-discounted or commuted payment. Second, the Full Commission determined that because Appellant had requested the two cases be combined for hearing, the Claimant could receive no more than 500 total weeks of

compensation and awarded the Respondents a credit of 17.5714 weeks of benefits previously paid on the 2007 injury. In due time, Duggans filed an Appeal to this Court. The sole issue in this case is whether the Full Commission erred in awarding Respondents a credit for the payment of temporary total paid on the 2007 claim.

ARGUMENT

I. Did the South Carolina Workers' Compensation Commission err in crediting Defendants/Respondents with 17.5714 weeks of Temporary Total Disability Compensation Benefits under the circumstances of this case?

a. The Commission did not err as a matter of law.

As noted above, this case involved two separate injuries to Appellant, one occurring in 2007 and one occurring in 2009. At the time of the original hearing on December 14, 2017, Commissioner Wilkerson noted for the record that the 2007 and the 2009 cases had been joined as one case for hearing (ROA p. 70). He specifically noted that the two cases were combined into one hearing (ROA p. 71). The position of Appellant was, essentially, that in combining the two cases together there was no question that the claimant was totally and permanently disabled under South Carolina Code of Laws Annotated §42-9-10 for total wage loss (ROA pp. 72 - 74).

Mr. Saffran specifically questioned Claimant about her condition before both the 2007 and the 2009 injuries and her capabilities after both injuries (ROA pp. 80 - 81).

The Claimant had returned to work after the carpel tunnel surgery before the 2009 injury (ROA p. 82). However, that case was not resolved because the claimant was referred to Dr. Johnson in Charleston for a second opinion (ROA p. 137). While the referral was pending, Appellant alleged additional injuries to her cervical and lumbar spines as a result of the injury of December 17, 2009. Respondents subsequently authorized the spine evaluation with Dr. Johnson who recommended physical therapy and medications (ROA pp. 138 – 139).

The legal reason Appellant requested the two claims to be combined was because she was seeking total and permanent disability either under §42-9-30 (21) for 50% or greater loss to the back, or for total loss of earning capacity under §42-9-10. The problem Appellant faced at the hearing was the back ratings were relatively low and in order to get total and permanent disability for wage loss she had to prove that she had multiple body parts affected. Wigfall v. Tidelands Utilties, Inc., 354 S.C. 100, 580 S.E. 2d 100 (2003); Lee v. Harborside Café 350 S.C. 74, 564 S.E. 2d 354 (Ct. App 2002). If the injury were confined solely to a single body part, in this case, the back, the Claimant would have been bound by §42-9-30 and could not have sought wage loss under §42-9-10. Dent v. East Richland County Public Service District 423 S.C 193, 813 S.E. 2d 886 (Ct. App.

2018); Colonna v. Marlboro Park Hosp. 404 S.C. 537, 745 S.E. 2d 128 (Ct. App. 2013).

Appellant cites Eaddy v. Smurfite-Stone Container Corp. 335 S.C. 154, 584 S.E. 2d 390 (Ct. App, 2003) for the proposition that the 17 plus weeks credit given to the Respondents was not proper. The Eaddy case, however, does not address the issue currently before the Court. First, in Eaddy the Court of Appeals dismissed the argument as not having been properly preserved (355 SC @ 164). Second, the Court stated that even if the argument was properly before the Court, it would still be dismissed because there was no proof in the record that prior payments made to the Claimant were made due to Smurfite-Stone's liability under the South Carolina Workers' Compensation Act. It appears from the opinion that Eaddy was receiving other benefits while he was out due to his hernia injury, which were not payable under the South Carolina Workers' Compensation Act.

Interestingly, the Eaddy Court directly addressed the South Carolina Code of Laws Annotated §42-9-160, which directly relates to the case at bar. §42-9-160 specifically states when "an employee receives an injury for which compensation is payable while he is still receiving or entitled to compensation for a previous injury in the same employment, he shall not at the same time be entitled to compensation for both injuries..." South Carolina Code Annotated §42-9-10 specifically states "In no case may the period covered by the compensation exceed 500 weeks..." The sole exception is if the claimant is

paraplegic, quadriplegic, or total disabled as a result of physical brain damage, none of which exist in the current case. §42-9-160 specifically states that the period of "compensation" cannot be extended.

The Court will note that §42-1-100 specifically defines "compensation" as "the money allowance payable to an employee or to his dependents as provided for in his title." The definition under §42-1-100 does not differentiate between permanent partial, permanent total, or temporary total disability compensation. Because these two cases were combined for hearing, the Appellant was not entitled to more than 500 total weeks of compensation. §42-9-10.

In the case of Medlin v. Greenville County, 301 S.C. 411, 392 S.E. 2d 192 (Ct. App. 1990) *Aff'd as modified*, 303 S.C. 484, 401 S.E. 2d 667 (1991) the Court specifically noted that the 500 weeks was the maximum that any employee could receive over his or her entire lifetime. The Medlin Court stated that this principle did not apply if the employers were different employers, but only if it was the same employer. The modification made by the South Carolina Supreme Court overruled Wyndham v. R.A. & E.M. Thornley and Co., 291 S.C. 496, 354 S.E. 2d 399 (Ct.App 1987) by stating that this rule applied to all employments whether with the same employer or otherwise. 303 S.C. 484, 401 S.E. 2d 667 (1991). The Supreme Court in Medlin specifically cited Hopper v. Firestone Stores, et al. 222 S.C. 143, 72 S.E. 2d 71 (1952) for the proposition that the 500 week limit applied.

It is therefore submitted that the 17 plus week credit for overpayment was proper.

b. The Workers' Compensation Commission also had authority under its equitable powers to award the 17.5714 week credit.

The South Carolina Appellate Courts have recognized that the South Carolina Workers' Compensation Commission has equitable powers. Hopkins v. Floyd's Wholesale, 299 S.C. 127, 382 S.E. 2d 907 (1989); Harrison v. Owen Steel Co., Inc., 442 S.C. 132, 810 S.E. 2d 433 (Ct. App. 2018); Richey v. Becton-Dickenson 359 S.C. 609, 598 S.E. 2d 307 (Ct. App. 2004).

In this instance, the Appellant was clearly "hedging her bets" by joining the two cases in order to assure that even if she could not receive total disability under §42-9-30, she could receive the same under §42-9-10. She now appears before this Court with "unclean hands" claiming that her actions in combining the two cases should be overlooked by the Court. However, as noted by the Commission in their order, under the unusual "facts of this case, as stated hereinabove, the defendants are entitled to a credit for 17.5714 weeks of temporary total disability compensation..." (ROA p. 55). Because of the facts of this case and Appellant's intentional combining of the two injuries in order to help guarantee total disability under §42-9-10 if she could not receive it under §42-9-30, the Respondents are entitled to the credit, also as a matter of equity.

CONCLUSION

It is therefore respectfully submitted that the credit of 17.5714 weeks of Temporary Total Disability compensation to the Respondents was proper both as a matter of law and of equity.

Respectfully submitted,

David Hill Keller, Esquire
S.C. Bar No.: 3345
TURNER PADGET GRAHAM & LANEY, P.A.
Post Office Box 1509
Greenville, SC 29602
(864) 552-4622

January 16, 2020

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CERTIFICATION OF COUNSEL

The undersigned certifies that the final Brief of Respondents complies with SCACR RULE 211 (b).

David Hill Keller, Esquire
S.C. Bar No.: 3345
TURNER PADGET GRAHAM & LANEY, P.A.
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Greenville, SC 29602
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