

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA  
Workers' Compensation Commission

Appellate Case No. 2020-001220

RECEIVED  
JAN 15 2021  
SC Court of Appeals

Paul Misuraca,

Employee, Respondent,

v.

Charleston County,

Employer,

&

SC Association of Counties SIF,

Carrier, Appellants.

APPELLANTS' INITIAL REPLY BRIEF

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**I. THE APPELLATE PANEL ERRED IN NOT REMANDING THIS CASE TO THE HEARING COMMISSIONER TO RULE ON ALL ISSUES AT ONCE.**

**a. Respondent incorrectly argues that Appellants should have pled the disputed body parts in their pleadings.**

In his Brief, Respondent argues, “[i]f Appellants desired a determination of the denied of back and depression claims, they should have filed an Amended Form 21 or included the denied claims in their pre-hearing brief.” Appellants again emphasize that unlike a claimant’s Form 50, there is no line on a Form 21 that allows defendants to assert admitted and denied body parts.<sup>1</sup> On a Form 21, defendants are limited to requesting a hearing for the following reasons:

- I. Stop payment of compensation.
- II. Address suspension, termination, or reduction of temporary disability payments for any cause.
- III. Determine if compensation is due pursuant to § 42-9-10, § 42-9-20, or § 42-9-30.
- IV. Request Credit for Overpayment of temporary compensation pursuant to § 42-9-210.
- V. Determine amount of compensation for claims involving a fatality.
- VI. Mediation.

*See e.g.* Appellants’ Form 21. There is simply no line for defendants to admit or deny specific body parts nor to request a hearing to adjudicate the compensability of certain body parts. Further, in the present case at hand, Appellants’ Form 21 states, “Defendants request hearing to determine PPD and address termination of temporary disability benefits,” and it does not exclude the consideration of any additional body parts. At the hearing, Appellants also requested the Hearing Commissioner to address the compensability of all alleged body parts. (Hrg. Tr. p. 9, l. 23–p. 10, l. 6).

Respondent also asserts that he “did not amend his pre-hearing brief, he withdrew his Amended Form 50.” However, on his Form 58, Respondent argued under Section 5: Legal Issues

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<sup>1</sup> Compare Appellants’ Form 21 with Respondent’s Form 50.

involved, “[p]ermanent partial disability to the left leg, back. - § 42-9-30; and/wage loss § 42-9-10, 42-9-20.” (Cl. Form 58). The Addendum to his Form 58 also details multiple allegations of back pain and depression. (Cl. Form 58: Addendum). By choosing to not litigate those issues at the hearing, Claimant not only withdrew his Form 50, he also amended his Pre-Hearing Brief to remove the back and depression claims as issues to be litigated. Allowing Respondent to amend his Form 58 at the time of the hearing is in direct contradiction to S.C. Code Regulation 67-611(B)(2).<sup>2</sup> This procedural, legal error materially prejudiced Appellants, as this claim is now improperly bifurcated into separate claims for admitted and denied injuries arising out of the same accident. As a result, Appellants request this case be remanded for a hearing consistent with these rulings.

**b. The Appellate Panel erred in affirming the bifurcation of a workers’ compensation claim by body part.**

Respondent further cites the cases of Logan v. Gatti<sup>3</sup> and Trotter v. Trane Coil Facility<sup>4</sup> for the proposition that the decision as to whether “to go forward with a claim rests in the sound discretion of the hearing commissioner and will not be disturbed unless it is shown to be an abuse of discretion.”<sup>5</sup> However, factually and legally, these cases are distinguishable from the one before this Court.

As a primary matter, the case of Logan does not involve a hearing commissioner or a workers’ compensation claim. Logan details a medical malpractice action in which the plaintiffs sought to present a medical expert, a captain in the U.S. Navy, at trial. 289 S.C. 546, 547, 347

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<sup>2</sup> “All amendments and supplements to a Form 58 must be made at least **5 days prior** to the date of the scheduled hearing.” S.C. Code Regs. 67-611(B)(2) (emphasis added).

<sup>3</sup> 289 S.C. 546, 347 S.E.2d 506 (Ct. App. 1986).

<sup>4</sup> 393 S.C. 637, 714 S.E.2d 289 (2011).

<sup>5</sup> Resp. Initial Brief p. 6.

S.E.2d 506, 507 (Ct. App. 1986). However, shortly before trial, the plaintiffs' medical expert was unexpectedly called to serve at sea, and he was therefore unavailable to appear at trial. Id. The plaintiffs moved before one judge for a continuance due to their expert's unavailability. Id. The first judge ruled that the plaintiffs could use the expert's discovery deposition as evidence at trial. Id. The case eventually made it to trial. Id. at 548, 347 S.E.2d at 507. The plaintiffs renewed their motion for continuance upon their inability to find a substitute witness to testify to the standard of care. Id.

However, at trial, the trial judge denied the plaintiff's motion for a continuance and further ordered a directed verdict against the plaintiff, as well as refused to consider the discovery deposition of the expert witness. Id. The South Carolina Court of Appeals asserted, "[a] motion for continuance because of the absence of a material witness is addressed to the judge's discretion, and his ruling will not be disturbed unless he is shown to have abused that discretion." Id. (*citing Gavin v. North Carolina Mut. Ins. Co.*, 265 S.C. 206, 217 S.E.2d 591 (1975)). Further, a judge abuses his discretion if his decision is based on an error of law. Renney v. Dobbs House, Inc., 275 S.C. 562, 274 S.E.2d 290 (1981). In reviewing the judge's actions, this Court found that the trial judge's decision was an error of law due to the plaintiffs only requesting a two-and-a-half-month continuance based on an unexpected development regarding a fact witness whose opinion was material to the case. Id. at 548-49, 347 S.E.2d at 507-08. Due to the trial judge's error of law, the Court reversed the judgment and remanded for a trial *de novo*. Id. at 549, 347 S.E.2d at 508.

While the case of Trotter does consider a workers' compensation claim, it also involves a motion for continuance similar to Logan. In Trotter, a hearing went forward on the compensability of a claimant's back injury. 393 S.C. 637, 643, 714 S.E.2d 289, 292. At the hearing, defendants moved for a continuance or to leave the record open to take the depositions of claimant's treating

physician and the employer's fact witness. Id. This motion was due to the fact witness suddenly being hospitalized on the weekend before the hearing and undergoing surgery on the date of the hearing. Id. at 646, 714 S.E.2d at 293. The hearing commissioner initially twice granted motions to hold the record open for the fact witness' testimony, but with no deposition ever being scheduled due to his incapacity, she closed the record. Id. at 643-44, 714 S.E.2d at 282. The defendants also sought to depose the claimant's treating physician prior to the hearing but decided not to for strategic reasons. Id. at 648, 714 S.E.2d at 295. As a result, the hearing commissioner denied the defendants' motion. Id. at 643, 714 S.E.2d at 282. On appeal, the Appellate Panel of the Commission unanimously affirmed the decision of the hearing commissioner. Id. at 643-44, 714 S.E.2d at 282.

The defendants appealed the decision of the Commission, and upon review, the South Carolina Court of Appeals reversed, finding the Commission abused its discretion in denying the defendant's motions for a continuance or to keep the record open for the depositions, finding the defendants had exercised due diligence, and the testimony was necessary. Id. at 644, 714 S.E.2d at 292. In response, the claimant filed a petition for a writ of certiorari, and in reviewing the facts, of the case, the South Carolina Supreme Court reversed the decision of the Court of Appeals and reinstated the order of the Commission. Id.

It is true that the Supreme Court stated, "[t]he granting or refusal of a request for a continuance rests in the sound discretion of the hearing commissioner, whose ruling will not be disturbed unless a clear abuse of discretion is shown." Id. at 645, 714 S.E.2d at 293 (*citing Gurley v. Mills Mill*, 225 S.C. 46, 80 S.E.2d 745 (1954)). Appellants do not dispute that a hearing commissioner retains the power to decide whether to continue a case or move forward with it. However, in the case presently before this Court, no motion for continuance was made by

Respondent. In fact, Regulation 67-613 dictates that the Respondent *should* have moved for postponement or adjournment of the scheduled hearing.<sup>6</sup> S.C. Code Regs. 67-613. These two cases are not comparable case law and their authority does not apply in the present action. Therefore, neither the case of Logan nor Trotter is instructive as to the issues currently before this Court.

Furthermore, in addition to there being no motion for a continuance, the hearing commissioner did not make a decision as to “whether to go forward with a claim” or to continue the hearing—he bifurcated the claim and moved forward with a permanency determination of one body part but neglected the others. As stated in the Initial Brief of Appellants, bifurcation is inappropriate when evidence relevant to issues of both liability and damages overlaps. Creighton v. Coligny Plaza Ltd. Pshp., 334 S.C. 96, 108, 512 S.E.2d 510, 516 (Ct. App. 1998). By bifurcating this claim, at least two fact finders will consider overlapping issues regarding compensability of the injuries and permanent disability. This directly impedes judicial efficiency and consistency, and the decision to do so should be reversed and remanded.

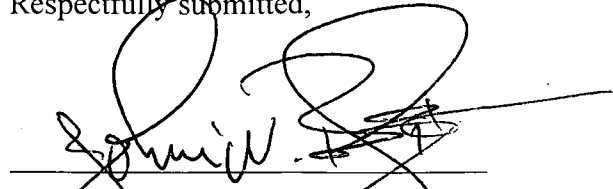
### CONCLUSION

In response to Claimant’s contentions against a credit since the date of MMI and the redetermination of PPD to the left leg, Appellants rely on the arguments and authority cited in our Initial Brief. Based on the foregoing reasons and those set forth within the Appellants’ Initial Brief, Appellants respectfully request this honorable Court reverse the Full Commission Decision and Order and remand for a decision based on the evidence in the record as to whether Respondent sustained compensable injuries other than to his left leg, the extent of PPD to his left leg, and the extent of Appellants’ credit for benefits paid after the date of MMI.

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<sup>6</sup> “[A] party seeking to amend the Form 58 must move for relief pursuant to R.67-613.” SC. Code Regs. 67-611(B)(2).

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Johnnie W. Baxley, III", written over a horizontal line. The signature is stylized with large loops and a long horizontal stroke extending to the right.

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Date: January 13, 2021

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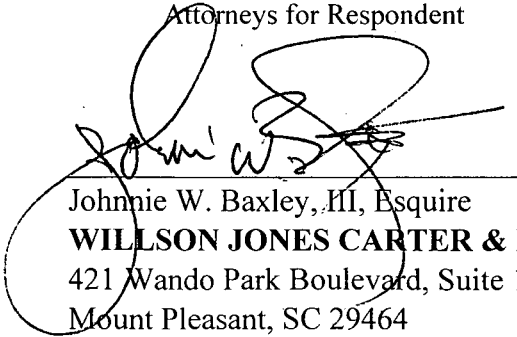
PROOF OF SERVICE

I do hereby certify that I have served the foregoing **APPELLANTS' INITIAL REPLY BRIEF** on the 13th day of January, 2021 to the following by placing a copy thereof in the United States mail, first class, proper postage affixed thereto:

Jenny Abbott Kitchings, Clerk  
South Carolina Court of Appeals  
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Columbia, SC 29201

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RECEIVED

January 13, 2021

JAN 15 2021

SC Court of Appeals

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

Re: Paul Misuraca vs. Charleston County  
WCC File No.: 1701642 DOI: 2/16/2017  
Carrier: SC Association of Counties SIF - Claim No.: 2017-SCAC-068413  
WJC&B File No.: 0560.00877  
Appellate Case No. 2020-001220

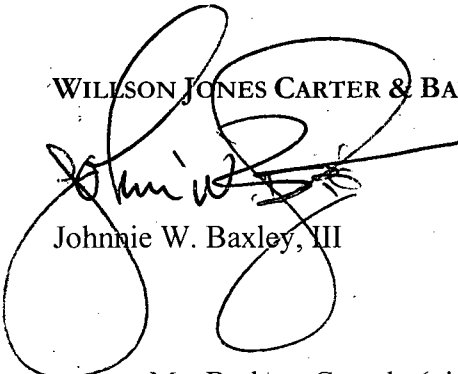
Dear The Honorable Kitchings:

Please find enclosed the following documents for filing in regards to the above-referenced case:

1. 1 copy of the Appellants' Initial Reply Brief;
2. 1 copy of the Proof of Service.

With kindest regards,

WILLSON JONES CARTER & BAXLEY, P.A.

  
Johnnie W. Baxley, III

JWB/ces

Enclosures

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SC Court of Appeals

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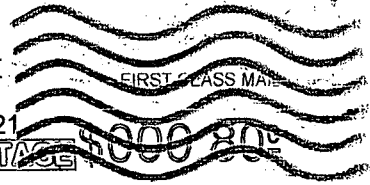
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