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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Appellate Case No. 2021-000585

Ana Rodriguez Galvan, Employee, Respondent,

v.

Griffin Stafford North Charleston, Employer; Accident Fund General Insurance Company c/o Accident Fund Insurance Company of America, Hartford Accident & Indemnity Co., and Employers Preferred Insurance Company, Carriers, Defendants,

of whom Griffin Stafford North Charleston, Employer, and Employers Preferred Insurance Company, Carrier, are the Appellants,

and Accident Fund General Insurance Company c/o Accident Fund Insurance Company of America and Hartford Accident & Indemnity Co. are Respondents.

APPELLANTS' REPLY BRIEF

Kathryn Fiehrer Walton, Esq.
Wood Law Group, LLC
Post Office Box 20550
Charleston, South Carolina 29413
(843) 577-5732
Attorney for Appellants

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APPELLANTS' REPLY TO RESPONDENTS' ARUGMENTS

I. Respondent Claimant's arguments regarding the Commission's authority to award medical treatment and change a treating physician cite to §42-15-60 and related case law prior to the July 1, 2007 amendments and thus should be disregarded.

On July 1, 2007, S.C. Code Ann. §42-15-60 was amended to reflect changes in the statutory law. Those changes are applicable to all injuries that occur on or after July 1, 2007 and, as such, are applicable in this claim. In the Respondent Claimant's arguments to support the Commission's Decision & Order, the Claimant Respondent (hereinafter "Claimant") cites §42-15-60 and case law prior to the implementation of the statutory amendments. Prior to July 1, 2007, §42-15-60 contained the language: **"In case of a controversy arising between employer and employee, the commission may order such further medical, surgical, hospital and other treatment as may in the discretion of the commission be necessary**" (emphasis added). This sentence was removed from §42-15-60 effective July 1, 2007 and is no longer contained in the statute.

Further, prior to July 1, 2007, §42-15-60 did not contain the language regarding the heightened evidentiary requirement that the Commission's award of additional medical must be supported by. §42-15-60 now states that "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 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**" (emphasis added). As such, the Claimant's arguments in Section II alleging that the Commission can order medical when a physician states it is not necessary and that it only needs to be based on the 'judgment of the Commission' is simply inaccurate when implementing §42-15-60 as amended.

In order to make an award of additional medical treatment for the Claimant's initial admitted right shoulder injury on October 9, 2015, an award must be based on expert medical evidence stated to a reasonable degree of medical certainty and, in the judgment of the Commission, tend to lessen the Claimant's period of disability. The Commission did not make a finding that additional medical would tend to lessen the Claimant's disability in its May 4, 2021 Decision & Order. Further, the Claimant did not have expert medical evidence, stated to a reasonable degree of medical certainty, relating her need for shoulder surgery for the new rotator cuff tear identified on the December 12, 2017 MRI of the right shoulder at the time of the submission of her evidence pursuant to the Administrative Procedures Act for the single Commissioner Hearing (Hartford APA page 260; Claimant's APA submissions). As addressed in detail in Appellants' Brief, Dr. James McCoy, the authorized treating physician, Dr. Bright McConnell and Dr. Richard Freidman all opined that the Claimant reached maximum medical improvement for the October 9, 2015 injury to her right shoulder and she did not require any further surgery (APA page 390, page 104, and Accident Fund APA page 388).

The Commission's finding that the Claimant is not at maximum medical improvement for the October 9, 2015 injury is clearly erroneous when reviewing the substantial evidence in this claim. The evidence reflects that multiple physicians concurred that the Claimant reached maximum medical improvement; she did not have any medical treatment for 51 weeks after being placed at maximum medical improvement; a new rotator cuff tear was identified in her right shoulder 15 months after she was released at maximum medical improvement; and the treating physician confirmed that the current need for surgery is due to the new rotator cuff tear (Accident Fund APA pages 421 and 422). The only evidence in the record to support that the Claimant was not at maximum medical improvement for the October 9, 2015 injury came from Dr. George

Pappas, the Claimant's IME physician, who saw her three and half years after the initial shoulder injury and after the Claimant had already been evaluated by six other physicians.

In reviewing the report of Dr. Pappas, it is clear that he did not acknowledge that the Claimant had been placed at maximum medical improvement by Dr. McCoy on September 28, 2016 (APA Page 106). Further, Dr. Pappas recommended additional diagnostics to rule out issues already previously addressed by Dr. McCoy (Accident Fund APA pages 420-424). This opinion from Dr. Pappas amounts to exactly a scintilla of evidence. Appellants do not assert that the Commission merely improperly weighed the evidence but that the Decision & Order of the Commission is not supported by the record as a whole. As such, the Appellants respectfully assert that the Decision & Order of the Commission is in violation of the statutory provisions of §42-15-60, as amended, and is clearly erroneous in view of the reliable, probative and substantial evidence on the whole record. See *Lark v. BiLo Inc.*, 276 S.C. 130, 132-133, 276 S.E.2d 304, 305 (1981)(The Court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are: (1) in violation of the constitutional or statutory provisions; (2) in excess of the statutory authority of the agency; (3) made upon unlawful procedure; (4) affected by other error of law; (5) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion).

II. <u>The untimely evidence allowed into the record by the Commission did not amount to harmless error as alleged by the Claimant.</u>

Although the Claimant's IME physician opined on February 15, 2019 that the Claimant was not at maximum medical improvement and hypothesized as to potential explanations for her ongoing symptoms, the opinion did not state that the Claimant's ongoing symptoms were related to the October 9, 2015 injury in this report. The statement relating the Claimant's current condition

to the October 9, 2015 injury came six weeks later in the form of a "Supplement to February 15, 2019 IME Report" which was not submitted into evidence with the Claimant's April 9, 2019 submission for the hearing on April 23, 2019 and was not identified as a forthcoming opinion pursuant to *Morgan v. JPS Automotives*, 321 S.C. 2012, 467 S.E.2d 457 (Ct. App. 1996). Claimant argues that the Commission's inclusion of this untimely submission amounted to a harmless error. However, the Supplement to February 15, 2019 IME Report, which is not a medical record from Dr. Pappas, is the first time he related the Claimant's symptoms and treatment recommendations to her original October 9, 2015 injury. As identified in *Muir* and cited by the Claimant, an improper evidence submission is only harmless if it is cumulative of other evidence in the record. *Muir v. CR Bard, Inc.*, 336 S.C. 266, 519 S.E.2d 583 (Ct. App. 1999). Dr. Pappas' opinion was contradictory to, not cumulative of, the opinions of Dr. Freidman, Dr. McCoy and Dr. McConnell (stating the Claimant had reached maximum medical improvement for the October 9, 2015 injury). The submission is not harmless, it is required in order to have any evidence that the Claimant is not at maximum medical improvement for her October 9, 2015 injury.

S.C. Code Ann. Regulation 67-612 states that a moving party must submit evidence 15 days prior to a hearing. This requirement allows adequate time for the responding parties to review additional evidence and confer with clients on further handling and potential additional discovery in light of the new evidence. In *Morgan*, the Court concluded that the moving party thought only one issue was to be adjudicated and by including additional forthcoming evidence in the record, additional issues were able to be addressed in an interest in judicial efficiency. *Morgan* at 2012, 459. In this claim, the Claimant was aware of the additional rotator cuff tear in December 2017 and did not obtain an opinion from Dr. Pappas relating her symptoms and need for treatment to the injury on October 9, 2015 until the supplemental statement prepared by her attorney and signed

by Dr. Pappas on March 30, 2019. The Appellants dispute that *Morgan* allows a moving party to supplement a record in violation of Regulation 67-612 and prolong litigation when the moving party had over a year to obtain such an opinion to meet the requirements of §42-15-60. *Id.*

The Claimant also cites to *Risher* as support for the Commission's discretion to admit untimely evidence. *Risher v. South Carolina Department of Health and Environmental Control*, 393 S.C. 198, 712 S.E. 2d 428 (2001). If you review the Court's analysis in *Risher*, discretion was granted to a trial judge on qualifications of a witness as an expert and admissibility of such testimony. *Id.* at 198, 432. This is not the same discretion exercised by the Commission in this claim. Allowing an attorney generated physician statement in violation of Regulation 67-612 when the Claimant had years to obtain such evidence is an abuse of discretion. Accordingly, Dr. Pappas' supplemental statement should not have been allowed into the evidentiary record. Without such an opinion in the record, the Commission does not have expert medical evidence to award the Claimant medical treatment under §42-15-60 related to the October 9, 2015 injury.

III. Claimant's allegation that issues were not raised, ruled on and preserved for review is erroneous when reviewing the record.

The Claimant alleges throughout her Brief that the Appellants did not raise the issue of the Claimant reaching maximum medical improvement, the issue of the Commission addressing future medical related to the October 9, 2015 injury and the issue of permanent disability benefits related to the initial October 9, 2015 injury. Appellants have continually maintained that the Claimant is at maximum medical improvement for the October 9, 2015 injury and that it is ripe to determine her entitlement to future medical benefits pursuant to the amended language in §42-15-60 as well as permanent disability benefits. The raising of these issues can be found in Appellants' Form 51, Answer to Claimant's Hearing Request; Appellants' Form 58, Pre-Hearing Brief, with attachment; Appellants' Form 30, Request for Commission Review, and Appellants' Brief to the Commission.

The Commission also ruled on these issues by finding that the Claimant was not at maximum medical improvement, awarding additional medical and finding that permanent disability shall be held in abeyance (May 4, 2021 Decision & Order). As such, these issues are preserved for review.

IV. The Commission abused its discretion by selecting a treating physician and Claimant's arguments based on outdated legal authority should be disregarded.

The Claimant alleges that the Commission did not err by selecting a treating physician. Regulation 67-509 states that "the employer's representative chooses an authorized health care provider and pays for authorized treatment." The Appellants have never waived such a right. This issue was raised by the Claimant to the Commission at the Hearing and ruled on in the Decision & Order. Again, the Claimant cites to case law interpreting §42-15-60 prior to the statutory amendments going into effect on July 1, 2007. The now omitted portion of §42-15-60 stated "in case of a controversy arising between the employer and employee, the Commission may order such further medical, surgical, hospital and other treatment as may in the discretion of the Commission be necessary." In the cases cited by the Claimant, the Courts clearly addressed the Commission's order of a treating physician in the context of a dispute and the pre-July 2007 language in §42-15-60. *See Martin v. Rapid Plumbing*, 369 S.C. 278, 631 S.E.2d 547 (Ct. App. 2006); *Hall v. United Rentals Inc.*, 371 S.C. 69, 636 S.E.2d 876 (Ct. App. 2006) and *Gattis, v. Murrells Inlet VFW #10420,* 353 S.C. 100, 576 S.E.2d 191 (Ct. App. 2003). In this claim, the Claimant did not refuse authorized treatment from the Employer's provider and the law referenced by the Claimant in her Brief no longer exists. Furthermore, the Commission did not provide explanation of why it would be necessary to deprive the Employer of its right to choose a health care provider under the Act. As the Commission did not provide any explanation on good grounds to deprive the Employer of its right and the Claimant's argument is based on outdated law, the

Commission abused its discretion by selecting a treating physician and such a finding should be reversed.

V. The facts and law support that the Claimant sustained a subsequent accident causing her current shoulder condition; therefore, the Decision & Order finding that Appellant is responsible for Claimant's future surgery constitutes a reversible error.

As addressed hereinabove and in Appellants' Brief, the substantial evidence in the record does not support that the Claimant requires surgery for her new rotator cuff tear a result of the October 9, 2015 injury by accident. Respondent Accident Fund (hereinafter "Accident Fund"), argues that in order to apply the *Geathers* last injurious exposure rule and for the Appellants to avoid liability for the Claimant's future surgery, the Appellants must show that there was a second accident or event. *Geathers v. 3V, Inc.*, 371 S.C. 570, 461 S.E.2d 29 (2007). However, in order for an employee to have a compensable "injury by accident" an actual "event" is not required. The fact that an unexpected injury (i.e. new rotator cuff tear) occurred is itself considered the accident. *Stokes v. First National Bank,* 306 S.C. 46, 410 S.E.2d 248, 250 (1990) *citing Hiers v. Brunson Construction,* 221 S.C. 212, 231, 70 S.E.2d 211, 220 (1952). As such, "the focus is not on some specific event, but rather the injury itself." *Pee v. AVM, Inc.,* 352 S.C. 167, 171, 573 S.E.2d 785 (2002) *citing Stokes v. First National Bank* at 50, 250. The Appellants have shown that the Claimant sustained an unexpected, worsening of her right shoulder condition after reaching a level of maximum medical improvement. (Accident Fun APA pages 357-362). There is no evidence in the record to support that the Claimant's current right shoulder condition is a natural progression or merely a reoccurrence of the injury sustained on October 9, 2015 as evidenced by the lack of supporting citations when this argument is made by the Respondents (Accident Fund APA page 374, line 3- page 376, line 4; Accident Fund APA page 417, line 24- page 419, line 10).

§42-9-35 states that "the commission may award compensation benefits to an employee who has a permanent physical impairment or preexisting condition and who incurs a subsequent disability from an injury arising out of and in the course of employment for the resulting disability of the permanent physical impairment or preexisting condition and the subsequent injury." The new rotator cuff tear is not in the same location as the initial rotator cuff tear that was repaired by Dr. McCoy (Accident Fund APA pages 358-360). Not only did the Appellants prove that there was a new injury but also obtained the evidence showing that the new injury likely occurred two to three months prior to the MRI performed on December 12, 2017 (Accident Fund APA page 361, line 12- page 362, line 8). Dr. McCoy specifically testified that the new tear is not a reoccurrence of the tear that occurred on October 9, 2015 (Accident Fund APA page 374, lines 3-10). Dr. Pappas merely hypothesizes that the Claimant's current shoulder symptoms are "due to her original injury or, alternatively, result from a continuum following the surgery that was necessitated by the original injury because her rotator cuff tear was incompletely addressed during surgery" while completely disregarding that the Claimant was able to work for over a year without any requests for medical treatment and that the prior rotator cuff tear repair was intact on December 2017 MRI. Although the Claimant testified as to her work limitations after returning to work after the rotator cuff tear from the October 9, 2015 injury was repaired, she reported to Dr. Keith Santiago on November 8, 2016 that she was tolerating regular duty without difficulty (APA page 245-246). If the Claimant had waited for one additional week, she would have been statutorily barred from seeking any further medical treatment related to the October 9, 2015 injury pursuant to §42-15-60(B)(3) which states that "in no case shall an employer be required to provide medical treatment or modalities in any case where there is a lapse in treatment of the employee by an authorized physician in excess of one year..." The evidence in the record supports that the

Claimant had an accident after reaching maximum medical improvement for the October 9, 2015 injury and that the Claimant's new injury to a different location of her tendon is not a natural progression or merely a reoccurrence of the injury sustained on October 9, 2015. As such, Appellants should not be responsible for the Claimant's future surgery.

CONCLUSION

The substantial evidence in this case supports that the Claimant reached a level of maximum medical improvement for the October 9, 2015 right shoulder injury; did not timely provide the expert medical evidence for the Commission to award surgery related to the October 9, 2015 injury; that the Commission violated §42-15-60 by ordering that the Appellants provide the Claimant with additional medical treatment without finding that it will tend to lessen the Claimant's period of disability; and violated §42-15-60, as amended, and Regulation 67-509 by allowing the Claimant to select her treating physician. In light of these clear violations of law, the Appellants respectfully request reversal of the Commission's May 4, 2021 Decision and Order.

Respectfully submitted,

Wood Law Group, LLC
P. O. Box 20550
Charleston, SC 29413
Ph.: 843-577-5732

By: _____
Kathryn Fiehrer Walton
Attorney for Appellants

November 18, 2021

THE STATE OF SOUTH CAROLINA

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of whom Griffin Stafford North Charleston, Employer, and Employers Preferred Insurance Company, Carrier, are the Appellants,

and Accident Fund General Insurance Company c/o Accident Fund Insurance Company of America and Hartford Accident & Indemnity Co. are Respondents.

PROOF OF SERVICE

I hereby certify that that I have served the Appellants' Reply Brief to be included in the Record on Appeal by depositing a copy in the United States Mail, postage prepaid, on November 18, 2021 addressed to the attorneys of record:

Michael J. Jordan, Esquire
Steinberg Law Firm, LLP
P.O. Box 1028
Goose Creek, SC 29445

Elliotte Quinn, Esquire
Steinberg Law Firm, LLP
103 Grandview Dr., Suite A
Summerville, SC 29483

Lynnley D. Ross, Esquire
Willson Jones Carter & Baxley, P.A.
4922 O'Hear Avenue, Suite 301
North Charleston, SC 29405

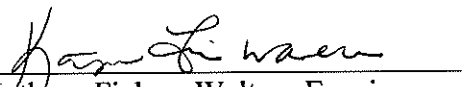
Regan A. Cobb, Esquire
Holder Padgett Littlejohn + Prickett, LLC
945 Houston Northcutt Blvd.
Mt. Pleasant, SC 29464

Michael W. Burkett, Esquire
Willson Jones Carter & Baxley, P.A.
3600 Forest Drive, Suite 204
Columbia, SC 29204

Alexa M. Tattersall, Esquire
Willson Jones Carter & Baxley, P.A.
3600 Forest Drive, Suite 204
Columbia, SC 29204

J. Gabriel Coggiola, Esquire
Willson Jones Carter & Baxley, P.A.
3600 Forest Drive Suite 204
Columbia, SC 29204

Andrew T. Smith, Esquire
Willson Jones Carter & Baxley
4922 O'Hear Avenue, Suite 301
North Charleston, SC 29405



Kathryn Fiehrer Walton, Esquire
Wood Law Group, LLC
P.O. Box 20550
Charleston, SC 29413
Attorney for Appellants

Charleston, South Carolina

WOOD LAW GROUP, LLC
ATTORNEYS AT LAW
ONE WESLEY DRIVE
CHARLESTON, SOUTH CAROLINA 29407
(843) 577-5732 FAX (843) 577-4326

J. HUBERT WOOD, III
KATHRYN F. WALTON*
MATTHEW J. FULTZ+

REPLY TO
P.O. BOX 20550
CHARLESTON, SOUTH CAROLINA, 29413

November 18, 2021

*MEDICARE SET-ASIDE CERTIFIED CONSULTANT
+S.C. CERTIFIED MEDIATOR

Via E-Mail and U.S. Mail
The Honorable Jenny Abbott Kitchings
Clerk of the South Carolina Court of Appeals
P.O. Box 11629
Columbia, South Carolina 29211

RE: Ana Rodriguez Galvan v. Griffin Stafford North Charleston

Appellate Case No.:	2021-000585
WCC File No.:	1515209
Carrier File No.:	2015279729
Date of Accident:	October 9, 2015
Our File No.:	69.252

Dear Ms. Kitchings:

Please find enclosed the original and one (1) copy of the Appellants' Reply Brief to be included in the Record on Appeal in the above referenced matter. I would appreciate you filing the original Appellants' Reply Brief and returning a clocked in copy of the same to my office via e-mail.

By copy of this letter and the aforementioned documents to all interested parties, I am serving them with a copy of the Appellants' Reply Brief.

Very truly yours,

Kathryn Fiehrer Walton

KFW/sf
Enclosures
cc: Elliotte Quinn, Esquire (w/enc.)
Michael J. Jordan, Esquire (w/enc.)
Lynnley D. Ross, Esquire (w/enc.)
Regan A. Cobb, Esquire (w/enc.)
Michael W. Burkett, Esquire (w/enc.)
Alexa M. Tattersall, Esquire (w/enc.)
J. Gabriel Coggiola, Esquire (w/enc.)
Andrew T. Smith, Esquire (w/enc.)
Ms. Terri Lampton (via e-mail only) (w/enc.)
Claims Mail (via e-mail only) (w/enc.)