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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, 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.

FINAL BRIEF OF APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

STATEMENT OF ISSUES ON APPEAL

1. Did the Appellate Panel err in finding that the Claimant is not at maximum medical improvement for her right shoulder injury occurring on October 9, 2015 when the evidence in the record, including the opinions of Dr. James McCoy, Dr. Richard Friedman and Dr. Bright McConnell, indicates that the Claimant reached maximum medical improvement?

2. Did the Appellate Panel err in not addressing whether the Claimant is entitled to any permanent disability benefits for loss of use of the right shoulder as a result of her October 9, 2015 injury?

3. Did the Appellate Panel err in finding Employers Preferred Insurance Company is responsible for ongoing medical care for the Claimant's right shoulder following her subsequent rotator cuff tear that occurred after the Claimant reached maximum medical impairment for her October 9, 2015 injury and after she had a one year lapse in treatment?

4. Did the Appellate Panel err in finding that the Claimant's current condition emanates from the original October 9, 2015 injury when the evidence in the record indicates that the Claimant suffered an intervening aggravation injury or repetitive trauma to her right shoulder sufficient to break the chain of causation from the October 9, 2015 injury?

5. Did Appellate Panel err in finding that Dr. George Pappas, the Claimant's IME physician, shall be the new treating physician authorized by Employers Preferred Insurance Company and not allowing the Defendants to select a treating physician following the authorized treating physician's retirement from performing surgical operations?

6. Did the Appellate Panel err in allowing a supplemental questionnaire from Dr. George Pappas to be included in the record in violation of South Carolina Code Ann. Regulation 67-612 when the document was mailed to the parties on April 14, 2019 prior to the April 23, 2019 hearing and was not identified on Claimant's Form 58 Pre-Hearing Brief in accordance with Morgan v. JPS Auto., 321 SC 201, 476 S.E.2d 457 (Ct. App. 1996)?

STATEMENT OF CASE

The Claimant sustained an admitted injury to her right shoulder on October 9, 2015 in the course of her employment with Griffin Stafford N. Charleston. Employers Preferred Insurance Company provided coverage for the Employer at the time of said accident. Griffin Stafford N. Charleston and Employers Preferred Insurance Company (hereinafter referred to as "Appellants") respectfully contend that the evidence and applicable law supports that the Claimant reached maximum medical improvement ("MMI") for her October 9, 2015 right shoulder injury and that the Claimant's current need for treatment regarding her right shoulder emanates from either a subsequent injury or repetitive trauma that occurred after the Claimant reached MMI in the underlying workers' compensation claim.

This matter came before the South Carolina Workers' Compensation Commission pursuant to the Claimant's Form 50 and the Forms 51 filed by all Defendants. The Claimant asserted that she is entitled to additional medical treatment related to her original October 9, 2015 injury. At the hearing before the single Commissioner, the Claimant amended her Form 50 and requested to hold the compensability of her neck in abeyance pending a surgical outcome regarding her right shoulder. The Claimant requested to hold a ruling on her permanent disability benefits in abeyance as well.

The Appellants assert that the Claimant reached MMI for her October 9, 2015 injury by September 28, 2016 based on the opinion of the authorized treating physician, Dr. James McCoy, and the concurring opinions of Dr. Bright McConnell and Dr. Richard Friedman. The Appellants deny responsibility for the Claimant's further medical treatment after the date she reached MMI due to the aggravation of her right shoulder condition.

Moreover, the Appellants deny responsibility for providing the Claimant with shoulder surgery to repair a rotator cuff tear identified by Dr. McCoy on a December 12, 2017 MRI. Dr. McCoy testified that the tear likely occurred two to three months prior to the MRI based on the acute tear having fresh edges and no retraction of the muscle noted on the images. Dr. McCoy testified that the new tear likely occurred due to the Claimant's repetitive type of work activities or some acute incident after the Claimant reached MMI for the October 9, 2015 injury. As Dr. McCoy testified that the Claimant had a worsening in her condition after reaching MMI for her October 9, 2015 right shoulder injury, the Appellants denied responsibility for providing the Claimant further medical treatment for the new tear.

Accident Fund General Insurance Company (hereinafter "Accident Fund") provided coverage for the Employer at the time of the December 12, 2017 MRI and thus was added as a defendant following the Claimant filing a motion to add. Hartford Accident and Indemnity Company (herein after "Hartford") was added as a defendant following the Claimant filing a motion to add as Hartford provided coverage for the Employer on April 12, 2018, the day Dr. McCoy testified as to the cause of the Claimant's subsequent rotator cuff tear. Accident Fund and Hartford both denied responsibility for providing the Claimant with medical treatment.

The single Commissioner issued a Decision and Order on August 20 2019 concluding, *inter alia*, that the Appellants are responsible for the Claimant's ongoing medical care for her right shoulder recommended by Dr. Pappas and Dr. McCoy; that Accident Fund and Hartford are released from the claim; and that the issue of compensability for the Claimant's neck and permanency to the right shoulder are in abeyance. Appellants timely requested Full Commission review by way of a Form 30 dated

August 30, 2019. Oral arguments were held before the Appellant Panel on November 19, 2019 and the Appellate Panel affirmed the single Commissioner's finding in a Decision and Order dated May 4, 2021. Thereafter, the Appellants served the Notice of Appeal to the Court of Appeals on May 28, 2021.

STANDARD OF REVIEW

The Administrative Procedures Act governs review of the Full Commission Appellate Panel's decisions. *See* Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981). Although the Appellate Panel is the ultimate finder of fact in workers' compensation cases, an appellate court may reserve or modify a decision of the Appellate Panel if the findings and conclusions are "affected by error of law, clearly erroneous in view of the reliable and substantial evidence on the whole record, or arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." Gray v. Club Grp., Ltd., 339 S.C. 173, 182, 528 S.E.2d 435, 440 (Ct. App. 2000). *See* S.C. Code Ann. §1-23-380(A)(6)(d),(e)(Supp. 1997).

STATEMENT OF THE FACTS

The Claimant initially presented to Health First on October 10, 2015 complaining of shoulder pain (R. pp. 086-088). Thereafter an MRI of the right shoulder was performed on November 2, 2015 at Lowcountry Orthopaedics and Sports Medicine (R. p. 123). The MRI report revealed that the Claimant had a full thickness minimally retracted tear involving the supraspinatus tendon with minimal partial thickness infraspinatus and subscapularis tendon tears (R. p. 123). Thereafter Dr. James Spearman at Lowcountry Orthopaedics recommended surgical intervention to repair the rotator cuff (R. p. 120). Dr.

James McCoy performed the arthroscopic right shoulder surgery with mini open rotator cuff repair on February 24, 2016 (R. pp. 116-117). At a follow-up visit, Dr. McCoy expressed that it was his opinion the Claimant was doing better in regards to her shoulder than she believed she was (R. p. 111). The Claimant also had numbness complaints in the right hand, primarily the middle and little finger, which Dr. McCoy described as a bit of a puzzle (R. p. 111). In that respect, Dr. McCoy recommended a nerve conduction study of the right upper extremity which was performed on May 12, 2016 (R. pp. 098-099, 111). The EMG/NCS was a normal study (R. p. 098). Further, Dr. Shailesh Patel noted on May 12, 2016 that the EMG/NCS was negative for carpal tunnel or peripheral neuropathy. Dr. Patel suspected the Claimant's complaints stemmed from more of a cervical etiology and recommended x-rays/MRI of the cervical spine (R. pp. 106-108). The cervical MRI was performed at Imaging Specialists on August 18, 2016, which was noted to be unremarkable with the exception of minimal degenerative disc disease at C5-6 (R. pp. 668-669). No significant neuroforaminal or spinal canal narrowing was noted at any level (R. pp. 668-669). Dr. McCoy indicated that the nerve conduction study and MRI of the cervical spine did not lead the physicians to believe there was any severe nerve involvement or issues with the cervical spine (R. p. 658).

Dr. Keith Santiago, a hand specialist at Lowcountry Orthopaedics, evaluated the Claimant's hand complaints and indicated she could return to regular duty as tolerated from a right hand standpoint (R. p. 642). At the final visit with Dr. Santiago on November 8, 2016, Dr. Santiago noted that the Claimant was performing regular duty without difficulty and thus could continue work without any permanent work restrictions (R. pp. 650-651). Dr. Santiago further indicated that the Claimant would not require any future medical

treatment for her hand and he indicated that she does not have any permanent impairment to the right upper extremity (R. pp. 650-651).

After the Claimant's right shoulder surgery and physical therapy, she returned to work on August 15, 2016 (R. p. 597). On August 3, 2016, Dr. McCoy noted that the Claimant had made great strides in regards to motion over the last month and that she was anticipated to make progress in strengthening to ultimately get her back to her regular job (R. p. 639). At the follow-up appointment on September 28, 2016, Dr. McCoy indicated the Claimant had reached MMI, could continue on permanent light duty, and would require future medical care including anti-inflammatory medications periodically with an occasional injection of the right shoulder (R. p. 648). Dr. McCoy also opined the Claimant had a 15% permanent impairment of the right shoulder, could return on an as-need basis and would likely see her motion improve slightly over the next year as well as her strength (R. p. 648).

The Claimant sought an independent opinion from Dr. Richardson at Southeastern Spine Institute on October 25, 2016 (R. p. 186). Dr. Richardson noted that the Claimant had normal bulk and tone and 5/5 strength in all groups except for the right deltoid where strength was diminished with abduction possibly related to pain (R. p. 186). He also noted that the cervical range of motion was fairly normal and there were no long track or sensory deficits noted. Dr. Richardson further indicated that the cervical spine MRI scan was reviewed and discussed with the Claimant. Dr. Richardson described the MRI as a fairly normal-appearing study (R. p. 187). Dr. Richardson recommended physical therapy and a return to Dr. McCoy (R. p. 187).

Pursuant to the Claimant's request, the Appellants authorized a second opinion with

Dr. Bright McConnell, which was performed on April 14, 2017. During that evaluation, the Claimant stated that her residual issue with respect to her right shoulder was the persistence of pain particularly with her horizontal or overhead activity (R. p. 191). Dr. McConnell indicated that the Claimant's right shoulder examination revealed no evidence for any significant deltoid atrophy and that her strength was a 5/5 throughout the radial median and ulnar nerve distribution (R. p. 192). Dr. McConnell noted that he agreed with Dr. McCoy that the Claimant reached MMI for her October 9, 2015 right shoulder injury. Specifically, Dr. McConnell indicated that he did not believe surgical intervention would be necessary; however, the Claimant could consider non-provocative progressive range of motion of the shoulder and an occasional injection (R. p. 794).

Dr. McCoy completed a Form 14B, Physician's Statement, on February 9, 2017 wherein he verified that the Claimant reached MMI on September 28, 2016. He further opined that the Claimant had a permanent impairment of 15% to the right shoulder, no other affected body parts, permanent limited duty work restrictions and would need future medical care of anti-inflammatory medicines periodically and an occasional injection of the right shoulder (R. p. 687).

The Claimant's personnel file verified that she switched from a room attendant to a housekeeping supervisor at Suburban Extended Stay Hotel on August 29, 2016 which resulted in a raise from $9.75 per hour to $10.00 per hour (R. p. 688).

After a one year lapse in treatment with Dr. McCoy, the Claimant returned on September 20, 2017 complaining of pain when she was working and pain at night (R. p. 654). Dr. McCoy noted that the Claimant was one year post-MMI and occasionally was taking Tylenol for pain (R. p. 654). At that visit, x-rays were performed which revealed

that the bone anchor placed during the rotator cuff repair was in good position (R. p. 655). Dr. McCoy indicated the Claimant may have subacromial bursitis and he injected the right shoulder (R. p. 655). The Claimant returned on November 1, 2017 wherein Dr. McCoy indicated that he had to be suspicious of the possibility of a new rotator cuff tear therefore he thought an MRI of the right shoulder would be appropriate (R. p. 658). The MRI of the right shoulder was performed on December 12, 2017 at South Carolina Diagnostic Imaging (R. p. 666). At the follow up visit on December 27, 2017 after the MRI, Dr. McCoy indicated that the Claimant had a small new through and through tear which could possibly require surgical repair (R. p. 661)(emphasis added). At the visit on March 29, 2018, Dr. McCoy indicated that the Claimant continued to have aggravation at home and at the job therefore a new surgery including debridement and/or repair of the rotator cuff would be necessary (R. p. 664).

When the Claimant was asked at her March 14, 2018 catch-up deposition as to what was making her right shoulder condition worse, the Claimant cited movement at work such as opening drawers during the course of her housekeeping inspections (R. pp. 330-331). The Claimant also described that part of her housekeeping supervisory duties included folding small towels for approximately two hours per day of every shift (R. p. 333). At the Claimant's third deposition on October 28, 2018 after Hartford was added as a Carrier Defendant, the Claimant testified that she had continuously been worsening over the six months prior to the March 14, 2018 deposition (R. p. 376). At that point, the Claimant testified that she had been limiting the use of her right hand at work in the six months prior to the October 28, 2018 deposition (R. pp. 377-378).

Dr. McCoy was deposed on April 12, 2018. During the deposition, Dr. McCoy

testified that the nerve conduction study performed prior to the Claimant reaching MMI indicated that there was no evidence of peripheral neuropathy, cervical radiculopathy or carpal tunnel syndrome (R. p. 429, lines 19-23). Furthermore, Dr. McCoy described the rationale on referring the Claimant for a cervical MRI and indicated that the findings on the MRI did not explain the Claimant's complaints (R. p. 430, lines 2-18). Dr. McCoy confirmed that he placed the Claimant at MMI for the October 9, 2015 injury on September 28, 2016 (R. p. 430, lines 19-22). Dr. McCoy also testified that the only future medical treatment that he anticipated at the time of placing the Claimant at MMI was anti-inflammatory medications periodically and occasional injections for the right shoulder related to the October 9, 2015 injury (R. p. 432, lines 4-11).

Dr. McCoy testified that he did not see the Claimant for a year after he placed her at MMI (R. p. 432, lines 22-24). According to Dr. McCoy, when the Claimant returned, she indicated that she was having pain at work (R. p. 433, lines 10-13). Dr. McCoy testified that he performed an injection of the shoulder and based on the Claimant's lack of improvement, he ruled out bursitis as the source of her discomfort (R. p. 434, lines 2-13). Dr. McCoy also testified that the radiologist who performed the subsequent MRI on December 12, 2017 did not read it in comparison with the November 2, 2015 MRI but Dr. McCoy was able to obtain the images and place them side by side (R. p. 434, lines 21-25). According to Dr. McCoy, when comparing the MRIs, you could see that there was a new different tear in the rotator cuff which he interpreted to be a full thickness tear (R. p. 435, lines 2-5). When asked whether the new tear was a reoccurrence, Dr. McCoy testified that you can have a re-tear of a previously repaired tendon but, in this situation, the Claimant had a new tear which was slightly posterior and slightly towards the back of the rotator

cuff compared with the full thickness tear that was addressed after the October 9, 2015 injury (R. p. 435, line 19 – R. p. 436, line 3). Furthermore, Dr. McCoy testified that the rotator cuff tear that was surgically repaired after the October 9, 2015 accident was still intact in reviewing the December 12, 2017 MRI (R. p. 436, lines 4-7). Dr. McCoy also testified that he did not anticipate from the October 9, 2015 injury that the Claimant would have any new subsequent tears after being released at MMI (R. p. 436, lines 8-13). Dr. McCoy was asked if he had any idea how the Claimant's subsequent tear occurred and he testified "I have to think it is basically part of the repetitive type work that she does" (R. p. 436, lines 14-17). Dr. McCoy confirmed that the 10 hours per week that the Claimant spends folding towels could have been the repetitive activity that led to the new rotator cuff tear (R. p. 436, lines 18-25).

Dr. McCoy also testified that the new tear addressed on the December 12, 2017 MRI demonstrates a worsening of the Claimant's prior condition from the October 9, 2015 accident (R. p. 437, lines 1-6). In terms of the timeline of the new rotator cuff tear occurring, Dr. McCoy testified that the December 12, 2017 MRI revealed an acute tear with fresh edges and no retraction of the muscle. Therefore, it was his opinion that the new tear likely occurred between 2-3 months prior to the December 12, 2017 MRI (R. p. 438, line 12 – R. p. 439, line 8). Furthermore, Dr. McCoy testified that he is no longer performing surgery and that is the only reason that the Claimant has been referred to someone else in his practice at this point (R. p. 439, lines 9-15).

Dr. McCoy confirmed that the Claimant's need for treatment at this point is related to the new rotator cuff tear identified on the December 12, 2017 MRI which was not present on the first MRI in November 2015 or at the time of her rotator cuff repair for the October

9, 2015 injury (R. p. 448, lines 22-25 and R. p. 450, lines 6-12). Although Dr. McCoy is of the opinion that the original injury on October 9, 2015 predisposed the Claimant to another injury, Dr. McCoy confirmed that the current tear requiring medical treatment is not a reoccurrence of the initial injury (R. p. 451, lines 3-10). Dr. McCoy concluded that there was either an acute incident or repetitive activities that lead the Claimant to having the current tear as evidenced on the December 12, 2017 MRI (R. p. 452, line 25 – R. p. 453, line 4).

During Dr. McCoy's subsequent deposition on April 4, 2019, he reaffirmed that the Claimant's current right shoulder condition involves a new tear that is not a reoccurrence of the prior rotator cuff tear from October 9, 2015; the Claimant's need for a surgical evaluation is related to the new tear as evidenced on the December 2017 MRI; that to a reasonable degree of medical certainty the new rotator cuff tear identified in December 2017 MRI occurred between 2-3 months prior to said MRI; the new tear in the Claimant's rotator cuff is a worsening of the Claimant's condition with regard to her right shoulder and none of these opinions changed after his first deposition (R. p. 505, line 24 – R. p. 507, line 10). Dr. McCoy also testified that once the Claimant returned after a year lapse in treatment, he performed an x-ray to analyze the bone anchor because it is possible for the hardware to move and be the source of the Claimant's complaints (R. p. 508, lines 4-11). At the time of the re-evaluation on September 20, 2017, Dr. McCoy confirmed that the bone anchor was in position without any movement (R. p. 508, lines 12-15). During the course of the April 4, 2019 deposition, Dr. McCoy also reviewed the photograph of films taken by Dr. Pappas (Claimant's IME provider) on February 15, 2019 and confirmed that the bone anchor was still in position based on those films as well (R. p. 509, lines 5-20).

As such, Dr. McCoy indicated that in his opinion to a reasonable degree of medical certainty, the bone anchor is not the cause of the Claimant's need for surgery and that it is the new rotator cuff tear identified in the December 12, 2017 MRI which warrants surgical intervention (R. 509, line 21 – R. p. 510, line 5). After reviewing the actual images per request of the Claimant's attorney, Dr. McCoy testified that the bone anchor heights were in the same place in 2017 as the x-ray performed by Dr. Pappas in 2019 (R. p. 512, lines 6-15). In regards to causation, Dr. McCoy testified at the April 4, 2019 deposition that it is his opinion to a reasonable degree of medical certainty more likely than not that the Claimant participated in repetitive activities or she had some type of acute incident that lead to the tear documented on the December 12, 2017 MRI; that the new tear occurred after she had been released at MMI for the October 9, 2015 injury; and that she has had a subsequent worsening of her shoulder condition (R. p. 522, lines 7-17).

After Accident Fund was added as a Carrier Defendant to this matter, it scheduled the Claimant for an independent medical evaluation with Dr. Richard Friedman. Dr. Friedman evaluated the Claimant on December 18, 2018 wherein he concluded that the Claimant did not sustain a neck injury as a result of the October 9, 2015 accident (R. p. 467). Dr. Friedman also indicated the Claimant had an appropriate work up to date including the cervical spine MRI and EMG nerve conduction study, all of which had been essentially normal (R. p. 467). Dr. Friedman opined that the Claimant is not a candidate for any further diagnostic studies, treatment or surgery and he agreed that the Claimant reached MMI for her right shoulder to a reasonable degree of medical certainty (R. p. 467).

ARGUMENT

The main issues in controversy stem from whether the Claimant in fact reached MMI for the October 9, 2015 injury and which, if any, party is responsible for treating the Claimant's subsequent rotator cuff tear identified on a December 12, 2017 MRI of the right shoulder.

1. Did the Appellate Panel err in failing to find that the Claimant reached MMI for her October 9, 2015 injury by accident and err in finding that the Appellants shall be responsible for the Claimant's ongoing medical treatment for the worsening of her condition after she reached MMI?

After the Claimant was placed at MMI and had a year long lapse in treatment, she returned to Dr. McCoy on September 20, 2017 with shoulder pain complaints (R. p. 654). At a follow up appointment on November 1, 2017, Dr. McCoy stated "even though there is no history of new injury we have to be suspicious of the possibility of a new rotator cuff tear we think a new MRI scan of the shoulder would be appropriate" (R. p. 658). The Appellants authorized the MRI which was completed on December 12, 2017 (R. p. 666). Dr. McCoy reviewed the MRI and confirmed that there was a new through and through tear (R. p. 661). Thereafter, at the visit on March 29, 2018, Dr. McCoy recommended debridement and/or repair of the rotator cuff due to continued aggravation at home and at the job (R. p. 664).

During his deposition on April 12, 2018, Dr. McCoy testified that he compared the November 2, 2015 right shoulder MRI and the December 12, 2017 MRI twice to confirm that Claimant has a new rotator cuff tear that was not present on the first MRI or at the time of surgery for the first rotator cuff tear (R. pp. 435-436). Further, Dr. McCoy testified that the first rotator cuff tear which was surgically repaired remained intact as of the December

12, 2017 MRI (R. p. 436, lines 4-7). Dr. McCoy classified the findings on the December 12, 2017 MRI as a worsening of the Claimant's right shoulder condition (R. p. 437, lines 1-6). Due to the fresh edges and no retraction of the muscle, Dr. McCoy testified that the acute new tear likely occurred 2-3 months prior to the December 12, 2017 MRI (R. p. 438, line 12- R. p. 439, line 8). Further, Dr. McCoy confirmed that this new tear is not a reoccurrence of the tear that occurred in the initial injury (R. p. 451, lines 3-10).

As to the mechanism of injury for the new tear, Dr. McCoy testified that he has "to think it is basically part of the repetitive type work that she does" "...but there also could have been an incident that she did not give a lot of significance to as per [his] example of the stuck drawer." (R. p. 436, lines 14-17, R. p. 452, lines 16-24). At the Claimant's deposition after the subsequent tear was discovered, she was asked what caused her pain and she cited movement at work such as opening drawers and folding small towels two hours per day (R. pp. 330-331, 333). It wasn't until the Claimant's third deposition, after the additional defendants were added, that the Claimant alleged she no longer used her right upper extremity at work (R. pp. 377-378). Dr. McCoy confirmed that it could have been the 10 hours per week folding towels that led to the new tear (R. p. 436, lines 18-25). Dr. McCoy also testified that the current tear requiring surgery is an entirely new finding that either resulted from an acute incident or repetitive activities (R. p. 452, line 25- R. p. 453, line 4). Dr. McCoy did <u>not</u> testify that this tear was a natural occurrence from the October 9, 2015 injury and confirmed that it was not anticipated to occur as a result of the October 9, 2015 injury when she was released at MMI (R. p. 436, lines 8-13).

SC Code Ann §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 of the permanent physical impairment or preexisting condition and the subsequent injury. The Appellants dispute responsibility for treating the Claimant's current condition as the evidence suggests that the Claimant had a subsequent worsening of her condition after being placed at MMI by multiple physicians and after Appellant's coverage for the Employer terminated.

At the time of the subsequent tear and the MRI, the Employer was insured by Accident Fund. In Geathers, the court discussed the last injurious exposure rule which holds the insurer on risk at the time of the second injury solely liable when the second injury aggravates the first injury. Geathers v. 3V, Inc., 371 S.C. 570, 580, 461 S.E.2d 29, 34 (2007). This claim is somewhat distinguishable from Geathers in that the Claimant did not admit to a second accident; however, Dr. McCoy testified that the Claimant may not have known when exactly it occurred. This claim is similar to Geathers in most aspects including that the Claimant clearly had an aggravation of her condition. The Court in Geathers, found that the aggravation of the claimant's condition made the injuries intertwined and therefore the carrier who provided coverage for the employer at the time of the aggravating incident was solely liable for paying benefits to the claimant as the court adopted the last injurious exposure rule as opposed to the apportionment rule. Id.

In this claim and Geathers, both employees returned to work after the initial injury. In Geathers the lapse in treatment was only four months and the claimant was contacting the physician to request pain medication during that time. The lapse of treatment between injuries in this claim was even longer. In one year, the Claimant made no request for pain medication or other treatment. In both claims, the employees were released from care by the authorized treating physician prior to the aggravation; however, the employee in

Geathers was not specifically placed at MMI (although Dr. Wilkins, the treating physician, later testified that Geathers had reached MMI at the time of her release). Dr. Wilkins testified in the Geathers claim that the first and second problem that he saw the Geathers for are all the same problem in his mind and he would just consider the second injury to be an aggravation of the initial injury. Id. at 574, 31. In fact, Dr. Wilkins was asked in Geathers whether the claimant's current condition flowed from the first accident and Dr. Wilkins responded that yes if the claimant did not have the original injury, he would think it would be reasonable that she probably would not have had the second injury which is actually an aggravation. Id. Dr. Wilkins in the Geathers claim identified the first accident as the "proximate cause of the entire thing" even though he attributed the claimant's subsequent condition to the aggravation. Id. at 574-575, 31. Much like in Geathers, the Claimant in this case had a worsening of her condition that is not totally independent of the first accidental injury. Id. at 575, 31. However, the Appellate Panel found that the Appellants are responsible for treating the aggravation of the right shoulder injury despite the evidence supporting that that the Claimant had a worsening of her condition after reaching MMI.

The Court in Geathers went on to discuss that the last injurious exposure rule makes the insurer at risk at the time of the second injury liable even if the aggravation injury would have been much less severe in the absence of the prior condition and even if the prior injury significantly contributed to the final condition as the employer takes the employee as he finds her. Id. at 578, 33. Further, the Court in Geathers discussed that the Gordon rule addressing an aggravation of a pre-existing condition should also apply when injuries are not separate and distinct. Id. at 579-580, 34 citing Gordon v. E. I. DuPont Nemours & Company, 228 S.C. 67, 88 S.E.2d 844 (1955). As such, the Appellants

respectfully assert that the Appellate Panel erred in failing to apply the analysis from Geathers and Gordon. Based on the evidence in the record, the Appellants assert that the Appellate Panel should have concluded that the Claimant sustained an aggravation of her right shoulder condition and that the Appellants are not responsible for her ongoing medical treatment as a result of the worsening of her condition.

a. Did the Appellate Panel err in relying on the opinion of Dr. George Pappas over the opinions of Dr. James McCoy, Dr. Richard Friedman and Dr. Bright McConnell?

Dr. McCoy opined the Claimant reached MMI for the October 9, 2015 injury on September 28, 2016 (R. p. 687, R. p. 430, lines 19-22, R. p. 648). Dr. McConnell agreed with Dr. McCoy that the Claimant reached MMI for the October 9, 2015 injury following the 2nd opinion he performed on April 14, 2017 (R. p. 192, R. p. 794). Dr. Friedman, Accident Fund's IME provider, also opined that the Claimant reached MMI for her right shoulder to a reasonable degree of medical certainty (R. p. 467). Only Dr. Pappas, the Claimant's 2nd IME provider who saw her on February 15, 2019 (three and a half years after the October 9, 2015 injury), opined that she had not reach MMI for the October 9, 2015 right shoulder injury.

Dr. Pappas stated "the patient reports that due to continued complaints of pain and weakness, Dr. McCoy ordered a repeat postoperative MRI" (R. p. 797). There was no acknowledgement that the surgery occurred on February 24, 2016 and the MRI was ordered 21 months later during which time the Claimant had been released at MMI. There was also no acknowledgement that during this time, the Claimant continued to work and had a year lapse in treatment. Dr. Pappas indicated the physical exam and imaging were consistent with right shoulder subacromial impingement and bursitis. Dr. McCoy also initially

thought the Claimant's complaints in September 2017 were related to bursitis but he recommended an injection which reportedly provided no benefit and thus he ruled out bursitis as a cause of the complaints (R. p. 434, lines 2-13).

Dr. Pappas also referenced that if the Claimant does not require rotator cuff repair surgery, then he would recommend removal of the bone anchor (R. pp. 204- 206). However, Dr. McCoy already performed a x-ray on September 20, 2017 at the first return appointment and he confirmed that the bone anchor remained in position (R. p. 655; R. p. 508, lines 12-15). During the course of Dr. McCoy's second deposition on April 4, 2019, Dr. McCoy reviewed the photograph of films taken by Dr. Pappas on February 15, 2019 and confirmed that the bone anchor was still in position based on those films as well (R. p. 509, lines 5-20). As such, Dr. McCoy testified that in his opinion to a reasonable degree of medical certainty, the bone anchor is not the cause of the Claimant's need for surgery, rather it is the new rotator cuff tear identified in the December 12, 2017 MRI (R. p. 509, line 21 – R. p. 510, line 5). Further, after reviewing the actual images per request of the Claimant's attorney, Dr. McCoy testified that the bone anchor heights were in the same place in 2017 as the x-ray performed by Dr. Pappas in 2019 (R. p. 512, lines 6-15). As Dr. Pappas did not have the benefit of evaluating the Claimant over the years and he is recommending diagnostics to address potential causes of complaints that have already been ruled out, the Appellate Panel should have placed more weight on the opinion of Dr. McCoy, the Claimant's treating physician, and the concurring opinions of Dr. McConnell and Dr. Friedman.

b. <u>In light of the evidence that the Claimant reached MMI for the October 9, 2015 right shoulder injury, did the Appellate Panel err by failing to address the Claimant's permanent disability benefits as a</u>

result of loss of use of the right shoulder?

The Appellants respectfully assert that the Commission erred by not reaching a determination as to the Claimant's entitlement to permanent disability benefits based on the admitted October 9, 2015 right shoulder injury. The Appellants filed a Form 51 asserting that it is ripe to address the Claimant's entitlement to permanent disability benefits and the hearing was set on the Forms 50 and 51s. Unlike in Geathers, the Claimant's impairment was assessed as a result of the initial injury. According to Dr. McCoy, the Claimant has 15% impairment to her right shoulder with no other affected body parts (R. p. 687). According to Dr. McConnell, the Claimant has 33% impairment to her shoulder based on loss of strength and range of motion (R. p. 794). According to Dr. Friedman, based on his examination of the Claimant on December 18, 2018, the Claimant has a 16% impairment to her right shoulder with no work restrictions (R. p. 467). The Claimant's disability related to the initial injury is limited as she returned to work and demonstrated no loss in her earnings capacity post October 9, 2015 injury (R. p. 688). Further, the alleged hand and cervical spine components were ruled out through evaluations.[1] As such, the Appellants respectfully assert that the Appellate Panel should

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[1] Regarding the hand, on April 21, 2016 Dr. McCoy indicated that Claimant's hand numbness complaints started in January of 2016 and are a bit of a puzzle (R. p. 111). After diagnostics and evaluation, on November 8, 2016 Dr. Santiago referenced Claimant was tolerating regular duty without any major difficulty, can continue without permanent restrictions, does not need any future medical and does not have any impairment for her hand (R. p. 651).

Regarding the cervical spine, Dr. McConnell agreed that the MRI was relatively normal (R. p. 190). The May 12, 2016 EMG was a normal study which did not reveal evidence of any other focal nerve entrapment, generalized peripheral neuropathy or cervical radiculopathy in the right upper limb (R. pp. 098-099). Dr. McCoy testified on April 12, 2018 that the cervical MRI did not reveal any findings to explain Claimant's ongoing symptoms (R. p. 430). Further, when Claimant returned to Dr. McCoy on November 1, 2017, Dr. McCoy referenced that "early on we had a nerve conduction study and MRI of the cervical spine but these did not lead us to believe there was any severe nerve involvement or issues with the cervical spine" (R. p. 658). According to Dr. Friedman, the Claimant did not have a neck injury as a result of the October 9, 2015 accident to a reasonable degree of medical certainty (R. p. 467).

have reached a decision as to the Claimant's permanent disability for her right shoulder only related to the October 9, 2015 accident.

c. In light of the evidence that the Claimant reached MMI did the Appellate Panel err by failing to address whether the Appellants are liable for providing any ongoing medical treatment for the Claimant's October 9, 2015 right shoulder injury?

The Form 14B from Dr. McCoy states that to a reasonable degree of medical certainty, the Claimant can only anticipate future medical treatment related to the October 9, 2015 injury to include injections and periodic medications (R. p. 687, R. p. 432, lines 4-11). Dr. McConnell agreed that an occasional injection to her shoulder may offer some palliative benefit and the Claimant should consider non-provocative range of motion of her shoulder (R. p. 794). Dr. McConnell specifically stated that surgical intervention, particularly arthroscopic debridement or capsulotomy would not provide improvement (R. p. 794). Dr. Friedman opined that there is no indication for any further diagnostic studies, treatment or surgery (R. p. 467). As such, to the extent that the subsequent rotator cuff tear does not break the chain of causation in regards to medical treatment for the right shoulder, the Appellants' responsibility for the Claimant's future right shoulder medical treatment should be limited to the injections and medication that Dr. McCoy stated to a reasonable degree of medical certainty will tend to lessen the casually related disability from the October 9, 2015 accident in accordance with S.C. Code Ann. §42-15-60.

2. Does the application of South Carolina Code Ann. Regulation 67-612 and *Morgan v. JPS Auto*, 321 S.C. 201, 476 S.E.2d 257 (Ct. App. 1996) suggest that the supplemental questionnaire from Dr. George Pappas should have been excluded from the evidentiary record?

The Appellants assert that the Claimant's supplemental APA submission should not have been included in the evidentiary record. Pursuant to Regulation 67-612, the

Claimant's evidence was due to be submitted 15 days prior to the hearing, April 9, 2019. The supplemental APA submission was provided to the Defendants on April 14, 2019. The Claimant referenced on her Pre-Hearing Brief that she would request the record be left open to submit additional medical records/opinions pursuant to Morgan v. JPS Auto, 321 S.C. 201, 467 S.E.2d 457 (Ct. App. 1996). The IME report from Dr. Pappas was already in the evidentiary record. The Claimant did not reference that she was requesting that the record be left open to submit a supplement to the IME report of Dr. Pappas. As discussed in Morgan v. JPS Auto and S.C. Code Ann. Regulation 67-613(D), the Commission will allow a party to procure additional evidence to be included in a hearing record when the evidence is "in existence, identified and necessary for the decision but unavailable". Id. at 204-5. In Morgan v. JPS Auto, the physician had already evaluated the claimant's records and created the evidence that was not available. In this claim, the medical record following the IME was in existence and timely submitted into the record. However, the attorney generated supplemental statement was not only untimely but it was not "identified and necessary" for the decision. As such, the Appellants request a finding that the Claimant's supplemental APA provided on April 14, 2019 shall be excluded from the record as it was not identified on the Claimant's Pre-Hearing Brief, it is not a medical record and it was not timely submitted pursuant to Regulation 67-612.

3. Did the Appellate Panel err in finding that the Claimant's IME physician, Dr. George Pappas, shall be the new authorized treating physician?

The Appellants concede that the Commission has the authority to select a treating physician; however, the Appellants request reversal of the finding that Dr. Pappas be the new treating physician. Before the Claimant's most recent IME with Dr. Pappas, she was evaluated by Dr. Spearman, Dr. McCoy, Dr. Santiago, and Dr. Patel- all at Lowcountry

Orthopaedics and Sports Medicine. She also had second opinions with Dr. Richardson, Dr. McConnell and Dr. Friedman. Dr. Pappas, the Claimant's second IME provider, was the 8th physician to evaluate her. This evaluation took place 3 ½ years after the original injury. The Appellants assert that Dr. Spearman, the first orthopaedic to evaluate the Claimant's condition after the October 9, 2015 injury, would be a reasonable selection for providing further treatment as he practices with Lowcountry Orthopaedics and has access to the Claimant's medical chart. Dr. McCoy only took over as the treating physician for Dr. Spearman when Dr. McCoy was available to perform the first rotator cuff repair. Alternatively, Dr. Bright McConnell would be a reasonable selection as a future treating physician. The Claimant and the Appellants previously consented to Dr. McConnell to provide a 2nd opinion and he is already familiar with the Claimant's condition having evaluated her between the rotator cuff tears. Wherefore, the Appellants would respectfully request that Dr. Spearman or Dr. McConnell be selected as the new treating physician in the event that the Court finds that the Appellants should be responsible for providing further treatment for the Claimant's right shoulder.

CONCLUSION

Based on the foregoing, Appellants respectfully request the Court of Appeals reverse the Decision and Order dated May 4, 2021. Appellants further request this Court to hold that the Claimant reached MMI and remand the Claimant to the South Carolina Workers' Compensation Commission to make a determination with regard to the Claimant's permanent disability and future medical entitlement as a result of her October 9, 2015 right shoulder injury. Appellants additionally request that the Court find the untimely submission of Dr. Pappas' supplemental questionnaire should be excluded from

the evidentiary record. Alternatively, Appellants would request the Court find that the new authorized treating physician shall be Dr. Spearman or Dr. McConnell for the reasons set forth hereinabove.

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Case No. 2021-000585

Ana Rodriguez Galvan, 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 Appellants,

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

CERTIFICATE OF COUNSEL

The undersigned counsel for the Appellants certifies that the Final Brief complies with SCACR 211.

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