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; Employers Preferred Insurance Company, Accident Fund General Insurance Company c/o Accident Fund Insurance Company of America, and Hartford Accident & Indemnity 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 RESPONDENTS

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STATEMENT OF ISSUES ON APPEAL

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2. Whether the Appellate Panel correctly concluded that Claimant's current condition is not the result of post injury repetitive trauma nor an acute intervening injury; therefore, there is not an intervening accident to break the causal chain from the original accident.

3. Whether the Appellate Panel correctly concluded that Claimant's current condition is merely a recurrence of Claimant's original injury; therefore, pursuant to *Geathers*, the original carrier should remain liable.

4. Whether the Appellate Panel correctly overruled Appellants' objection to the submission of Dr. Pappas' medical evidence into the evidentiary record.

5. Whether the Appellate Panel correctly ruled Accident Fund General Insurance Company c/o Accident Fund Insurance Company of America to be dismissed from the claim.

STATEMENT OF CASE

This matter came before the Single Commissioner pursuant to Claimant's Form 50 and the Forms 51 filed by all the Defendants. Claimant asserted she is entitled to medical treatment, specifically surgery, as recommended by Dr. McCoy and Dr. Pappas. The Claimant asserted the surgery is related to her original October 9, 2015 accident, and, therefore, Employers Preferred Insurance Company (hereinafter referred to as "Appellants") has the burden of demonstrating a new injury.

Appellants asserted that the Claimant reached maximum medical improvement ("MMI") for her October 9, 2015 injury by September 28, 2016 based on the opinion of the authorized treating physician, Dr. James McCoy. Appellants denied responsibility for Claimant's further medical treatment, taking the position that Claimant's current condition is the result of a new tear in the rotator cuff. Pursuant to Dr. McCoy's deposition testimony, Appellants asserted that the tear in Claimant's rotator cuff likely occurred two to three months prior to the December 12, 2017 MRI. Dr. McCoy testified that the current tear likely occurred due to Claimant's repetitive type of work activities or some acute incident after the Claimant reached MMI. Appellants therefore denied responsibility for providing Claimant with further medical treatment.

Accident Fund General Insurance Company c/o Accident Fund Insurance Company of America (hereinafter "Accident Fund') asserted that the Claimant did not sustain a new injury after the initial October 9, 2015 work accident based on the Claimant's own deposition testimony and on the deposition testimony of Dr. McCoy and medical evidence of Dr. Pappas and Dr. Friedman. Accident Fund asserted that the Claimant was deposed three times prior to the hearing with the Single Commissioner, and, in all three depositions, the Claimant testified she did not sustain a new work accident to her right arm. Additionally, she testified she limited the use of her right arm,

using mostly her left arm to close drawers and fold clothes in her new role as a supervisor. Accident Fund additionally asserted that their defense is supported by Dr. McCoy's testimony. Dr. McCoy testified in his last deposition of April 4, 2019, that the tear is in the same supraspinatus tendon as the initial October 9, 2015 injury. He additionally testified to a reasonable degree of medical certainty that the current tear is causally related to the accident of October 9, 2015 since it is in the same tendon and Claimant cannot say when or how it occurred. Accident Fund also asserted their position is supported by Dr. Pappas whose opinion indicates that more likely than not to a reasonable degree of medical certainty her current shoulder symptoms are due to her original injury or alternatively result from a continuum following that surgery that was necessitated by the original injury because her rotator cuff tear was incompletely addressed during surgery.

Accident Fund additionally relied on the medical opinion of Dr. Friedman who stated in his report that her current symptoms are related to the original accident of October 9, 2015. As a result, Accident Fund asserted that Appellants did not meet their burden in showing a break in the chain to cause Accident Fund to be responsible, and that this is either the original injury and the tear is related to the original injury or even if it's a new tear, then it is the natural progression resulting from the original accident that has never been resolved.

Hartford Accident and Indemnity Company (hereinafter "Hartford") asserted that it is not responsible for Claimant's further medical treatment as the Claimant's subjective symptoms increased to the point that the Claimant sought medical care prior to Hartford's coverage for the Employer. Therefore, Hartford asserted that either Appellants or Accident Fund is responsible for providing the Claimant further benefits.

In a Decision and Order dated August 20, 2019, the Single Commissioner found and concluded, *inter alia*, that the fact that Claimant was placed at MMI for her right shoulder by Dr.

McCoy on September 28, 2016 is dispositive of nothing. R. p. 687. The Single Commissioner also found that Claimant's current condition is not the result of Post Injury Repetitive Trauma nor Acute Intervening Injury. The Single Commissioner also found that, based on the greater weight of the credible evidence, including the Claimant's testimony and the opinions of Dr. Pappas and Dr. McCoy, shows that Claimant's current condition emanates from her original injury of October 9, 2015. As a result, the Single Commissioner found and concluded that Appellants are responsible for ongoing medical care for Claimant's right shoulder as recommended by Dr. Pappas and Dr. McCoy. Appellants timely requested Full Commission review though filing of a Form 30 dated August 30, 2019. Oral arguments were subsequently heard before the Appellate Panel on November 19, 2019, and the Appellate Panel affirmed the Single Commissioner's findings in a Decision and Order dated May 4, 2021. Accordingly, the Appellants served the Notice of Appeal to the Court of Appeals on May 28, 2021.

STANDARD OF REVIEW

The Administrative Procedures Act supplies the standard of review for workers' compensation cases. *Lark v. Bi-Lo, Inc.*, 2767 S.C. 130, 132-35, 276 S.E.2d 304, 205-06(1981). Under the APA, the Commission's findings of fact are binding unless they are clearly erroneous in the view of the reliable, probative, and substantial evidence in the record. *See* S.C. Code Ann. § 1-23-380(5)(e) (Supp. 2020).

STATEMENT OF THE FACTS

A. Testimony of the Claimant

Claimant was the only witness to testify at the hearing. She testified that Griffin Stafford was the employer at the time of her original accident along with the fact that she continues to work

there. She even left work early to be at the hearing. R. p. 738, ll. 20-22. She's not worked for any other employers since the time her accident through today's date. R. p. 739, ll. 5-7. She described her accident occurring when she was coming out of the bathroom and the floor is wet so she slipped and she tried to grab the handle of the door so she would not fall but the handle moved so she fell on her right side. R. p. 739, ll. 8-18. She was a housekeeper at the time of the accident. R. p. 739, ll. 21-25. She was given treatment with Concentra and sent to Dr. McCoy who performed surgery in February 2016. R. p. 740, ll. 1-3. Before her surgery, Claimant testified that she had pain in the entire part of her arm along with her neck hurting a little bit. R. p. 740, ll. 9-13. She was indicating the pain went down her arm from her shoulder into the upper arm. R. p. 740, ll. 14-20. She had physical therapy after surgery but it did not help. R. p. 740, ll. 21-25. When asked about her symptoms being different after finishing surgery and physical therapy, Claimant testified that it was the same pain and that nothing changed after surgery and it was the same pain before and after the surgery. R. p. 741, ll. 1-6. Claimant also testified still having pain in the same place as she pointed to in the hearing. She also testified that her pain is now more than the neck and the numbing of her hand and fingers. R. p. 741, ll. 7-10. She does not remember when she went back to work but it was a few months later with restrictions. R. p. 741, ll. 11-15. At that time, she was promoted to housekeeping supervisor. R. p. 741, ll. 19-23. She's been a supervisor ever since she had surgery. R. p. 742, ll. 2-14. She goes inside the rooms that the housekeepers have been cleaning checking that the bathroom has all the towels and the trash bags and it's completely clean along with making sure the bed is made well, the closest is empty and kitchen is clean. R. p. 743, ll. 2-9. If she finds a problem, she doesn't have to do the actual cleaning. R. p. 743, ll. 10-16. Her physical activities include folding the small towels, wash cloths and hand towels, but not big towels. R. p. 744, ll. 2-12. She does not have to fold every day. R. p. 744, ll. 22-25 and R. p. 745, ll. 1-4.

Claimant testified she does have to open and close drawers which there are three drawers and two small ones and she typically uses her left arm to do this. R. p. 745, ll. 5-20. When asked if she has any activities at work that cause increased pain, she testified she does not do it because she knows she has the restrictions. R. p. 745, ll. 21-25 and R. p. 746, ll. 1-6. Claimant testified that she's not had any new accidents since she returned to work. R. p. 746, ll. 7-9. She would like to have surgery. R. p. 746, l. 12.

On cross-examination by Defendants Employers Preferred, Claimant was questioned regarding her return to work date on light duty of August 15, 2016 . R.p. 747, ll. 1-4. Claimant was questioned regarding telling the therapist in August 18, 2016 that she was doing better but the Claimant testified the therapies were not helping her and that the pain was still there. R. p. 747, ll. 6-10. Claimant admits to being released from Dr. McCoy on September 28, 2016. R. p. 747, ll. 11-15. Claimant did not remember how much time had elapsed between the visits with Dr. McCoy. R. p. 747, ll. 11-19. Claimant admitted to only taking Tylenol for headaches during the one year between doctor visits. R. p. 747, ll. 20-23. In addition, Claimant admitted during her second deposition on March 14, 2018 that she was worse in regard to her right shoulder and neck pain and that she had movement with things like opening drawers which was making her pain worse. R. p. 748, ll. 1-7. Further, Claimant admitted that she testified she was folding towels for around two hours per day. R. p. 748, ll. 8-11. Claimant did not recall when she stopped using her right arm to open drawers, but she did stop using it and now she only uses her left arm. R. p. 748, ll. 12-15. Claimant further admitted that the third time she was deposed she did indicate her symptoms were worse since the last time she been deposed. R. p. 748, ll. 16-20. She also admitted that she continuously gotten worse over the last six months since she was deposed in March 2018. R. p. 748, ll. 21-24.

On cross-examination by Defendants Accident Fund, Claimant admitted that she testified that her accident occurred when she tried to grab the handle of the door and felt pain in her right shoulder, right arm, and the side of her neck in October 2015. R. p. 749, ll. 12-18. Claimant further testified that she had not had any new accidents while working for the employer and has not had any accidents at home since October 2015. R. p. 749, ll. 19-25. Claimant further testified that the surgery done by Dr. McCoy in February 2016 did not help her pain and that she had the same pain before the surgery that she had after surgery. R. p. 750, ll. 4-7. Claimant also testified that she told Dr. McCoy when she went back in September 2016 this information about her pain, but she was released from treatment. R. p. 750, ll. 11-18. Although the Claimant did not go back for a year to Dr. McCoy, she testified she did not have any new accidents at work and did not go to her supervisor or boss to indicate she been hurt again at work. R. p. 750, ll. 19-24. Claimant testified that she was a supervisor what she went back to work after surgery and never had to do the actual cleaning again. R. p. 750, ll. 25 and R. p. 751, ll. 1-5. Further on cross-examination by Defendants Accident Fund, Claimant confirmed that all she did was check on housekeepers, pull out some drawers and then fold the small square hand towels and that's what she does at work. R. p. 751, ll. 6-9. Since 2015 over 3 1/2 years since her accident, Claimant testified that her pain has gotten worse. R. p. 751, ll. 12-16. When questioned if it was worse because the doctor told her she had a tear and hasn't had had surgery, Claimant testified the pain she's always had it and it never went away after surgery and now she feels that it's worse but she does not know whether it's because of the time that's lapsed. R. p. 751, ll. 17-22. Claimant testified that she relates the pain now that's worse back to the original accident that occurred in October 2015 as she does not recall anything else happening to her shoulder. R. p. 751, ll. 23-25 and R. p. 752, ll. 1-4.

On cross-examination by Defendants Hartford, Claimant was asked if she remembered deposition number three in October 2018 and that she testified she's no problems or difficulties doing her job and that she was able to perform all of her job duties. R. p. 752, ll. 11-18. She stands by that testimony today because she does it with her other hand. R. p. 752, ll. 19-21. She was further questioned in regard to her deposition and saying her current pain in her neck, her right arm and her right hand is more than it was at the time of her deposition and she confirmed yes. R. p. 753, ll. 2-11. When asked whether she related that anything at work the Claimant testified no because the entire time the pain was there. R. p. 753, ll. 13-16. Claimant was shown APA page 289 in regard to this testimony. R. p. 753, ll. 17-19.

No other witnesses were called for the hearing.

On April 4, 2019, Dr. McCoy had a subsequent deposition after Accident Fund was added to the claim. Dr. McCoy was asked

> Q: Okay. And so if that's the case and it's in the same tendon and Ms. Rodriguez can't say when or how, would that mean that you believe that the need for the surgical repair of the current tear is causally related to the accident of October 9th, 2015?
>
> A: Correct.
>
> Q: So regardless of whether this new tear was therefor two months before the MRI scan or four months, since we didn't do MRIs every month, or even six months, it's still your opinion no matter when that new tear showed up that it's causally related to the injury that she informed you about of October 9th, 2015.

A: Because, as has been discussed, there is injury to the rotator cuff. And even though we see maybe a full thickness tear or interstitial tears, there is injury to the structure and the tissue that is not appreciated by MRI or necessarily looking at the top or bottom surface of the cuff at the time of surgery. And yes, I believe it's causally related to the original injury to a reasonable degree of medical certainty.

(R. p. 520-521, ll. 7-25; 1-4.)

ARGUMENT

I. Whether the Appellate Panel correctly found Claimant's current right shoulder condition emanates from her original injury on October 9, 2015, making Appellants responsible for her continued medical treatment.

In the present case, the preponderance of the evidence supports a finding that Claimant's current condition emanates from her original injury of October 9, 2015, and Appellant has failed to prove a break in the chain releasing itself of responsibility in providing the additional recommended medical treatment. The Claimant's current condition is not the result of post injury repetitive trauma nor an acute intervening injury. Therefore, this is not an intervening accident to break the causal chain from the original accident. Furthermore, the Claimant's current condition is merely a recurrence of Claimant's original injury. Therefore, according to *Geathers*, the original carrier, Appellants, should remain liable.

A. Whether the Appellate Panel correctly concluded that Claimant's current condition is not the result of post injury repetitive trauma nor an acute intervening injury; therefore, there is not an intervening accident to break the causal chain from the original accident.

Claimant has consistently testified she has not sustained a new work injury following her surgery and returning to work in her new role as a supervisor. In all three depositions of the Claimant prior to and including her hearing testimony, Claimant has testified there has not been

an intervening injury to her right arm since the October 9, 2015 accident. She additionally has always testified she has experienced the same pain in her right shoulder both prior to and following her surgery in February of 2016. Furthermore, Claimant has testified that she relies on her other arm when she is required to do physical activities at work. R. p. 752, ll. 19-21. Therefore, the Claimant could not have sustained a repetitive trauma injury after her October 9, 2015 accident as the use of her right arm has been limited.

Appellant relies on *Geathers v. 3V, Inc.* and the "last injurious exposure rule" in its position that it should not be responsible for Claimant's additional medical treatment. *Geathers v. 3V, Inc.* 371, S.C. 570, 641 S.E.2d 29 (2007). In *Geathers*, the court adopted the last injurious exposure rule which places full liability upon the carrier covering the risk at the time of the most recent injury that bears a causal relation to the disability. *Id.* at 577–78, 641 S.E.2d at 33. The court went on, however, holding if the second injury is merely a recurrence of the first injury, then the insurer on the risk at the time of the original injury remains liable for the second accident. *Id.* at 578, 641 S.E.2d at 33.

Distinguishable from the current case, the Claimant in *Geathers* had two distinct accidents. In *Geathers*, the Claimant had an initial accident on July 20, 1999 and returned to work on August 24, 1999. *Id.* at 573, 641 S.E.2d at 31. The Claimant was released from Dr. Wilkins', the authorized treating physician, care in January 2000 because she reached MMI. *Id.* at 574, 641 S.E.2d at 31. On May 11, 2000, the Claimant had a second accident, but the employer had a new carrier from the first injury in 1999. *Id.* Importantly, the court in *Geathers* required two accidents for the analysis to flow. In applying the last injurious exposure rule, the court held the second carrier may be liable for the injury from the second accident even if the injury is "intertwined, indistinguishable, and inseparable" from the injury resulting from the first accident. *Id.* at 580, 641

S.E.2d at 34 (citing *Gordon v. E.I. Du Pont Nemours & Co.*, 228, S.C. 67, 88 S.E.2d 844 (1955)). Therefore, the nature of the injury that results from the later accident is irrelevant from the first accident, so long as there were two accidents.

In this case, however, there is not a second distinct accident to break the causal chain. In fact, all of the Claimant's testimony shows that she has not experienced any new intervening accident to her right shoulder since her original accident on October 9, 2015. In all three depositions of the Claimant and in her hearing testimony, Claimant testified she has not experienced a new accident to her right shoulder. R. p. 751, ll. 23-25 and R. p. 752, ll. 1-4.

Furthermore, Claimant does not have a post injury repetitive trauma. Claimant's new role with the Employer is as a supervisor. As a supervisor, Claimant has consistently testified that she avoids using her right arm, using her left arm to fold clothes and close drawers. R. p. 750, ll. 25 and R. p. 751, ll. 1-5. Currently, Claimant testified that she does not use her right arm at all. Therefore, it is impossible for her to have a post injury repetitive trauma.

Appellant argues the fact that a torn rotator cuff is present on the December 2017 MRI after the surgery necessarily means there was another work-related accident that breaks the causal chain of its own liability. There is nothing concrete in the record, however, which shows a second accident occurring following surgery. While Dr. McCoy testified in his deposition that Claimant's current tear in her rotator cuff must be the result of a new acute work injury or repetitive trauma occurring maybe 2 months prior to the December 2017 MRI, Claimant's testimony directly contradicts this testimony. R. p. 746, ll. 7-9. Furthermore, Dr. McCoy was speculating on the cause of the tear in the rotator cuff. Specifically, he stated 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, ll. 14-17, R. p.

452, l. 16-24. This statement is not a statement of medical certainty, but rather just thinking and speculating on how the tear could have occurred. Additionally, an incident causing a tear in a rotator cuff would not go unnoticed as Dr. McCoy would suggest, as a tear causes increased pain.

Claimant has consistently testified that she has experienced the same amount of pain to her right shoulder since the work accident on October 9, 2015. If anyone would know when a tear occurred, it would be the Claimant as a tear in a rotator cuff comes with associated pain. The Single Commissioner and Appellate Panel properly relied on the Claimant's testimony regarding her own symptoms and a lack of an intervening accident rather than relying on the speculation given by Dr. McCoy as Appellant would argue. Therefore, the Appellant has not met its burden in proving an intervening accident causing the second injury and relieving it from liability. As a result, the Single Commissioner did not err in holding the Claimant's current condition emanates from her original accident on October 9, 2015.

B. Whether the Appellate Panel correctly concluded that Claimant's current condition is merely a recurrence of Claimant's original injury; therefore, pursuant to *Geathers*, the original carrier should remain liable.

The court in *Geathers* adopted the last injurious exposure rule to be simple and easy to administer when two carriers are disputing liability over separate accidents. *Geathers*, 371 S.C. at 578, 641 S.E.2d at 33. As argued above, this case does not involve separate accidents as Claimant's testimony indicates. Regardless of the fact that there are not two accidents, the court continued to say, however, that if the second injury is merely a recurrence of the first injury, then the insurer on the risk at the time of the original injury remains liable for the second. *Id.*

In this case, the Claimant's current condition is merely a recurrence of the original injury. Dr. McCoy testified in his last deposition of April 4, 2019, that the tear is in the same supraspinatus tendon as the initial October 9, 2015 injury. R. p. 520, ll. 3-6. He additionally testified to a

reasonable degree of medical certainty that the current tear is causally related to the accident of October 9, 2015 since it is in the same tendon and Claimant cannot say when or how it occurred. R. pp. 520-521, ll. 7-25; 1-4. Dr. Pappas also opined that more likely than not to a reasonable degree of medical certainty her current shoulder symptoms are due to her original injury or alternatively result from a continuum following that surgery that was necessitated by the original injury because her rotator cuff tear was incompletely addressed during surgery. R. p. 206. Further, Dr. Friedman opined Claimant's current symptoms are related to her work injury of October 9, 2015. R. pp. 465-467.

It is this type of claim and recurrence the court was thinking in *Geathers* where the original carrier would remain liable especially in light of Claimant's testimony. According to Dr. Pappas and Dr. McCoy, the Claimant's condition is causally related to the accident of October 9, 2015. This is therefore a linking of the causal chain between the Claimant's original accident and her current condition rather than the breaking of the causal chain that Appellants must prove. Furthermore, Dr. Pappas alternatively opines that her current condition is a natural consequence of her rotator cuff surgery that was incompletely addressed during surgery. R. p. 206. Therefore, this would continue to emanate from the original accident on October 9, 2015. As a result, and applying *Geathers*, Claimant's current rotator cuff tear is merely a recurrence of the first injury. Thus, the Single Commissioner and Appellant Panel did not err in holding Appellant responsible for the additional medical treatment and releasing Accident Fund and Hartford from the claim.

II. Whether the Appellate Panel correctly overruled Appellants' objection to the submission of Dr. Pappas' medical evidence into the evidentiary record.

Respondent Accident Fund assert Claimant properly submitted Dr. Pappas' medical report into evidence as he reserved the right on his Pre-hearing Brief by citing *Morgan v. JPS Automotives*

that additional evidence would be submitted. Based on Appellant's objection to this submission, the Single Commissioner provided Appellant the opportunity to depose Dr. Pappas on his opinions. Appellant declined to depose Dr. Pappas. The opportunity to question Dr. Pappas on his opinion, or any question regarding this claim, was waived by the Appellant. Thus, Appellant cannot now argue it should not have been submitted into evidence and the Single Commissioner's decision on the same should be affirmed.

III. Whether the Appellate Panel correctly ruled Accident Fund to be dismissed from the claim.

Based upon finding Appellants responsible for Claimant's current right shoulder medical care, the Single Commissioner and Appellate Panel correctly found Respondent Accident Fund to be dismissed from the claim.

CONCLUSION

For the foregoing reasons, Respondent Accident Fund respectfully request the Court of Appeals to affirm the Decision and Order of the Appellate Panel dated May 4, 2021 in full. The Respondent Accident Fund further request this Court find that Appellants be responsible for providing further medical care. The Respondent Accident Fund further request this Court to find that Dr. Pappas' medical evidence into the evidentiary record was proper. Additionally, Respondent Accident Fund further request this Court to dismiss Respondent Accident Fund from this claim.

Respectfully submitted,

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Date: January 19, 2022

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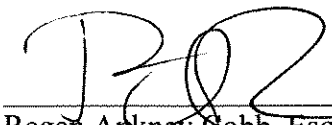
CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

January 19, 2022



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