

Summary of SC94724, *Carl Greer v. Sysco Food Services and Treasurer of Missouri as Custodian of the Second Injury Fund*

Appeal from the labor and industrial relations commission

Argued and submitted September 2, 2015; opinion issued December 8, 2015

Attorneys: Greer was represented by Jonathan Sternberg of Jonathan Sternberg Attorney PC in Kansas City, (816) 292-7000; and Ray B. Marglous, Robert S. Merlin and Sarah H. Hale of Ray B. Marglous PC in St. Louis, (314) 721-6757. Sysco was represented by John M. Allen and Cynthia L. Parnell of Restovich Allen LLC in Kirkwood, (314) 434-7700. The treasurer was represented by Tracy E. Cordia of the attorney general's office in Jefferson City, (573) 751-3321. The Missouri Chamber of Commerce and Industry, which filed a brief as a friend of the Court, was represented by Brian A. Bunten of the chamber in Jefferson City, (573) 634-3511, and Richard M. AuBuchon of AuBuchon Law Firm LLC in Jefferson City, (573) 614-1845.

This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.

Overview: A man and his prior employer appeal the labor and industrial relations commission's award of workers' compensation benefits to the man. In a unanimous decision written by Judge George W. Draper III, the Supreme Court of Missouri affirms the decision. This Court defers to the commission's credibility findings and factual resolutions of conflicting evidence. The man failed to prove he was entitled to permanent total disability benefits, but he was entitled to temporary total disability benefits related to a surgery he underwent – even though doctors had determined he had achieved maximum medical improvement – because he was engaged in the rehabilitative process allowed by the relevant statute. Whether treatment is part of that process is a fact question for the commission; the statute does not require the treatment be successful for a claimant to be entitled to benefits. The employer was not entitled to have the award reduced because the employer failed to prove the man failed to obey a safety rule. The record further supports the commission's decision to award the man benefits for certain future medical care.

Facts: Longtime Sysco Food Systems employee Carl Greer was injured in a February 2006 workplace accident when a forklift a coworker was operating hit the forklift on which Greer was stationed, pinning Greer's left foot between the two forklifts, causing a crush injury. His supervisor determined the accident could have been prevented had Greer followed preferred safety measures by keeping his feet within the running lines of the equipment; Greer thought the measures only applied if the equipment was in motion. Greer underwent medical treatment for several months and was released to return to work in August 2006. Due to difficulties working, he reentered treatment. In April 2007, a doctor determined that Greer had achieved maximum medical improvement and had a 5-percent permanent partial disability of his left ankle. Greer continued to seek treatment. In November 2007, he voluntarily resigned his employment and continued to seek treatment, including having surgery in June 2010. Greer first sought workers' compensation benefits in December 2006 and amended his claim in March 2013. Following a May 2013 hearing, an administrative law judge ruled in Greer's favor as to medical causation and liability for past medical expenses and found that Greer: was not entitled to temporary total

disability benefits after reaching maximum medical improvement in April 2007; was 27.5-percent permanently and partially disabled as a result of the accident; and had violated the safety rule, reducing his benefit award by 25 percent as a result. Greer sought review from the labor and industrial relations commission, which modified the award. The commission determined Greer was entitled to additional temporary total disability benefits; overturned the findings involving the safety penalty and reduction of benefits; and affirmed the remainder of the findings. Greer and Sysco both appeal.

AFFIRMED.

Court en banc holds: Substantial and competent evidence supports the commission’s decision.

(1) The commission did not err in failing to award Greer permanent total disability benefits. Greer bore the burden of proving he is eligible to receive such benefits if, in the ordinary course of business, no employer reasonably would be expected to hire him given his present physical condition – a matter within the commission’s expertise. The commission, after weighing the testimony presented by all the witnesses, found Greer failed to prove he was entitled to permanent total disability benefits, either as a result of the ankle injury alone or based on all his injuries. In part, the commission relied on video surveillance footage that showed Greer walking, climbing stairs, leaning on his left foot, standing and driving, which the commission found cast doubt on Greer’s credibility about his subjective complaints. Although Greer challenges witness credibility and the weight to be given to conflicting evidence, this Court must give deference to the commission’s findings about these factual issues.

(2) The commission did not err in modifying the administrative law judge’s decision and awarding Greer an additional period of temporary total disability benefits after his June 2010 surgery for tarsal tunnel syndrome.

(a) In determining Greer’s eligibility for temporary total disability benefits related to the surgery, the commission acted within its statutory authority when it found that it was not bound by the maximum medical improvement date offered and that Greer was engaged in the rehabilitative process when he pursued treatment after that date. Section 287.149.1, RSMo, requires that temporary total or partial disability benefits “shall be paid throughout the rehabilitative process,” and section 287.170, RSMo, provides that an employer’s obligation to pay temporary total disability benefits shall not extend beyond 400 weeks during the continuance of the disability. Since a 1991 appellate decision, the commission and the appellate courts have relied on the date of maximum medical improvement to determine when a condition becomes permanent and temporary total disability benefits terminate. While the commission must decide whether any further medical progress can be reached – essential in determining when a disability becomes permanent – the commission cannot be required to accept maximum medical improvement as a bright-line date to terminate temporary total disability benefits when there is substantial and competent evidence presented that the claimant continues to be engaged in the rehabilitative process. Cases that hold to the contrary no longer should be followed. The plain language of section 287.149.1 makes whether the claimant is

engaged in the rehabilitative process the appropriate guidepost to determine whether the claimant is entitled to temporary total disability benefits.

(b) The question of whether additional medical treatment for a work-related injury, especially treatment not guaranteed to improve or cure the condition, is part of the rehabilitative process and cannot be answered until after the treatment occurs. Whether the treatment is part of the rehabilitative process is a fact question for the commission. Sysco was aware Greer suffered from tarsal tunnel syndrome related to his work-related injury as early as February 2007. At least five physicians subsequently diagnosed and treated Greer for tarsal tunnel syndrome, he underwent surgery for the condition in June 2010, and he continued to have physical therapy until his last visit with the orthopedic surgeon in February 2011. All of these actions were intended to restore Greer to a condition of health or normal activity by a process of medical rehabilitation, even though it is undisputed his condition worsened overall after the surgery. But whether treatment is a success or failure is immaterial because section 287.149.1 does not precondition an award of temporary total disability benefits on whether a claimant demonstrates the treatment had a successful outcome. The statute only requires that the claimant be engaged in the rehabilitative process. Section 287.170 contemplates an award of up to 400 weeks of temporary total disability benefits, which is approximately 7.5 years. But before awarding such benefits, the commission still must make a fact-intensive inquiry whether a claimant is engaged in the rehabilitative process. Greer was engaged in professionally accepted, medically relevant prescribed treatment.

(3) The commission did not err in modifying the administrative law judge's award to overturn the imposition of the safety rule violation penalty. Section 287.120.5, RSMo, permits the commission to reduce a claimant's compensation award by 25 to 50 percent if the claimant's work-related injury was caused by his or her failure to obey any reasonable work safety rule adopted by the employer. The burden is on the employer to prove the employer is entitled to such a reduction. The commission found Sysco failed to prove Greer had actual knowledge of the safety rule. The rule required employees traveling in equipment to keep all body parts within the equipment's running lines, but it was undisputed that, at the time of the accident, Greer's forklift was stationary. The commission found Greer's explanation credible, and this Court defers to the commission's credibility determinations and the weight given to conflicting evidence.

(4) The commission's decision to award Greer benefits for future medical care is supported by substantial and competent evidence in the context of the whole record. Section 287.140.1, RSMo, requires an employer to provide an employee with such medical treatment as may be reasonably required to cure and relieve the effects of the injury. A claimant need not present evidence that future medical treatment is needed but instead needs only to show a reasonable probability that future treatment is necessary because of the work-related injury. Future medical care should not be denied simply because an employee may have achieved maximum medical improvement. Whether to accept conflicting medical opinions is a fact issue for the commission, to which this Court defers. The commission found that one doctor's treatment recommendations – including the use of nonsteroidal anti-inflammatory medication and analgesics for Greer's left foot and ankle pain – and another doctor's testimony about Greer's need for pain management and a possible future tendon transfer justified ordering Sysco to provide future medical care.