THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
APPELLATE PANEL

Appellate Case No.: 2022-000214
W.C.C. Case No.: 1805291

Stara S. McLeod, Employee

Appellant,

v.

CW Group, Inc., Employer, and PMA Insurance Group, Carrier

Respondents.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. IS THE FINDING OF THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION CLEARLY ERRONEOUS IN VIEW OF THE SUBSTANTIAL EVIDENCE IN THE RECORD?

II. DID THE WORKERS' COMPENSATION COMMISSION ERR BY FINALLY DETERMINING THE AVERAGE WEEKLY WAGE AND COMPENSATION RATE?

STATEMENT OF THE CASE

On February 24, 2021, CW Group, Inc. ("the employer") and its carrier, PMA Insurance group ("the carrier")(collectively "the defendants") filed a Form 21, Employer's Request for Hearing, seeking a determination of compensability of the claim of Stara McLeod ("the claimant"). The claimant asserted that she injured her back while emptying a mop bucket for the employer on March 26, 2018, thereby aggravating a preexisting condition in her back. The defendants denied the claimant could prove a compensable injury or an aggravation of a preexisting condition.

Commission Susan Barden held a hearing on May 26, 2021. By order dated August 2, 2021, the single commissioner found there were "simply too many inconsistencies in the record for me to find this claim compensable" and denied the claim. The claimant timely appealed to the full commission, and by order dated January 20, 2022, the full commission, adopting verbatim the findings of fact and conclusions of law of the single commissioner, affirmed the order of the single commissioner. The claimant timely filed a notice of appeal to this court.

FACTS

Over a year before the accident in question, on February 1, 2017, the claimant had back surgery unrelated to any work injury. (Def. APA p. 93). Dr. deHoll performed the surgery, and the surgery was successful. The claimant saw Dr. deHoll on February 23, 2017. He noted that

"[o]verall, she feels a little bit achy, but otherwise is doing very well." (Def. APA p. 49).

On November 6, 2017, over eight months after she had been released from her successful surgery, the claimant began working for the employer. (Cl. Exhibit 2, p. 17). This job was in addition to her regular employment with the South Carolina Department of Mental Health. (Hrg. Tr. p. 17). Due to the physical nature of her work with the employer, the claimant began experiencing discomfort and tightening in her back. (Hrg Tr. p. 26; Depo. Tr. p.34). She returned to Dr. deHoll on November 17, 2017, to make sure she had not "done anything to her back." (Depo. Tr. p. 34). Dr. deHoll noted that she was last seen in February, 2017, but that her pain had since worsened. He noted the claimant was "having mostly back pain more than leg pain." (Def. APA p. 47). He recommended physical therapy, and, if she was not improved, she should call back, and he would recommend additional treatment. (Def. APA p. 47).[1] The claimant did not call back in the months following that visit leading up to the work accident.

On March 26, 2018, while working for the employer, the claimant was emptying a mop bucket and felt a popping and burning sensation in her back. (Hrg. Tr. p. 30). Pain began to shoot down her buttocks and into her left leg. (Hrg. Tr. p. 30). Her foot was numb, and she removed her shoe to try to get relief. (Hrg. Tr. p. 31). She told her crew leader, Annie Crawford, that she hurt her back with the mop bucket. (Hrg. Tr. p. 31). Her supervisor began massaging her back area. (Hrg. Tr. p. 31). In the following days, someone from the employer instructed her to go to Doctor's Care, but Doctor's Care would not see her. (Hrg Tr. p. 32, 35). The pain was different than what she had experienced with her prior back issues. (Hrg. Tr. p. 37).

On April 13, 2018, the claimant saw Dr. DeHoll. He noted he had last seen the claimant

[1] Because the medical records come from the provider in reverse chronological order, and the commission prefers chronological order, the records are a victim of cut and paste and can be confusing to the reader.

in November, 2017, and at that time she was having minimal pain. (Cl. APA p. 2). At this visit, however, her pain had worsened, and she was experiencing pain radiating into her left leg and numbness and tingling in her toes. (Cl. APA p. 2). His record does not contain a reference to the mop bucket incident. He recommended physical therapy and medication. (Cl. APA p. 3).

On April 19, 2018, the employer completed a workers' compensation incident report. (Cl. Exhibit 2 p. 17). The incident report stated the employer was notified of a back injury on April 2, 2018. (Cl. Exhibit 2 p. 17). Furthermore, the description of the incident was that the claimant "lifted the full mop bucket to the sink in order to empty it, and as she lowered it after emptying, she felt a 'popping' and pain in her back." (Cl. Exhibit 2 p. 17). Witnesses were listed as Gequan Charles and Annie Crawford. (Cl. Exhibit 2 p. 17). No one from the employer testified at the hearing.

On April 23, 2018, the claimant presented to the emergency room at Tuomey Hospital. (Cl. APA p. 20). The record states "[p]t. to ED with reports of pt emptied mop bucket two weeks ago at work, felt something pop, and now has pain to buttocks and has numbness to left leg." (Cl. APA p. 20). Also, the record notes "40 y/o female s/p lumbar laminectomy for HNP 1-2 years ago dev'd recurrent pain lt LS area with radiation into buttock and post thigh after lifting heavy bucket 2 wks ago." (Cl. APA p. 21). The emergency room doctor prescribed medication and recommended a return to her back specialist if the problems persisted. (Cl. APA p. 20).

On April 27, 2018, the claimant returned to Dr. deHoll and saw Dr. deHoll's physician's assistant. He noted her prior surgery and further noted she "recently [has] had an increase in pressure in her tailbone and increased pressure and pain in her left leg with numbness and tingling radiating down to her foot. Recently, we tried to get her into physical therapy" but the "pain ha[d] increased [to] the point where she is unable to do so. (Cl. APA p. 5)(emphasis added). Because he was "[c]oncerned . . . with the increased pain and the decrease in strength of

her left leg," he ordered an MRI. (Cl. APA p. 6).

On April 30, 2018, the claimant presented to Sumter Physical Therapy Clinic. The therapist noted that about four weeks ago, the claimant was leaning forward to empty a mop bucket and felt warmth in the low back and pain went into left leg and thigh. (Cl. APA p. 29). The therapist was unable to relieve the claimant's radicular symptoms. (Cl. APA p. 29).

The claimant continued to see Dr. deHoll, and on July 19, 2019, he recommended surgery. (Cl. APA p. 15). He also referred her to Dr. Karanloo to see if there may be a pain management option before resorting to surgery. (Cl. APA p. 15).

The claimant saw Dr. Koranloo on August 7, 2018. Dr. Koranloo noted the claimant did very well after her earlier surgery with Dr. deHoll, and further noted: "[i]n April of this year, after she emptied several buckets of water she felt a sudden and severe left-sided low back pain radiating down the left posterior leg all the way down to the bottom of the foot. She felt warm and burning sensation for the first time." (Cl. APA p. 17). He recommended an EMG/nerve conduction study and an injection. (Cl. APA p. 18). Dr. Troyer performed the EMG/nerve conduction study on August 16, 2018. Dr. Troyer noted: "[p]atient is a 40-year-old female who presents with back pain and numbness, tingling, weakness, and pain in the left lower extremity. She had a discectomy at L4 in 2016 with improvements. The symptoms have been present for several months since April." (Cl. APA p. 34).

On August 23, 2018, the claimant saw Dr. Johnson, an orthopaedic surgeon. (Cl. APA p. 36). Dr. Johnson noted the claimant had prior surgery and was able to return to all activities. It was Dr. Johnson's opinion to a reasonable degree of medical certainty that the work accident of March 26, 2018 aggravated her preexisting condition to her back. (Cl. APA p. 37). He recommended additional treatment (Cl. APA p. 37).

Dr. deHoll was deposed on August 23, 2018. He testified that when he saw the claimant

on April 13, 2018, her pain was worse than when he saw her in November, 2017. (Depo of Dr. deHoll p. 8-9). He testified her tailbone complaints and complaints of increased pressure were new. (Depo of Dr. deHoll p. 10). Dr. deHoll testified that although the claimant did not tell him about the job injury, "a vigorous, physical job [can] exacerbate a pre-existing condition," (Depo of Dr. deHoll p. 19) and that the mechanics of lifting and pouring the bucket could have aggravated or hurt the claimant's back. (Depo of Dr. deHoll p. 22). Finally, in response to a hypothetical question that the claimant had the accident as described, with the popping in her back, he testified that the answer to that hypothetical would be yes—it could exacerbate a pre-existing condition. (Depo of Dr. deHoll p. 30-32).

STANDARD OF REVIEW

"The Administrative Procedures Act ("APA") provides the standard for judicial review of decisions by the Commission." Burnette v. City of Greenville, 401 S.C. 417, 426, 737 S.E.2d 200, 205 (Ct. App. 2012). This court can "reverse or modify the decision only if the claimant's substantial rights have been prejudiced because the decision is affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." Hutson v. South Carolina State Ports Authority, 399 S.C. 381, 387, 732 S.E.2d 500, 503 (2012). Substantial evidence is neither a "mere scintilla of evidence nor evidence viewed from one side, but such evidence, when the whole record is considered, as would allow reasonable minds to reach the conclusion the Full Commission reached." Id.

*"*When the commission's factual determination is 'founded on evidence of sufficient substance,' and the evidence 'afford[s] a reasonable basis' for the commission's decision in [a] case, the evidence meets the 'substantial evidence' standard." Crane v. Raber's Discount Tire Rack, 420 S.C. 636, 842 S.E.2d 349 (2020)(citing Hutson v. S.C. State Ports Auth., 399 S.C.

381, 732 S.E.2d 500 (2012)). Also, "when the commission's factual finding is not 'founded on evidence of sufficient substance to afford a reasonable basis' for the finding," this court must not uphold it. Id.

Furthermore, "[i]n determining whether a work-related injury is compensable, the Workers' Compensation Act is liberally construed toward providing coverage and any reasonable doubt as to the construction of the Act will be resolved in favor of coverage." Davaut v. University of South Carolina, 418 S.C. 627, 795 S.E.2d 678 (2016).

ARGUMENT

I. THE RULING OF THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION WAS CLEARLY ERRONEOUS IN VIEW OF THE SUBSTANTIAL EVIDENCE IN THE RECORD.

The commission's ruling that the claimant failed to carry her burden of proving a compensable injury and failed to prove a compensable aggravation of a preexisting condition is clearly erroneous in view of the reliable, probative, and substantial evidence in the record. The factual findings are not "founded on evidence of sufficient substance to afford a reasonable basis for the finding." Crane v. Raber's Discount Tire Rack, 429 S.C. 636, 842 S.E.2d 340 (2020).

"An injured employee 'who has a permanent physical impairment or preexisting condition' may receive benefits for a subsequent work-related disability if he establishes by a preponderance of the evidence that 'the subsequent injury aggravated the preexisting condition or permanent physical impairment.'" Burnette v. City of Greenville, 401 S.C. 417, 427, 737 S.E.2d 200, 205–06 (Ct. App. 2012); S.C. Code Ann. § 42-9-35.

The evidence regarding the work injury itself is uncontested in the record. The claimant testified as to how the accident happened. The claimant reported the accident, and the employer completed an accident report, listing two witnesses to the accident. No one from the employer testified to contradict the information included in the employer's own accident report. The

employer did not call the two witnesses to the accident to testify. It is uncontested that due to lifting the heavy mop bucket, the claimant had increased pain and sought medical treatment. The issue, then, becomes whether the accident constituted an aggravation of the claimant's preexisting condition. The medical records are clear that the accident caused an aggravation of her back.

The records indicate the claimant had done well after her original surgery. After the mop bucket incident, however, she had an increase in pain, a change in the nature of her pain, and a change in the symptoms in her leg. Dr. Johnson opined to a reasonable degree of medical certainty that the March 26, 2018 accident aggravated her preexisting condition.

When the claimant saw Dr. deHoll after the accident, on April 13, 2018, he noted that the last time he had seen her (in November 2017), she had minimal pain. He noted that her pain had increased. At his deposition, Dr. deHoll testified her pain in April was worse than it had been in November. He testified the April complaints of tailbone pain and increased pressure were new.

Although Dr. deHoll testified in his deposition that she did not tell him about the work accident, and therefore he could not correlate it to her increased pain, he testified that if it occurred as she said, then it could have aggravated her back. In Finding of Fact number 12, the commission mischaracterizes Dr. deHoll's testimony. The commission found that Dr. deHoll testified that "given the evidence in this case, there is no way for him to correlate the Claimant's current back condition to an alleged work injury" and cites p. 26 of his deposition. On page 26, Dr. deHoll testified he did not know about the accident, so he could not correlate it. Later in the deposition, when he was presented with a hypothetical regarding the facts of this case and was actually "given the evidence in this case," he testified that "yes" the accident could have aggravated the claimant's back.

Other medical records show the claimant's pain both increased and changed in nature

after the mop bucket incident. The claimant presented to the emergency room on April 23 with complaints of emptying a mop bucket at work, feeling something pop, and now having pain in the buttocks and numbness to the left leg. She mentioned that it was "more in the bone kind of hurt" and it felt like she was "sitting on something." The emergency room physician noted the claimant had a previous surgery but had developed recurrent pain in her left lumbosacral area with radiating pain into her buttock and posterior thigh after lifting a heavy bucket.

The claimant saw Dr. deHoll's physician's assistant on April 27. He noted the claimant recently "had in increase in pressure in her tailbone and increased pressure and pain in her left leg with numbness and tingling radiating down to her foot."

In the thirteen months between being released for her preexisting surgery and her work accident, she saw a doctor for her back one time—in November, 2017 — because of some discomfort she had from her new physical job. In the five months following her work accident, she had at least ten visits to physicians seeking relief for her pain, as well as a visit to physical therapy. This fact illustrates the severity and nature of her pain changed since the work accident.

Ultimately, the Commission denied the claim due to "too many inconsistencies in the record." The "inconsistencies" are either not inconsistencies at all or so minor as to not constitute substantial evidence. In its order, the commission cites confusion about the actual date of the claimant's prior surgery (on both the claimant's and the medical providers' behalf), but whether the surgery occurred in December 2017, January 2018 or February 1, 2018 is irrelevant. She never tried to hide the fact that she had a prior surgery.

The commission relies on the fact that on her visit to Dr. deHoll in November, 2017, he noted worsening back pain, but she testified it was tightness and discomfort. What one person describes as discomfort the other may describe as pain. This is not inconsistent. Furthermore, the commission ignored the fact that in April, 2018, Dr. deHoll noted the claimant had minimal

pain at that visit in November and that her pain at that November visit was back pain, not leg pain, unlike her issues in April. The commission relies on the fact that the claimant did not report a work injury to Dr. deHoll. Nevertheless, the claimant had already reported the injury to her employer before she saw Dr. deHoll.

The commission relies on the fact that when the claimant went to the ER, she said the pain had started about two weeks ago when in fact it had been closer to three weeks before. The description of the accident and the ensuing pain in the ER record is completely consistent with the claimant's testimony and the other medical records. Getting the timing of an accident off by a few days when in pain at the ER is hardly a substantive inconsistency.

The commission takes issue with the records of Dr. Karanloo describing the accident as occurring in April and Dr. Troyer stating that the claimant's issues had been present for "several months, since April." Once again, the dates are off by only a few days. There is no evidence that the claimant herself gave this date to the doctors. The April date likely came from the fact that she saw Dr. deHoll after the accident in April. This is not a substantive inconsistency.

The commission also found inconsistencies in the description of the accident, although the commission's order notes *the claimant* gave the same description at her deposition and at the hearing. All the descriptions cited by the commission, however, deal with the claimant emptying a mop bucket and hurting her back. Any differences are minor and are to be expected.

The commission made a finding that the claimant had not been working long, was in need of money for private and college school tuition and had credit card debt. The only reason to include this finding is to insinuate the claimant had a motive to falsify a work accident in order to get money. There is no evidence in the record to support this insinuation, and it is sheer speculation.

The uncontested evidence in the record is that the claimant was emptying a mop bucket at

work and felt pain. Dr. Johnson stated to a reasonable degree of medical certainty that this incident aggravated her preexisting condition. Dr. deHoll testified that the claimant's pain had intensified after the accident and that some of the complaints she had were new. He testified lifting could have aggravated her preexisting condition. The remaining medical records are clear that the claimant had an increase in pain after the lifting incident. The commission's finding that the claimant failed to carry her burden of proof is not supported by the substantial evidence in the record and should be reversed.

II. THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION ERRED BY FINALLY DETERMINING THE AVERAGE WEEKLY WAGE AND COMPENSATION RATE.

The commission erred and abused its discretion by failing to hold the issue of average weekly wage and compensation rate in abeyance. If a claimant has concurrent employment, those wages may be considered in calculating the average weekly wage and compensation rate. Foreman v. Jackson Minit Markets, Inc., 265 S.C. 164, 217 S.E.2d 214 (1975). The claimant was employed by the South Carolina Department of Mental Health, and the defendants were aware of the concurrent employment. The "ultimate objective" in calculating the average weekly wage is to fairly reflect a "claimant's probable future earning loss." Sellers v. Pinedale Residential Ctr., 350 S.C. 183, 191, 564 S.E.2d 694, 698 (Ct. App. 2002).

The defendants filed a Form 21 requesting a hearing. The Form 21 does not indicate average weekly wage and compensation rate were at issue. The Form 58 (Prehearing Brief) filed by the defendants likewise fails to mention that average weekly wage and compensation rate were facts in controversy. Although the commission held the hearing was not a "surprise" hearing, the issue of average weekly wage and compensation rate was not properly noticed.

Furthermore, the claimant was not asking for weekly payments at the time of the hearing. The claimant requested the issue of average weekly wage and compensation rate be held in

abeyance, and this in no way prejudiced the defendants. It was not necessary for the commission to decide the issue at the time of the hearing. The commission's ruling fails to fairly reflect the claimant's probable future earning loss.

In its order, the commission took issue with the length of time the claim had been pending to deny the request to hold the issue in abeyance. The claimant had been undergoing cancer treatment, and the delay was occasioned by this illness. By ruling on an issue that was not properly before it at a time it was unnecessary to do so, the commission erred in finally deciding the claimant's average weekly wage and compensation rate.

CONCLUSION

For the reasons stated, this Court should reverse the decision and order of the South Carolina Workers' Compensation Commission.

Respectfully submitted,

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Stara S. McLeod, Employee,

Appellant,

CW Group, Inc., Employer, and PMA Insurance Group, Carrier,

Respondents.

PROOF OF SERVICE

The undersigned hereby certifies that the above-named Appellant have been served the Initial Brief of Appellant and Designation of Matter by Electronic Mail and Hand Delivery, on June 21, 2022, addressed to the attorneys of record, as follows:

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Reply to: Rock Hill Office

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RE: Stara S. McLeod, Employee, Appellant vs.
CW Group, Inc., Employer, and PMA Ins. Group, Carrier
Appellate Case No. 2022-000214

Dear Ms. Kitchings:

Enclosed for filing please find the original and one (1) copy of the Initial Brief of Appellant and Designation of Matter in the above case.

If you have questions, please do not hesitate to contact me.

With kind regards, I am,

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