

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from the South Carolina Workers' Compensation Commission

Susan S. Barden, Commissioner
Derrick L. Williams, Commissioner
Andrea C. Roche, Commissioner

W.C. C. File No. 0809520

Yuri Valderrama,, ...Respondent,

v.

Kohler Company, Employer, Self-Insured Appellant.

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE ISSUE ON APPEAL

1. Did the Commission err in finding Valderrama permanently and totally disabled when such a finding is contrary to the substantial weight of the evidence?

STATEMENT OF THE CASE

On June 24, 2008, Claimant/Respondent Yuri Valderrama ("Valderamma") suffered an injury to his left knee while employed by Appellant Kohler Company ("Kohler"). (R. 94-95). Kohler admitted the injury. (R. 92-93). Valderrama underwent two separate surgeries on his left knee and reached maximum medical improvement (MMI) on June 22, 2009. (R. 96). His treating physician gave him a rating of 10% impairment to his left leg. During the course of treatment for his left knee injury, Valderrama claimed additional injuries to his right knee, back, digestive system, psyche, and liver. (R. 88-89). Kohler initially denied these injuries. (R. 90-91). Eventually, however, Kohler admitted these injuries were causally related. (R. 61-62).

Valderrama underwent additional surgery to repair his right knee and has undergone physical therapy subsequent to each surgery. Valderrama has been treated for back pain, stomach issues related to the medications prescribed by the treating physicians, skin problems, and psychological issues. Valderrama reached MMI for all his causally related medical and psychological issues on October 18, 2011. (R. 51). Valderrama continued to work at Kohler until approximately six weeks prior to the Single Commissioner hearing, at which time he was laid off due to a reduction in force. (R. 375:1-7) (R. 377:16-20).

On December 13, 2011, Commissioner G. Bryan Lyndon found that Valderrama was totally and permanently disabled pursuant to S.C. Code Ann. § 42-9-10 (Supp. 2010). (R. 53-54, 56). The Commissioner denied Valderrama's request for lump sum payment of the award. (R. 56).

On December 22, 2011, Kohler appealed the Commissioner's Order to the Full Commission. (R. 85-87). An appellate panel of the Commission heard oral argument

and affirmed Commissioner Lyndon's Order. (R. 5-18). Kohler thereafter filed a Notice of Appeal.

STATEMENT OF FACTS

On June 24, 2008, Valderrama injured his left knee while in the course of his employment. (R. 94-95). At the time of his injury, Valderrama was employed as a rover for Kohler. (R. 365:19-22). Kohler admitted this injury. (R. 92-93). Valderrama's left knee underwent two separate surgeries. He reached MMI on June 22, 2009 and was given a 10% impairment rating by his treating physician. (R. 96). Valderrama underwent an Independent Medical Examination (IME) performed by Dr. William DeVault. (R. 274-275). Dr. DeVault rated Valderrama's impairments at 25% impairment to this left knee and 5% impairment to his back. (R. 274-275). Notably, Dr. DeVault's IME report does not contain any mention of anxiety or depression. Valderrama has not sought another IME.

During the treatment for his left knee injury, Valderrama claimed additional injury to his right knee. After some discussions regarding the validity of this injury, Kohler admitted the right knee injury. (R. 63-64). While undergoing treatment for his knee injuries, Valderrama asserted further injuries to his back, stomach, skin and psyche. (R. 88-89). After some disagreement on the validity of these claims, Kohler also admitted these claims. (R. 61-62). Valderrama has received treatment for these injuries and reached MMI on October 18, 2011. (R. 49-51).

Other than the brief period in which causation of the right knee injury had not been determined, and for two weeks prior to the reduction in force, Kohler has paid temporary partial disability payments to Valderrama. Valderrama continued to work

for Kohler in modified or light duty positions since the time of his initial injury until he was laid off during a reduction in force. (R. 366:4-7). In his light duty position, Valderrama worked as a laboratory assistant, a job which he performed without complaint or issue. (R. 377:16-20). At the time the reduction in force was implemented, Kohler offered Valderrama a new position in the dry finish area, which Valderrama refused without attempting to perform. (R. 378:12-25). Up until the reduction in force eliminated his position as a laboratory assistant, Valderrama had maintained continued employment at Kohler.

SUMMARY OF ARGUMENT

The Commissioner's determination that Valderrama was permanently and totally disabled is not supported by the substantial weight of the evidence. Valderrama has failed to prove that his injuries have rendered him unable to obtain comparable employment. Valderrama has failed to meet the burden of proof required for a determination of permanent and total disability because he has not sought employment, of any type, since being laid off from Kohler.

Approximately six weeks prior to the Commission hearing, Valderrama was still working at Kohler Company. On September 24, 2011, Valderrama's position at Kohler was eliminated due to a reduction in force. Kohler offered Valderrama another position which Valderrama refused without attempting to perform. Valderrama's injuries have been rated at 25% impairment to his left leg and 5% impairment to his back; these ratings do not reach the level at which an individual is permanently and totally disabled. Valderrama did not file for unemployment nor has he not sought any employment since the reduction in force at Kohler. Without some showing that Valderrama attempted but was unable to comparable work, he has failed to meet the burden of proof required for a

determination of permanent and total disability.

ARGUMENT

I. THE RECORD DOES NOT CONTAIN SUBSTANTIAL EVIDENCE TO SUPPORT AN AWARD OF PERMANENT AND TOTAL DISABILITY.

A. APPLICABLE LAW.

The Administrative Procedures Act establishes the standard for judicial review of worker's compensation decisions. *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 276 S.E.2d 304 (1981). This Court "may reverse or modify an agency's decision if the findings, inferences, conclusions or decisions of that agency are clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." *Gadson v. Mikasa Corp.*, 368 S.C. 214, 220, 628 S.E.2d 262, 266 (Ct. App. 2006). "Substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the administrative agency reached in order to justify its action." *Frame v. Resort Servs., Inc.*, 357 S.C. 520, 527-28, 593 S.E.2d 491, 495 (Ct. App. 2004).

If an employee is capable of performing other work that is continuously available to him, he will not be deemed totally disabled simply because he is unable to resume the duties of the particular occupation in which he is engaged at the time of his injury. *Eaddy v. Smurfit-Stone Container Corp.*, 355 S.C. 154, 163, 584 S.E.2d 390, 395 (Ct. App. 2003). The burden is upon the claimant to prove such facts as will render his injury compensable within the provisions of the Worker's Compensation Act,

and such award must not be based on surmise, conjecture or speculation. *Kennedy v. Williamsburg County*, 242 S.C. 477, 480, 131 S.E.2d 512, 513 (1963). This burden can be met only by evidence that claimant had made reasonable efforts to obtain employment and had failed because of an injury produced handicap. *Shealy v. Algernon Blair, Inc.*, 250 S.C. 106, 110, 156 S.E.2d 646, 648 (1967). Where the only reasonable inference from the record is that the claimant has failed to sustain this burden, it would be futile to remand the case. Id. An award which is without support in the evidence should be reversed on appeal whether or not it is legally sufficient as to form and content. Id.

B. THE RECORD DOES NOT CONTAIN SUBSTANTIAL EVIDENCE TO SUPPORT AN AWARD OF PERMANENT AND TOTAL DISABILITY.

1. Valderrama Failed to Meet His Burden of Showing That He Could Neither Locate Nor Hold Comparable Employment.

Valderrama has failed to meet his burden of showing that he could neither locate nor hold comparable employment. In fact, Valderrama testified that since being laid off from Kohler he has not attempted to look for work elsewhere. (R. 383:18-20). Valderrama did not present any evidence showing that he made any effort to find comparable employment or that such employment was unavailable to him due to the injuries he sustained at Kohler.

Admittedly, Valderrama can not return to the strenuous lifting and movement required by his former position at Kohler; however, his experience working in the lab has provided an entirely new skill set that may afford him other financially comparable job opportunities. (R. 375:13-16). Without any evidence that the training provided to Valderamma in the laboratory did not provide him with another means of obtaining

comparable employment, the determination of permanent and total disability is speculative.

The vocational evaluation performed on Valderrama failed to acknowledge or consider that Valderrama's year long employment in Kohler's lab provided him with new skills which could potentially lead to financially comparable employment. Instead, the vocational evaluation focuses on Valderrama's inability to perform the labor intensive work which he initially performed at Kohler. (R. 101-113). The Commission erroneously speculated that, because Valderrama cannot perform the duties of a castor or other labor intensive work, he is totally and permanently disabled.

The Court has long held that the burden of proof is on the claimant to prove that his injury is compensable and that a claimant's disability should be measured by the claimant's capacity or incapacity to earn the wages which he was receiving at the time of this injury. *Walker v. City Motor Car Co.*, 232 S.C. 392, 396, 102 S.E.2d 373, 375 (1958); see also, *Shealy*, 250 S.C. at 113, 156 S.E.2d at 649 (holding that the burden of causation rested upon the claimant and that burden could only be met by evidence that the claimant had made reasonable efforts to obtain employment and failed because of an injury produced handicap). Additionally, this Court concluded that an individual's failure to seek work "is not in itself determinative of the extent of loss of his earning capacity." *Floyd v. City of Charleston*, 287 S.C. 474, 479-480, 339 S.E.2d 166, 169 (Ct. App. 1986).

Without evidence that Valderrama tried but could not obtain or maintain comparable employment due to the injuries he sustained while working at Kohler, Valderrama has not met the burden of proof required to show that he is permanently and totally disabled.

2. Valderrama Maintained Employment at Kohler until His Position was Eliminated Due to a Reduction in Force.

Valderrama asserts that he is permanently and totally disabled due to injuries he suffered while employed at Kohler. Despite his injuries, however, Valderrama maintained stable employment at Kohler until his position was given to another employee due to a reduction in force and his lack of seniority. (R. 377:16-20). Valderrama worked as a laboratory assistant, which was a light duty assignment, for over a year until his position was terminated as part of a reduction in force. (R. 378:6-11). Valderrama testified that he performed the tasks of a laboratory assistant without complaint, without the need to leave or take any time off due to his physical and/or emotional problems, and without suffering from any problems with concentration. (R. 377:9-15) (R. 383:5-12). In fact, even though Valderrama did not perform all of the duties of a laboratory assistant, he admitted that these modified duties were solely the result of his lack of training, not his injuries. (R. 376:4-5).

The Commissioner found and the panel affirmed the decision that Valderrama's anxiety and depression combined with his physical injuries rendered him permanently and totally disabled. (R. 53-56). In making this finding, the Commissioner relies heavily on the vocational evaluation of Dr. Brabham. (R. 101-113). Dr. Brabham noted that Valderrama's inability to concentrate, combined with his inability to pay attention and his physical pain render him unable to perform "the essential duties of gainful employment." (R. 112).

Dr. Brabham's opinion is contrary to the substantial evidence weight of the evidence as Valderrama testified that he did not suffer from the very same issues which Dr. Brabham relied on when describing Valderrama as unemployable. (R. 377:3-24) (R. 383:5-12). Valderrama's testimony was taken only one month after the vocational evaluation. In

his vocational evaluation, Dr. Brabham fails to consider the skills and training Valderrama obtained while working as a laboratory assistant. While the types of jobs Valderrama is capable of performing today are different than the type of work he performed at Kohler, this fact does not render him permanently and totally disabled. Disability is the incapacity, because of injury, "to earn the wages which the claimant was receiving at the time of the injury in the same or any other employment." *Floyd*, 287 S.C. at 479, 339 S.E.2d at 168 (emphasis added). Valderamma has not presented evidence of such incapacity. To provide such evidence, Valderrama must, at a minimum, seek employment.

Valderrama admitted that, but for the reduction in force at Kohler, he would still be employed as a laboratory assistant. (R. 377:3 – 378:2). Valderrama also admitted that he was offered another position at Kohler but he declined the position without making any attempt to work in the new position. (R. 378:5-25). The record shows Valderrama was employed until six weeks prior to the single Commissioner hearing and would still be employed full-time at Kohler if his lack of seniority had not forced him out of his position during the reduction in force.

Since the reduction in force, Valderrama believes that his medical condition has worsened. (R. 384:12-22). Valderrama felt better when he was working and working "took his mind off" his injuries. (R. 367:16-24). Yet, when given the opportunity to take other employment at Kohler, Valderrama refused to even try the new position. Given Valderrama's injuries, the position in the dry finish area may not have been suitable; however, Valderrama is obligated to at least try to obtain employment.

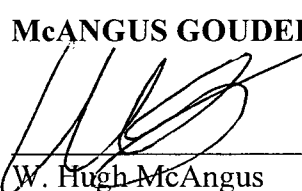
Throughout the course of his treatment Valderrama maintained continuous employment at Kohler. Valderrama is not unemployed because he could not perform

the job requirements at Kohler due to his injuries; he is unemployed because Kohler no longer had a position which he considered viable. Valderrama's ability to maintain stable employment until the reduction in force, his own testimony that he performed his job without complaint, the need for time off, or special accommodation provide substantial evidence that he is capable of obtaining comparable employment. Without some evidence to the contrary, the finding that Valderrama is permanently and totally disabled is contrary to the substantial weight of the evidence.

CONCLUSION

For the reasons set forth above, Kohler Company respectfully asks this Court to reverse the Commission's finding that Yuri Valderrama is permanently and totally disabled.

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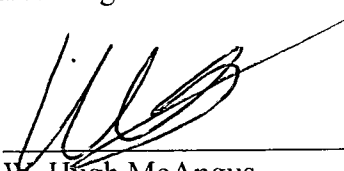
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PROOF OF COMPLIANCE

The undersigned certifies that the Final Brief of Appellant Kohler Company complies with Rule 211(b), SCACR. The undersigned further certifies that the Final Brief of Appellant Kohler Company complies with the South Carolina Supreme Court's August 13, 2007 Order re: Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings.

May 1, 2013



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PROOF OF SERVICE

I certify that I have served the **Final Brief of Appellant Kohler Company** on Yuri Valderrama by depositing a copy of it in the United States Mail, postage prepaid, on May 1, 2013, addressed to his attorney of record as follows:

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