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THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Avery B. Wilkerson, Appellate Panel Chairman, Commissioner

WCC File No.: 0818219
Case No.: 2011196087

JOE OSMANSKI, EMPLOYEE, PETITIONER,

V.

WATKINS & SHEPARD TRUCKING, INC., EMPLOYER, AND ZURICH NORTH AMERICAN INSURANCE COMPANY, CARRIER, DEFENDANTS,

OF WHOM, ZURICH NORTH AMERICAN INSURANCE COMPANY, CARRIER, IS THE RESPONDENT.

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for the Petitioner certifies that a Petition for Rehearing was made and finally ruled on by the Court of Appeals on May 3, 2013.

QUESTIONS PRESENTED

I. DID THE COMMISSION DECIDE THIS CLAIM USING THE WRONG LEGAL STANDARD?

II. CAN THE RESPONDENT EMPLOYER CLAIM RELIANCE ON A FACT THEY KNEW NOT TO BE TRUE?

III. WAS THE PETITIONER'S ACCIDENT UNEXPECTED?

IV. DOES THE COMMISSION'S ANALYSIS VIOLATE THE SOUTH CAROLINA WORKERS' COMPENSATION ACT?

STATEMENT OF THE CASE

The Claimant is forty-five (45) years old and married to his wife of twenty-five (25) years. Together they have nine (9) children. He has worked in heavy manual labor his entire life and supported his family. In 1987, he injured his arms (elbow/left worse than right) while working construction. He had several surgeries that ended with a left elbow replacement. He has very large surgical scars on both of his arms which are clearly visible.

In physical therapy, he was taught proper lifting techniques in dealing with any functional deficits with his left arm. Dr. Larry Chidgey, the Petitioner's treating physician, assigned lifting restrictions of ten (10) to fifteen (15) pounds. When deposed, Dr. Chidgey testified that as he gained more strength in his right/dominant arm, he would not be limited to those restrictions as long as he shifted most of the weight to his stronger right arm. Dr. Chidgey went further and stated, "I have a 10 to 15 pound weight restriction on the left arm. I have no weight restriction on the right arm." (R. pp. 368-

369). The Petitioner was last seen by Dr. Chidgey in 2002. He did not see any doctors for any problems with either of his arms until the accident in this claim in 2008.

In 2006, the Petitioner applied for a position as a driver with the Respondent Employer, Watkins Trucking. He traveled to Hickory, North Carolina. He was there for two (2) full days. The Petitioner filled out various forms, was physically examined by a company physician (Dr. Albert Osbahr), and given an extensive lifting test, much like a functional capacity evaluation or FCE. The Petitioner passed the drug screen and lift test. Dr. Osbahr found that the Petitioner had impairment and problems with the use of his left arm, but certified that he could still perform the job. He reported these findings directly to the Employer. (R. pp. 381-382, Osbahr Depo pp. 16-22). The Petitioner was hired and worked for over two (2) years without incident.

The Petitioner's job involves mostly pushing and pulling. All of the freight he was hauling was loaded onto the truck before he arrived. The boxes were arranged in the order of his deliveries, so all he had to do was push them towards the back of the trailer. Workers from the delivery sites would be in charge of taking the boxes off the truck and into the store. (R. p. 194).

On November 1, 2008, the Petitioner was in Aiken, SC and had just finished making a delivery. He noticed the boxes were stacked in such a way that they might fall over. When he attempted to reposition one of the boxes, it became dislodged and unexpectedly started to fall. He tried to catch it, but the weight came down on his left arm causing his injury. (R. pp. 197-198). The Respondents initially accepted the claim. They paid temporary compensation and provided medical treatment. It was only after surgery was recommended did they produce an unsigned statement they claim to have

come from the Petitioner. Using this highly questionable form, the Petitioners denied the claim on the basis that the Petitioner failed to disclose his prior injury.

The source of the alleged false statement comes from a document titled "Post Job Offer Questionnaire" dated October 30, 2006. It asks whether or not the employee who has been offered a job has been injured previously while on the job or otherwise that would prevent him from being able to perform the job. On the form submitted by the Respondents, the answer to this question is "No." Interestingly, this form was not filled out by the Petitioner. It has a signature of his name, but it was not the Petitioner that signed it. The Respondent Employer claims that while all of the other paperwork was available at the Hickory, NC facility, they chose to do this one (1) form over the phone.

The Respondent Employer had the Petitioner at their office in Hickory, NC for two (2) days. He filled out the application along with numerous other forms, took the drug test, took the lift test and submitted to their physical examination, but for some reason they claim this one document was completed over the telephone from Missoula where an interviewer asked the questions and noted the Petitioner's responses. The Petitioner testified he does not recall answering these questions for anyone over the phone. (R. pp. 194-195). Although the Employer's witness, Matthew Grandy, stated this was the normal procedure, the form itself indicates otherwise. When looking at the bottom of the form, it contains the statement, "Please fax this immediately to Debi Hould and Janice Peterson in the Missoula Safety Department." (R. p. 447). Instead, the Respondent Employer claims someone in Missoula called the Petitioner and completed the form over the phone.

The Petitioner challenged the relevance and weight afforded to this document because it was apparent that the Respondents did not plan on presenting the person who completed the form as a witness. The Respondents already knew the Petitioner would testify that he did not recall answering these questions for anyone. (R. p. 272, lines 10-22).

ARGUMENT

I. THE COMMISSION DECIDED THIS CLAIM USING THE WRONG LEGAL STANDARD.

GENERAL DEFINITIONS

A. Fraud in the Application: "The general rule is that the following factors must be present before a false statement in an employment application will bar benefits: 1. The employee must have knowingly and willfully made a false representation as to his physical condition. 2. The employer must have relied upon the false representation and this reliance must have been a substantial factor in the hiring. 3. There must have been a causal connection between the false representation and the injury. Cooper v. McDevitt & Street, 260 SC 463.

B. Any action or defense for Fraud requires: 1. A representation. 2. Its falsity. 3. Its materiality. 4. The speaker's knowledge of its falsity. 5. His intent that it should be acted upon by the person. 6. The hearer's ignorance of its falsity. 7. His reliance on its truth. 8. His right to rely thereon. 9. His consequent and proximate injury. Outlaw v. Calhoun Life, 236 SC 272. The standards for providing fraud are the same whether raised as a cause of action or as a defense. Hansen v. DHL Laboratories, 3316 SC 505. Fraud is never presumed and must be proven by clear and convincing evidence. Byars v. Cherokee County, 237 SC 548.

Due to the harsh consequences of a finding of fraud or either a plaintiff or a defendant, the burden of proof goes beyond a preponderance of the evidence. A fundamental principle for alleging fraud is that it must be proven by clear and convincing evidence. Byars v. Cherokee County, 237 SC 548. While the Respondents point to the case of Brayboy v. Workforce, 383 S.C. 463, 681 S.E.2d 567 (2009) as support for the position that the standard is preponderance of the evidence, it is respectfully submitted that the standard of proof was not a point raised on appeal of that case. In other words, no one contested or asked the Court to rule upon that issue. Therefore, when the *Brayboy* Court listed the standard, it was only copying and pasting the general idea that the standard of proof in a Workers' Compensation case is the preponderance of the evidence.

The Worker's Compensation Act is remedial legislation enacted to protect the worker. Therefore, the statute is given a broad construction in order to accomplish that end. *Booth v. Midland Trane Heating & Air Conditioning,* 298 S.C. 251, 254, 379 S.E.2d 730, 731 (Ct.App.1989). If the Court is going to deny someone benefits for an otherwise compensable case, shouldn't there be clear and convincing evidence that the injured worker actually made the statements as opposed to simply tipping the scales ever so slightly? The Petitioner is asking the Court to change the standard.

II. THE RESPONDENTS CANNOT CLAIM RELIANCE ON A FACT THEY KNEW NOT TO BE TRUE.

In order to prevail on a *McDevitt Street* defense, the employer must have relied upon the false representation and this reliance must have been a substantial factor in the hiring. Cooper v. McDevitt & Street, 260 SC 463. Fundamental to any claim or defense involving an allegation of fraud is the hearer's ignorance of the statement's falsity. Outlaw v. Calhoun Life, 236 SC 272. In other words, you can't claim reliance on a fact

you know not to be true. The Respondents claim the Petitioner failed to disclose information regarding his physical condition. If the evidence in the records contained only the Petitioner's responses to their questions, we certainly see the logic in their position. However, the Respondent Employer's own doctor reported to them that the Petitioner had both impairment and a loss of function in his left arm. Matthew Grandy, the Respondent Employer's witness, testified that Dr. Osbahr's findings of impairment and decreased supination would be serious enough that someone should have followed up with the doctor or the Petitioner. (R. p. 340, Grandy Dep, p. 35, lines 14-23). He testified that nothing was preventing the Respondent Employer from following up on this information. (R. p. 340, Grandy Dep, p. 35, lines 8-13). Dr. Osbahr testified that the Respondent Employer never called him to follow up on his notation and finding that the Apellant had impairment and problems moving his left arm. He further testified, that had the Respondent Employer called him to ask about it, he would have spoken with them and done his best to answer their questions. (R. p. 381, Osbahr Dep, pp. 16-17).[1]

The Respondents cannot claim ignorance and reliance on a fact that they knew to be false. The hearer's ignorance of the statement's falsity is an essential element of reliance. The Respondent's own witness admitted that upon reading Dr. Osbahr's findings, they should have followed up with either Dr. Osbahr or the Petitioner. (R. p. 340, Grandy Dep, p. 35, lines 8-13). That is to say, they had enough information about the Petitioner's physical condition to know they needed to know more. Had they done what they admitted they should have done, they could have asked for specific restrictions,

[1] Although the Respondents claim they are not sure if they received Dr. Osbahr's note, the testimony of Matthew Grandy reveals otherwise. Mr. Grandy was asked: "All right. And this form that Osbahr completes, this was contained in Mr. Osmanski's personnel file?" Mr. Grandy responded, "Yes." (r. P. 274, Grandy Dep, p. 29, lines 19-22). Moreover, Dr. Osbahr specifically stated, "This information was sent to Watkins Shepard Trucking, LLC." (R. p. 331).

the nature of any surgeries, or anything else they needed to know. Instead, they chose not to follow up or ask anyone for any additional information. Therefore, the Respondents did not meet their burden of proving reliance because their own witness admitted they knew the Petitioners' responses were incorrect.

The Respondents take issue with the qualifying statement in Mr. Grandy's deposition where he stated someone should have followed up on Dr. Osbahr's note. The question asked Mr. Grandy to assume 180 degrees is normal supination. Dr. Osbahr reported to them that the Petitioner had "decreased supination, only 90 degrees" in his left arm. (R. p. 408). Our courts have long held that in cases alleging fraudulent statements, the aggrieved party cannot rely upon a misstatement of facts if the truth is easily within its reach. O'Shields v. Fountain Mobile Homes, Inc., 262 S.C. 276, 282, 204 S.E.2d 50, 52 (1974). Mr. Grandy admited that had he known what normal supination was, someone should have followed up with either the Petitioner or the company doctor, or both. (R. pp. 339-340, Grandy Dep. p. 31, lines 15-23, p. 35, lines 14-23).

First of all, Mr. Grandy did not need to know what normal supination was in order to know the Petitioner had problems using his left arm. The fact that Dr. Osbahr indication his supination was *decreased* was enough to know it was less than normal. And, if Mr. Grandy exercised any diligence after being informed the Petitioner had a less than normal range of motion, all he really had to do was do a Google search for "what is normal arm supination?" This would have revealed the Petitioner had only half of the normal range of motion in his left arm. Dr. Osbahr testified he was willing to speak with the Respondent if they had any questions. (R. p. 381, Osbahr Dep, pp. 16-17). Mr.

Grandy could have asked Dr. Osbahr to explain normal supination. The question is, was the fact that the Petitioner had problems moving his arm within the Respondents' reach? Was the fact the he had only half the normal range of motion also within their reach given that all they had to do was either ask their own company doctor or simply look it up? The Respondents cannot claim reliance on a statement they knew not to be true or where the truth was easily within their reach.

III. THE PETITIONERS ACCIDENT WAS UNEXPECTED.

The claim was further denied on the basis that this occurrence was not an accident. Under our established case law, the word "accident" is defined under the Act as an "unlooked for **an untoward event which is not expected or designed by the person who suffered the injury**." Radcliffe v. Southern Aviation School, 209 SC 411, Capers v. Flautt, 305 SC 254 (emphasis added). Judging if the injury was unexpected is determined from considering the injured worker's point of view. Pee v. AVM, 352 SC 167.

The Petitioner's usual job was described as mostly pushing and pulling. He did not have to load any of the freight he was hauling. He only pushed the boxes to the end of the trailer so they could be off loaded by the customers' workers. Since the boxes were arranged in the order of his deliveries, all he had to do was push them towards the back of the trailer. (R. p. 194). The accident happened when a box he was shifting became dislodged and fell onto his weaker arm.

Dr Chidgey, the Petitioner's treating doctor for his prior injury, testified that as the Claimant gained more strength in his right/dominant arm, he would not be limited to those restrictions as long as he shifted most of the weight to his stronger right arm He

went further and stated, "I have a 10 to 15 pound weight restriction on the left arm. I have no weight restriction on the right arm." (R. pp. 368-369).

The Commission failed to consider the fact that prior to accepting employment, the Petitioner was certified by the Employer's doctor as able to perform the job. He had passed the Employer's extensive testing designed to mirror the actual requirements of the job and was again certified as being physically able to perform all of the essential functions of the job. His treating doctor testified that as long as he used his right/dominant arm for most of the lifting and used his left arm as a guide, he would not have violated his restrictions. (R. p. 369).

The Petitioner's treating physician opined that but for the "unusual event of the heavy weight falling unexpectedly on his left arm, damaging the joint replacement itself, Mr. Osmanski would have undoubtedly been able to continue his work activities for the employer, as he did so for the two years prior to this work-related injury on or about November 1, 2008." (R. p. 395). In light of the foregoing, the Petitioner contends the Commission erred as a matter of law in misapplying the standard for an accident and failing to base the ruling on evidence from the Petitioner's point of view. The accident was unexpected.

CONCLUSION

The Petitioner requests an Order declaring the correct legal standard to be by clear and convincing evidence. The Petitioner contends the claim need not be remanded to the Commission to decide the case under the correct legal standard because as a matter of law, the Respondents failed to prove reliance, which is essential to that defense.

Additionally, the Petitioner requests a ruling that the Petitioners' accident was just that, an accident under our legal definition thereof.

Respectfully Submitted

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30 day of May, 2013

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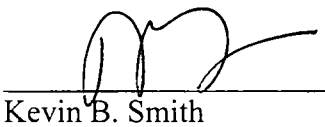
PROOF OF SERVICE

I certify that I have served the Petition for Writ of Certiorari by depositing a copy of it in the United States Mail, postage prepaid, on May 31, 2013, addressed to the South Carolina Court of Appeals, P.O. Box 11629, Columbia, South Carolina, 29211, and to the attorneys of record, Jason Lockhart, Esquire, McAngus, Goudelock & Courie, LLC, P.O. Box 12519, Columbia, South Carolina, 29211-2519.



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