

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Kristi Lea Harrington, Circuit Court Judge

Appellate Case No. 2012-211873
Case No. 2011-CP-08-00396

Robert Russell,.....Employee/Claimant, Respondent,

v.

Department of Health and Environmental Control, Employer, and
The State Accident Fund, Carrier,.....Appellants.

RETURN OF RESPONDENT
OPPOSING APPELLANTS'
PETITION FOR REHEARING

RECEIVED

MAY 31 2013

SC Court of Appeals

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I. THE COURT OF APPEALS DID NOT ERR IN AWARDING
PAYMENT FOR ALL PAST AND FUTURE MEDICAL BENEFITS
RELATED TO RESPONDENT'S PSYCHOLOGICAL CONDITION

Appellants (hereinafter "the Fund") claim that § 42-9-400 makes no provision for payment of medical care regarding to "non work related" conditions. However, § 42-9-400 provides, in pertinent part, that "If an employee who has a permanent physical impairment from any cause or origin incurs a subsequent disability from injury by accident arising out of and in the course of his employment, resulting in compensation and medical payments liability or either, for disability that is substantially greater, by reason of the **combined effects of the preexisting impairment and subsequent injury** or by reason of the aggravation of the preexisting impairment, than that which would have resulted from the subsequent injury alone, **the employer or his insurance carrier shall in the first instance pay all awards of compensation and medical benefits provided by the Title.**" (Emphasis provided).

This argument totally ignores the fact that § 42-9-400 mandates payment of medical benefits as a result of the combined effects of the preexisting impairment and the subsequent work-injury. In addition, the Fund states repeatedly in its Petition for Rehearing that since the psychological condition of Respondent (hereinafter "Mr. Russell") was not aggravated by the work-injury, § 42-9-400 does not require them to pay for medical benefits for the psychological condition. First, the Fund does not correctly cite § 42-9-400 on page 3 of its Petition and completely omits the "combined effects" language of the statute. Second, while § 42-9-400 does allow for payment of medical benefits for pre-existing conditions that are aggravated by the work-injury, it clearly also provides the same for "the combined effects" of the pre-existing condition and the work-injury. Since the Appellate Panel found the disability of Mr. Russell was substantially greater as a result of the combined effects of his work-injury to his back and his

pre-existing psychological condition, the Court of Appeals correctly ruled that § 42-9-400 states the Fund shall pay for medical benefits for Mr. Russell's psychological condition.

II. THE COURT OF APPEALS DID NOT ERR IN FINDING THAT MR. RUSSELL WAS PERMANENTLY AND TOTALLY DISABLED PURSUANT TO ELLISON.

The Fund argues again that since Mr. Russell injured a single body part, his compensation is limited to an award for the single member under §42-9-30 pursuant to Singleton v. Young Lumber Company, 298 S.C. 454, 114 S.E.2d 837 (1960). The Fund's position is a misinterpretation of Ellison. The Supreme Court in Ellison explained the distinction between the application of Singleton and §42-9-400, the statutory basis of Ellison. The Court held that Singleton "involved a sole injury to a scheduled member – no other condition was claimed to have contributed to disability. The argument was that the injury to the scheduled member, a leg, was itself so disabling that the claimant should be found totally disabled." Ellison p. 665. In the case sub judice, the Hearing Commissioner and the Appellate Panel clearly ruled that Mr. Russell not only had a work-related injury to his back, but that he had a significant pre-existing psychological history that combined with his work-injury to make him permanently and totally disabled. (R. p. 12). (Decision and Order, Finding of Fact No. 23).

Furthermore, the Supreme Court in Ellison stated that Singleton "stands simply for the proposition that impairment involving only a scheduled member is compensated under the scheduled injury statute and not the general disability statute." Ellison p. 666. Since Mr. Russell clearly presented his back injury and his pre-existing psychological condition at the Hearing, the Hearing Commissioner and the Appellate Panel correctly ruled that Ellison, and not Singleton, applied.

Again, the Fund claims that since Mr. Russell's pre-existing psychological condition was not aggravated by his compensable injury to the back, the Hearing Commissioner and the Appellate Panel erred in applying Ellison. The Fund is misinterpreting the holding of Ellison. The statutory foundation of the decision reached in Ellison, which is on-point with Mr. Russell's case, is found in §42-9-400 which provides in pertinent part:

(a) If an employee who has a **permanent physical impairment from any cause or origin** incurs a subsequent disability from injury by accident arising out of and in the course of his employment, resulting in compensation and medical payments liability or **either**, *for disability that is substantially greater, by reason of the combined effects of the preexisting impairment and subsequent injury or* by reason of the aggravation of the preexisting impairment, than that which would have resulted from the subsequent injury alone, the employer or his insurance carrier shall in the first instance pay all awards of compensation and medical benefits provided by this Title; but such employer or his insurance carrier shall be reimbursed from the Second Injury Fund...

...

(d) As used in this section, "**permanent physical impairment**" means any permanent condition, *whether congenital or due to injury or disease*, of such seriousness as to constitute a hindrance or obstacle to obtaining employment or to obtaining reemployment if the employee should become unemployed.

(emphasis added). Ellison p. 665.

The Ellison Court held that "[t]here is no requirement that the pre-existing condition aggravated the injury, or that the injury aggravated the pre-existing condition, so long as there is

a greater disability simply for the “combined effects” of the injury and the pre-existing condition.” Ellison p. 666.

The key component of Ellison is the combined effects created by the compensable injury and the pre-existing condition. Based on the testimony and medical evidence, the Hearing Commissioner and the Appellate Panel set forth how Mr. Russell’s work-injury to his back and his pre-existing psychological condition combine to render him permanently and totally disabled. First, the Hearing Commissioner and the Appellate Panel ruled that Mr. Russell injured his back at work and the treating physician opined he had sustained a disc bulge. (R. pp. 9-10). (Decision and Order, Finding of Fact Nos. 1 and 9 respectively). It was also ruled that the treating physician had assigned Mr. Russell a 5% impairment rating to his back as a result of his work-injury and had placed permanent physical restrictions on him of no lifting of more than 35 pounds occasionally and 20 pounds on a frequent basis and no prolonged periods of climbing, bending and stooping. (R. p. 11). (Decision and Order, Finding of Fact Nos. 16 and 17 respectively).

Secondly, the Hearing Commissioner and the Appellate Panel ruled that six days after his work-injury, Mr. Russell was hospitalized for psychiatric care. (R. p. 10). (Decision and Order, Finding of Fact No. 7). It was ruled that Mr. Russell “has a significant psychological history as documented in the evidence.” (R. p. 10). (Decision and Order, Finding of Fact No. 8). Furthermore, the Hearing Commissioner and the Appellate Panel ruled that Mr. Russell was permanently and totally disabled based on the application of the Ellison decision because the “evidence is not just persuasive, but overwhelming.” (R. p. 12). (Decision and Order, Finding of Fact No. 19). Lastly, the Hearing Commissioner and the Appellate Panel unequivocally ruled that the decision to find Mr. Russell permanently and totally disabled pursuant to Ellison was

“based upon the substantial evidence” of “the combined effects” of Mr. Russell’s work-injury to his back and his pre-existing psychological condition. (R. p. 12). (Decision and Order, Finding of Fact No. 23).

As set forth above, the Hearing Commissioner and the Appellate Panel correctly applied the holding in Ellison to the facts, testimony and medical and documentary evidence presented to determine that Mr. Russell’s work-injury to his back combined with his pre-existing psychological condition to render him permanently and totally disabled. Substantial evidence is more than a mere scintilla, but less than a preponderance. Bilton v. Best Western Royal Motor Lodge, 321 S.E.2d 63 (1984).

It is important to note that despite his extensive psychological history, Mr. Russell continued to work for DHEC before his compensable work-related injury occurred. After his back injury occurred at work on June 11, 2004, the Hearing Commissioner and the Appellate Panel found that Mr. Russell was hospitalized for psychiatric care “six days after the accident[.]” (R. p. 10). (Decision and Order, Finding of Fact No. 7 – emphasis in original). Lastly, the Hearing Commissioner and the Appellate Panel ruled that “Claimant’s psychological condition has resulted in Claimant’s perceived worsening of his physical condition.” (R. pp. 10-11). (Decision and Order, Finding of Fact No. 11). Mr. Russell testified that his back and left hip still hurt and that his depression and bi-polar are worse. (R. p. 392, lines 2-6). (Transcript p. 28, lines 2-6). Mr. Russell also testified that after his work-injury, his pain was so bad he could kill himself, he would cry a lot and was worried, anxious and got depressed. (R. p. 396, lines 6-12). (Transcript p.32, lines 6-12).

Mr. Russell testified that he had bipolar and depression since the early 1980s. (R. p. 402, lines 21-25). (Transcript p. 38, lines 21-25). Mr. Russell testified that after his injury on-the-job,

he was out of work for two days (R. p. 382, lines 13-17) (Transcript p. 18, lines 13-17) and then he returned to work (R. p. 383, line 9—p. 384, line 6) (Transcript p. 19, line 9 to p. 20, line 6). Mr. Russell's work-injury occurred on June 11, 2004 and he testified that he retired from DHEC on July 16, 2005. (R. p. 391, lines 17-23). (Transcript p. 27, lines 17-23). Mr. Russell also testified that he was unable to perform his job with DHEC or any work as a result of his work-injury and his psychological condition. (R. p. 411, lines 3-7). (Transcript p. 47, lines 3-7). The Hearing Commissioner found that:

Claimant's limb shaking and tremors observed by the undersigned at the hearing are also documented in the evidence by various providers. A video of the hearing (obviously, hearings are not recorded) would have shown that Claimant's demeanor/psychological condition would be next to impossible to fake or feign. (R. p. 10). (Finding of Fact No. 8).

This finding was accepted by the Appellate Panel and is part of their Decision and Order. It is logical for the [Appellate Panel of the] Full Commission, which did not have the benefit of observing the witness, to give weight to the hearing commissioner's opinion. Green v. Raybestos-Manhattan, 250 S.C. 58, 156 S.E.2d 318 (1967). The Hearing Commissioner and the Appellate Panel clearly stated that Mr. Russell was permanently and totally disabled in light of his testimony and medical evidence based on the application of the Ellison decision.

The Fund also claims that because Finding of Fact No. 11 discounted the opinion of Mr. Russell's psychologist that Mr. Russell's back injury worsened his depression and bi-polar disorder, it was error to find him permanently and totally disabled. This argument is without merit as Ellison clearly holds that "[t]here is no requirement that the pre-existing condition aggravated the injury, or that the injury aggravated the pre-existing condition, so long as there is

a greater disability simply from the ‘combined effects’ of the injury and the pre-existing condition.” Ellison p. 666. In addition, the Hearing Commissioner and the Appellate Panel explained that even though Mr. Russell’s psychologist’s opinion regarding aggravation of Mr. Russell’s psychological conditions was not accepted, the finding that Mr. Russell was permanently and totally disabled was because “[t]he remainder of the evidence is not just persuasive, but overwhelming (Claimant’s APA #10, page 100; evidence as a whole).” (R. p. 12). (Finding of Fact No. 19).

Thus after reviewing the testimony and medical evidence in this case and viewing the Appellate Panel’s Decision and Order in its entirety, it was correctly ruled that Mr. Russell’s work-injury to his back had combined with his pre-existing psychological condition to render him permanently and totally disabled. (R. p. 12). (Decision and Order, Finding of Fact Nos. 19 and 23 respectively and Conclusion of Law No. 4). Substantial evidence is more than a mere scintilla, but less than a preponderance. Bilton v. Best Western Royal Motor Lodge, 321 S.E.2d 63 (1984). Any reasonable doubts as to construction of the Act should be resolved in favor of coverage. Mauldin v. Dyna-Color/Jack Rabbit, 308 S.C. 18, 461 S.E.2d 639 (1992).

III. THE COURT OF APPEALS DID NOT ERR IN ITS DECISION.

The Fund states in the third argument of its Petition that the Court of Appeals erred in finding that Mr. Russell’s physical injury was aggravated by his psychological condition. This argument is incorrect as the Court of Appeals affirmed the ruling of the Hearing Commissioner and the Appellate Panel that Mr. Russell was permanently and totally disabled pursuant to Ellison as it was “based upon the substantial evidence” of “the combined effects” of Mr. Russell’s work-injury to his back and his pre-existing psychological condition. (R. p. 12). (Decision and Order, Finding of Fact No. 23).

The Court of Appeals also affirmed the ruling of the Hearing Commissioner and the Appellate Panel that "Claimant's psychological condition has resulted in Claimant's perceived worsening of his physical condition." (R. pp. 10-11). (Decision and Order, Finding of Fact No. 11). Mr. Russell testified that his back and left hip still hurt and that his depression and bi-polar are worse. (R. p. 392, lines 2-6). (Transcript p. 28, lines 2-6). Mr. Russell also testified that after his work-injury, his pain was so bad he could kill himself, he would cry a lot and was worried, anxious and got depressed. (R. p. 396, lines 6-12). (Transcript p.32, lines 6-12).

Lastly, the Court of Appeals affirmed the ruling of the Hearing Commissioner and the Appellate Panel that even though Mr. Russell's psychologist's opinion regarding aggravation of Mr. Russell's psychological conditions was not accepted, the finding that Mr. Russell was permanently and totally disabled was because "[t]he remainder of the evidence is not just persuasive, but overwhelming (Claimant's APA #10, page 100; evidence as a whole)." (R. p. 12). (Finding of Fact No. 19).

CONCLUSION

Accordingly, based on the foregoing, Mr. Russell respectfully requests that the Court deny the Fund's Petition for Rehearing.

Respectfully submitted,

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May 29, 2013.
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I certify that I have served the Respondent's Return Opposing Appellants' Petition for Rehearing on Appellants by depositing a copy of the same in the United States Mail, postage prepaid, on May 29, 2013, addressed to their attorneys of record, Margaret M. Urbanic, 126 Seven Farms Drive, Suite 200, Charleston, SC 29492 and Ellen Goodwin, P.O. Box 102100, Columbia, SC 29221-5000.



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May 29, 2013

The Honorable Jenny Abbott Kitchings
Clerk of the South Carolina Court of Appeals
P. O. Box 11629
Columbia, South Carolina 29211

**Re: Robert Russell, Respondent v. Department of Health and
Environmental Control and the State Accident Fund, Appellant**

Appellate Case No. 2012-211873

Dear Ms. Kitchings:

Enclosed please find the original and six copies of the Return of Respondent Opposing Appellants' Petition for Rehearing along with Respondent's Proof of Service regarding the above-referenced case.

I have provided a copy of the same to Margaret M. Urbanic, Esq., and Ellen Goodwin, Esq., counsels for Appellant. If you have any questions or should need additional information, please do not hesitate to contact me.

Sincerely,



J. David Murrell

JDM/
Enclosures

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