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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

T. Scott Beck; Avery B. Wilkerson, Jr.; Aisha Taylor
Workers' Compensation Commissioners

WCC File No: 1805291
Appellate Case No. 2022-000214

Stara S. McLeod, Employee, Appellant

v.

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

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INITIAL BRIEF OF RESPONDENT

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November 4, 2022

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STATEMENT OF ISSUES ON APPEAL

DID THE COMMISSION ERR IN FINDING THAT APPELLANT HAD FAILED TO MEET HER BURDEN OF PROOF TO ESTABLISH A COMPENSABLE INJURY?

DID THE COMMISSION ERR IN ADJUDICATING CLAIMANT'S COMPENSATION RATE BASED ON THE EVIDENCE SUBMITTED AT THE HEARING?

STATEMENT OF THE CASE

This appeal from a decision and order of the Appellate Panel of the South Carolina Workers Compensation Commission ("Full Commission") arises out of a work-related accident that is alleged to have occurred on March 26, 2018. At the time of the accident, the claimant, Stara McLeod ("Claimant") was employed by CW Group, Inc. ("Employer") as a custodian. Claimant alleges that she sustained a compensable injury by accident to her back when she was emptying a mop bucket and felt a "pop". Employer and its workers compensation insurance carrier, PMA Insurance Group, (collectively, "Respondents"), denied the claim after investigation based on evidence of a pre-existing condition for which Claimant has reported identical symptoms and had sought treatment prior to the alleged date of accident.

A hearing was held before Commissioner Susan S. Barden ("Single Commissioner") on May 26, 2021 for the purpose of, *inter alia*, determining whether Claimant had sustained a compensable injury. The Single Commissioner found that Claimant did not meet her burden of proof to establish a compensable injury and denied the claim. The Single Commissioner further found that Claimant had failed to provide evidence of wage records from a concurrent employer and ruled that the average weekly wage and compensation rate were based solely on the income from Employer. Claimant appealed to the Full Commission and, in an order dated January 20, 2022, the Full Commission affirmed the Single Commission's decision in its entirety. This appeal by Claimant followed.

STANDARD OF REVIEW

"In workers' compensation cases, the Full Commission is the ultimate fact finder. The final determination of witness credibility and the weight to be accorded evidence is reserved to the Full Commission. It is not the task of [the appellate courts] to weigh the evidence as found by the Full Commission. *Shealy v. Aiken Cty.*, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000)(internal citations omitted). A decision of an administrative agency must be affirmed unless that decision is clearly erroneous in view of the reliable, probative and substantial evidence on the record as a whole. S.C. Code Ann. § 1-23-380(5)(Supp. 2012); *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 276 S.E. 2d 304 (1981). "Under the substantial evidence standard, the appellate court may not substitute its judgment for that of the Commission as to the weight of the evidence on questions of fact." *Forrest v. A.S. Price Mech.*, 373 S.C. 303, 306, 644 S.E.2d 784, 785 (Ct. App. 2007).

The findings of the Commission are presumed correct and will be set aside only if unsupported by substantial evidence. *Medlin v. Upstate Plaster Serv.*, 329 S.C. 92, 495 S.E.2d 447 (1998). When factual findings are supported by substantial evidence, "analogous to a jury's findings of fact on disputed issues, the Commission's conclusions must be affirmed." *Hunter v. Patrick Construction Co.*, 289 S.C. 46, 48, 344 S.E. 2d 613, 614 (1986). Where there is a conflict in the evidence, either by different witnesses or in the testimony of the same witness, the findings of fact of the Commission are conclusive. *Tiller v. Nat'l Health Care Ctr.*, 334 S.C. 333, 338, 513 S.E.2d 843, 845 (1999).

STATEMENT OF FACTS

Claimant alleges that she was injured on March 26, 2018 while working as a custodian for Employer and assigned to work at Shaw Air Force Base. At the hearing, Claimant testified that she took a mop bucket into the janitorial space with a floor sink and proceeded to turn the

bucket over to empty it in the sink. (Tr. p. 29, ll. 11 – 24) As she was standing back up, she felt a popping, burning sensation in her back. (Tr. p. 30, ll. 3 – 8) She described feeling an immediate tingling with numbness and pain shooting down her butt area, down into her left leg. (Tr. p. 30, ll. 8 – 15) Claimant testified that she didn't do anything about it at first but continued to work to finish up that building. (Tr. p. 30, ll. 15 – 18) She testified she did mention something to a co-working about her back hurting. (Tr. p. 31, ll. 16 – 19) According to Claimant, this co-worker came over and started massaging her butt area. (Tr. p. 31, ll. 19 – 20) Claimant testified that she called in sick the next Friday. (Tr. p. 34, l. 23 – p. 35, l. 1) The first documented report of the injury to Employer occurred on April 2, 2018. (*See* Claimant's APA, Exhibit B, p. 18).

Claimant testified that, after she reported the incident to Employer, she was told to go see a doctor. (Tr. p. 32, ll. 13 – 17) Claimant testified that she tried to go to Doctors Care about a week after the incident but was informed by the provider that the visit was not authorized by Employer. (Tr. p. 35, ll. 13 – 24) There is no corroborating evidence in the record regarding this occurrence. Claimant testified that she then went to see her personal physician, Dr. Paul D. deHoll, Palmetto Health USC Orthopedic Center, on April 16, 2017. (Tr. p. 34, ll. 16 – 18)

The uncontradicted evidence in the record shows that Claimant had been a patient of Dr. deHoll for several years prior to her alleged work accident and that he performed a left-sided microdiscectomy at L5-S1 on February 1, 2017. (Def. APA, p. 71) The record further shows that Claimant had initially reported substantial improvement in her back pain after the surgery and she was released by Dr. deHoll back to work with restrictions of no lifting. (Def. APA, p. 49) Claimant, however, returned to Dr. deHoll on November 30, 2017. (Def. APA, p. 53) Dr. deHoll notes that Claimant reported that her pain had worsened since her last visit and that she was experiencing intermittent pain radiating into her left leg, as well as minimal numbness and tingling in her toes. (Def. APA, p. 54) Dr. deHoll referred Claimant for physical therapy with consideration of additional injections if her symptoms did not improve. (Def. APA, pp. 47, 55)

Claimant's testimony regarding this office visit was that only returned to Dr. deHoll in November 2017 "as a precaution." (Tr. p. 25, l. 15 – 22) She explained that she had been doing strenuous work for Employer and wanted to make sure she was fine. Claimant testified that she told Dr. deHoll she had some "tightening" in her back. (Tr. p. 26, l. 1 – 6) Claimant testified that she did not remember having the symptoms reported by Dr. deHoll and was not having increased pain. (Tr. p. 48, l. 6 – 25).

Following her alleged date of accident, Claimant returned to Dr. deHoll on April 13, 2017. (Def APA, p. 56) Dr. deHoll notes that Claimant was last seen in November 2017 and that she has been doing physical therapy since that visit. (Def. APA, p. 58) Dr. deHoll ordered a lumbar x-ray that showed loss of disc height at L5-S1. (Def. APA, pp. 58, 60) He ordered additional physical therapy with follow-up after completion. While the note indicates that Claimant had been doing physical therapy since November, Claimant testified that she had only been to one therapy session but she did not go back. (Tr. p. 51, ll. 10 – 18) She testified that she did tell Dr. deHoll that her problems were work related despite the fact that his records do not contain any reference to it. (Tr. p. 53, ll. 1 – 19)

Claimant presented to Palmetto Health Toumey Emergency Room on April 23, 2018 (Def. APA, p. 3) According to the note, Claimant reported emptying a mop bucket "two weeks ago at work", that she felt something "pop," and "now has pain to buttocks, and has numbness to left leg." The note further reflects that Claimant reported her symptoms were similar to previous episodes. (Def. APA, p. 6)

Claimant returned to Palmetto Health USC on April 27, 2018 and was seen by Douglas Dow, PA. (Def. APA, p. 61) Mr. Dow notes that Claimant had continued lower back pain for the past couple of years with a previous surgery in 2017. He also notes that Claimant had attempted physical therapy but her pain increased to the point she was unable to do it. Claimant reported decreased strength in her left leg and that she's been taking NSAIDs since December without

any relief in her pain or symptoms. (Def. APA, p. 62). Mr. Dow ordered an MRI of her lumbar spine. (Def. APA, p. 63) The MRI was performed on May 3, 2018. (Def. APA, p. 34)

On May 3, 2018, Dr. deHoll reviewed Claimant's MRI. He noted that there was minimal bulging and evidence of her prior hemilaminotomy but no recurrent herniation. (Def. APA, p. 69) He did note severe discogenic collapse at L5-S1 with mild modic endplate changes. Dr. deHoll noted a preference to avoid any possible surgery so he recommended a left-sided SI joint injection.

Dr. deHoll was deposed in this matter on August 23, 2018. Dr. deHoll stated that in November 2017, Claimant presented with worse back pain and pain radiating into her left leg. (Def. APA, p. 108) He testified that when Claimant returned to him in April of 2018, she was there for the same complaints. (Def. APA, p. 108). He testified that her symptoms on April 27, 2018 were "basically what she's been complaining about in the last several months." (Def. APA, p. 110) Dr. deHoll testified that he did not recall having any conversation with Claimant about a work injury. (Def. APA, p. 110) He stated that he did not make any diagnosis that was different from any of her prior visits. (*Id.*) He testified that he ordered an MRI in May 2018 in order to rule out a re-herniation at the surgical level and concluded that she had not. (Def. APA, pp. 110-11) Dr. deHoll did testify that there was a degenerative collapse at that level and that it was "not an injury; it's wear and tear." (Def. APA, p. 111). When asked whether Claimant aggravated her prior condition in her alleged work accident, Dr. deHoll responded that he had no history of anything happening at work and that it was never mentioned to him. (Def. APA, p. 119) He further explained that the absence of any such reference was important because he uses a scribe and does not write his own notes. (Def. APA, p. 120) He testified that the first time a work accident was mentioned was during his most recent visit. (Def. APA, p. 121) Dr. deHoll did testify that it is "possible" for someone to aggravate or get hurt while lifting and pouring. (Def.

APA, p. 122) He further testified that since his records reflect no reference to or report of a work injury, there was no way for him to correlate her issues to a work incident. (Def. APA, p. 126)

Claimant has produced an IME report from Dr. Donald Johnson dated August 23, 2018. (Clmt APA, pp. 36-37). Dr. Johnson states that it is his opinion to a reasonable degree of medical certainty that Claimant's current symptoms are causally related to her work injury of March 26, 2018 "by way of an exacerbation of a symptomatic exacerbation of a pre-existing ***asymptomatic*** condition." (Clmt APA, p. 37) (emphasis added).

ARGUMENT

I. THE COMMISSION DID NOT ERR IN FINDING THAT APPELLANT HAD FAILED TO MEET HER BURDEN OF PROOF TO ESTABLISH A COMPENSABLE INJURY.

In any workers compensation case, "[t]he claimant has the burden of proving facts that will bring the injury within the workers' compensation law, and such award must not be based on surmise, conjecture or speculation." *Crisp v. SouthCo. Inc.*, 401 S.C. 627, 641, 738 S.E.2d 835, 842 (2013). With regard to any aggravation of a pre-existing condition, "it is the burden of the claimant to prove 'by a preponderance of the evidence, including medical evidence, that ... the subsequent injury aggravated the preexisting condition or permanent physical impairment; or ... the preexisting condition or the permanent physical impairment aggravates the subsequent injury' in order to be eligible for compensation for that injury." *Frampton v. S.C. Dep't of Nat. Res.*, 432 S.C. 247, 259, 851 S.E.2d 714, 720–21 (Ct. App. 2020)(citing S.C. Code §42-9-35. The Appellate Panel expressly found that Claimant has failed to meet her burden in this case. As this determination is supported by the substantial evidence in the record, that decision should be affirmed in its entirety.

In her brief, Claimant contends that the "records indicate the claimant had done well after her original surgery." (Appellant's Brief, p. 7) In arguing this, Claimant attempts to gloss over the evidence that shows that Claimant had been back to Dr. deHoll several months prior to the

alleged date of accident complaining that her "pain had worsened since her last visit and that she was experiencing intermittent pain radiating into her left leg, as well as minimal numbness and tingling in her toes." (Def. APA, p. 54) At that time, Dr. deHoll ordered physical therapy and discussed possible injections if her symptoms did not return. It was Dr. deHoll's testimony that these were the same symptoms she reported to him in April 2018 and he saw no evidence of any intervening injury. (Def. APA, p. 110). Claimant cites the opinion of Dr. Johnson as evidence of an aggravation of a pre-existing condition. In his report, however, Dr. Johnson concludes that Claimant sustained "an exacerbation of a symptomatic exacerbation of a pre-existing *asymptomatic* condition." (Clmt APA, p. 37) (emphasis added). The Single Commissioner and the Appellate Panel expressly determined not to give this opinion weight on the basis that it was inaccurate. *See* Finding of Fact No. 22. The Commission's finding on this matter is conclusive on appeal as it is based on the Commission's decision regarding what weight to give evidence and testimony. *Forrest*, 373 S.C. at 306, 644 S.E.2d at 785 ("Under the substantial evidence standard, the appellate court may not substitute its judgment for that of the Commission as to the weight of the evidence on questions of fact.").

Claimant further argues that her position is supported by Dr. deHoll's testimony that a subsequent intervening injury "could" aggravate a pre-existing condition. (Appellant's Brief, p. 7) Claimant, however, improperly suggests that his testimony regarding a hypothetical situation about which he had no knowledge, is sufficient to establish the medical causation opinion that she needs in order to meet her burden of proof. The Single Commissioner and the Appellate Panel properly rejected this argument because speculation about what could or might happen does not meet the level of proof required to establish an opinion to a reasonable degree of medical certainty that an injury or aggravation did occur. (*See* Finding of Fact No. 20).

Claimant also takes issue with the decision of the Appellate Panel to point out various inconsistencies in the record. (Appellant's Brief, p. 8) In each case, the Appellate Panel points

out areas in the record where the facts do not corroborate Claimant's version of the events. While Claimant attempts to brush this off by claiming they are not inconsistent or are minor, the fact that the records demonstrate some degree of uncertainty as to what occurred and when is relevant information for the Commission to consider. This is especially true where there is no reliable medical opinion concluding the existence of any compensable injury or exacerbation. In the end, Claimant's essential argument on appeal is the Commission erred in not believing her version of the events regarding the existence of an aggravation of a pre-existing condition. The Appellate Panel expressly weighed the evidence in this case and concluded that it did not. Dr. Johnson's opinion was not given weight because it was clearly inaccurate and unreliable. Dr. deHoll's opinion was given the greatest weight as he was the physician in the best position to evaluate the evidence and he testified that her post-accident symptoms were consistent with those that she reported month prior to her alleged accident. The Appellate Panel's decision to find that the evidence was insufficient for Claimant to meet her burden of proof was based on the substantial evidence in the record and should be affirmed in its entirety.

II. THE COMMISSION DID NOT ERR IN ADJUDICATING CLAIMANT'S COMPENSATION RATE BASED ON THE EVIDENCE SUBMITTED AT THE HEARING.

In order to have wages from two or more employers included in the average weekly wage and compensation rate for any claim, the Commission's regulations require the claimant to produce evidence of those wages. *See* S.C. Code Reg 67-1603(H). Specifically, the regulation provides:

> The claimant may request the additional wages be included as part of his or her average weekly wage. The claimant shall obtain a completed Form 20 from each of the other employers and file the Forms 20 with the Claims Department.

Id. By its terms, whether or not to include the additional wages is a matter of discretion on the part of the claimant ("the claimant *may* request"), but it is mandatory as to how that request is to be made ("The claimant *shall* . . ."). At the time of the underlying hearing, this claim was over

three years old and no Form 20 showing concurrent employment wages was ever filed with the Commission. The issue of the dispute over the compensation rate was properly before the Single Commissioner at the time of the hearing (see Form 58 of each party). At the hearing, Claimant made an oral motion to the Single Commissioner to hold this issue in abeyance but the Single Commissioner exercised her discretion to deny that motion and proceed as to the issues raised in the pleadings. As the decision whether to grant this motion was left to the sound discretion of the hearing Commissioner, this Court should affirm that decision. Furthermore, the determination of the compensation rate of the Single Commissioner and the Appellate Panel was based on the uncontradicted evidence in the record and, therefore, should be affirmed in its entirety.

Claimant contends on appeal that the Commission erred and abused its discretion by failing to hold the issue of the average weekly wage and compensation rate in abeyance. In making this argument, Claimant raises lack of proper notice for the first time. The issue of notice, however, was not raised by Claimant at the original hearing or to the Appellate Panel and is not preserved. *See Robbins v. Walgreens & Broadspire Servs., Inc.*, 375 S.C. 259, 266, 652 S.E.2d 90, 94 (Ct. App. 2007) (an issue not raised to the single commissioner or appellate panel is not appropriate for appellate review); *see also Harbin v. Owens-Corning Fiberglas*, 316 S.C. 423, 428, 450 S.E.2d 112, 115 (Ct. App. 1994) (arguments not raised to the appellate panel or circuit court are not preserved for appeal). The record reflects only that Claimant argued that the issue should be held in abeyance: she did not argue that the issue wasn't properly noticed. (Tr. p. 5, ll. 3 – 7) ("It is the Claimant's position that she is not requesting any temporary benefits at this juncture. So that should be held in abeyance, or that issue should be held in abeyance."). In addition, the issue of the alleged lack of notice was not raised in Claimant's Form 30, *Request for Commission Review*, nor was it argued before the Appellate Panel. *See generally,* Form 30, FC Hearing Transcript. Consequently, the question of proper notice is not preserved on appeal.

While Claimant did request that the issue be held in abeyance, the Single Commissioner and the Appellate Panel exercised their discretion on that matter and found that the claim had been pending more than three years and there was no justification for any further delay "for an issue over which Claimant has had ample time and opportunity to address." Order, Finding of Fact No. 25. Contrary to the assertion of Claimant in her brief, the Pre-Hearing Briefs of both parties made it clear that the issue of the compensation rate was in dispute. *See* Defendants' Form 58 (alleging a compensation rate of $113.28); Claimant's Form 58 (alleging a compensation rate of $194.01). Defendants furthermore specified in the Form 58 that the issue of what benefits Claimant would be entitled to if her claim was found compensable was in controversy. *See* Defendants' Form 58, Line 4. Finally, Claimant herself introduced evidence of her wage records from her employment with CW Group in her APA submissions. *See* Claimant's APA, p. 20-21.

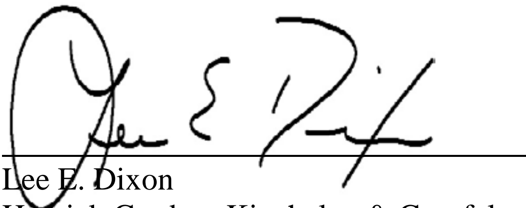
The sole reason provided by Claimant for the failure to produce evidence of her concurrent wages was that she had health problems during the pendency of her claim. Respectfully, while Claimant herself undeniably had some personal health problems for which she had undergone certain treatment, no subpoenas for wage records were ever issued by her attorney and no depositions were ever set of anyone who could have established these wages. Moreover, per the Commission regulations, the proper evidence to be provided in order to establish concurrent wages is a Form 20, *Statement of Wages*, that is prepared by the concurrent employer. *See* S.C. Code Reg 67-1603(H). This is not an issue requiring extensive involvement by Claimant personally and thus her personal health condition does not appear relevant to the timeliness of providing evidence of concurrent wages.

For these reasons, Respondents contend that the Commission did not err in finding this issue ripe for adjudication and declining to hold the matter in abeyance. As the Commission's decision regarding the amount of the compensation rate was based on the uncontradicted

evidence in the record, Respondents respectfully request that this Court affirm the decision of the Commission on this issue.

CONCLUSION.

Based on the foregoing, the decision of the Appellate Panel to deny this claim based on Claimant's failure to satisfy her burden of proof should be affirmed. Furthermore, the Commission was correct in determining Claimant's compensation rate based on the evidence in the record at the time of the properly noticed hearing and should be affirmed. Respondents respectfully content that the Order and Decision of the Commission in this case should be affirmed in its entirety.



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Stara S. McLeod, Employee, Appellant

v.

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

PROOF OF SERVICE

This is to certify that a copy of the foregoing **Respondent's Initial Brief** and **Designation of Matter to be Included in the Record on Appeal** has been served upon the flowing by electronic delivery, addressed as shown below on the 4th day of November, 2022, and by Electronic Mail to the address listed:

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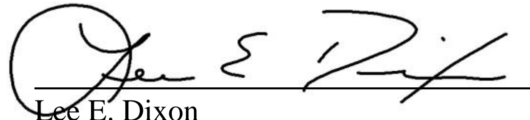

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RE: McLeod, Stara S. v. CW Resources
WCC File No.: 1805291
Appellate Case No.: 2022-000214
Claim No.: W002335075
Our File: 00034L.00106

Dear Ms. Kitchings:

Enclosed please find Respondents' Initial Brief, Designation of Matter and Proof of Service, in connection with the above-referenced matter.

By copy of this letter to the Appellant's attorney, Andrea C. Roche, I am informing her of this contact with your office.

Very truly yours,

Lee E. Dixon

LED/lcs
Enclosures

cc: Andrea C. Roche, Esquire – via email
Dwight C. Moore, Esquire