RECEIVED
Nov 17 2023
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

The Honorable Avery B. Wilkerson, Jr., the Honorable Melody L. James,
and the Honorable R. Michael Campbell, II
Commissioners for the Appellate Panel

Appellate Case Number 2023-001155
SCWCC Number: W.C.C. No. 1914733

William Oliver, Claimant, …….. Respondent,

v.

Syncreon, Employer, and Travelers Insurance Company, Carrier, ……. Appellants.

FINAL BRIEF OF RESPONDENT

Jacob M. Smith, Esquire
SC Bar No.: 100757
Smith & Jones Law, LLC
949 E. Main St., Suite B
Lexington, SC 29072
(803) 996-3333
jsmith@smithandjoneslaw.com
Attorney for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

STATEMENT OF THE CASE

On September 14, 2019, Respondent William Oliver (hereinafter "Oliver") was working as a forklift operator for Appellant Syncreon and sustained an injury to his left shoulder when he was attempting to unload a bin into a trash compactor. (R. p. 607, line 18 – p. 608, line 9). The bin, which should have contained a metal plate to allow dumping without the need to exit the forklift, was missing the metal plate. Id. Due to the missing plate, Oliver was forced to exit the forklift to empty the bin manually. Id. Oliver stepped onto the railing with one foot, while maintaining his other foot on the forklift. Id. As Oliver reached out at shoulder level to release the bin, his foot began to slip off the rail forcing him to grab hold of the forklift and, putting all of his weight onto his left arm, resulted in an injury to his left shoulder. Id. Due to the lateness in the shift, Oliver completed his workday and went home hoping that the pain would subside with ice and Icy Hot cream. (R. p. 608, lines 24-25; R. p. 609, lines 13-15). Unfortunately, Oliver continued to have significant pain the next day and immediately reported the work accident to his plant manager. (R. p. 609, lines 20-25).

Following the accident, Syncreon and its workers' compensation insurance carrier, Travelers Insurance Company (hereinafter cited collectively as "Appellants") initially provided medical treatment. Oliver was sent to Doctors Care, and an MRI of his left shoulder was ordered. (R. pp. 364-366) The MRI revealed a "partial thickness tear on the bursal side of the supraspinatus." (R. pp. 367-368). Oliver was ultimately referred to an orthopaedic specialist, and Appellants selected Dr. William Owens as the authorized treating physician. Dr. Owens evaluated Oliver's left shoulder, reviewed Oliver's preexisting medical records and ultimately opined that Oliver sustained an aggravation of

a preexisting condition due to his work injury and required surgical intervention. (R. p. 380). Appellants subsequently denied the claim.

Throughout discovery, depositions were taken, including of Oliver and Mr. Jimmy Henderson, a supervisor with Syncreon. Those depositions were submitted into the record.

A hearing was held on October 29, 2020, to determine compensability of the claim. Oliver sought benefits under the Act for an injury by accident on September 14, 2019. Oliver maintained he sustained a compensable injury by accident arising out of and in the course of his employment on September 14, 2019. Oliver asserted he was entitled to causally related medical treatment, as well as TTD benefits, pursuant to the Act. (R. .p. 600, line 2 – p. 601, line 8). Appellants set forth their denial on the basis that Oliver committed fraud in the application for employment and should therefore be barred from workers' compensation benefits. (R. p. 601, line 9 – p. 602, line 20). Appellants also argued that if the claim was not barred for fraud in the application, then there was no direct evidence that an injury took place on the day and at the time in question. Id.

At the hearing, testimony was taken from Oliver, Mr. Henderson ("Henderson") and John Krampp ("Krampp").

Oliver testified that he began his employment with Syncreon as a temporary employee before being promoted to a full-time employee. (R. p. 606, line 22 – p. 607, line 13). Oliver worked for Syncreon for nine months prior to his work accident. Id. During his entire time with Syncreon, Oliver worked as a forklift operator. (R. p. 607, lines 14-16). Oliver testified that his primary duty as a forklift operator was sitting and operating the forklift. (R. p. 608, lines 10-12). Regarding his injury, Oliver testified that he sustained a work injury to his left shoulder on September 14, 2019, while attempting to unload a bin

into a trash compactor. (R. p. 609, lines 10-19). Oliver testified that he had no left shoulder problems while working for Syncreon in the nine months prior to his work injury. (R. p. 625, line 24 – p. 626, line 2).

Oliver testified that following his accident, he was told by Syncreon there was a video of the incident and he was called to the plant to review the video. (R. p. 612, line 24 – p. 613, line 2). However, after riding up with his wife to Syncreon's location to review the video, Oliver was told by the Human Resources Department that they saw his accident, and he no longer needed to review the video. (R. p. 498, lines 7-16). Oliver confirmed that the incident occurred between 3am and 4am, as indicated on the accident report. (R. p. 618, lines 18-23).

Krampp testified that he was the Human Resources Manager at Syncreon (R. p. 629, lines 24-25). As part of his duties as the Human Resources Manager, Krampp indicated he was responsible for the investigation of workers' compensation claims at Syncreon. (R. p. 630, lines 1-5). Krampp specifically testified about the video system used at Syncreon. (R. p. 633, line 17 – p. 634, line 2). Krampp testified that when an accident report is completed, video of the time period listed on the accident report should be saved, viewed and maintained by the Human Resources Department. (R. p. 634, lines 10-18). Krampp admitted he never actually reviewed the video from the time period of the accident in this case, but he believed the entire period was reviewed by someone else in his office. (R. p. 637, lines 8-10). On cross-examination, Krampp confirmed that while it was important to capture and maintain the entire time period listed on the accident report, he was unaware the video that had been provided only included a small portion of the time period listed on the accident report. (R. p. 637, lines 11-25). A video clip was listed as

evidence by Appellants but not submitted or reviewed by the Single Commissioner. (R. p. 25).

Henderson, a supervisor at Syncreon, offered testimony regarding a conversation that he allegedly overheard Oliver having with another employee prior to his work accident. (R. p. 644, line 19 – p. 645, line 5). Henderson stated that during the conversation he overheard Oliver complaining about left shoulder pain prior to the start of his shift where he sustained a left shoulder work injury. Id. At the hearing, Henderson testified that at the time he heard the conversation, Oliver and another employee were walking up onto the dock and that they were approximately 12 feet away. Id. Conversely, in his deposition, Henderson indicated that he overheard the conversation while Oliver was talking to three people as Henderson was sitting at his desk. (R. p. 314, lines 3-16). Henderson could not recall any of the names of the person(s) that Oliver was allegedly speaking with that day. (R. p. 645, line 10-11). Henderson confirmed that Oliver never spoke directly to him about his left shoulder bothering him prior to the start of his shift. (R. p. 645, lines 6-7).

Henderson testified that the conversation he overheard did not become relevant until after Oliver made a workers' compensation claim. (R. p. 667, lines 6-9). Henderson testified that he became aware of the work injury Oliver sustained to his left shoulder on or about September 15, 2019, when notice of Oliver's injury was sent out in the Syncreon's system to all the managers. (R. p. 657, lines 1-3). Henderson did not know why **he failed to tell anyone about the conversation he'd overheard for three weeks after he received notice of the work accident.** (R. p. 657, lines 8-11) (Emphasis Added). Henderson admitted that it was not until after he was approached by the "Safety Lady" on October 4, 2019, that he finally reported the conversation he'd overheard. (R. p. 661, lines 3-13).

Henderson testified about the shift when Oliver sustained his work injury. Henderson stated that Oliver was not completing his tasks because he was talking with co-workers. (R. p. 654, line 24 – p. 655, line 18). Later, Henderson testified that Oliver told him directly that he was moving slower because working on the forklift was hurting his left shoulder. (R. p. 655, lines 2-17). Henderson admitted that he failed to complete an incident report about Oliver's left shoulder pain while operating a forklift. (R. p. 655, lines 7-8; R. p. 316, lines 17-18). **Henderson further admitted that no documentation of Oliver's left shoulder pain was ever made prior to his work injury**. (R. p. 653, lines 7-8; R. p. 655, lines 18-23) (Emphasis Added).

Henderson testified that he spoke with a supervisor during the shift in an effort to move Oliver from the receiving department to the dunnage department because he was not unloading trailers fast enough. (R. p. 653, lines 17-21). **Henderson testified at the hearing that he never told the supervisor about Oliver's left shoulder pain.** (R. p. 655, line 24 – p. 656, line 1) (Emphasis Added). **However, in his statement given on October 4, 2019, and during his deposition, Henderson confirmed that he did tell the supervisor about Oliver's left shoulder symptoms and that those symptoms were the reason for the job change.** (R. p. 318, lines 6-15) (Emphasis Added). Henderson admitted that he never told Oliver that he was moving him due to his left shoulder pain. (R. p. 660, line 25 – p. 661, line 2). During the shift, Oliver's position was in fact switched from receiving to dunnage. Interestingly, regarding the physical requirements of those positions, Henderson indicated that being a forklift operator in receiving or dunnage was the same job but in reverse. (R. p. 659, lines 3-7).

Henderson admitted that he never heard Oliver make any complaints of pain in his left shoulder prior to September 14, 2019, the shift the work injury occurred. (R. p. 656, lines 22-25).

Following the hearing on October 29, 2020, the Single Commissioner initially found the claim barred by Fraud in the Application of Employment. (R. p. 62).

However, on appeal, the Full Commission reversed the Single Commissioner as to his findings of Fraud in the Application of Employment and remanded the claim back to the Single Commissioner to review the evidence and to make a determination of compensability of an injury by accident without consideration of the fraud in the application defense. (R. p. 38).

Upon remand and after a complete and thorough review of all of the medical evidence and testimony in this case as well as hearing oral arguments by the parties, the Single Commissioner found that Oliver sustained an injury by accident. (R. pp. 27-28). The Single Commissioner found that the medical evidence in this case was a primary reason for determining causation. (R. p. 26). Notably, the authorized treating physician, Dr. William Owens, indicated that he reviewed all preexisting and post-accident medical records as it pertained to Oliver's left shoulder and opined that Oliver had sustained an aggravation of his left shoulder condition as a result of his job injury on September 14, 2019. (R. p. 27).

The Full Commission unanimously affirmed the Single Commissioner's Decision and Order. (R. p. 14).

Thereafter, Appellants filed their Notice of Appeal with the South Carolina Court of Appeals on July 18, 2023. An amended Notice of Appeal was filed July 19, 2023.

STANDARD OF REVIEW

The Administrative Procedures Act ("APA") governs review of decisions of the South Carolina Workers' Compensation Commission by the Court of Appeals. S.C. Code Ann. § 1-23-380 (Supp. 2006); Lark v. Bi-Lo, Inc., 276 S.C. 130, 136, 276 S.E.2d 304, 307 (1981). Under the APA, the decisions of the South Carolian Workers' Compensation Commission may be reversed, modified, or remanded if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are affected by error of law. S.C. Code Ann. § 1-23-380(A)(6)(d) (Supp. 2010).

Furthermore, decisions of the Workers' Compensation Commission may be reversed, modified or set aside only if unsupported by reliable, probative, or substantial evidence on the whole record. Ellis v. Spartan Mills, 276 S.C. 216, 218, 277 S.E.2d 590, 591 (1981); Lark, supra.; S.C. Code Ann. § 1-23-380(A)(6)(e) (Supp. 2006). "Substantial evidence" necessary to support a decision of the Commission is:

> 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion….It must be enough to justify, if the trial were [sic] to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury…This is something less than the weight of the evidence and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.'

Lark, supra.; *see also* O'Banner v. Westinghouse Electric Corp., 319 S.C. 24, 30, 459 S.E.2d 324, 327 (Ct. App. 1995) (The determination of witness credibility and the weight to be accorded evidence is reserved to the Commission.). The findings of the Commission are presumed correct and will be set aside only if unsupported by substantial evidence.

Etheredge v Mansanto Company, 349 S.C. 451, 562 S.E.2d 679 (Ct. App. 2002); Medlin v. Upstate Plaster Serv., 329 S.C. 92, 495 S.E.2d 447 (1998).

The appellate court's review of the Commission's findings of fact is limited to determining whether the findings are clearly unsupported by substantial evidence in the record, rather than reweighing the evidence presented to the Commission. *See generally*, Lark v. Bi-Lo, Inc., 276 S.C. 130, 135, 276 S.E.2d 304, 306-7 (1981); Howell v. Pacific Columbia Mills, 291 S.C. 469, 471, 354 S.E.2d 384, 385 (1987); Brown v. Jordan Oil Co., 291 S.C. 272, 275, 353 S.E.2d 280, 282 (1987); O'Banner v. Westinghouse Elec. .Corp., 319 S.C. 24, 30, 459 S.E.2d 324, 327 (Ct. App. 1995). Thus, if reasonable minds could reach the conclusion reached by the Commission, the Commission's findings must be affirmed. McGuffin v. Schlumberger-Sangamo, 307 S.C. 18, 414 S.E.2d 162, 163 (1992).

Of special note is that where the evidence is conflicting, "the Commission's findings of fact are conclusive. Sharp v. Case Produce, Inc., 336 S.C. 154, 160, 519 S.E.2d 102, 105 (1999); *See also*, Hoxit v. Michelin Tire Corp., 304 S.C. 461, 405 S.E.2d 407 (1991) ("Where there is a conflict in the evidence either of different witnesses or of the same witnesses, the findings of fact of the Commission as triers of fact are conclusive."). Indeed, the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence. Tiller v. National Health Care Ctr., 34 S.C. 333, 513 S.E.2d 843 (1999); Clade v. Champion Laboratories, 330 S.C. 8, 496 S.E.2d 856 (1998).

ARGUMENT

I.

SUBSTANTIAL EVIDENCE SUPPORTS THE COMMISSION'S FINDING THAT OLIVER SUSTAINED A COMPENSABLE INJURY BY ACCIDENT

In deciding whether a work-related injury is compensable, the Workers' Compensation Act is liberally construed toward the end of providing coverage rather than noncoverage in order to further the beneficial purposes for which it was designed, and any reasonable doubt as to the construction of the Act will be resolved in favor of coverage. Shealy v. Aiken County, 341 S.C. 48, 535 S.E.2d 438 (S.C. 2000). To sustain an award under the Act, an accident must arise out of and in the course of employment. Nicholson v. South Carolina Dept. of Social Services, 405 S.C. 537, 748 S.E.2d 256 (Ct. App. 2013). Workers' compensation claimants who have permanent physical impairment or preexisting conditions 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, 737 S.E.2d 200 (Ct. App. 2012). The Workers' Compensation Act provides, in part:

> (A) The employee shall establish by a preponderance of the evidence, **including medical evidence**, that:
> (1) The subsequent injury aggravated the preexisting condition or permanent physical impairment.

S.C. Code § 42-9-35 (Supp. 2010). (Emphasis Added).

Oliver worked for Syncreon for nine months prior to his work injury, and during that time, he earned a full-time position with Syncreon. He sustained an injury on September 14, 2019, when he was attempting to manually empty a bin from his forklift and

sustained an injury to his left shoulder. (R. p. 608, line 18 – p. 609, line 9). Oliver's description of his accident has remained wholly consistent since sustaining his injury. (R. p. 443).

Following his injury, Appellants initially provided authorized medical treatment. An MRI was performed for Oliver's left shoulder on September 27, 2019, and revealed a tear on the bursal side of the supraspinatus. (R. pp. 367-368).

Appellants scheduled follow up orthopedic treatment with Dr. William Owens. (R pp. 369-370). **Notably, Dr. Owens's opinion is the *only* medical opinion in the record.** Prior to giving his opinion, Dr. Owens was presented with and reviewed all of the preexisting records from Dr. Fulton, who treated Oliver's admitted preexisting left shoulder condition. (R. p. 372). **After reviewing the preexisting records and evaluating the new MRI and new EMG, Dr. Owens determined that Oliver's work injury aggravated his preexisting condition.** (R. p. 380) (Emphasis Added). Following Dr. Owens recommendation for surgery, Appellants denied the claim.

Appellants argue that the Commission "is not **required** to yield to a medical professional" in determining whether an accident occurred. (Appellant's Brief, p. 19). While Oliver agrees—the Commission is not required to yield to a medical professional, the Commission, as the ultimate finder of fact, determines the weight to be accorded to the evidence. *See* Lark v. Bi-Lo, Inc., 276 S.C. 130, 136, 276 S.E.2d 304, 307 (1981). In this case, the Commission gave greater weight to the opinion of the authorized treating physician that Claimant had sustained a new injury to his left shoulder that was ultimately caused by his work accident. Appellants argue that the only thing that could have allowed Dr. Owens to arrive at this opinion is the testimony of the Claimant. In fact, Appellants

ignore the expertise of the doctor in dealing with injuries of this nature, and the reason he was selected as the authorized treating physician. However, Appellants ignore Dr. Owens' past experiences in treating these types of injuries and his expertise in dealing with injuries of this nature, which is presumably the reason Appellants selected him as the authorized treating physician. Appellants further ignore the mechanism of injury being consistent with the MRI, the doctor's review of the preexisting medical records as it correlates to the new injury, and the doctor's own perceptions of Oliver's credibility. Appellants claim that Dr. Owens arrived at his opinion solely due to Oliver's testimony is based on pure speculation. Dr. Owens's deposition was never taken. However, his opinion, and the only medical evidence in this case, clearly states that Oliver sustained a work-related aggravation of a preexisting condition. The Commission, in its discretion, chose to give greater weight to that opinion in finding that Oliver sustained a compensable work injury.

Furthermore, while Appellants correctly state that the accident itself was unwitnessed, Syncreon had video surveillance all throughout the plant. (R. p. 633, line 17 – p. 634, line 2). In fact, Appellants listed video evidence in their APAs, but this video was never submitted, nor reviewed by the Single Commissioner. (R. p. 25). However, Krampp and Oliver testified about the missing video evidence. Krampp testified that the video in question portrayed the incident location of where Oliver sustained injuries. (R. p. 637, lines 8-10). Krampp testified that the video for the time period listed on the accident report should have been reviewed by someone in his department, but he admitted that he never actually reviewed the video. Id. Krampp acknowledged that it would be important to maintain video of the entire period listed on the accident report for when an injury occurred. (R. p. 637, lines 11-22). Krampp admitted that Syncreon failed to save video of the time

period listed on the accident report. (R. p. 637, lines 23-25). **The Appellants failure to properly collect and produce the complete video in this case resulted in the spoliation of the evidence that would have been used to help prove Oliver's case. The failure to maintain this evidence is especially concerning when considering that following the injury, Syncreon contacted Oliver to review the video, invited Oliver to the plant to review the video and then informed Oliver that he did not need to review the video because they were able to witness the accident**. (R. p. 233, lines 7-16) (Emphasis Added). **This testimony is uncontested.** It is extremely self-serving for Appellants to say Oliver's accident is unwitnessed when Appellants failed to follow their own procedure that would have maintained evidence documenting Oliver's accident.

Following a thorough review, the Commission correctly concluded that Oliver sustained an injury by accident. Oliver has remained consistent with his testimony regarding his injury in his original statement, his deposition testimony and his hearing testimony. He detailed on multiple occasions the timing, the occurrence itself and his follow up actions and has never departed from his original statement of how the accident occurred. That said, the Commission, found that Oliver's testimony alone was not determinative as to causation. (R. p. 25). The Commission also found that the testimony of Appellants' witnesses was not determinative as to causation due to the numerous inconsistencies in that testimony. Id. The Commission, in their discretion, chose to give greater weight to the authorized treating physician's opinion that, after his review of Oliver's prior medical records, a new, work-related aggravation of a preexisting condition had occurred to Oliver's left shoulder. Id.

For all the above reasons, it is abundantly clear that there is substantial evidence in the record to support the Commission's unanimous decision that Oliver sustained a compensable work accident.

II.

APPELLANTS' ARGUMENT THAT LANDRY, CAPERS AND HAVIRD BARS COMPENSABILITY IS AN INCORRECT APPLICATION OF THE LAW.

S.C. Code § 42-1-160 of the South Carolina Workers' Compensation Act states that a claimant is entitled to benefits for an "injury by accident arising out of and in the course of employment." S.C. Code Ann. § 42-1-160 (Supp. 2010). It has long been held that the word "accident" is an unlooked for and untoward event which is not expected or designed by the person who suffered the injury. Radcliffe v. Southern Aviation School, 209 S.C. 411, 40 S.E.2d 626 (1946); Yates v. Life Ins. Co. of Georgia, 291 S.C. 301, 353 S.E.2d 297 (Ct. App. 1987). "[I]n determining whether something constitutes an injury by accident the focus is not on some specific event, but rather on the injury itself." Pee v. AVM, Inc., 352 S.C. 167, 171, 573 S.E.2d 785, 787 (2002). "[A]n injury is unexpected, bringing it within the category of accident, if the worker did not intend it or expect it would result from what he was doing." Landry v. Carolinas Healthcare Systems, 396 S.C. 149, 719 S.E.2d 288, (Ct. App. 2011). "Therefore, if an injury is unexpected from the worker's point of view, it qualifies as an injury by accident." Id.

The Courts in Capers, Havird and Landry found that the claimants in those cases had longstanding issues and were specifically aware that the re-exposure to chemicals (Capers) or ongoing repetitive standing (Havird and Landry) would result in an injury. Capers v. .Flautt, 305 SC. 254, 407 S.E.2d 660 (Ct. App. 1991); Havird v. Columbia

YMCA, 30 S.C. 397, 418 S.E.2d 329 (Ct. App. 1992); Landry, supra. This claim is different, in that it involves a specific, unexpected event. Oliver was operating a forklift to dump a container into a trash bin. A process he had previously completed several times without issue throughout his nine-month employment. On this day, the metal plate that would automatically dump the container was broken, which necessitated Oliver to step out of his forklift and reach out to manually pull a lever to unload the container. At that time, Oliver's foot slipped, causing his weight to shift onto his left arm, resulting in injuries. (R. p. 607, line 18 – p. 608, line 9). Nothing about Oliver's accident/injury was a planned or expected event, as there is no way Oliver could have expected the sequence of events or the injury that followed.

For the foregoing reasons, Oliver's injury plainly falls into the definition of an injury by accident and the Commission correctly found as such.

CONCLUSION

Oliver respectfully requests that the Court of Appeals affirm the Commission's Order finding that Oliver suffered a compensable work-related left shoulder injury on September 14, 2019, that he is entitled to medical treatment as recommended by Dr. Owens and that he is entitled to past and ongoing temporary total disability benefits.

Respectfully submitted,

s/Jacob M. Smith
Jacob M. Smith, Esquire
SMITH & JONES LAW, LLC
949 E. Main Street
Post Office Box 2145
Lexington, S.C. 29071-2145
(803) 996-3333 - Office

(803) 746-7780 - Facsimile
jsmith@smithandjoneslaw.com
Attorney for Appellant

November 14, 2023

RECEIVED
Nov 17 2023
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

The Honorable Avery B. Wilkerson, Jr., the Honorable Melody L. James,
and the Honorable R. Michael Campbell, II
Commissioners for the Appellate Panel

Appellate Case Number 2023-001155
SCWCC Number: W.C.C. No. 1914733

William Oliver, Employee, …….. Respondent,

v.

Syncreon, Employer, and Travelers Insurance Company, Carrier, ……. Appellants.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR.

Respectfully submitted,

s/Jacob M. Smith
Jacob M. Smith, Esquire
SMITH & JONES LAW, LLC
949 E. Main Street
Post Office Box 2145
Lexington, S.C. 29071-2145
(803) 996-3333 - Office
(803) 746-7780 - Facsimile
jsmith@smithandjoneslaw.com
Attorney for Appellant

November 14, 2023