In The Court of Appeals

APPEAL FROM RICHLANDCOUNTY
Court of Common Pleas

Casey Manning, Circuit Court Judge

Case No. 2008-CP-400-2813

Linda Burris, Employee .....Appellant,

v.

Lexington/Richland School District 5, Employer,
And South Carolina School Board Insurance Trust, Carrier.....Respondents

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FINAL REPLY BRIEF

August 06, 2013

E. Ros Huff, Jr., Esquire # 2767
Shelby H. Kellahan, Esquire #74731
HUFF LAW FIRM, LLC
Post Office Box 1935
7244 Woodrow Street
Irmo, South Carolina29063
(803) 252-2232
Attorney for Appellant

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QUESTION PRESENTED

Did the court err in denying the Claimant benefits under the act, and thereby affirming and adopting the Order of the Commission, the error being the decision is not supported by substantial evidence which shows that the claimant's injuries were the result of repetitive job duties which either caused or aggravated the claimant's condition, and is an error of law?

ARGUMENT

1. The court erred in denying the Claimant benefits under the act, and thereby affirming and adopting the Order of the Commission, the error being the decision is not supported by substantial evidence which shows that the claimant's injuries were the result of repetitive job duties which either caused or aggravated her condition, and is an error of law.

The substantial evidence, including the medical evidence supports a finding of compensability of this claim. The Respondent states in his brief that *"the medical records and Claimant's testimony clearly establish the factual finding that Claimant's condition existed before her return to work in August 2001."* However, Ms. Burris was unaware that she had any back condition, specifically, spondylolisthesis, until such was revealed by an MRI performed on February 15, 2002. Respondent has not pointed to any medical evidence in the record which refers to this as a condition "that long pre-existed the alleged date of accident in 2001." Even if the specific condition of spondylolisthesis did "long pre-exist" August of 2001, it was asymptomatic and not in any way disabling.

The Respondent takes the terms "back condition" and "degenerative spondylolisthesis" and uses them interchangeably, as does the Commissioner. They are not the same thing. Assuming that Mrs. Burris' spondylolisthesis pre-existed the time when she first reported an injury and back pain to her employer in August of 2001 (Respondent does not challenge the fact that Mrs. Burris did report a back injury then to her employer), whatever it was she was experiencing, it was most certainly <u>not</u> her "long standing" and dormant (asymptomatic) degenerative spondylolisthesis. Something caused that condition to become symptomatic and it was therefore <u>not the same condition that pre-existed the injury.</u> Due to the repetitive trauma of Mrs. Burris work, which was

particularly intense at the start of the new school year, she began to experience low back pain and radiculopathy down into her leg. This was something entirely new to her, she did not know what it was, only that it would not stop and continued to worsen until:

"*. . . I had gotten to where I couldn't walk. The pain was so bad I was just - - - I just didn't feel like I could go on without some sort of treatment. So they had me in treatment really from about February to June or July and I got better.*" (R. p. 65, L.13-17)

She was referring to August of 2001 through July of 2002. Over the summer break she improved and returned to work in August of 2002. About that she testified:

"*. . . I started back to school in August and I hadn't been there two days. Probably just one day. Because like I say, we had to do a lot of stooping and the bending and the twisting and the cutting and the laminating and all of that. I was on my feet nonstop except for a lunch break until like about 7:00 o'clock at night those first few days of school. And so the pain started shooting down the other leg. So I went back to Dr. Sanford and they started me on treatment again. And I was in there close to a year with therapy.*" (R. p. 65, L.18-25, R. p. 66, L. 1-3).

Mrs. Burris continued to work during the 2002-2003 school year, but with great difficulty due to her ongoing pain. Finally, by the end of May 2003, Mrs. Burris was forced to admit that she could not continue. (R. p. 66, L.6-11).

Even if it were true that her pre-existing underlying condition (degenerative spondylolisthesis) did not result from her work or a work-related accident, there can be no question based upon the medical evidence and the events to which she testified, that the repetitive trauma of her work did cause a 'new' condition to develop which resulted

in painful radiculopathy and compression of the exiting L5 nerve roots. The fact that she was asymptomatic before August of 2001 proves this.

Respondent argues that "The Claimant never presents medical evidence showing a worsened spondylolisthesis condition. . .." The Claimant did, however, show that her condition had changed from an essentially asymptomatic and stable spinal condition to one of traumatically induced *"Lumbar instability at L5-S1, with both mechanical back pain and L5 radicular symptoms."* (R. p. 102-103). Also see the last sentence of Dr. Levinson's report of November 20, 2002: *" . . . as a result of the findings of her MRI scan dated February 15, 2002, that she has an extreme amount of problems in her lower back relating into the instability with associated disk bulging with the compression at the exiting L5 nerve root."* (R. p. 183). This constitutes an injury by accident under our law. The condition revealed by the MRI and described by two separate medical doctors, not chiropractors, was clearly not a result expected by Mrs. Burris, to arise from her work duties.

Respondent's state that Mrs. Burris engages in "rigorous recreational activity such as walking between two and three miles several times a week" and "participates in line dancing classes multiple times per week." As Mrs. Burris testified several times, she exercises to stay active on the advice of her therapist, Dr. Rick Sanford and therapists at the Moore Clinic. She testified that she had been advised by Dr. Sanford, that *"if I don't keep moving, I'll get to where I can't move. And that's why I keep trying to keep active a little bit."* (R. p. 69 L. 25, R. p. 70 L. 1,2). Furthermore, she said "*Stay active and have a maintenance program will keep that off the sciatic nerve."* (R. p. 83 L. 5, 6). She has stated more than once in the record that she has been helped by therapy. (R. p. 66, L. 14-

20). In fact, the therapy and home exercise regimen engaged in over the years by Mrs. Burris have allowed her to avoid surgery and give her a semblance of a normal life *as long as she does not have to engage in the difficult and strenuous tasks of her former work.* (R. p. 69, L. 7-15) (R. p. 238).

Respondent argues in their brief that "*The claimant's condition in the present case did not permanently worsen as a result of her work-related activities.*" This assertion is manifestly incorrect. The record is replete with evidence, both lay and expert that Mrs. Burris' life forever changed as a result of her work activities, from that of an active, professional career woman to that of one who suffers at night with pain shooting through her back, has trouble getting up and walking, (R. p. 71, L. 1-8); is limited to an hour on concrete floors, can't grocery shop for long without having to come home, (R. p. 73, L. 5-12); other restrictions (R. p. 75, L. 11-21); wears a prescribed back brace for housework (R. p. 76, L. 9-17), tries to walk with her husband and does line dancing classes at the recreation center as therapy to try and maintain the integrity and strength of her back.

Respondent argues that Mrs. Burris could not be hurt too much as she has not continued to go to the doctor for treatment of her back on a regular basis. It is true, Mrs. Burris could have visited a doctor every so often to be told again that she should continue with her exercise regimen or undergo surgery. She did, in fact, continue throughout the years to engage in home exercise therapy, also had therapy at the Moore Clinic. (R. p. 71, L 9-17). She was still afraid she may need surgery, even today. She has thus far avoided surgery, nevertheless she observed: *"but that [surgery] is probably down the road." (R. p. 67 L. 25; R. p. 68 L. 1).*

For the Respondent to infer that the Claimant is not hurt because she doesn't go to the doctor often enough, after having denied the claim and refused to pay any medical expenses, is having your proverbial cake and eating it too. (Resp. brief, p. 3). They have left Mrs. Burris to fend for herself, which she did as well as she could without surgery and without running up huge hospital and doctor bills. She should be commended rather than denied relief by the employer.

The employer further argues, because she didn't push around a 1,500 lb. "big boy" bed, her injury is denied in that it *"would not meet the White threshold."* (Resp. brief, p. 3) (See White v. Medical University of South Carolina, 355 SC 560, 586 S.E.2d 157 (Ct. App. 2003). I am not certain what the "White threshold" is, but if Respondent is saying that there is now a 1,500 lb. weight requirement on pushing, lifting, etc., before an injury by accident can occur, I must take strong issue with that proposition. There is no "White threshold" in our law. The distinction drawn by the Commissioner's Order between the facts in the White case and Mrs. Burris' case, i.e., *"in that no specific exposure or repeated activity exists in this case"*, is simply both an incorrect statement of the law and the facts. The record contains numerous details of her exposure to repeated strenuous activities in her work. There being no "big boy bed" at the H.E. Corley Elementary School, Mrs. Burris could not meet the 'White threshold", argues the Respondent. The absurdity of that statement needs no further elucidation.

CONCLUSION

The Claimant has proven an injury by accident through repetitive trauma. She has carried her burden of proof and should be awarded proper and lawful benefits including medical costs, medical travel, temporary total disability from the identified date of accident to the present and continuing, and total and permanent disability under 42-1-10 or partial disability under 42-1-20 based upon her incapacity to earn the wages she was earning at the time of the injury; or in the alternative, under 42-1-30 an award based upon a percentage of loss of use of the back.

Respectfully Submitted,

E. Ros Huff, Jr. Esquire #2767
Shelby H. Kellahan, Esquire #74731
HUFF LAW FIRM, LLC
Post Office Box 1935
7244 Woodrow Street
Irmo, South Carolina29063
(803) 252-2232
Attorney for Appellant

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Certificate of Counsel

In compliance with Rule 211(b), the Final Reply Brief is identical to the Briefs previously served except for references to the Record and correction of minor typographical errors and misspellings.

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E. Ros Huff, Jr. #2767
Shelby H. Kellahan #74731
HUFF LAW FIRM, LLC.
Post Office Box 1935
Irmo, South Carolina 29063
(803) 252-2232

Attorneys for Linda Burriss

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PROOF OF SERVICE

I certify that I have served the Final Reply Brief on Lexington/Richland School District 5 and South Carolina Board Insurance Trust by depositing a copy of the same in the United States Mail, postage prepaid, on _____, addressed to their attorney of record,Ernest Lawhorne, Ellis, Lawhorne& Sims, P.A., 1501 Main Street, Suite 500, PO Box 2285, Columbia, SC 29202.

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E. Ros Huff, Jr., Esquire # 2767
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HUFF LAW FIRM, LLC
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