THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM THE WORKERS' COMPENSATION COMMISSION

WCC FILE NO.: 0914812

Oscar Hickman,

Appellant

vs.

City of Myrtle Beach, Self-Insured

and

Companion Property and Casualty Group, Third Party Administrators,

Respondents

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

Hickman asserted a change of condition for the worse before the South Carolina Workers' Compensation Commission (Commission) pursuant to SC Code Ann. § 42-17-90 and requested an Order requiring carrier to provide additional compensation and medical treatment for his back. The Commission affirmed the hearing commissioner's denial of the change of condition request and Hickman appeals. For the reasons stated herein, this Court should affirm the Commission.

FACTS

This is an admitted back injury case which was originally heard by the Honorable Avery B. Wilkerson on employer's Form 21 on May 12, 2011 in Myrtle Beach, South Carolina. He issued his Order on July 21, 2011 finding claimant reached maximum medical improvement on June 30, 2010 and was rated by Dr. Bauerle at 5% whole person. (ROA at 21-26) Dr. Bauerle's Form 14B dated August 11, 2010, indicated claimant would not need further medical care. (ROA at 67) Hickman was awarded 7.5% disability to the spine but no medical treatment pursuant to Dodge v. Bruccoli, Clark, Laymen, Inc., 334 S.C. 574, 514 S.E.2d 593 (Ct. App.

1999). There was no appeal from that Order. The Employer paid the award in a lump sum on October 11, 2011.

The events leading up to the hearing before Commissioner Wilkerson are well summarized in his Order. Claimant injured his back on September 9, 2009 and was treated by Dr. Bauerle. (ROA at 6-10 and 173-174) An MRI was performed on October 20, 2009, and showed degenerative changes in claimant's lumbar spine which were most severe at L4-5 and L5-S1. Claimant also underwent physical therapy (ROA at 125-144) and epidural steroid injections. (ROA at 123-124)

In mid January, 2010, claimant was diagnosed with colon cancer which was unrelated to his back injury. The day after his diagnosis, he had a scheduled appointment with Dr. Bauerle who told claimant he could either live with the back and leg pain or consider surgery. Hickman disclosed he had to undergo treatment for the cancer, so he was not interested in back surgery. (ROA at 65)

Because of the cancer, claimant applied for and received disability retirement. (ROA at 145-166) His wife, a registered nurse, took a job in California and they moved to the west coast. Claimant received his cancer treatment while in California. He returned to South Carolina in June 2010 to see Dr. Bauerle and underwent a Functional Capacity Evaluation (FCE). (ROA at 69-78) Dr. Bauerle reviewed it on June 30, 2010, declared claimant at MMI and rated him at 5% whole person. (ROA at 66) Dr. Bauerle also indicated claimant was able to return to work without restrictions and would not need further medical care for the back. (ROA at 67)

Employer filed a Form 21 requesting a hearing to end temporary benefits and determine permanency. Claimant continued his cancer treatment in California and, by the time a hearing was scheduled on May 12, 2011, had completed his cancer treatment. Dr. Shah, claimant's

oncologist, wrote a letter on May 9, 2011, advising the cancer was no longer a detriment to back surgery. (ROA at 79)

At the hearing on employer's Form 21, Hickman asserted he wanted the surgery, but Dr. Bauerle had submitted a Form 14B indicating claimant was at MMI and did not need any further medical treatment. Commissioner Wilkerson issued his Order on July 21, 2011, finding claimant reached MMI on June 30, 2011, and awarding 7.5% to the back. Hickman did not appeal that order.

Claimant filed a Form 50 on January 12, 2012, asserting a change of condition. Attached thereto was a letter from Dr. Bauerle dated November 28, 2011, in which he opined that there was "objective evidence" that claimant's condition had progressively worsened. (ROA at 87) Employer responded with a Form 51 denying any change of condition.

Dr. Bauerle was deposed on March 16, 2012, and the deposition was introduced by both parties. (ROA at 30-31) Dr. Bauerle testified that he had been claimant's treating physician and that he had found him to be at maximum medical improvement on June 30, 2010. The FCE put claimant at 5% whole person impairment. (ROA at 91, line 22 to 92, line 3) Dr. Bauerle saw claimant again on October 3, 2011 for complaints of continuing back and leg pain. Dr. Bauerle told Hickman another MIR would have to be done to determine if surgery could help. Claimant had had another MRI performed in California on August 17, 2011, but did not have it for Dr. Bauerle to review at that time. Hickman returned to Dr. Bauerle on November 16, 2011, with the MRI report and pictures, but when Dr. Bauerle compared the pictures to the previous MRI done in 2009, he testified under oath he did not see "any significant change in the two [MRIs]." (ROA at 94, lines 8-19) When asked about his letter of November 28, 2011 in which he opined Claimant had a physical change of condition for the worse, he said that opinion was based on

claimant's subjective complaints of pain, not diagnostic studies. (ROA at 94, line 8 to 95, line 14) Based on the objective evidence before him, Dr. Bauerle could not opine, to a reasonable degree of medical certainty, claimant exhibited a physical change of condition. (*Id.*)

Claimant was the only witness to testify at the change of condition hearing. He testified that he worked for the City of Myrtle Beach for 20 years and had been in the military for 10 years. His oncologist in California was Dr. Mukund Shah. Dr. Shah wrote a letter on May 9, 2011 stating that claimant was "cleared" for further treatment and care of his ongoing back therapy. This included surgery. Claimant testified he was still experiencing back and leg pain and now wanted the back surgery.

ARGUMENTS

I. CLAIMANT HAS THE BURDEN OF PROVING A PHYSICAL CHANGE OF CONDITION FOR THE WORSE AND, IN THIS CASE, DID NOT MEET THAT BURDEN.

"Change of condition" is governed by S.C. Code Ann. § 42-17-90. That code section provides in part that a party in interest may file a motion on the ground of a change of condition and receive additional benefits if the claimant can prove by a preponderance of the evidence that there has been a change of condition for the worse caused by the original injury. The motion must be made within 12 months from the date of the last payment of compensation pursuant to an award provided by the Act.

Our Courts have interpreted "change of condition" to mean a physical change of condition as a result of the original injury. Causby v. Rock Hill Printing & Finishing, Co., 249 S.C. 225, 153 S.E.2d 697 (1967); Cromer v. Newberry Cotton Mills, 201 S.C. 349, 23 S.E.2d 19 (1942). Proof of a change of condition requires more than mere subjective complaints of pain. Robbins v. Walgreen's and Broadspire Services, Inc., 375 S.C. 259, 652 S.E.2d 90 (S.C. App.

2007). In his letter of November 28, 2011, Dr. Bauerle originally opined there was "objective evidence that [Hickman's] condition had progressively worsened." However, in his deposition, he admitted that opinion was based on claimant's subjective complaints of pain, not objective evidence of physical change. (ROA at 94, line 8 to 95, line 14) When he compared the 2009 MRI with the copies of the 2011 MRI, Dr. Baurele did not see any significant change. (ROA at 94, lines 8-19) He could not opine to a reasonable degree of medical certainty claimant had a physical change of condition for the worse. (ROA at 95, lines 1-14)

Claimant makes the argument that, because he was diagnosed with cancer and Dr. Bauerle would not operate until that problem was resolved, claimant should be provided back surgery now that his cancer is in remission. A review of the record belies this argument. The date of accident was September 9, 2009. Claimant was diagnosed with cancer in January 2010 after which he discussed back surgery with Dr. Bauerle. Dr. Bauerle explained claimant could have back surgery or live with the pain. (ROA at 65) Dr. Bauerle's notes indicated Hickman was not interested in back surgery and added he had been diagnosed with cancer, so back surgery was not pursued. (*Id.*) Claimant, who then lived in California, returned to South Carolina in June, 2010, underwent a FCE, and was pronounced at maximum medical improvement (MMI) and rated by Dr. Baurele. Employer filed a Form 21 seeking a determination of permanency and the hearing was set for May 12, 2011. Dr. Shad's letter clearing Hickman for back surgery is dated May 9, 2011. (ROA at 79)

Carrier paid the award on October 11, 2011, as reflected in the Form 19. As of that day, claimant's cancer was in remission and the Commission had determined his disability. There has been no showing of a physical change of condition since that date. S.C. Code Ann. Section 42-17-90 specifically requires there be a "change of condition caused by the original injury, after the

last payment of compensation." Claimant's argument that the improvement in the cancer should be the basis of change in condition is misplaced. The cancer was not part of the original injury and no change of condition has been shown to the original injury,

II. THE COMMISSION PROPERLY APPLIED THE WORKERS' COMPENSATION ACT.

Claimant argues that the hearing commissioner erred by not liberally construing the Act. On the contrary, the hearing commissioner applied the Act exactly as the legislature intended.

The basic rule on statutory interpretation is legislative intent. Roper Hospital v. Clemons, 326 S.C. 534, 484 S.E.2d 598 (Ct. App. 1997). As claimant points out, our Supreme Court has recognized the Act is social legislation and remedial in nature. But the Courts also hold that, while the Act has given liberal construction, it cannot be construed so as to do violence to a specific requirement of the Act. Teigue v. Appleton Co., 221 S.C. 52, 68 S.E.2d 878 (1952). Where the Act is clear and unambiguous in its terms, it must be strictly applied. Transportation Ins. Co. and Flagstar Corp. v. S.C. Second Injury Fund, 389 S.C. 422, 699 S.E.2d 687 (2010). The meaning of §42-17-90 is not ambiguous or unclear.[1] It requires proof of a change of condition "by a preponderance of the evidence" and no less.

Hickman is asking this Court to liberally construe "preponderance of the evidence" to mean something less than the greater weight, clear and convincing, or that conclusion that reasonable minds can reach. Rather than liberally construing the law, claimant asks the Court to liberally construe the facts. This is not what is meant when the Courts say the Act should be

[1] S.C. Code §42-17-90 (A) reads as follows: On its own motion or on the application of a party in interest on the ground of a change in condition, the commission may review an award and on that review may make and award ending, diminishing, or increasing the compensation previously awarded, on proof by a preponderance of the evidence that there has been a change of condition caused by the original injury, after the last payment of compensation. An award is subject toe maximum or minimum provided in this title, and the commission immediately shall send to the parties a copy of the order changing the award. The review does not affect the award as regards any monies paid and the review must not be made after twelve months from the date of the last payment of t compensation pursuant to an award provided by this title.

liberally construed in favor of claimant. The principle of liberal construction applies to the law, not the facts.

Hickman's burden in this case is to prove by a preponderance of the evidence that he has a physical change of condition for the worse. In reviewing the evidence, it is clear he does not. His appeal rests upon the testimony of Dr. Bauerle who stated in his deposition that, given his examination of the MRI obtained in 2010 at Strand Orthopaedic Consultants and the MRI performed in California in 2011, he could not say to a reasonable degree of medical certainty that claimant's condition had progressed significantly. (ROA at 94, lines 8-19) In response to questions from claimant's counsel, Dr. Bauerle acknowledged his reference to "objective evidence" of a change of condition referred only to claimant's subjective complaints. Subjective complaints of pain are insufficient to support an award for a change of condition. See Robbins, supra.

III. THE COMMISSION PROPERLY FOUND CLAIMANT HAD NO CHANGE OF CONDITION.

Claimant's argument for change of condition is unique. He argues that his unrelated cancerous condition is better, therefore his back is worse. As noted previously, the factual determination of whether a change of condition occurred is the province of the Workers Compensation Commission, and their findings cannot be altered if they are supported by substantial evidence. Clark v. Aiken County Government, 336 S.C. 102, 620 S.E.2d 99 (Ct. App. 2005). In the case subjurice, two facts demonstrate the flaws of Claimant's argument.

A. The oncologist had already released Hickman to have back surgery before Commissioner Wilkerson issued his Order in July 2011.

Dr. Shah, an oncologist in California, wrote his letter on May 9, 2011 indicating Claimant was cleared to have back surgery. The hearing before Commissioner Wilkerson was on May 12, 2011, and Commissioner Wilkerson's Order was dated July 21, 2011. There was no appeal. The carrier paid the Order on October 11, 2011.

B. Dr. Bauerle, the orthopaedic surgeon who was treating Hickman's back in South Carolina, rated him at 5% to the back and indicated on the Form 14B that Hickman did not need any further medical care.

At the time Commissioner Wilkerson issued his Decision and Order, Dr. Bauerle's Form 14B was in evidence. In it, Dr. Baurele opined claimant did not need any additional medical treatment. There was no evidence in the record upon which to base a finding claimant's impairment would improve with surgery. Likewise, there is no such evidence now.

Hickman asserts he is entitled the surgery because, at the time it was discussed, he had been diagnosed with cancer. It is unfortunate Claimant's diagnosis occurred while he was being treated for his back injury, but the presence of cancer does not automatically place his claim on hold. Where the law of the case is the claimant is at MMI and has a 7.5% rating to the whole person, it is not enough to argue entitlement to surgery because his cancer is in remission. Hickman must prove a physical change of condition to the original injury irrespective of the cancer. Claimant's change of condition argument is an attempt to revisit, reopen, and reargue what is already the controlling law of the case. Dr. Bauerle simply did not provide sufficient testimony to prove a physical change of condition and the Commission correctly held Hickman did not prove his case.

IV. THE COMMISSION DID NOT ERR IN FAILING TO HOLD THE BACK SURGERY WOULD LESSEN THE PERIOD OF DISABILITY.

The Commissioner properly did not address whether back surgery would lessen Claimant's period of disability for two reasons. First, it was not an issue. Second, if it were an issue it was not proven by the greater weight of the evidence.

A. Whether back surgery would lessen the period of disability was not an issue at the hearing.

The issue before the Commission was whether there was a change of condition for the worse. Hickman now wishes to morph that into an issue whether the Commission should have considered whether surgery would lessen claimant's impairment under § 42-15-60. This is improper. An issue cannot be raised for the first time on appeal. Bazen v. Badger R. Bazen Co., Inc., 388 S.C. 58, 693 S.E.2d 436 (Ct. App. 2010)

When the original hearing was held before Commissioner Wilkerson on carrier's Form 21, the Form 14B prepared by Dr. Bauerle indicated there was no future medical treatment necessary. That is to say, there was no future medical treatment that would lessen claimant's period of disability and entitle him to additional medical treatment pursuant to Dodge v. Bruccoli Clark Layman, Inc., 334 S.C. 574, 514 S.E.2d 593 (Ct. App. 1999). Consequently, Commissioner Wilkerson did not award any additional medical treatment pursuant to Dodge and that is the law of the case. There was no appeal from that Order. The only issue now before this Court is whether Hickman carried his burden of proving he has a change of condition for the worse.

B. There is no evidence to support a factual finding that back surgery would lessen Hickman's period of disability.

Disability is a defined term within the Act. It means "incapacity because of injury to earn the wages which the employee was receiving at the time of the injury in the same ore any other

employment." S.C. Code Ann. §42-1-120. Continued medical treatment is therefore predicated on claimant's being able to return to the workforce in some capacity. Here, Hickman acknowledged he would not work even if he had the surgery. At the hearing the following exchange took place on cross-examination:

Q. If you had this surgery, do you know if it would increase your ability to find a job?

A. Would it increase my ability to find a job?

Q. If you are already receiving your disability retirement, do you think it would help you get back in the workforce?

A. No, sir.

(ROA at 200, lines 11-17)

The record is void of any medical opinion that, if claimant had the back surgery, it could lessen his period of disability. On the contrary, Dr. Bauerle stated he was not in a position to opine on that issue. Hickman would have to be re-evaluated before he would opine whether surgery was of benefit. (ROA at 106, line 25 to 107, line 20)

The issue of whether back surgery would lessen Hickman's disability was not before the Commission, but if it had been, there was no evidence to support it.

CONCLUSION

For the foregoing reasons, Commission's Order should be affirmed in its totality.

Respectfully submitted,

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July 25, 2013

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PROOF OF SERVICE

Counsel for Respondents Companion Property and Casualty Group, Third Party Administrators certifies it has served the Respondent City of Myrtle Beach, Self Insured's Final Brief on all parties by depositing a copy of it in the United States Mail, postage prepaid, on July 25, 2013, addressed to the following attorneys of record:

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[SIGNATURE PAGE TO FOLLOW]

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July 25, 2013

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CERTIFICATE OF COUNSEL

The undersigned certifies that Respondents Companion Property and Casualty Group, Third Party Administrators Final Brief complies with Rule 211(b), SCACR and the August 13, 2007 Order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Identifiers and Other Sensitive Information in the Appellate Court Filings."

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