

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Clifton B. Newman, Circuit Court Judge

Case No.: 2013-000634

South Carolina Second Injury Fund,..... Appellant,

v.

Spartanburg Regional Healthcare System, Employer, and
PHTS Risk Management Services, Carrier,..... Respondents.

In re:

Sarah Jones,..... Employee/Claimant,

v.

Spartanburg Regional Healthcare System,.....Employer.

INITIAL BRIEF OF APPELLANT

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AUG 26 2013

SC Court of Appeals

TABLE OF CONTENTS

Table of Authoritiesiii

Statement of the Issues..... 1

Statement of the Case..... 1

Standard of Review..... 2

Argument.....

 I. CLAIMANT’S PRIOR RIGHT WRIST INJURY WAS NOT PERMANENT AND
 SERIOUS ENOUGH TO CONSTITUTE A HINDRANCE TO HER
 EMPLOYMENT 2,3,4,5

 II. CLAIMANT’S ANXIETY, IF IT PREEXISTED, WAS NOT PERMANENT AND
 SERIOUS ENOUGH TO CONSTITUTE A HINDRANCE OR OBSTACLE TO
 HER EMPLOYMENT..... 5,6

 III. CARRIER DID NOT ESTABLISH THE REQUISITE KNOWLEDGE REQUIRED
 BY THE STATUTE..... 6,7

 IV. THE CIRCUIT COURT ERRED IN DETERMINING THAT THE COMMISSION
 DISREGARDED EXPERT MEDICAL OPINIONS 7,8,9

Conclusion..... 9

TABLE OF AUTHORITIES

Cases

Anderson et al v. Campbell Tile Co., 202 S.C. 54, 24 S.E.2d 104 (1943) 7

Ballenger v. Southern Worsted Corporation, 209 S.C. 463, 467, 40 S.E.2d 681, 682-83 (S.C. 1946) 8

Bass v. Kenco Grp., 366 S.C. 450, 457, 622 S.E.2d 577, 580 (Ct. App. 2005) 2

Burnette v. City of Greenville, 401 S.C. 417, 428, 737 S.E. 2d 200, 206 (S.C. Ct. 2012)..... 8

Carolinas Recycling Group v. SC Second Injury Fund, 398 S.C. 480, 485, 730 S.E.2d 324, 327 (Ct. App. 2012)..... 8

City of Greenville v. S.C. Second Injury Fund, 339 S.C. 141, 147, 528 S.E.2d 91, 94 (S.C. App. 2000) 6

Corbin v. Kohler Co., 351 S.C. 613, 617, 571 S.E.2d 92, 95 (Ct. App. 2002)..... 2

Crisp v. SouthCo., 401 S.C. 627, _____, 738 S.E.2d 835, 843 (S.C. 2013)..... 3

Lark v. Bi-Lo, Inc., 276 S.C. 130, 133, 276 S.E. 2d 304, 305 (1981)..... 2

Liberty Mut. Ins. Co. v. S.C. Second Injury Fund, 363 S.C. 612, 619, 611 S.E.2d 297 (Ct. App. 2005)..... 2

Stone v. Traylor Bros., 360 S.C. 271, 600 S.E.2d 551 (Ct. App. 2004)..... 2

Statutes and Regulations

S.C. Code Ann. § 42-9-400..... 1,6

S.C. Code Ann. § 42-9-400(c)..... 6

S.C. Code Ann. § 42-9-400(d) 2

Other Authority

WEBSTER’S DESK DICTIONARY 212 and 312 (2004)..... 3

5 Larson, Workers’ Compensation § 91.02(6)..... 3

MERRIAM-WEBSTER’S MEDICAL DESK DICTIONARY (2005)..... 7

ISSUE ON APPEAL

Under S.C. Code Ann. § 42-9-400, did the Circuit Court err in reversing the Commission's decision to deny reimbursement, when the Commission's decision was supported by substantial evidence in the record?

STATEMENT OF THE CASE

This is a claim for partial reimbursement from the South Carolina Second Injury Fund (the "Fund") by Spartanburg Regional Healthcare System, Employer, and Palmetto Hospital Trust, Carrier, (collectively "Carrier") pursuant to S.C. Code Ann. § 42-9-400. Carrier alleged that they incurred substantially greater liability for compensation and medical benefits when employee Sarah Jones' (the "Claimant") preexisting anxiety and prior right wrist injury were either aggravated by or combined with her April 17, 2006 left wrist injury. Carrier further alleged that Claimant's preexisting anxiety and right wrist injury were permanent and serious enough to constitute a hindrance or obstacle to employment. The Fund argued that Claimant did not have preexisting anxiety, but if anxiety preexisted it was not permanent and serious enough to constitute a hindrance or obstacle to employment or reemployment. The Fund also argued that Carrier had not established knowledge, that Claimant's prior right wrist injury was not permanent and serious enough to constitute a hindrance to employment, and that Carrier was not entitled to reimbursement pursuant to S.C. Code Ann. § 42-9-400.

The Hearing Commissioner denied Carrier's reimbursement request pursuant to S.C. Code Ann. § 42-9-400 and the Appellate Panel affirmed. The Circuit Court reversed and the Fund now appeals to this Court.

STANDARD OF REVIEW

The Administrative Procedures Act governs the standard of review in workers' compensation cases. Liberty Mut. Ins. Co. v. S.C. Second Injury Fund, 363 S.C. 612, 619, 611 S.E.2d 297 (Ct. App. 2005). An appellate court may not substitute its judgment for that of the Workers' Compensation Commission as to the weight of the evidence on questions of fact. Stone v. Traylor Bros., 360 S.C. 271, 600 S.E.2d 551 (Ct. App. 2004). Courts can reverse the decision of an administrative agency where it is affected by an error of law or not supported by substantial evidence. Lark v. Bi-Lo, Inc., 276 S.C. 130, 133, 276 S.E.2d 304, 305 (1981); Corbin v. Kohler Co., 351 S.C. 613, 617, 571 S.E.2d 92, 95 (Ct. App. 2002). A reviewing court may reverse an agency decision if the findings or conclusions are clearly erroneous in view of the reliable, probative, and substantial evidence in the record. Bass v. Kenco Grp., 366 S.C. 450, 457, 622 S.E.2d 577, 580 (Ct. App. 2005).

ARGUMENT

I. CLAIMANT'S PRIOR RIGHT WRIST INJURY WAS NOT PERMANENT AND SERIOUS ENOUGH TO CONSTITUTE A HINDRANCE TO HER EMPLOYMENT.

The statutory reimbursement scheme requires that Carrier establish several elements in order to implicate reimbursement. One of the requisite elements of reimbursement is that Claimant have a "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." S.C. Code Ann. §42-9-400(d). While the statutory reimbursement scheme does not define what constitutes a hindrance to employment, the determination can be

gleaned from other authority. Webster's defines "hinder" and "obstacle" respectively, as that which causes delay or difficulty, or to prevent from doing or happening; and "something that obstructs or hinders progress." WEBSTER'S DESK DICTIONARY 212 and 312 (2004). Recent case law instructs that "permanent" encompasses the fact that a Claimant may require specialized healthcare without the means to earn a living. Crisp v. SouthCo., 401 S.C. 627, _____, 738 S.E.2d 835, 843 (S.C. 2013). Additionally, Larson's instructs that whether a condition is a hindrance to employment depends upon whether an employer would hire, employ or promote Claimant knowing all of the facts. 5 Larson, Workers' Compensation § 91.02(6).

Claimant's 1993 right wrist injury does not pass muster under any of these definitions. Under the Webster definition, Claimant's prior right wrist injury did not prevent or hinder her from doing her job for the thirteen (13) years that she continued to work before she sustained the April 17, 2006 work injury to the left wrist. R.p. _____. Generally, a wrist injury would not require specialized healthcare and would not have an impact on a Claimant's ability to earn a living. More specifically, Claimant's 1993 right wrist injury did not require specialized healthcare because Claimant was treated for her prior right wrist injury with physical therapy and she did not require surgery. R.p. _____. Also, Claimant's 1993 right wrist injury appears to have had no impact on her employment because she returned to work for at least thirteen (13) years after she recovered from the prior right wrist injury and ultimately worked until March 2007. R.p. _____.

In 2000 and 2002, Claimant's annual health history form revealed that she was not receiving medical treatment for any reason. R.p. _____. In 2004 and 2005, several

years after her right wrist injury but prior to her April 17, 2006 left wrist injury, Claimant indicated via her annual health history survey that she knew of no reason that would interfere with her safely performing her job, that she had never been out of work for more than three (3) days for medical reasons, and had not developed any new medical conditions. R.p. _____.

On August 17, 2006, approximately four (4) months post injury, Claimant's right hand revealed "no obvious deformities", excellent range of motion with good wrist function, good grip strength and no swelling. R.p. _____. This medical narrative also noted "no acute injury to the right hand or wrist." R.p. _____. On January 19, 2007, approximately nine (9) months post injury, Claimant's EMG and nerve conduction studies were "within normal limits" and revealed "no evidence of carpal tunnel syndrome or peripheral neuropathy." R.p. _____. On January 25, 2007, Claimant's medical visit confirmed the prior right wrist findings of no swelling or deformities, excellent range of motion and good grip strength. R.p. _____. In 2008, Claimant rated her average right hand pain at 0/10 with zero (0) being no pain and ten (10) being the greatest amount of pain. R.p. _____. The medical records also reveal that Claimant had "no physical limitations." R.p. _____. Additional evidence indicated that Claimant was "focusing on her perceived vocational limitations, rather than her vocational assets" and that she qualified for jobs in numerous occupational fields. R.p. _____. Moreover, Claimant was not assigned an impairment rating to her right wrist prior to the April 17, 2006 left wrist work injury. After Claimant's April 17, 2006 left wrist injury, the treating physician assigned zero (0%) percent to the right arm and fifteen (15%) percent to the left

hand. R.p. _____. The plastic surgeon that provided an independent medical evaluation assigned significantly higher impairment ratings than the treating physician. R.p. _____.

The record is replete with substantial evidence supporting the Commission's decision to deny Carrier's reimbursement request on the issue of hindrance; and, as such, the Circuit Court's decision should be reversed and the Commission's decision should be reinstated.

II. CLAIMANT'S ANXIETY, IF IT PREEXISTED, WAS NOT PERMANENT AND SERIOUS ENOUGH TO CONSTITUTE A HINDRANCE OR OBSTACLE TO HER EMPLOYMENT.

The substantial evidence in the record supported the Commission's decision that Claimant did not have preexisting anxiety. There are no medical records predating Claimant's April 17, 2006 left wrist injury indicating treatment or diagnoses of anxiety or a psychological problem. After Claimant sustained the April 17, 2006 left wrist injury, the medical narratives indicate that she began experiencing panic attacks, the first of which occurred when she was denied access to medical records. R.p. _____. Other post injury medical reports indicate that Claimant was taking Elavil, an antidepressant, for night time sleep and pain management but she had no history of psychiatric treatment or counseling. R.p. _____. Claimant also denied having prior psychological problems. R.p. _____. The record also revealed that the psychiatric symptoms that manifested after Claimant's April 2006 left wrist injury did not interfere with her ability to interact with others. R.p. _____.

Even if Claimant had preexisting anxiety, the medical evidence indicates that it was not serious enough to constitute a hindrance or obstacle to her employment. On June

21, 2007, treating psychiatrist, Dr. Robert Richards, noted that Claimant said she loved life, and “manages her anxiety by working very hard and . . . doing a good job.” R.p. _____. Dr. Richards also indicated that “there was no significant impairment due to her anxiety until after her work related injury, when she lost her job and her ability to work was limited due to pain.” R.p. _____. Claimant’s psychologist, Dr. Nicholas Lind, also noted that Claimant had no restrictions from a mental health perspective. R.p. _____.

The Commission’s findings were supported by the substantial evidence in the record and must be reinstated.

III. CARRIER DID NOT ESTABLISH THE REQUISITE KNOWLEDGE REQUIRED BY THE STATUTE.

Section 42-9-400 (c) allows a Carrier to satisfy the requisite knowledge if

it had knowledge of the permanent physical impairment at the time that the employee was hired or at the time the employee was retained in employment after the employer acquired such knowledge. However, the employer may qualify for reimbursement hereunder upon proof that he did not have prior knowledge of the employee’s preexisting physical impairment because the existence of the condition was concealed by the employee.

S.C. Code Ann. §42-9-400.

In City of Greenville v. South Carolina Second Injury Fund, the employer failed to show that the Claimant intentionally concealed his preexisting condition; and, as such, the Carrier was not entitled to reimbursement. 339 S.C. 141, 147, 528 S.E.2d 91, 94 (S.C. App. 2000). Here, if Claimant had preexisting anxiety, Carrier has failed to establish that Claimant intentionally concealed this information. Claimant’s annual health survey inquires whether Claimant had various conditions; however, anxiety is not one of the conditions on the health survey. R.p. _____. While psychological problems

are referenced on Claimant's annual health survey, the Fund disagrees that anxiety is tantamount to a psychological problem. Anxiety is defined as "a painful or apprehensive uneasiness or mind." MERRIAM-WEBSTER'S MEDICAL DESK DICTIONARY 49 (2005). Psychological is defined as "relating to, characteristic of, directed toward, influencing, arising in, or acting through the mind, especially in its affective or cognitive functions." MERRIAM-WEBSTER'S MEDICAL DESK DICTIONARY 682 (2005). By definition, anxiety is wholly different from a psychological problem. However, the Fund reiterates that the record is devoid of evidence that Claimant suffered from anxiety or a psychological problem prior to the April 17, 2006 left wrist injury and thus, concealment is inapplicable in this case. Since Carrier did not inquire whether Claimant had anxiety, they cannot successfully argue that she concealed it. The Commission's decision that concealment was inapplicable should be reinstated and Carrier's reimbursement request should be denied.

IV. THE CIRCUIT COURT ERRED IN DETERMINING THAT THE COMMISSION DISREGARDED EXPERT MEDICAL OPINIONS.

The Circuit Court found that the Commission disregarded medical evidence in denying Carrier's reimbursement request. Though the Commission may disregard medical experts' opinions in favor of other competent evidence, this did not happen here. On the contrary, the Commission reviewed the medical evidence in its entirety and placed greater weight on the medical narratives than it did on the medical questionnaires submitted by Carrier. In Anderson et al v. Campbell Tile Co., the South Carolina Supreme Court held that opinions of medical experts may constitute substantial evidence sufficient to support a judgment. 202 S.C. 54, 24 S.E.2d 104 (1943). Anderson does not require that the opinions of medical experts are the only evidence that may constitute

substantial evidence nor does it exclude other sufficiently compelling evidence that would support a judgment. Anderson also held that the Commission determines the weight given to the opinion of medical experts. Id. The Commission is not required to give medical questionnaires conclusive effect to the exclusion of other more compelling medical evidence. Ballenger v. Southern Worsted Corporation, 209 S.C. 463, 467, 40 S.E.2d 681, 682-83 (S.C. 1946). In this case, the Commission relied on the medical narratives and Claimant's own statements to her physicians, which is more than a mere scintilla of evidence; and, as such, its decision was not based on speculation, conjecture or surmise but rather on the substantial evidence in the record.

The Commission's decision is also consistent with recent workers' compensation cases. In Carolinas Recycling Group v. SC Second Injury Fund, this Court reversed the decision of the Commission because the Appellate Panel "relied exclusively upon an evaluation by a non-treating physician who only met with the Claimant on one occasion." 398 S.C. 480, 485, 730 S.E.2d 324, 327 (Ct.App. 2012). Carolinas Recycling Group was reversed solely on medical issues and the "hindrance" element was not at issue. Hindrance is clearly an issue in this case and it is not solely a medical issue but is also a vocational issue that does not require an interpretation of diagnostic tests. Also, in Burnette v. City of Greenville, this Court reversed and remanded the case with instructions that the Commission either reconsider or enter findings of fact concerning Claimant's injuries because the Commission's decision was based on the medical opinion of a single commissioner rather than a medical provider. 401 S.C. 417, 428, 737 S.E.2d 200, 206 (S.C.Ct. 2012). This Court's decision in Burnette was also based solely on medical issues that required an interpretation of diagnostic tests such as MRIs and CT

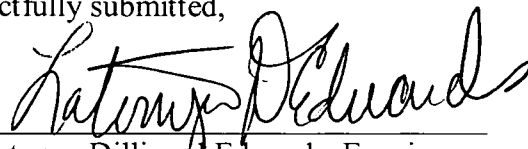
scans. Here, the Commission's decision was based on the statutory elements of hindrance and knowledge, which are not solely medical issues. However, the medical records provided substantial evidence for the Commission's denial and its decision should be reinstated.

CONCLUSION

For the reasons cited here, the South Carolina Second Injury Fund request that this case be reversed and that the Commission's decision be reinstated because it was supported by substantial evidence in the record.

Respectfully submitted,

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August 23, 2013
Columbia, South Carolina

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SC Court of Appeals

The undersigned employee of Dilligard Edwards, LLC, Attorney for the Appellant, does hereby certify that service of the **INITIAL BRIEF OF THE APPELLANT** and **DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL** to the South Carolina Court of Appeals in the above-captioned matter was made upon counsel of record for Respondents Spartanburg Regional Healthcare System, Employer, and PHTS Risk Management Services, Carrier, and the South Carolina Workers' Compensation Commission by

placing same in the United States Mail, first class postage prepaid, at the below listed address clearly indicated on said envelope on this 23rd day of August, 2013, addressed as follows:

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Post Office Box 10589
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The Honorable Virginia Crocker, Judicial Director
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A handwritten signature in black ink, appearing to read "Latonya Dilligard Edwards", written over a horizontal line.

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