THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM CHESTERFIELD COUNTY
Court of Common Pleas

The Honorable Paul M. Burch, Circuit Court Judge

Case No.: 2012-213511

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

v.

American Home Assurance,..... Respondent.

(In Re: John Stroud v. John F. Stroud & Sons, Inc.)

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

This is an appeal by the South Carolina Second Injury Fund (hereinafter the "Fund") for an award of reimbursement under South Carolina Code Ann. § 42-9-400. Employer John F. Stroud & Sons, Inc. and Carrier Chartis Insurance Company (collectively "Carrier") sought compensation from the Fund for employee John Stroud's (hereinafter "Claimant") April 10, 2005 severe work-related injury, wherein the plane that Claimant was piloting, nose-dived and crashed. R. pp. 193, 195, 204, 234, 316. As a result of the accident, Claimant suffered injuries to his left and right eyes; left and right leg; left hip; right arm; fractured pelvis; fractured vertebrae; multiple rib fractures; femur fracture; mid-face fractures; fractured ankle; fluid around the lungs, pancreas, and mesentery; collapsed lung; second and third degree burns; and brain hemorrhage, among other injuries. R. pp. 161, 265, 283-284. Claimant suffered amputation of his lower right leg, hip replacement, head trauma, torso injuries, hearing loss, and problems related to these injuries. R. p. 7.

Carrier contended it incurred substantially greater liability for medical costs, disability, and compensation based on a prior permanent physical condition of alleged brain damage and diabetes, which combined with the April 10, 2005 injury to result in permanent impairment equal to or in excess of seventy-eight (78) weeks or more pursuant to § 42-9-400(d)(2), (28), and (34)(b). Carrier also asserted that Claimant's preexisting brain damage, in the form of a concussion, and diabetes were permanent and serious enough to constitute a hindrance or obstacle to employment pursuant to S.C. Code Ann. § 42-9-400(d) (2) and (28).

The Fund denied the claim was reimbursable, contending Claimant's preexisting diabetes was not serious enough to constitute a hindrance or obstacle to his employment and Claimant's diabetes did not combine with the April 10, 2005 work-related injury to result in permanent impairment. The Fund also argued that Claimant's prior history of a concussion did not rise to the level of brain damage, was not serious enough to constitute a hindrance or obstacle to employment, and also did not combine with the April 10, 2005 work-related injury to result in permanent impairment. Finally, the Fund further denied that the preexisting diabetes and concussion substantially increased Carrier's liability pursuant to § 42-9-400 and the case of City of Greenville v. S.C. Second Injury Fund, 339 S.C. 141, 528 S.E.2d 91 (Ct. App. 2000).

The Hearing Commissioner determined that reimbursement was proper and the Appellate Panel and the Circuit Court affirmed. The Fund appealed 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. THE COMMISSION ERRED IN FINDING THAT THE FUND CONCEDED KNOWLEDGE OF CLAIMANT'S ALLEGED TRAUMATIC BRAIN INJURY/BRAIN DAMAGE AND THAT CLAIMANT'S PRIOR CONCUSSION ROSE TO THE LEVEL OF BRAIN DAMAGE.

The Commission's finding that Claimant's concussion rose to the level of brain damage, and that the Fund conceded knowledge of brain damage is not supported by the evidence in the record. The Fund did not concede employer knowledge of brain damage, and the medical records do not support a presumption of hindrance or obstacle to employment pursuant to S.C. Code Ann. §42-9-400(d)(28).

The Fund concedes that the effects of a concussion may lead to permanent damage. However, the Fund denies that the concussion itself is a permanent physical impairment as contemplated by the statute and further denies that a concussion automatically results in permanent brain damage. In Crisp v. SouthCo. Inc., the South Carolina Supreme Court instructed that the mere presence of a physical brain injury or damage is not tantamount to physical brain damage but rather compensation for physical brain damage is preserved for "the most serious cases to the brain . . . resulting in permanent physical brain damage." 401 S.C. 627,

738 S.E.2d 835 (2013). The Supreme Court further instructed that a permanent physical impairment denotes that which is permanent and serious enough to constitute a hindrance or obstacle to employment or reemployment. S.C. Code Ann. § 42-9-400(d). In Sparks v. Palmetto Hardwood, Inc., the South Carolina Supreme Court further indicated that consistent with legislative intent and the statutory requirements, physical brain damage denotes "damage that is permanent" and "necessarily continues into the present." 401 S.C. 619, 738 S.E. 2d 831 (2013); See also, S.C. Code Ann. §§ 42-9-10(C) and 42-9-400(d). Carrier has not established that Claimant has sustained preexisting physical brain damage based on either the medical evidence in the record or the prevailing case law.

The medical records indicate that Claimant was involved in an accident where heavy machinery rolled over him in July 2004. R. p. 184. As a result of this accident, Claimant's chief complaints were right posterior shoulder and scapular pain. Although Claimant admitted to a loss of consciousness, once at the hospital, he was capable of moving all extremities, conversant, answered questions appropriately, had 5/5 motor strength, and a CT scan of the head was negative. R. pp. 184-185. More specifically, the CT scan revealed that there were no calvarial lesions or skull fractures, and there was no midline shift, mass effect, or abnormal densities of the brain. The overall impression of the skull and the brain was normal. R. pp. 186-187, 189.

Furthermore, during completion of an independent medical evaluation, Dr. John Barkenbus specifically noted that "though mention is made of a prior concussion, there are no documented concerns of pre injury cognitive decline or aberrant mood states." R. p. 319. In other words, Claimant's prior concussion was not permanent because it did not continue up to his present injury. Thus, the Fund's position is that although Claimant was diagnosed with a concussion upon discharge in July 2004, the concussion did not rise to the level of permanent

brain damage, as evidenced by all the 2004 medical records and the independent medical evaluation, nor did Carrier present evidence that Claimant, as a self-employer, knew that he had actual brain damage. R. pp. 95, 184-189, 319. Thus, Carrier should not have been afforded a presumption pursuant to the listed condition of "brain damage."

The Commission's decision was not supported by the substantial evidence in the record and must be reversed.

II. CLAIMANT'S CONCUSSION, IF IT CONSTITUTED A PERMANENT CONDITION, WAS NOT SERIOUS ENOUGH TO CONSTITUTE A HINDRANCE OR OBSTACLE TO EMPLOYMENT OR REEMPLOYMENT, NOR DID IT RESULT IN A COMBINATION WITH OR AGGRAVATION BY CLAIMANT'S APRIL 10, 2005 WORK-RELATED INJURY.

The 2004 medical records do not indicate that Claimant's concussion was a hindrance or obstacle to his employment. The 2004 medical records related to the concussion indicate that all exams of Claimant's skull and brain were negative. R. pp. 184-189. Other than listing the concussion diagnosis, the discharge summary does not address any complications Claimant had as a result of the concussion, it does not indicate that Claimant suffered serious or permanent damage, or that the concussion created a hindrance or obstacle to employment. R. pp. 188-190. Additionally, Dr. Barkenbus noted that Claimant was presumably functioning fine prior to the April 10, 2005 accident, as he was solo flying planes. R. p. 319. The Fund believes that this evidence negates the argument that Claimant's alleged physical brain damage continued into the present as contemplated by Sparks. Carrier did not present any evidence that Claimant's concussion, which we assert is different from brain damage, was permanent and serious enough to constitute a hindrance or obstacle to employment.

Even if we assume, arguendo, that a concussion is a permanent physical concussion, the records do not indicate that that it combined with or was aggravated by the April 10, 2005 work-

related injury. Immediately upon arrival in the emergency department after the April 10, 2005 plane crash, a CT scan of Claimant's head was negative, motor and sensory in upper and lower bilateral extremities were intact, and there was no loss of consciousness. R. pp. 194-195. CT scans read the same day Claimant was admitted into the hospital indicate injuries to the brain, including traumatic subarachnoid hemorrhage. R. pp. 245, 316. Additionally, a CT scan of Claimant's head, taken approximately two (2) weeks later, indicates further damage that represents "post traumatic edema or infarct." R. p. 263. The findings of this subsequent CT scan also noted several abnormalities or differences from the prior scan. R. p. 263.

The CT scans are evidence that Claimant's injuries are a result of the plane crash itself. After Claimant's 2004 concussion, CT scans were negative; however, CT scans from the 2005 work-related injury showed injuries that got worse over time, and the findings state that such injuries were post-traumatic from the plane crash. R. pp. 263, 269. Also, Dr. Barkenbus' independent medical evaluation noted that the medical records were consistent with Claimant's mechanism of traumatic injury, including "posttraumatic amnesia." R. p. 319. Dr. Barkenbus clearly states that the concussion did not cause pre-injury cognitive decline, and that all of Claimant's difficulties are "common sequelae of closed head injuries such as the one the patient sustained" in the plane crash. R. p. 320.

Evidence in the underlying claim addressing the Forms 50 and 51 also noted that Claimant's disability was a result of the traumatic plane crash itself. The Decision and Order acknowledges Dr. Barkenbus' evaluation, which revealed that Claimant "suffered a traumatic subarachnoid hemorrhage and subdural hematoma during the plane crash," and Dr. Barkenbus found anatomical damage to the brain consistent with traumatic brain injury. R. p. 5.

The Commission relied heavily upon the undisputed testimony of Claimant's wife, who "testified that Claimant suffered from none of [his] impairments prior to the plane crash, and that he only experienced them after the severe head trauma sustained in the accident." R. p. 4. A concussion was never discussed as a contributing factor to Claimant's resulting disability, by neither the medical records nor the testimony from Claimant's wife. Thus, the substantial evidence indicates that Claimant's prior concussion neither combined with nor was aggravated by the April 10, 2005 work-related accident. To the contrary, the severity of the traumatic plane crash itself resulted in Claimant's disability. The Commission's decision was not supported by the substantial evidence in the record and must be reversed.

III. CLAIMANT'S DIABETES WAS NOT SERIOUS ENOUGH TO CONSTITUTE A HINDRANCE OR OBSTACLE TO EMPLOYMENT OR REEMPLOYMENT, NOR DID IT RESULT IN A COMBINATION WITH OR AGGRAVATION BY CLAIMANT'S APRIL 10, 2005 WORK-RELATED INJURY.

While Claimant's preexisting diabetes is entitled to a presumption that it is permanent and serious enough to constitute a hindrance or obstacle to employment, a presumption may be overcome by evidence rebutting it. Black's Law Dictionary 558 (3rd pocket ed. 2006). Medical records prior to the plane crash indicate an onset of diabetes in 1998, and Claimant began dietary management, and was prescribed Glucophage. R. pp. 156, 161. Claimant was not restricted from working while managing his diabetes at any time after the first diagnosis of diabetes or at any time before the plane crash.

Furthermore, the substantial evidence in the record indicates that Claimant's diabetes neither combined with nor was aggravated by the severe injuries that Claimant sustained as a result of the April 10, 2005 injury. On August 2, 2005, during Claimant's first follow-up visit after being released from the hospital, all of Claimant's injuries are listed, and while the fact that Claimant has diabetes is mentioned, there is no indication that the diabetes played a part in the

severity of the injuries or affected Claimant's recovery. R. p. 161. Claimant followed-up with his physician again on August 24, 2005, and it is noted that Claimant's "[g]lucoses have been very stable in the low 100s fasting," Type II diabetes was stable, and Claimant requested Glucophage medication, which he previously used to control the diabetes. R. p. 161. Approximately eight (8) months after the plane crash, Claimant's glucose levels were still noted as having been stable. R. p. 162.

Carrier argued, and the Commission found that Claimant's required amputation of the right lower extremity was a result of the combination of the pre-existing diabetes and work accident of April 2005. R. p. 27. However, this is not supported by the substantial evidence in the record. The hospital discharge summary, which details the entire course of Claimant's stay at the hospital, including all complications and surgeries, does not indicate that Claimant's diabetes combined with or was aggravated by Claimant's injuries sustained in the plane crash. R. pp. 204-206. The history notes that Claimant has diabetes in which he was on Glucophage, and the discharge medications also note that Claimant will again be prescribed Glucophage. R. pp. 204-206. Additionally, the discharge summary from Carolinas Specialty Hospital indicates that one of Claimant's complications was second to third degree burns from the plane crash, and it was noted that the right lower extremity was infected. R. pp. 283-284.

Initially, the trauma team was not given clearance to manage Claimant's orthopedic injuries, which included an open talus fracture dislocation. R. pp. 192. Obvious deformity and open dislocation of the right lower extremity were noted. R. pp. 193-194, 246, 248-249, 256. Claimant developed a deep infection and it resulted in removal of all tendons and soft tissues of the medial side of the right lower extremity. During the surgery to remove the tendons, Claimant was found to have a completely devascularized and loose talus extruded from the wound, and

there was even more infection below that. R. pp. 232-233, 237-238, 240. "Based on the observation of the severe tissue damage, infection, and instability of the joint, and the requirements for a free tissue transfer and likely, at best, an ankle and subtalar fusion, . . . the [Claimant was] better served by amputation." R. p. 233. Thus, as Dr. Barkenbus determined that the complications of the right ankle injury, including infection, required a right below-knee amputation, not Claimant's diabetes. R. p. 316.

IV. THE COMMISSION ERRED IN FINDING THAT CARRIER IS ENTITLED TO REIMBURSEMENT FOR CLAIMANT'S PERMANENT AND TOTAL DISABILITY BECAUSE CLAIMANT'S PREEXISTING CONDITIONS DID NOT CONTRIBUTE TO CLAIMANT'S DISABILITY.

The Commission's finding that Claimant's prior physical impairments contributed to him being deemed permanently and totally disabled is not supported by the evidence in the record. A carrier is entitled to reimbursement if a claimant's pre-existing condition and second injury result in substantially greater disability than would have resulted from the second injury alone. Liberty Mutual Ins. Co. v. S.C. Second Injury Fund, 322 S.C. 201, 204, 470 S.E.2d 855, 856 (1996). However, "[w]hen an employee has been found to be totally disabled by an accident, an employer cannot incur greater liability for compensation due to a preexisting condition." City of Greenville v. S.C. Second Injury Fund, 339 S.C. 141, 528 S.E.2d 91 (Ct. App. 2000).

In City of Greenville, an employee fell thirty (30) to forty (40) feet while repelling during a police department training exercise. As a result of the fall, the employee sustained multiple severe injuries, which left him with significant paralysis from the waist down. The Single Commissioner's Order in that case concluded that substantially all of the employee's disability was caused by the fall rather than the employee's preexisting arthritis, and that the employee was a paraplegic as a result of the fall and could not suffer greater disability than that caused by the paraplegia. 528 S.E.2d at 92. Carrier argued and the Commission erroneously found that the

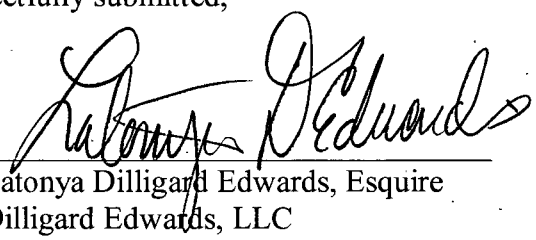
City of Greenville case was inapplicable in this instant case because the facts were not the same, and in the aforementioned case the carrier failed to submit evidence of employer knowledge and proof that there was a substantial increase in medical payments as a result of the pre-existing condition.

However, City of Greenville is applicable because Claimant was deemed permanently and totally disabled due to his permanent brain injury and the combined effects of all his injuries. R. p. 8. The Commission's mention of "all of [claimant's] injuries" refers to those injuries resulting from the plane crash itself. None of the medical records reference the prior concussion or diabetes affecting the severity of Claimant's injuries or recovery. Additionally, the Commission found that Mrs. Stroud's testimony was extremely credible, she did not exaggerate the extent of Claimant's injuries, and the "Claimant has suffered severe permanent physical damage and is permanently disabled as a result." R. p. 8. Therefore, the instant case is similar to the facts in City of Greenville, because both claimants were found to be disabled solely as a result of the work-related accidents. In both cases, the claimant was determined to be permanently and totally disabled based upon the work injury, and the City of Greenville provides that once a claimant has been deemed permanent and totally disabled due to the work injury, the employer cannot incur greater liability for compensation based on a preexisting condition. The Commission's decision was not supported by the substantial evidence in the record and must be reversed.

CONCLUSION

For the reasons cited herein, the Fund requests that this Honorable Court reverse the Commission's Order and deny Carrier's reimbursement request because it is not supported by substantial evidence in the record.

Respectfully submitted,

By: 

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CERTIFICATE OF COUNSEL

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

July 8, 2013

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PROOF OF SERVICE

The undersigned employee of Dilligard Edwards, LLC, Attorney for the Respondent, does hereby certify that service of the **Final Brief of Appellant, Record on Appeal and Certificate of Counsel** to the South Carolina Court of Appeals in the above-captioned matter was made upon counsel of record for Respondent John F. Stroud & Sons, Inc., Employer and American Home Assurance, 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 8th day of July, 2013, addressed as follows:

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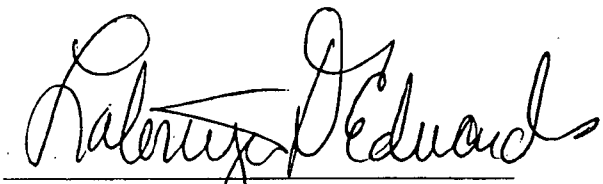

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