ORIGINAL

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
SINGLE COMMISSIONER & APPELLATE PANEL

WCC FILE NO. 0905998 & 0901428
TRACKING NO. 2013-001669

Katherine L. Haines, Employee, Respondent,

v.

Dollar Tree Stores, Inc., Employer, and ARCH Insurance Company, Carrier Appellants.

FINAL BRIEF OF APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

Did the South Carolina Workers' Compensation Commission err in its determination that Respondent is permanently and totally disabled and thus entitled to the balance of 500 weeks of compensation in a lump sum, in addition to medical care and treatment related to her injury?

STATEMENT OF THE CASE

This is an appeal by Dollar Tree Stores, Inc. and ARCH Insurance Company ("Appellants") from a decision of the South Carolina Workers' Compensation Commission finding that Katherine L. Haines ("Respondent") is totally and permanently disabled as a result of injuries she sustained on February 12, 2009 (W.C.C. No. 0901428) and June 3, 2009 (W.C.C. No. 0905998) while working for Dollar Tree Stores.

With respect to the procedural history relevant to this appeal, Respondent filed a Request for Hearing (Form 50) on May 31, 2012. She alleged an injury on February 12, 2009, to her neck and back when some shelving collapsed and fell on her. On June 28, 2012, Appellants timely filed an Answer to Respondent's Request for Hearing. Respondent had previously filed a Notice of Claim on May 25, 2011, alleging an injury to her left shoulder on June 3, 2009. Both claims were heard by Commissioner Derrick L. Williams on September 4, 2012. The Hearing Commissioner issued an Order on October 10, 2012, and issued an amended Order on October 22, 2012, vacating the Order issued on October 10, 2012.

The Hearing Commissioner concluded that Respondent was totally and permanently disabled under Section 42-9-30(21) of the Code of Laws of South Carolina in that she had sustained 50% loss of use or disability to her back. The Hearing Commissioner further concluded that Respondent was totally and permanently disabled under Section 42-9-10 in that she suffered injury to more than one body part and her incapacity to work was total. The Hearing Commissioner ordered Appellants to pay to Respondent the balance of 500 weeks of compensation in a lump sum, for a total of $120,378.74. The Appellants were also ordered to provide related and authorized medical care and treatment.

Respondent properly filed a Request for Commission Review (Form 30) on November 6, 2012. Appellants properly filed a Request for Commission Review (Form 30) on November 7, 2012. The parties were heard at a Full Commission hearing on February 19, 2013. On July 1, 2013, the Appellate Panel issued a Decision & Order affirming the Order of the Hearing Commissioner in full. From this decision, Appellants have appealed to this Honorable Court.

STATEMENT OF FACTS

In her nearly fourteen years of employment at Dollar Tree, Respondent served as both an assistant store manager and store manager. (R. p. 62, lines 24-25-p. 63, lines 1-6; p. 64, line 2; p. 66, lines 2-4) In these positions, she performed tasks such as supervising workers, producing schedules, processing freight, entering sales figures into the store computer, making deposits, and training new employees. (R. p. 86, lines 23-25-p. 87, lines 1-3) Respondent also performed some physical labor in the form of stocking shelves and unloading trucks. (R. p. 65, lines 6-9; p. 66, lines 8-16) She was in the position to hire and fire employees when she worked as a manager for the Harbison area Dollar Tree store. (R. p. 66, lines 22-25)

Respondent was proficient in using the company's computer and sales software. She ordered stock, emailed the district manager, and ran sales reports on the computer. (R. p. 87, lines 13-17; p. 105, lines 13-25-p. 106, lines 1-16) She regularly used a personal laptop at home to browse the internet. (R. p. 105, lines 2-5)

With respect to past employment, Respondent worked for Riviera Insurance as a customer service representative. In that role, she was responsible for processing insurance policies and taking calls from customers requesting quotes. Her job at Riviera Insurance was a sit-down desk job that did not require any physical work or heavy lifting. (R. p. 89, lines 2-18; p. 90, lines 3-5)

Respondent also worked for Miami Herald Newspapers for several years. (R. p. 63, lines 10-14) When her managers were on vacation, Respondent, as the D.M. Assistant, ensured the routes were running smoothly and "ran complaints" when customers did not receive their newspapers. (R. p. 63, lines 18-25)

Respondent is fifty-two years old. She nearly completed high school, having been expelled just four months prior to graduation. (R. p. 61, lines 3-4; p. 83, lines 7-14) While in school, Respondent was an average to above-average student. (R. p. 314) After high school, Respondent was certified as a certified nursing assistant in 1989. (R. p. 61, lines 5-6) She successfully completed a thirteen-week nurse's assistant certification class while residing in Florida. She had no difficulty completing the program. (R. p. 90, lines 6-19) She worked as a CNA for one year and as a private duty nursing assistant for two years. (R. p. 315)

Respondent injured her neck on February 12, 2009, when she was attempting to get shelves from the stockroom. The shelving collapsed and landed on her neck. (R. p. 67, lines 10-25-p. 68, lines 1-2) On June 3, 2009, Respondent was again injured when a collapsible table fell on her left shoulder. (R. p. 69, lines 18-25-p. 70, lines 1-6) The Commission found the June 3, 2009 accident caused no new injury. (R. p. 4) Appellants provided treatment for both injuries and Respondent was able to work light duty. (R. p. 70, lines 23-25)

Respondent has been treated by several physicians for her neck. On February 18, 2009, she initially presented to her family doctor, who noted she was having no radicular symptoms and set her up with medication and physical therapy. (R. pp. 426-27) Respondent then treated with Dr. Craig Burnworth at The Moore Orthopaedic Clinic who assessed cervicalgia. (R. p. 120) She was referred to Dr. Nancy Lembo for pain management. (APA pp. 127, 325-340) After approximately six months of treatment, Dr. Lembo opined Respondent reached maximum medical improvement and assigned 2% impairment to her cervical spine. (R. p. 329)

Dr. William Felmly performed an independent medical evaluation on September 15, 2009, in which he determined there was no clinical evidence to suggest the need for surgery and

recommended continued pain management with Dr. Lembo. He issued a 0% impairment rating to Respondent's upper back and neck. (R. pp. 390-394)

Respondent then presented to Dr. Scott Boyd at Columbia Neurosurgical Associates who diagnosed cervical myeloradiculopathy and recommended surgery. (R. p. 156) Dr. Boyd performed surgery on March 15, 2011, and believed Respondent progressed well. (R. pp. 293, 168) He saw no need for additional surgery, but he did recommend a consultation with a pain management specialist. (R. p. 174; p. 95, lines 21-25-p. 96, line 1) Dr. Steven B. Storick, who specializes in pain medicine at Columbia Neurosurgical Associates, saw no need for Respondent to undergo an implantation of a spinal cord stimulator. Dr. Storick indicated Respondent had numerous complaints that he did not believe correlated with Respondent's neck injury. (R. p. 189)

Respondent was ultimately referred to the Pain Management Program at Palmetto Health Baptist. (R. p. 91, lines 1-3) She participated in a course of physical therapy, injections, and counseling for approximately six weeks. (R. pp. 192-258) She underwent a Functional Capacity Evaluation on August 24, 2011, which found she was best suited for a physical demand level of less than sedentary to sedentary. (R. p. 264) Dr. M. David Redmond, the director of the program, noted Respondent reached maximum medical improvement on August 30, 2011, with 28% impairment to the cervical spine. (R. p. 289) Dr. Donald Johnson of the Southeastern Spine Institute has also assigned 25% impairment to the whole person due to Respondent's limited range of motion. (R. p. 149)

J. Adger Brown, Jr., MA, CDMS, performed a vocational evaluation on behalf of Respondent. He noted he had doubts as to Respondent's capacity to engage in any type of sustained work. (R. p. 296) However, he noted that Respondent would be capable of less than

sedentary to a limited range of sedentary physical activity, albeit with the assistance of narcotics. (R. p. 296-97)

Jan Westmoreland, M.Ed., CRC, performed a vocational assessment and labor market survey on behalf of Appellants. (R. pp. 308-324) Ms. Westmoreland identified several open or recently-filled jobs in the Columbia, South Carolina, and surrounding areas that would match Respondent's qualifications and restrictions. She identified positions such as a medical front desk secretary, receptionist, office assistant, account manager, and clerical aide. (R. pp. 323-324) During Ms. Westmoreland's evaluation of Respondent, Respondent acknowledged she was able to sit all day as long as she was able to move around occasionally. (R. p. 313) Respondent maintains a valid South Carolina drivers' license and has access to her own operational vehicle, a Ford Windstar van. (R. p. 316; p. 100, lines 22-24) She drives alone to run errands and attend appointments. (R. p. 99, lines 20-25; p. 100, lines 10-13, 19-22)

Respondent remains physically active. She performs chores around her house, including cleaning bathrooms, dusting, sweeping, mopping, doing laundry, and cooking. (R. p. 101, lines 15-23; p. 316) Respondent is able to perform light repair work around her house such as changing light bulbs, fixing door knobs, and the like. (R. p. 101, lines 24-25-p. 102, lines 1-9; p. 316) Respondent enjoys swimming. (R. p. 316) She also enjoys the beach, and, since her neck surgery, has spent time on the beach in Florida. (R. p. 102, lines 23-25-p. 103, lines 1-15) Respondent noted she is forced to hold her head "cocked" to the left on a permanent basis. (R. p. 979, lines 6-21) However, surveillance videos submitted into evidence show Respondent without as much restriction in her movement. (Video Surveillance)

Respondent was referred to South Carolina Vocational Rehabilitation, but she never made contact with the agency. (R. p. 91, lines 12-23; p. 317) Respondent has made no attempt

to look for other work since leaving Dollar Tree's employment. (R. p. 91, lines 24-25-p. 92, lines 1-4)

ARGUMENT

The South Carolina Workers' Compensation Commission erred in its determination that Respondent is permanently and totally disabled because Respondent could obtain gainful employment in the competitive marketplace and Appellants rebutted the presumption of permanent and total disability.

The Commission committed error in its determination that Respondent is permanently and totally disabled as a result of her cervical injury on February 12, 2009. In light of this error, Appellants respectfully request that this Honorable Court reverse the decision of the Commission and remand the case for a determination of permanent disability pursuant to South Carolina Code Section 42-9-30.

The South Carolina Administrative Procedures Act establishes the standard for judicial review of decisions by the Workers' Compensation Commission. Lark v. Bi-Lo, 276 S.C. 130, 276 S.E.2d 304 (1981). The court can reverse or modify the Commission's decision if it is affected by an error of law or is "clearly erroneous in view of the reliable, probative, and substantial evidence in the whole record." S.C. Code Ann. § 1-23-380(5) (Supp. 2012). Substantial evidence is "not a mere scintilla of evidence nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the same conclusion that the administrative agency reached or must have reached in order to justify its action." Lark, 275 S.C. at 135, 276 S.E.2d at 306.

Although Appellants recognize the deference that the substantial evidence standard affords the Commission, Appellants respectfully submit that reasonable minds would not reach the same conclusion that the Commission reached in this case, namely that Respondent is permanently and totally disabled.

A claimant may obtain compensation for a permanent disability in these ways: (1) permanent and total disability under S.C. Code Ann. § 42-9-10; (2) partial disability [wage loss] under § 42-9-20; and (3) scheduled disability under § 42-9-30. Wigfall v. Tideland Utilities, Inc., 354 S.C. 100, 105, 580 S.E.2d 100, 102 (2003). The first two are general disability statutes and are premised on the economic model. The last is the scheduled loss statute and is premised on the medical model. Id.

Appellants acknowledge Respondent sustained a significant injury to her cervical spine, which ultimately required surgery. Appellants further acknowledge that Respondent's injury limits her physical activity and requires her to take pain medication. However, based on Respondent's age, education, past job experience, and the vocational evaluation performed on Appellants' behalf, there are several jobs in the competitive labor market for Respondent, thus defeating any claim for permanent and total disability under Section 42-9-30(21) or Section 42-9-10.

A. The Commission erred in its determination that Respondent is totally and permanently disabled under Section 42-9-10 because Respondent has not proven injuries to multiple body parts or a loss of earning capacity.

Substantial evidence in the record does not support the conclusion that Respondent sustained an injury to any body parts other than her neck. As such, Respondent is not entitled to an award under South Carolina Code Section 42-9-10(B), which provides "[t]he loss of both hands, arms, shoulders, feet, legs, hips, or vision in both eyes, or any two thereof constitutes total and permanent disability to be compensated according to the provisions of this section."

Although Appellants concede that Respondent has complained of some radicular pain in her extremities, such radiculopathy does not rise to the level of a loss of the body part. "Where the injury is confined to the scheduled member and there is no *impairment* of any other part of

the body because of such injury, the employee is limited to the scheduled compensation." Singleton v. Young Lumber Co., 236 S.C. 454, 471, 114 S.E.2d 837, 845 (1960) (emphasis added). See also Colonna v. Marlboro Park Hosp., 745 S.E.2d 128, 133 (Ct. App. 2013) (finding another body part must be impaired or injured in order for Section 42-9-10 to apply) and Bolds v. UTI Integrated Logistics, Inc., 2011 S.C. App. Unpub. LEXIS 159 (Apr. 13, 2011) (holding that, where a back injury caused radiculopathy to a claimant's left arm and right leg but there was no other evidence of physical deficiency in the arms and legs, the claimant failed to show impairment to other parts of the body and was not entitled to a general disability award).

None of the physicians who have assigned impairment ratings to Respondent's cervical spine have assigned impairment ratings to other body parts. In discussing Respondent's permanent impairment, Dr. Boyd assigned 26 to 28 percent impairment to the whole person based solely on Respondent's two level cervical fusion. (R. p. 302) Drs. Redmond and Johnson noted Respondent's limited range of motion in her neck but did not reference any other body parts. (R. p. 149, 282.) As such, Appellants submit that there is no impairment to or physical deficiency of additional body parts, and the Commission erred in its seventh conclusion of law that Respondent suffered an injury to five body parts.

Moreover, substantial evidence in the record does not support the conclusion that Respondent is permanently and totally disabled. "The generally accepted test of total disability is inability to perform services other than those that are 'so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist.'" Watson v. Xtra Mile Driver Training, Inc., 399 S.C. 455, 463, 732 S.E.2d 190, 194 (Ct. App. 2012) (quoting Wynn v. Peoples Natural Gas Co. of S.C., 238 S.C. 1, 11-12, 118 S.E.2d 812, 817-18 (1961)). In Watson, the claimant graduated from high school, had vocational training in secretarial work, and

participated in several training courses in insurance. Id. The claimant further had extensive experience in occupations of a sedentary nature, with experience in customer service, contract negotiations, and other secretarial work, in addition to experience operating computers. Id. With respect to her physical abilities, the claimant could drive and perform household chores. Moreover, she was able to pay her bills and do her grocery shopping, and she did not take anti-inflammatories or pain medication. Id.

This Honorable Court affirmed the Appellate Panel's conclusion that the claimant was not permanently and totally disabled under Section 42-9-10. This Court found the claimant "failed to show that she was unable to perform services that are so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist." Id. at 463-64, 732 S.E.2 at 195.

Similar to the claimant in Watson, who had a high school diploma and participated in vocational training courses, Respondent received a high school education, despite the fact she was four months short of graduating. Moreover, Respondent's CNA training and certification demonstrate her aptitude for learning new skills. Also similar to the claimant in Watson, who had extensive experience in sedentary jobs and worked in customer service, Respondent served as a customer service representative for Riviera Insurance and was tasked with managerial and administrative duties during her fourteen years with Dollar Tree.

With respect to activities outside of work, the claimant in Watson was able to drive, perform household chores, and go grocery shopping. Similarly, Respondent regularly performs chores and repairs around her house. She drives, runs her own errands, and attends doctors' appointments alone.

Appellants concede this Court in Watson was also constrained by the substantial evidence standard of review. However, given the factual similarities and the reasoning in Watson, Appellants contend that the skills and services Respondent could provide to the workforce are not so limited in quality, dependability and quantity that a reasonably stable market for them does not exist. In fact, Ms. Westmoreland identified several jobs in the local Columbia market that would comply with Respondent's qualifications and restrictions. Respondent even conceded that her past work experience at Riviera Insurance and Dollar Tree qualified her for the jobs identified by Ms. Westmoreland. (R. p. 104, lines 10-17.) Based on Respondent's prior work experience, transferable skills, and ability to learn, a reasonably stable market exists for her services. Appellants submit Respondent could readily find a sedentary job within her physical restrictions. As such, the Commission erred in finding Respondent permanently and totally disabled.

B. The Commission erred in its determination that Respondent is permanently and totally disabled due to fifty percent permanent loss of use to her back because Appellants rebutted the presumption of permanent and total disability.

Substantial evidence in the record does not support the Commission's conclusion that Appellants failed to present testimony to rebut total and permanent disability. South Carolina Code Section 42-9-30(21) provides

> . . . in cases where there is fifty percent or more loss of use of the back the injured employee shall be presumed to have suffered total and permanent disability and compensated under 42-9-10(B). The presumption set forth in this item is *rebuttable*.

S.C. Code § 42-9-30(21) (Supp. 2012) (emphasis added). A claimant with fifty percent or more loss of use of the back is not required to prove loss of earning capacity because permanent and total disability is presumed. Bateman v. Town & Country Furniture Co., 287

S.C. 158, 160, 336 S.E.2d 890, 891 (Ct. App. 1985). However, the presumption may be rebutted where there is reliable evidence to suggest a claimant may return to work. See Watson, supra, 399 S.C. at 464, 732 S.E.2d at 195.

In Watson, the Commission relied on an FCE which concluded the claimant could obtain a position in the light strength category. The Commission also relied on the opinions of two physicians who believed it would be reasonable for the claimant to continue working so long as she was able to work within particular restrictions. Id. at 465, 732 S.E.2d at 195. One physician opined the claimant could perform a sedentary job if she were able to stand up and sit down periodically. The claimant, while noting she was willing to work within her restrictions, also admitted she had not looked for any employment within those restrictions. Id. at 465, 732 S.E.2d at 195. The Commission rejected the opinion of the claimant's vocational analyst, J. Adger Brown, who determined the claimant was permanently and totally disabled. Id. at 465, 732 S.E.2d at 195. This Honorable Court held the employer rebutted the presumption that the claimant was permanently and totally disabled even though she had sustained fifty percent permanent loss of use to the back. Watson, 399 S.C. at 464, 732 S.E.2d at 195.

In the instant case, Dr. Scott Boyd, Respondent's treating physician, believed she was coming along reasonably well just three weeks following her cervical discectomy and fusion. (R. p. 168) He released her to return to work with restrictions in the light work category. (R. p. 169) He specifically noted her "physical demand requirements are in excess of those for sedentary work." (R. p. 169) Dr. David Redmond at Palmetto Health Baptist's Pain and Orthopedic Care Center noted that he would defer to the opinion of Dr. Boyd as to Respondent's permanent impairment. (R. p. 282) In the instant case, Mr. Brown also was the vocational

analyst for Respondent and determined Respondent was incapable of returning to any form of employment. (R. p. 297)

Appellants also provided the Commission with the opinion of Jan Westmoreland, M.Ed., CRC, of The Directions Group. Ms. Westmoreland concluded Respondent could work at the sedentary to light work capacity level. (R. p. 320) In its fourth finding of fact, the Commission noted the conclusions of The Directions Group were "at odds with the overwhelming weight of the evidence." (R. p. 5) As mentioned above, Dr. Boyd also found that Respondent could work light duty. (R. p. 169.) The Functional Capacity Evaluation performed by Palmetto Health Baptist Pain & Orthopaedic Care noted that Respondent would be best suited for less than sedentary to sedentary category of physical demands. (R. p. 264) The Summary Report of the Functional Capacity Evaluation provided that Respondent functioned at the sedentary physical demand level for lifting, pushing, and pulling. (R. p. 258) The evaluator believed Respondent would benefit from a referral to the South Carolina Department of Vocational Rehabilitation. (R. pp. 258, 265.) Appellants submit that there would be no reason for a referral to the South Carolina Department of Vocational Rehabilitation if there was no hope of Respondent ever returning to work. Moreover, Respondent's pain management physician agreed that Respondent was functioning at a sedentary physical demand level. (R. p. 282)

All of the experts above discuss sedentary duty. As such, Appellants submit that it was error for the Commission to conclude that Ms. Westmoreland's opinion was "at odds" with the evidence where the evidence suggests Respondent likely could work sedentary duty. Appellants provided ample evidence regarding Respondent's ability to return to gainful employment in the competitive marketplace. However, the Commission ignored the reliable, probative, and substantial evidence in the record that noted Respondent could likely engage in sedentary work.

CONCLUSION

Appellants acknowledge that Respondent sustained a permanent disability as a result of her cervical injury on February 12, 2009. Appellants do not contend that Respondent can return to her past work at Dollar Tree. However, Appellants submit that, based on the reliable, probative, and substantial evidence in the record, the Commission clearly erred in finding Respondent was permanently and totally disabled.

In view of this contention, Appellants further submit the Commission erred in ordering Appellants to pay the balance of five hundred weeks of compensation to Respondent in a lump sum when the reliable, probative and substantial evidence of the case does not support an award of permanent and total disability.

For the foregoing reasons, Appellants respectfully request that this Honorable Court reverse the decision of the South Carolina Workers' Compensation Commission and find that Respondent is not permanently and totally disabled. Appellants further request that the case be remanded to the Commission for a final determination of permanent partial disability under Section 42-9-30.

Respectfully submitted,

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December 12, 2013

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CERTIFICATE OF COUNSEL

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

December 12, 2013

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PROOF OF SERVICE

I certify that I have served one copy of the Record on Appeal, Final Brief of Appellants and Final Reply Brief of Appellants on Claimant/Respondent Katherine Haines, by depositing a copy of it in the United States Mail, postage prepaid, on December 12, 2013, addressed to her attorney of record, Joseph T. McElveen, Jr., Esq., Post Office Box 2038, Sumter, South Carolina 29151-2038.

December 12, 2013

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