

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM SOUTH CAROLINA
WORKERS COMPENSATION COMMISSION
WCC FILE No. 1118397

Appellate Panel

Appellate Case No: 2013-000727

William Rhodes, Claimant,.....Appellant,

v.

M. B. Kahn Construction Co., Inc., Employer and Self-Insurer,
and Hewitt, Coleman & Associates, Inc., TPA.,..... Respondents.

FINAL BRIEF OF RESPONDENTS

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October 7, 2013

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STATEMENT OF ISSUES ON APPEAL

- I. IS AN AWARD OF TEN PERCENT (10%) PERMANENT PARTIAL DISABILITY TO THE RIGHT SHOULDER SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD WHICH INCLUDES EVIDENCE THAT CLAIMANT HAD FULL RANGE OF MOTION AND THAT THE TREATING PHYSICIAN RELEASED CLAIMANT TO REGULAR DUTY WITH NO PHYSICAL RESTRICTIONS?
- II. IS THE COMMISSION'S DENIAL OF LEFT SHOULDER AND RIGHT ELBOW INJURIES SUPPORTED BY SUBSTANTIAL EVIDENCE WHEN CLAIMANT FAILED TO CONTEMPORANEOUSLY REPORT ALLEGED OVERUSE INJURIES TO HIS TREATING PHYSICIAN AND THE COMMISSION FOUND CLAIMANT'S TESTIMONY NOT CREDIBLE?
- III. WHEN A CLAIM IS BASED, IN PART, UPON THE CLAIMANT'S HISTORY OF EVENTS AND SUBJECTIVE COMPLAINTS, IS THE CLAIMANT'S CREDIBILITY IMPORTANT?

STATEMENT OF THE CASE

On November 28, 2011, William Rhodes ("Claimant") injured his right shoulder while lifting a wooden form off saw horses while working for Respondent M.B. Kahn Construction Company ("M.B. Kahn"). M.B. Kahn began paying the Claimant weekly temporary total disability benefits and provided medical care.

By Form 50 dated April 12, 2012, the Claimant alleged he sustained compensable injuries to his right shoulder, right elbow and left shoulder while "lifting" and sought addition medical treatment and temporary disability benefits. (ROA p. 31).

By Form 51 dated April 26, 2012, M.B. Kahn admitted that the Claimant sustained an injury to his right shoulder but denied any compensable injury to the right elbow or left shoulder. (ROA p. 32).

By Form 21 dated May 17, 2012, M.B. Kahn requested a hearing seeking an order to stop payment of temporary disability benefits and to determine Claimant's permanent disability, if any. (Appendix to ROA pp. 1-4).

By Form 58 dated July 3, 2012, M. B. Kahn alleged that claimant had reached maximum medical improvement on April 30, 2012, and sought the termination of permanent partial disability. (ROA p. 33).

By Form 58 dated July 9, 2012, Claimant sought a finding of compensability with regard to his right elbow and left shoulder and additional treatment as well as ongoing temporary total disability benefits. (ROA p. 62).

A hearing was held on July 18, 2012. In her Decision and Order, the hearing commissioner held that the Claimant injured his right shoulder in an admitted accident and found that the Claimant reached maximum medical improvement on April 30, 2012,

with a ten percent (10%) permanent partial disability to his right shoulder. The hearing commissioner specifically denied the Claimant's request that the Commission find compensable alleged injuries to Claimant's left shoulder and right elbow as a result of overuse following the admitted right shoulder injury. (ROA p. 1).

By Form 30 filed August 17, 2012, Claimant requested Full Commission review of the hearing commissioner's order. After oral argument, the Appellate Panel of the Full Commission issued an Order affirming the hearing commissioner's order in full. (ROA p. 13).

The Claimant now appeals to the Court of Appeals.

STATEMENT OF FACTS

The Claimant began working for MB Kahn in August of 2011 as a carpenter. His job consisted mostly of building concrete forms and preparing designated areas to pour concrete. (ROA pp.137-138). On November 28, 2011, the Claimant was building a form out of two by fours. When he lifted the form off the saw horses, he felt his right shoulder pop out. (ROA p.138). He was treated initially at Doctor's Care and was placed on light duty. Claimant testified that his light duty work consisted of setting forms with a sledge hammer using only his left arm and hand. (ROA p.141).

Claimant was referred to Dr. McFadden who performed surgery on his right shoulder on January 31, 2012. (ROA pp. 45-47). Claimant testified that he continued to work light duty for MB Kahn up and until the time of his surgery.

Claimant reached maximum medical improvement on April 30, 2012. On the date of maximum medical improvement, Dr. McFadden noted that Claimant had "full range of motion" in his right shoulder; that his right shoulder was doing "phenomenally well;" and

that Claimant had “full” rotator cuff strength in all planes. (ROA p. 54). Dr. McFadden assigned a sixteen percent (16%) impairment rating to the right shoulder and released Claimant to regular duty with no physical limitations. (ROA pp. 55-56).

Regarding his alleged left shoulder and right elbow injuries, the Claimant testified that he began having these problems the “last of December” 2011 and that he advised Dr. McFadden of his problems with his left shoulder. Records of visits to Dr. McFadden on December 14, 2011, January 23, 2012, February 13, 2012, and February 27, 2012, do not reflect the Claimant’s claims of shoulder and right elbow pain. (ROA pp. 41-54).

Claimant testified that he advised his supervisors at MB Kahn of the symptoms in his left shoulder; however, he did not receive any treatment for any problems with his left shoulder. Claimant stated that the problems with his left shoulder came from using a sledge hammer, and dragging a generator around with his left arm. (ROA p.149).

James Smith, the Claimant’s supervisor, testified that Claimant was not required to use a sledge hammer while on light duty, and he further directed other employees that Claimant was not to do so. James Smith also testified that Claimant was not required to pull a generator, nor was he ever aware that Claimant had done so while on light duty. (ROA p.181). Mr. Smith further testified that the light duty work did not require Claimant to use his right arm and that Claimant never complained about his left shoulder or right arm hurting while working light duty. (ROA pp. 179).

Claimant testified that he cannot move his left arm back behind his head and could not push or pull anything with his shoulders. (ROA pp. 149-150). He also stated that he is not able to return to full duty because of ongoing problems he has with his right shoulder despite being released for full duty by Dr. McFadden. (ROA pp.151-152).

Claimant testified that in the morning he has to grip a coffee pot with both hands because of his right elbow problems. (ROA p.154). He also testified that he has restrictive motion with his right elbow. As far as his left shoulder is concerned, he gets a burning sensation when he tries to push something heavy with his left arm and he does not have full range of motion of his left arm. (ROA pp. 155-156).

Claimant testified that he is unable to push or pull with either shoulder, unable to “pick my shoulder up,” and could not lift anything over his head with his right arm and did not have full range of his right shoulder. (ROA pp. 149-150, 153-154). However, Claimant also testified that absent his alleged left shoulder/right elbow injuries he would take his old job back if it were offered. (ROA pp. 152-152). Claimant further testified under cross-examination that when he saw Dr. McFadden March 26, 2012, he did not have full range of motion of his right shoulder. (ROA p.161).

STANDARD OF REVIEW

The substantial evidence rule of the Administrative Procedures Act governs the standard of review of a Workers’ Compensation decision. Corbin v. Kohler Co., 351 S.C. 613, 571 S.E.2d 92 (Ct. App. 2002); Gray v. Club Group, Ltd., 339 S.C. 173 528 S.E.2d 435 (Ct. App. 2000); Lake v. Reeder Constr. Co., 330 S.C. 242, 498 S.E.2d 650 (Ct. App. 1998). In an appeal from the Commission, the appellate court may not substitute its judgment for that of the Commission as to the weight of the evidence on questions of fact. Hamilton v. Bob Bennett Ford, 336 S.C. 72, 518 S.E.2d 599 (Ct. App. 1999); Stephen v. Avins Constr. Co., 324 S.C. 334, 478 S.E.2d 74 (Ct. App. 1996); S.C. Code Ann. §1-23-380(A)(6)(d) (Supp. 2001); see also Etheredge v. Monsanto Co., 349 S.C. 451, 562 S.E.2d 679 (Ct. App. 2002) (stating court may reverse or modify

Commission's decision if substantial rights of appellant have been prejudiced because administrative findings, inferences, conclusions or decisions are affected by other error of law). This court's review is limited to deciding whether the Commission's decision is unsupported by substantial evidence or is controlled by some error of law. See Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981); Gibson v. Spartanburg Sch. Dist. No. 3, 338 S.C. 510, 526 S.E.2d 725 (Ct. App. 2000); see also Lyles v. Quantum Chem. Co. (Emery), 315 S.C. 440, 434 S.E.2d 292 (Ct. App. 1993) (in reviewing decision of Workers' Compensation Commission, Court of Appeals will not set aside its findings unless they are not supported by substantial evidence or they are controlled by error of law).

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 conclusion the Commission reached in order to justify its action. Etheredge, 349 S.C. at 456, 562 S.E.2d at 684-82; Broughton v. South of the Border, 336 S.C. 488, 520 S.E.2d 634 (Ct. App. 1999). The Commission is the ultimate fact finder in Workers' Compensation cases. Muir v. C.R. Bard, Inc., 336 S.C. 266, 519 S.E.2d 583 (Ct. App. 1999). The final determination of witness credibility and the weight to be accorded evidence is reserved to the Commission. Shealy v. Aiken County, 341 S.C.448, 535 S.E.2d 438 (2000); Parsons v. Georgetown Steel, 318 S.C. 63, 456 S.E.2d 366(1995); Gibson, 338 S.C. at 517, 526 S.E.2d at 729. The findings of the Commission are presumed correct and will be set aside only if unsupported by substantial evidence. Anderson v. Baptist Med. Ctr., 343 S.C. 487, 541 S.E.2d 526 (2001); Hicks v. Piedmont Cold Storage, Inc., 335 S.C. 46, 515 S.E.2d 532 (1999). It is not within the

province of the appellate court to reverse findings of the Commission which are supported by substantial evidence. Broughton, 336 S.C. at 496, 520 S.E.2d at 637.

ARGUMENT

I. IS AN AWARD OF TEN PERCENT (10%) PERMANENT PARTIAL DISABILITY TO THE RIGHT SHOULDER SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD WHICH INCLUDES EVIDENCE THAT CLAIMANT HAD FULL RANGE OF MOTION AND THAT THE TREATING PHYSICIAN RELEASED CLAIMANT TO REGULAR DUTY WITH NO PHYSICAL RESTRICTIONS?

Claimant argues that the hearing commissioner improperly found permanent partial disability in an amount less than that assigned by the medical care providers. However, it is well settled that, although medical evidence is entitled to due deference, the Commission is not bound by the opinions of medical experts and may disregard medical evidence in favor of other competent evidence in the record. Potter v. Spartanburg Sch. Dist. 7, 395 S.C. 17, 716 S.E.2d 123 (Ct. App. 2011). Moreover, the Commission may find a degree of disability different from that suggested by expert testimony. Sanders v. MeadWestvaco Corp., 371 S.C. 284, 638 S.E.2d 66 (Ct. App. 2006) (citations and quotation marks omitted).

The first physicians to treat the Claimant after his November 28, 2011, accident were Doctor's Care, and shortly thereafter, Dr. McFadden. Dr. McFadden ultimately performed surgery on the right shoulder on January 31, 2012. On April 30, 2012, Dr. McFadden released the Claimant and noted that he had "full range of motion" in his right shoulder and that his right shoulder was doing "phenomenally well." (ROA p.54). Claimant was released to full duty for his right shoulder with no physical limitations

(emphasis added) (ROA p.56). Despite having no physical restrictions, Dr. McFadden assigned a sixteen percent (16%) impairment rating to the right shoulder. (ROA p.55-56). Dr. McFadden's observations regarding the condition of his shoulder upon release with no physical restrictions provide reliable, probative and substantial evidence to support the hearing commissioner's findings that the Claimant sustained a ten percent (10%) permanent partial disability to his right shoulder.

Moreover, Claimant testified that he takes no prescription medication for his work-related condition, (ROA pp. 172 and 100) and that absent his alleged left shoulder or right elbow injuries, he would take his old job back if offered. (ROA p. 167). The fact that the Claimant would resume his former job bolsters Dr. McFadden's observations regarding the condition of his shoulder upon release with no restrictions.

The Commission is the ultimate fact finder in a workers' compensation case. Shealy, supra. In determining whether substantial evidence exists, the Court of Appeals is not "to balance objective against subjective findings of medical witnesses, or to weigh the testimony of one witness against that of another. That function belongs to the Appellate Panel alone." Potter, 395 S.C. at 23, 717 S.E.2d at 126 (quoting Roper v. Kimbrell's of Greenville, 231 S.C. 453, 461, 99 S.E.2d 52, 57 (1957)). The Commission's finding of a 10% disability to the right shoulder is supported by reliable, probative and substantial evidence and therefore should be affirmed.

Claimant cites Herndon v. Morgan Mill, Inc., 246 S.C. 201, 143 S.E.2d 376 (1965) for the proposition that the Commission, as the ultimate fact finder in a workers' compensation case, must accept the opinion of the medical experts if there is no

competent evidence in the record contrary to the medical expert opinion. In Herndon, the claimant was attempting to establish a complex causal connection between a job injury and the claimant's cancer related death. The medical evidence in the record did not establish any causal connection and the Commission was reversed for relying strictly upon lay testimony to establish causation. In the present case the record includes substantial medical evidence from the authorized treating physician that the Claimant had "full range of motion," was doing "phenomenally well" and had "full" rotator cuff strength in all planes (ROA p.54), and was released to regular duty with no physical limitations. (ROA pp.55-56). There is clearly reliable, probative, substantial and *competent* evidence to support the Commission's finding of a 10% permanent partial disability to Claimant's right shoulder. The Commission's finding should therefore be affirmed.

II. IS THE COMMISSION'S DENIAL OF LEFT SHOULDER AND RIGHT ELBOW INJURIES SUPPORTED BY SUBSTANTIAL EVIDENCE WHEN CLAIMANT FAILED TO CONTEMPORANEOUSLY REPORT ALLEGED OVERUSE INJURIES TO HIS TREATING PHYSICIAN AND THE COMMISSION FOUND CLAIMANT'S TESTIMONY NOT CREDIBLE?

The first physicians to treat the Claimant after his November 28, 2011, accident were Doctor's Care, and shortly thereafter, Dr. McFadden. The only injury reported to these physicians was to the Claimant's right shoulder. Dr. McFadden performed surgery on the right shoulder on January 31, 2012 and Claimant had numerous follow-up visits with Dr. McFadden following his surgery. Although Claimant testified that his alleged overuse injuries began in late December of 2011, there is no contemporaneous report of these new injuries in the record.

Claimant visited Dr. McFadden on December 14, 2011, yet there is no report of new left shoulder and right elbow injuries in the medical record. (ROA pp.41-42). Claimant again saw McFadden two times in January of 2013-- January 23 and January 31, 2013, but again the records fail to reference any left shoulder and right elbow injuries. (ROA pp.43-47). Additional visits to Dr. McFadden on February 13, 2012, and February 27, 2012, also fail to evidence left shoulder or right elbow pain. (ROA pp.48-51). The lack of contemporaneous documentation of Claimant's alleged left shoulder and right elbow injuries is reliable, probative and substantial evidence to support the Commission's finding that the Claimant did not suffer compensable injuries to his left shoulder and right elbow. The Commission's finding in this regard should therefore be affirmed.

III. WHEN A CLAIM IS BASED, IN PART, UPON THE CLAIMANT'S HISTORY OF EVENTS AND SUBJECTIVE COMPLAINTS, IS THE CLAIMANT'S CREDIBILITY IMPORTANT?

In cases like the present where the medical record does not always support the claims of the Claimant, the Claimant's credibility is critical. Here the Commission formed a strong belief that the Claimant was not credible. The Commission "did not find believable Claimant's testimony that he used a sledgehammer with only his left arm while on light duty." (ROA pp.16-17). The Commission found that "Claimant's self-serving testimony" to be contrary to the medical records. (ROA p. 17).

The Commission further found numerous discrepancies with respect to Claimant's left shoulder and right elbow testimony, noting on several occasions that the Claimant failed to mention either the left shoulder or the right elbow to his treating physicians. (ROA p. ____; 3/11/13 Decision and Order, Paragraph 20). Moreover, the Commission characterized the Claimant's testimony as not "credible," not "believable,"

“self-serving,” having insurmountable “discrepancies,” and “not persuasive” (ROA pp. 16-18).

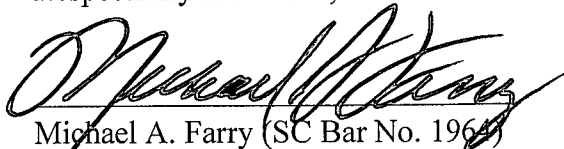
It is axiomatic that the Commission is the ultimate fact finder in workers’ compensation cases. Hunter v. Patrick Constr. Co., 289 S.C. 46, 344 S.E.2d 613 (1986). The final determination of witness credibility and the weight to be accorded evidence is for the Commission. Ford v. Allied Chem. Co., 252 S.C. 561, 167 S.E.2d 564 (1969). In the present case the Commission’s determination that the Claimant was not credible is supported by reliable, probative and substantial evidence and should therefore be affirmed. Likewise, the extent to which the Claimant’s lack of credibility impacted the Commission’s finding of a 10% impairment to the right shoulder and the non-compensability of the right elbow and left shoulder claims, the Commission is entitled to deference and those findings must also be affirmed.

CONCLUSION

The Claimant injured his right shoulder on November 28, 2011, and received appropriate treatment including surgery by Dr. McFadden. Dr. McFadden assigned a sixteen percent (16%) impairment rating to the right shoulder, but released the Claimant to full duty with no physical limitations. The Claimant’s medical records along with his inconsistent and often incredible testimony regarding his right shoulder restrictions resulted in the Commission finding that the Claimant sustained a ten percent (10%) disability to the right shoulder. These same inconsistencies, when coupled with the lack of contemporaneous notification to the treating physicians of alleged problems with the right elbow and left shoulder, led the Commission to deny compensability of the right

elbow and left shoulder. These findings were supported by the reliable, probative and substantial evidence in the record and should be affirmed.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Michael A. Farry", written over a horizontal line.

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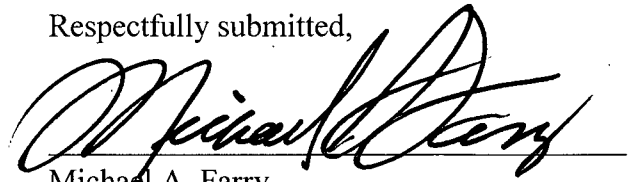
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PROOF OF SERVICE

I certify that I have served the Final Brief of Respondents on Appellant by depositing three copies to them by UPS, Next Day Air on October 7, 2013 addressed as follows:

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Respectfully submitted,



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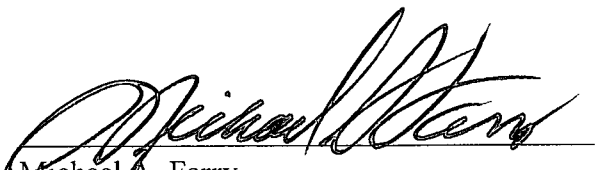
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CERTIFICATE OF COUNSEL

The undersigned certifies that the Respondent's Final Brief on Behalf of
Respondent complies with Rule 211(b), SCACR.


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