

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE APPELLATE PANEL OF THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Appellate Case No.: 2013-000600
W.C.C. File No. 1016910

Reginald T. Robinson, Respondent,

v.

Pella Corporation and Sentry Insurance Company, Appellants.

INITIAL BRIEF OF RESPONDENT

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SC Court of Appeals

TABLE OF CONTENTS

Table of Authorities	ii
Issues on Appeal	iii
Statement of the Case	1
Standard of Review	6
Argument	8
I. The SCWCC was correct in finding that Robinson sustained injury by accident arising out of and in the course of his employment	9
II. <u>Havird v. Columbia YMCA</u> and <u>Capers v. Flautt</u> do not apply to this claim	10
III. The Order of the SCWCC is proper as it was signed by at least two Commissioners	11
IV. Robinson is not at maximum medical improvement and needs additional medical care	12
Conclusion	14

TABLE OF AUTHORITIES

Cases:

Tims v. J.D. Kitts Construction, 393 S.C. 496, 713 S.E.2d 340 (Ct. App. 2011) 6

Lark v. Bi-Lo, Inc., 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981) 6

Hamilton v. Bob Bennett Ford, 336 S.C. 72, 76, 518 S.E.2d 599, 600-01
(Ct. App. 1999) 6

Pierre v. Seaside Farms, Inc., 386 S.C. 534, 540, 689 S.E.2d 615, 618 (2010) 6

Palmetto Alliance, Inc. v. S.C. Pub. Serv. Comm’n, 282 S.C. 430, 432,
319 S.E.2d 695, 696 (1984) 6

Liberty Mut. Ins. Co. v. S.C. Second Injury Fund, 363 S.C. 612, 621,
611 S.E.2d 297, 301 (Ct. App. 2005) 7

Tiller v. National Health Care Ctr., 334 S.C. 333, 513 S.E.2d 843 (1999) 9,13

Muir v. C.R. Bard, Inc., 336 S.C. 266, 282, 519 S.E.2d 583, 591
(Ct. App. 1999) 9

Havird v. Columbia YMCA, 308 S. C. 397, 418 S.E.2d 329 (Ct. App. 1992) 9

Capers v. Flautt, 305 S.C. 254, 407 S.E.2d 660 (Ct. App. 1991) 9

Landry v. Carolinas Healthcare Systems, 396 S.C. 149, 719 S.E.2d 288
(Ct. App 2011) 9, 10

O’Banner v. Westinghouse Elec. Corp., 319 S.C. 24, 28, 459 S.E.2d 324, 327
(Ct. App. 1995) 13

Hall v. United Rentals, Inc., 371 S.C. 69, 636 S.E.2d 876 (Ct. App. 2006) 13

Statutes and Regulations:

S.C. Code Ann. § 1-23-380 6

S.C. Regulation 67-709 12

ISSUES ON APPEAL

1. Did the South Carolina Workers' Compensation Commission err in finding that the Respondent Robinson sustained injury by accident arising out of and in the course of his employment, where the evidence clearly establishes that Robinson sustained an injury and that his current problems were causally related to the work accident?
2. Did the South Carolina Workers' Compensation Commission err in finding that the cases of Havird v. Columbia YMCA, 308 S.C. 397, 418 S.E.2d 329 (Ct. Ap. 1992) and Capers v. Flautt, 305 S.C. 254, 407 S.E.2d 660 (Ct. App. 1991) were inapplicable in this matter where the Respondent Robinson had an expectation, based on medical testing, that he could perform the job duties of the employer Pella?
3. Is an Order of the Full Commission valid if it is signed by two of the three hearing Commissioners, when three Commissioners conduct the review hearing pursuant to S.C. Regulation 67-709 and only two are available to sign the Order?
4. Is it error to find that the Respondent Robinson had not reached maximum medical improvement where expert testimony states that he was in need of additional medical care?

STATEMENT OF THE CASE

This appeal arises out of an Order of the South Carolina Workers' Compensation Commission ("SCWCC"), affirming the Order of the single Commissioner and awarding the Claimant/Respondent, Reginald Robinson ("Robinson") workers' compensation benefits.

A Hearing was held before Commissioner Andrea C. Roche on November 17, 2011, in Lexington County, South Carolina pursuant to Robinson's Form 50, Request for a Hearing. The Form 50, filed on August 15, 2011, sought the following: (1) that Robinson be found to have sustained injury by accident arising out of and in the course of his employment with the Defendant; (2) that Robinson be provided medical care for the back and both legs; and (3) that Robinson be paid temporary total disability benefits. By Order dated May 3, 2012, the Commissioner found that Robinson was entitled to the benefits sought and specifically awarded temporary total disability benefits from July 6, 2011 and continuing, as well as medical care for his back. (Order of Commissioner Roche).

The Defendants filed a Form 30, Notice of Appeal on May 17, 2012, seeking that the single Commissioner's decision be overturned. A Hearing was held before the Full Commission on December 17, 2012. By Order dated February 19, 2013, the Full Commission affirmed the Decision and Award of the single Commissioner. (Order of the Full Commission). The Defendants subsequently filed this appeal.

At the Hearing before the single Commissioner, Robinson testified that he was 44 years old, lived in Winnsboro, South Carolina and is a high school graduate. (Hearing Transcript, p. 7, ll. 1-6). Robinson testified that in 2001 he was injured in a work-related

accident. (Hearing Transcript, p. 7, ll. 9-11). As part of that claim, the Robinson underwent surgery on his neck with Dr. Thomas Holbrook. (Hearing Transcript, p. 7, ll. 12-17). The claim was settled and Robinson testified that he was given restrictions of no repetitive bending, stooping or lifting. (Hearing Transcript, p. 7, ll. 21-22; p. 8, ll. 2-3). In 2005, Robinson applied for a job with the Defendant Pella Corporation.

Robinson informed Pella of his previous back problems during the interview and on the application. (Hearing Transcript, p. 8, ll. 16-18; Respondent's APA 11, p. 109). Once aware of this information, Pella sent Robinson to Lexington Medical Center Occupational Medicine for a pre-employment evaluation, which was performed in November of 2005. (Hearing Transcript, p. 8, ll. 16-24). As a result of that appointment, the Claimant was then sent for a Functional Capacity Evaluation at the request of the Defendant Pella. (Hearing Transcript, p. 9, ll. 5-7).

The report from Lexington Medical Center Occupational Health reflect that Robinson was seen on November 7, 2005 by PB Padgett, a nurse. (Respondent's APA 11, p. 108). The note reflects that Robinson had back surgery in 2002 and it was specifically noted that he had a lumbar fusion. (Respondent's APA 11, p. 108). An addendum on the report was added on November 21, 2005, which states, "Cleared for work without restriction (Functional Capacity testing done)." (Respondent's APA 11, p. 108). In fact, the testing indicates that Robinson's "physical abilities MEET the functional requirements of the job description." (Respondent's APA 11, p. 112).

As a result of this testing, Robinson was hired and began to work on sliding windows. (Hearing Transcript, p. 9, ll. 17-20). Robinson testified that after the FCE, he believed that he had been cleared to perform that type of work and that he could do the

job. Robinson's job entailed him assembling windows "from scratch" from "the frame to putting the windows in. Actually building a window." (Hearing Transcript, p. 10, ll. 5-9). Robinson performed this job without any issues from 2005 until his accident in November of 2010. (Hearing Transcript, p. 10, ll. 12-21).

During this time, Robinson did not seek medical treatment for his back and he did not have any problems doing his job. (Hearing Transcript, p. 10, ll. 15-19). On November 12, 2010, Robinson was driving a forklift when a co-employee struck his forklift with another forklift and "t-boned me in the side." (Hearing Transcript, p. 10, ll. 24-25; p. 11, ll. 1-6). Following the accident, Robinson was taken to Occupational Medicine by his employer. (Hearing Transcript, p. 13, ll. 2-5). Robinson continued to treat with Occupational Medicine and was placed on light duty. (Hearing Transcript, p. 13, 18-21). The Defendants continued to provide medical care and eventually sent Robinson for additional care with Dr. William Felmly. (Hearing Transcript, p. 14, ll. 1-2).

On February 1, 2011, Dr. Felmly released Robinson to return to work. However he continued to have problems when he returned to work as instructed. (Hearing Transcript, p. 14, ll. 20-25; p. 15, ll. 1-3). Due to pain while working, Robinson asked to go home and sought medical care from his family physician. (Hearing Transcript, p. 14, ll. 20-25; p. 15, ll. 1-3). On February 14, 2011, Robinson was placed on light duty by his family physician, Dr. Herman Patrick. (Respondent's APA 1, p. 3-5). The employer did not provide light duty, and Robinson has been out of work continuously since that time. (Hearing Transcript, p. 15, ll. 8-13).

On July 6, 2011, Robinson sought medical treatment from Dr. Thomas Holbrook at Columbia Neurosurgical Associates. (Respondent's APA 7, p. 57-58). The notes indicate that Robinson complained of low back pain with numbness in both feet and tingling in both lower extremities, left greater than right. (Respondent's APA 7, p. 57-58). Dr. Holbrook also placed Robinson on sedentary work restrictions at that time. (Respondent's APA 7, p. 59). Additionally, Dr. Holbrook recommended steroid injections. (Respondent's APA 7, p. 58). In his deposition, dated July 13, 2011, Dr. Holbrook stated that based on the history given to him by Robinson (i.e. that he was involved in a forklift accident) the accident was responsible for his current problems. (Deposition of Thomas Holbrook, MD, p. 37, ll. 13-19).

At the original Hearing, the Defendants called Donna Butler Padgett, a nurse practitioner at Lexington Medical Center Occupational Health. (Hearing Transcript, p. 92, ll. 2-3). Ms. Padgett testified that she does the pre-employment physicals and sees patients with work related injuries. (Hearing Transcript, p. 92, ll. 16-17). Ms. Padgett also testified that she was aware that Robinson had back surgery in 2002 and due to that, she needed to ascertain whether or not he had any work restrictions. (Hearing Transcript, p. 95, ll. 15-25; p. 96, ll. 1-2). Nurse Padegett testified that during this process she had a copy of Robinson's prior functional capacity evaluation ("FCE") and that the Defendant Pella required Robinson to undergo a new FCE to determine if he could meet the requirements of his new job. (Hearing Transcript, p. 100, ll. 4-12).

On cross-examination Padgett admitted that as of November 21, 2005, Robinson had been cleared for full duty work at Pella Corporation. (Hearing Transcript, p. 101, ll.

16-22). Padgett also admitted that Pella requested that all of the testing, the FCE and the pre-employment physical, be performed. (Hearing Transcript, p. 102, ll. 9-19).

That testing, indicated the following:

Reginald demonstrated no functional limitations in today's testing. Based on this, Reginald's physical abilities do match the job requirements of General Assembly Operator as reported by Pella Corporation. Therefore, it is likely that Reginald would tolerate fully performing the job of General Assembly Operator without modifications or accommodations. (Exhibit A, Reports of FCE introduced as evidence at the Hearing).

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act establishes the standard for judicial review of decisions by the Appellate Panel of the Workers' Compensation Commission. Tims v. J.D. Kitts Construction, 393 S.C. 496, 713 S.E.2d 340 (Ct. App. 2011) See Lark v. Bi-Lo, Inc., 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981). Specifically, section 1-23-380 of the South Carolina Code (Supp. 2010) provides that this court may not substitute its judgment for that of the Appellate Panel as to the weight of the evidence on questions of fact, but may reverse when the decision is affected by an error of law. See Hamilton v. Bob Bennett Ford, 336 S.C. 72, 76, 518 S.E.2d 599, 600-01 (Ct. App. 1999), modified on other grounds, 339 S.C.68, 528 S.E.2d 667 (2000), (interpreting § 1-23-380). Section 1-23-380 allows reversal of a factual finding of the Appellate Panel only if it is "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." See Pierre v. Seaside Farms, Inc., 386 S.C. 534, 540, 689 S.E.2d 615, 618 (2010).

Our Supreme Court has defined substantial evidence as evidence that, in viewing the record as a whole, would allow reasonable minds to reach the same conclusion as the Appellate Panel reached. Lark, 276 S.C. at 135, 276 S.E.2d at 306. [T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." Palmetto Alliance, Inc. v. S.C. Pub. Serv. Comm'n, 282 S.C. 430, 432, 319 S.E.2d 695, 696 (1984).

The appellate court is prohibited from overturning findings of fact by the Appellate Panel unless there is no reasonable probability the facts could be as related by

the witness whose testimony the finding was based. Liberty Mut. Ins. Co. v. S.C. Second Injury Fund, 363 S.C. 612, 621, 611 S.E.2d 297, 301 (Ct. App. 2005).

Argument

I. The SCWCC was correct in finding that Robinson sustained injury by accident arising out of and in the course of his employment.

It is undisputed that on November 12, 2010, that Robinson was driving a forklift at work when he was "t-boned" by a co-employee on another forklift. It is also undisputed that Robinson immediately complained of back pain when he was asked by his co-employee if he was okay. (Hearing Transcript, p. 12). Robinson immediately told his supervisor that his back was injured and was taken to the doctor by his employer. (Hearing Transcript, p. 12, ll. 18-20; p. 13, ll. 1-4). Just as important, is the fact that the Defendants admit there was an accident. (Hearing Transcript, p. 4, ll. 24-25).

Only after Robinson was seen and released by Dr. Felmly did the position of the Defendants change. Instead of the facts, the Defendants have crafted an argument that relies on the medical records of Dr. Felmly, who opined that Robinson had not sustained a new injury to his back. (Respondent's APA 6, p. 55). The only doctor who had ever treated Robinson before and after this accident was Dr. Thomas Holbrook. At his deposition, Dr. Holbrook testified as follows:

Q. Okay, Mr. Robinson told you that he was in a forklift accident where he was struck by another forklift on November 12, 2010. That was an accepted workers' comp claim. The defendants admit he was in a forklift accident on that day.

My question to you is: In your opinion based just on this report or on your seeing the patient and your having treated him in the past, is that accident responsible for his current problems?

A. According to his history on that date, it was, yes sir.

(Deposition of Dr. Thomas Holbrook, p. 37, ll. 7-19).

In addition to the testimony of Dr. Holbrook, on August 3, 2011, Dr. William

Lehman opined that in his opinion that it “does appear to be most probable, and to a reasonable degree of medical certainty, that the back injury has aggravated his pre-existing back condition, not only of previous back fusion, but also spondylosis and facet arthropathy, leading to continued disability and work restrictions, likely on a permanent basis.” (Respondent’s APA 12, p. 116).

Expert medical testimony is designed to aid the Commission in coming to the correct conclusion; therefore the Commission determines the weight and credit to be given to the expert testimony. Tiller v. National Health Care Ctr., 334 S.C. 333, 340, 513 S.E.2d 843, 846 (1999). The final determination of witness credibility and the weight to be accorded evidence is reserved to the Full Commission. Muir v. C.R. Bard, Inc., 336 S.C. 266, 282, 519 S.E.2d 583, 591 (Ct. App. 1999). In this case, the Full Commission, after reviewing all of the medical records, testimony and evidence, concluded by a preponderance of the evidence that Robinson had sustained an accident, which the Defendants admit happened. The record reflects substantial evidence to find that Robinson’s injury on November 12, 2010, was the cause of his current problems, not simply a continuation of an old injury from 2001.

II. *Havird v. Columbia YMCA* and Capers v. Flautt do not apply in this claim.

The Defendants assert that Robinson is barred from recovery in this matter due to the cases of Havird v. Columbia YMCA, 308 S. C. 397, 418 S.E.2d 329 (Ct. App. 1992) and Capers v. Flautt, 305 S.C. 254, 407 S.E.2d 660 (Ct. App. 1991). This reliance is erroneous.

As most recent as 2011, the Court of Appeals stated in Landry v. Carolinas Healthcare Systems, 396 S.C. 149, 719 S.E.2d 288 (Ct. App 2011), that "an injury is

unexpected, bringing it within the category of accident, if the *worker* did not intend it or expect it would result from what he was doing." Landry v. Carolinas Healthcare Systems, 396 S.C. 149, 719 S.E.2d 288, 292 (Ct. App 2011). Therefore, if an injury is unexpected from the worker's point of view, it qualifies as an injury by accident. Id. There is absolutely no evidence in the record to support any argument that Robinson knew that he could be injured or that he expected to be injured while driving a forklift.

Robinson was required to have a pre-employment physical at the request of the Defendant Pella. Because of that request, Robinson underwent a Functional Capacity Evaluation, which he passed. As of that date, Robinson had no reason to believe that he could not perform the job duties assigned to him by Pella. It stands to reason that the Defendant Pella had relied on the FCE as well, because it hired him. Robinson testified that following the FCE he believed he could perform the work. Robinson testified that, "After I was cleared I felt like I could do the job." (Hearing Transcript, p. 17, ll. 22-23)(emphasis added).

Moreover, Robinson was medically cleared to work by the Defendants' own physicians prior to his being hired. A full functional capacity evaluation was performed, indicating that Robinson was able to perform full duties and that "Reginald's physical abilities do match the physical job requirements of General Assembly Operator as reported by Pella Corporation. Therefore, it is likely that Reginald would tolerate fully performing the job of General Assembly Operator without modifications or accommodations." (Exhibit A, Reports of FCE introduced as evidence at the Hearing). Havird and/or Capers simply do not apply to this evidence. Robinson did not mislead the Defendants – he told the examiner about his previous back injury and surgery – and he

was cleared to work full duty by the Employer.

In both Havird and Capers the injured worker was told by his physician that continuing work would result in their injuries. In both cases the court determined that the injury was something the injured worker could expect. Unlike those cases, Robinson was affirmatively told by a physician that he could work and that he was capable of performing the job duties as laid out by the employer. The report issued by the employer's representative, was clear – "Reginald demonstrated no functional limitations in today's testing." (Exhibit A, Reports of FCE). Robinson had no expectation that he could not perform the job, to the contrary he had been told by the employer and the employer's doctors that he could perform the work.

The Defendants are requesting that this Court find that even when an employee is told that he can work full duty by a physician of his potential employers choosing, he cannot rely on that medical opinion and instead must not work or be barred by Havird. That is not the law. The law as interpreted by this Court in Capers and Havird is that if an employee knows that the work will result in injury, then they are barred from recovery. Here, there is no evidence that Robinson, especially after the FCE, would have ever believed he could not perform the job duties assigned to him.

III. The Order of the SCWCC is proper as it was signed by at least two Commissioners.

The Defendants argue that the fact that three Commissioners heard the appeal in this matter at the Full Commission, yet the fact that only two signed the Order thus rendering it without any force or effect is without merit. The Full Panel heard this appeal on December 17, 2012, and the panel consisted of Commissioners Avery B. Wilkerson,

Jr., Commissioner Derrick L. Williams and Commissioner Gene McCaskill. (Full Commission Transcript). The Full Commission Order was signed by Commissioner Wilkerson and Commissioner McCaskill, as Commissioner Williams had resigned from the Commission by the time the Order was issued. Regulation 67-709 states that Full Commission Hearings shall be “conducted by a three or six member panel” - which this claim was. Nowhere in the regulation does it require that the Order be signed by all three Commissioners.

The Appellants argue that “the plain language of the regulation states that all decisions must be made by a three commissioner panel” however nowhere in the Regulation is there any reference to all three Commissioners making a decision, simply that a minimum of three Commissioners will conduct a review and vote accordingly within the time period. In the matter at hand, three Commissioners did conduct a review, with two of them signing the Order to affirm. It is not required that the third Commissioner sign the Order or even vote on the decision, as the regulation also states that “If a Commissioner fails to register a vote within the periods referred to above, the Commissioner is deemed to have registered a vote affirming the Hearing Commissioner and may not vote otherwise.” S.C. Regulation 67-709(F).

Regardless of whether two or three Commissioners signed the Full Commission Order, the fact is that a majority of the Commissioners who heard the case voted to affirm the decision of the single Commissioner. Despite language in their brief asserting the contrary, the Defendants were given a review by three Commissioners pursuant to the regulation and the decision was to affirm.

IV. The Claimant is not at maximum medical improvement and needs medical care.

Maximum medical improvement (“MMI”) is a term used to indicate that a person has reached a plateau that in the physician's opinion there is no further medical care or treatment which will lessen the degree of impairment. O'Banner v. Westinghouse Elec. Corp., 319 S.C. 24, 28, 459 S.E.2d 324, 327 (Ct. App. 1995). MMI is a factual determination made by the Commission. Hall v. United Rentals, Inc., 371 S.C. 69, 636 S.E.2d 876 (Ct. App. 2006).

At his deposition, Dr. Holbrook never placed Robinson at MMI. In fact, the record has zero mention of Robinson being placed at MMI by Dr. Holbrook. Instead, his medical reports reveal that as of July 6, 2011 - the last time Robinson was seen - Dr. Holbrook recommended lumbar epidural steroid injections. Other medical records reflect that Dr. Lehman stated in his report of August 3, 2011, that “it does not appear that Mr. Robinson has reached maximum medical improvement.” (Respondent’s APA 12, p. 116). Expert medical testimony is designed to aid the Commission in coming to the correct conclusion. Tiller v. National Health Care Ctr., 334 S.C. 333, 340, 513 S.E.2d 843, 846 (1999). Therefore, the Commission determines the weight and credit to be given to expert testimony. Id. The Commission was in its discretion when it sided with the testimony of Dr. Holbrook and Dr. Lehman and determined that the Claimant was in need of additional medical care.

In addition to the medical evidence, the Commission relied upon the testimony of Robinson. At the time of the Hearing, other than an independent medical evaluation from Lehman, Robinson had been unable to receive medical attention since being last seen in

July 2011 by Dr. Holbrook. Robinson testified that he was continuing to have back pain and wanted to receive the injections. (Hearing Transcript, p. 16, ll. 19-25; p. 17, ll. 1-9). It is well within the discretion of the Commission to order additional medical care per Dr. Holbrook and Dr. Lehman's recommendation in light of the evidence.

Conclusion

The Respondent submits that the SCWCC was correct in finding that Robinson sustained injury by accident, arising out of and in the course of his employment on November 12, 2010 when he was t-boned by another forklift on the job. Moreover, Robinson informed this employer in 2004 of his previous back problems, including the surgery, and the employer on its own initiative had Robinson undergo a functional capacity evaluation finding that he was capable of performing the job duties. Robinson's reliance on the employer's physician gave him a reasonable expectation that he could perform the job and Havird and Capers do not apply.

Additionally, the Appellants were not deprived a right to a proper Full Commission Hearing as three Commissioners considered their appeal and rendered an opinion. Lastly, there is ample evidence in the record in the testimony of Dr. Thomas Holbrook which reflects that Robinson was not at maximum medical improvement and was in need of additional medical care. As a result of the above, Robinson respectfully requests that this Court affirm the Decision and Order of the Full Commission in this matter.

Respectfully Submitted,

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

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Reginald T. Robinson, Respondent,

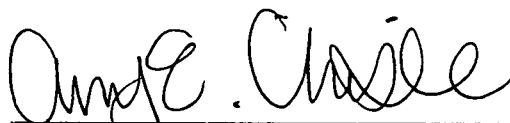
v.

Pella Corporation and Sentry Insurance Company, Appellants.

PROOF OF SERVICE

I certify that I have served a copy of the Initial Brief of Respondent and the Designation of Matter to be included in the Record on Appeal on Reginald T. Robinson by depositing a copy of same in the United States Mail, postage prepaid, on January 22, 2014, addressed to his attorney of record, Grady L. Beard and Robert E. Horner, Sowell Gray Law Firm, Post Office Box 11449, Columbia, South Carolina 29211.

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