

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM
The South Carolina Workers' Compensation Commission

Appellate Case No.: 2013-001474

Joann Brockington, ...

v.

NHC Lexington, and
Premier Group Insurance Co., Inc., Carrier, ... Respondents,

v.

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

FINAL BRIEF OF APPELLANT

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SC Court of Appeals

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STATEMENT OF THE ISSUES

1. Under S.C. Code Ann. § 42-9-400, was the Commission's decision that Claimant's preexisting arthritis is a hindrance to her employment erroneous in light of the substantial evidence in the record?
2. Under S.C. Code Ann. § 42-9-400, was the Commission's decision that Claimant's preexisting arthritis created substantially greater medical costs and permanent disability erroneous in light of the substantial evidence in the record?

STATEMENT OF THE CASE

This is an appeal by the South Carolina Second Injury Fund ("Fund") from an award of partial reimbursement under South Carolina Code Ann. § 42-9-400. Employer, NHC Lexington, and Carrier, Premier Group Insurance Company, Incorporated (collectively "Carrier") alleged that they incurred substantially greater liability for medical costs and disability when their employee, Joann Brockington ("Claimant"), sustained a work injury on August 8, 2007 that combined with her preexisting arthritis in her lower back. Carrier also argued that Claimant's preexisting arthritis in her lower back was permanent and serious enough to constitute a hindrance or obstacle to employment and that it met all requisites for reimbursement pursuant to S.C. Code Ann. § 42-9-400. The Fund denied the claim was entitled to reimbursement asserting that Claimant's preexisting arthritis was not permanent and serious enough to constitute a hindrance or obstacle to her employment. The Fund also asserted that Claimant's preexisting arthritis did not substantially increase Carrier's liability for medical costs and permanent disability as contemplated by S.C. Code Ann. § 42-9-400.

The Hearing Commissioner found the claim reimbursable and the Appellate Panel affirmed. The Fund now appeals to this Court.

STANDARD OF REVIEW

The Administrative Procedures Act governs the standard of review in workers' compensation cases. Liberty Mut. Ins. Co. v. S.C. Second Injury Fund, 363 S.C. 612, 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., Inc., 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, 276 S.E.2d 304 (1981); Corbin v. Kohler Co., 351 S.C. 613, 571 S.E.2d 92 (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, 622 S.E.2d 577 (Ct. App. 2005).

ARGUMENT

- I. CARRIER HAS NOT ESTABLISHED THAT CLAIMANT'S PREEXISTING ARTHRITIS WAS A HINDRANCE OR OBSTACLE TO HER EMPLOYMENT PURSUANT TO S.C. CODE ANN. §42-9-400.

The statutory reimbursement scheme underwent various changes in 2007. Prior to the changes, arthritis was a condition presumed to be permanent and a hindrance or obstacle to employment or reemployment. See S.C. Code Ann. § 42-9-400 (d)(4) (Supp. 2006). However, in 2007, the legislature eliminated arthritis from the list of conditions presumed to be permanent and a hindrance or obstacle to employment. See S.C. Code Ann. § 42-9-400(d) (Supp. 2008). Thus, carriers cannot rely on a presumption that

arthritis is permanent and serious enough to be a hindrance to employment if the Claimant was injured on or after July 1, 2007. In this case, Claimant sustained a work injury on August 8, 2007, and Carrier is not entitled to a presumption that arthritis is permanent and serious enough to constitute a hindrance or obstacle to Claimant's employment. Here, Carrier must prove via other evidence that Claimant's preexisting arthritis was permanent and serious enough to constitute a hindrance or obstacle to employment, and the substantial evidence does not support this assertion.

While the statutory reimbursement scheme does not define what constitutes a hindrance to employment, Webster's dictionary defines "hinder" and "obstacle" respectively, as that which causes delay or difficulty, or to prevent from doing or happening; and "something that obstructs or hinders progress." WEBSTER'S DESK DICTIONARY 212. 312 (2004). Additionally, recent case law instructs that "permanent" encompasses the fact that a Claimant may require specialized healthcare without the means to earn a living. Crisp v. SouthCo., Inc., 401 S.C. 627, 738 S.E.2d 835 (2013). Furthermore, Larson's instructs that whether a condition is a hindrance to employment depends upon whether an employer would hire, employ or promote Claimant knowing all of the facts. 5-91 LARSON'S WORKERS' COMPENSATION LAW § 91.02(6).

Claimant's preexisting arthritis in her lower back does not pass muster as a condition permanent and serious enough to constitute a hindrance to her employment under any of the definitions cited above. In this case, Claimant's preexisting arthritis did not hinder or obstruct her progress nor did it create difficulty in the performance of her job duties as a nursing home cook. Claimant began working as a nursing home cook in 2001. Claimant denied previous back problems or similar symptoms prior to her August

2007 work injury and did not undergo any physical therapy, MRIs or other radiographic imaging with respect to her back until approximately 2009. R.pp. 380 and 382. Claimant also denied having problems during her employment or any serious health concerns until she sustained the August 8, 2007 work related injury. R.p. 404. Furthermore, there is no evidence indicating that Claimant missed significant time from work due to preexisting arthritis in her lower back. In fact, Claimant's past back history is noted as negative and she attributed her physical difficulties and numerous absences from work as the direct result of her August 8, 2007 work related head injury not due to the preexisting arthritis in her lower back. R.p. 404.

The medical evidence in the record reveals that Claimant's preexisting arthritis did not require any specialized medical treatment that would prevent her from earning of living. Claimant presented for treatment on various occasions in the years preceding her August 8, 2007 work injury. R.pp. 34-63. In 1998, Claimant underwent a cervical spine x-ray that revealed degenerative joint disease in the AC Joint with no evidence of fractures or subluxation. R.p. 39. In 1999, Claimant presented for medical treatment for migraines and sinus related pain. R.p. 37. At this 1999 appointment, Claimant did not complain of arthritis or any other pain that would hinder or obstruct her progress or ability to perform the duties of her job as a nursing home cook. Rp. 37. Claimant did not receive any specialized treatment for arthritis in her low back.

In February 2004, Claimant presented to the Emergency Room at Palmetto Health Richland with bilateral knee sprain. R.pp. 44-54. Claimant's right knee x-ray revealed an old healed fracture but no evidence of acute fracture or subluxation and there were no complaints of low back pain at that time. R.p. 50. In March 2004, Claimant's follow up

visit revealed continued right knee pain, swelling with normal gait, range of motion and strength. R.pp. 75-77. The medical records do not reference arthritis in her low back as problematic. R.p. 77. When Claimant presented for treatment in June 2005 to follow up on other medical issues, she denied arthritis and an examination of her eyes, respiratory system, cardiovascular system, gastrointestinal system and feet were normal. R.pp. 100-101. When Claimant presented for treatment in November 2005, she complained about her arthritis, but she was in no acute distress and her musculoskeletal examination was normal. R.p. 106. When Claimant presented for treatment in May 2007, approximately two (2) months prior to the work injury, she complained of nagging and intermittent headaches but no chronic pain or arthritis. R.pp. 295-296. Claimant did not receive any specialized treatment for arthritis in her lower back in the years preceding her August 8, 2007 work injury.

On August 8, 2007, Claimant fell and hit her head on the concrete during the course of her employment. R.pp. 301 and 388. Claimant presented to the Emergency Room at Lexington Medical Center with a small hematoma, and decreased range of motion and tenderness in her right arm. R.p. 388. Claimant was diagnosed with neck pain, a neck contusion and a hip contusion. R.p. 391. On August 14, 2007, approximately one (1) week post injury, Claimant presented for treatment and her physical examination revealed moderate discomfort and decreased range of motion in her head and neck due to pain. R.pp. 301-303. There were no complaints of arthritis or low back pain at that time. Claimant did not receive any specialized care or treatment for arthritis in her low back. Furthermore, there were no diagnostic tests performed on

Claimant's lumbar spine prior to the work injury, which would indicate that none of the treating physicians thought it was serious enough to order additional testing or imaging.

Carrier submitted a medical questionnaire from the treating physician that supports reimbursement based on preexisting arthritis in the low back. R.pp. 416-417. However, the questionnaire is not supported by the voluminous medical records that clearly indicate Claimant received no significant treatment for arthritis in her low back either prior to or subsequent to the work injury. Claimant had limited pre injury complaints regarding arthritis in her low back and the medical records note that her musculoskeletal examinations were normal prior to the work injury. The Commission is not required to give conclusive effect to a questionnaire to the exclusion of other more compelling evidence. Ballenger v. S. Worsted Corp., 209 S.C. 463, 40 S.E.2d. 681 (1946). In this case, the substantial evidence indicated that Claimant's preexisting arthritis in her lower back was not permanent and serious enough to constitute a hindrance or obstacle to her employment and the Commission's decision to the contrary must be reversed.

II. CLAIMANT'S PREEXISTING ARTHRITIS DID NOT SUBSTANTIALLY INCREASE CARRIER'S LIABILITY FOR MEDICAL COSTS AND DISABILITY.

Section 42-9-400 of the South Carolina Code requires carriers to be reimbursed for compensation and medical benefits:

If an employee who has a permanent physical impairment from any cause or origin incurs subsequent disability from injury by accident arising out of and in the course of his employment, resulting in compensation and medical payments liability or either, for disability that is

substantially greater and is caused by aggravation of the preexisting impairment than that which would have resulted from the subsequent injury alone.

S.C. Code Ann. §42-9-400 (a).

Thus, Carrier must establish that Claimant's preexisting impairment was aggravated by the subsequent work injury to create substantially greater medical costs and permanent disability than that which would have resulted from the subsequent injury alone. S.C. Code Ann. § 42-9-400 (a) Here, the medical evidence does not support this element of reimbursement.

Claimant's post injury treatment for arthritis in the low back was limited at best. When Claimant presented for treatment post injury, she was not experiencing chronic pain and complained of blurred vision and headaches, which resulted from the work injury, where she hit her head on a concrete floor. R.pp. 301-303. Claimant's musculoskeletal examination revealed normal range of motion and strength in her lower extremities. R.p. 303. On September 4, 2007, when Claimant presented to The South Carolina Neurological Clinic, she was treated for post concussive headaches and subdural hematomas, all of which were the direct result of the work related head injury. R.pp. 396-397. On October 25, 2008, when Claimant presented to Midlands Neurology & Pain Associates, she was again treated for post concussive syndrome resulting from her work related head injury. R.pp. 398-402.

Claimant also received limited treatment for arthritis in her lumbar spine subsequent to work injury. Claimant's post injury medical reports consistently note that her musculoskeletal examination revealed normal range of motion in the lower extremities, R.pp. 306-307; normal gait and station, R.pp. 311, 317, 323; and, negative

findings with normal gait and station, R.pp. 329, 334, 340, 346, 355, 363. Claimant's post injury presentation included treatment for neck pain and spasms, blurred vision, imbalance, headaches, post concussive syndrome and hypertension, but no treatment for or problems associated with preexisting arthritis in her lower back. R.p. 307, 310, 315, 318, 332, 340-341, 346, 353, 366. In fact, physical therapy and an MRI of the lumbar spine were not ordered until approximately 2009, two (2) years post injury. R.pp. 380 and 382.

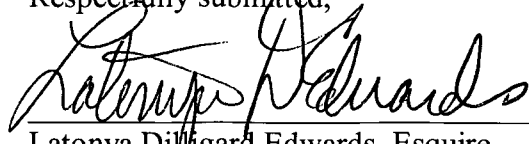
Claimant's preexisting arthritis did not create substantially greater permanent disability. On June 17, 2009, Claimant was deemed at maximum medical improvement and was assigned a four (4%) percent impairment rating to the lumbar spine. R.p. 384. On November 25, 2009, Claimant received an eight (8%) percent whole person impairment rating. R.p. 415. These ratings were the direct result of Claimant's August 8, 2007 work related head injury.

Claimant's preexisting arthritis in the lower back did not substantially increase Carrier's liability for medical costs and disability and the Commission's decision should be reversed.

CONCLUSION

For reasons cited herein, the Second Injury Fund requests that this Honorable Court reverse the decision below and deny Carrier's reimbursement request.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Latonya Dilligard Edwards". The signature is written in a cursive, flowing style with a horizontal line underneath it.

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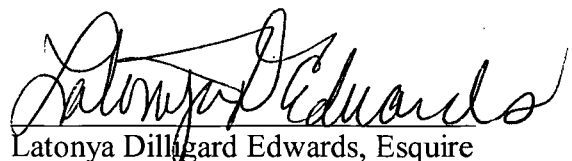
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CERTIFICATE OF COUNSEL

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

March 3, 2014



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