THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Appellate Case No.: 2013-002487

Commerce and Industry Insurance Company, ... Appellant,

v.

Second Injury Fund of South Carolina, ...Respondent.

INITIAL REPLY BRIEF OF APPELLANT

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I. Respondent fails to rebut Appellant's argument that the Circuit Court erred in affirming the Full Commission's erroneous finding that the claimant's pre-existing condition was not a hindrance to employment.

A. The Appellant submitted reliable, probative and substantial evidence to which the Respondent failed to rebut.

The Appellant has submitted reliable, probative, and substantial evidence proving each and every requirement for reimbursement as set forth in S.C. Code Ann. § 42-9-400 (2003), including evidence that the claimant's pre-existing back injury was a hindrance or obstacle to employment. Specifically, the Appellant has submitted medical questionnaires by the claimant's treating physicians, Drs. Scott Sauer and Gregory Kang, confirming that the claimant's pre-existing back injury was permanent and serious enough to constitute a hindrance to employment. (Carrier APA Ex. D-E, pp. 72-73). As the claimant's treating physicians, Drs. Sauer and Kang are familiar with the claimant and, thus, are the most qualified persons to render an opinion on the issue. There is no other evidence in the record which speaks directly to the issue of hindrance which can rebut these opinions. Accordingly, the only reliable, probative, and substantial evidence in the record supports a finding that the claimant's pre-existing injury was a hindrance to employment.

Once the Appellant presented substantial evidence supporting its claim for reimbursement, the burden then shifted to the Respondent to present reliable, probative and substantial evidence sufficient to rebut that presented by the Appellant. See Carolinas Recycling Group v. South Carolina Second Injury Fund, 398 S.C. 480, 730 S.E.2d 324 (Ct. App. 2012). Not only did the Respondent not present "reliable, probative and

substantial evidence," it did not present any evidence of any type on the issue of hindrance.

Specifically, the Respondent failed to present any expert medical evidence or expert testimony supporting its position. The issues involved in this action call for a level of expertise beyond laymen's knowledge. The only expert medical evidence and testimony in the record favors reimbursement. When the specific issues relevant to reimbursement were presented to the experts possessing the skills to offer an opinion, each determined that the claimant suffered from preexisting impairments that would constitute a hindrance to employment. For the Appellate Panel to have accepted the Respondent's contentions it would have had to render medical opinions based upon its own interpretation of isolated medical records; such an approach seemingly has been prohibited as outside the scope of the Commission's authority. See Burnette v. City of Greenville, 401 S.C. 417, 737 S.E.2d 200 (Ct. App. 2012) (rejecting a finding of the Commission containing a medical opinion that did not originate from a medical provider and remanding the claim to the Commission to enter findings consistent with the substantial evidence in the record). Accordingly, the Respondent failed to sufficiently rebut the evidence presented by the Appellant and therefore the Appellate Panel's findings were clearly erroneous.

Assuming *arguendo* that the Respondent was not required to present expert medical evidence supporting its position, it has failed to present any evidence sufficient to rebut the evidence submitted by the Appellant. The Respondent argues that the claimant's pre-existing injury was not a hindrance to his employment. In so arguing, the Respondent relies heavily upon the claimant's post-accident medical records, none of

which speak to the issue at hand. The determination of whether a condition is a hindrance is an analysis of whether the condition would affect the claimant's ability to obtain employment. See S.C. Code § 42-9-400(d). In other words, the inquiry is whether the condition was a hindrance prior to the accident. The Respondent's reliance on isolated language regarding the claimant's medical treatment in post-accident medical records is in no way relevant to the analysis of whether a condition was a hindrance prior to the accident itself. Even if such records could be used, none of the statements to which the Respondent directs the Court speak to the issue of hindrance. Rather, the Respondent is merely diverting attention away from the only substantial evidence in the record on the issue of hindrance – the statements of his treating physicians.

Moreover, the Respondent makes unfounded representations that the claimant was hired to work a "heavy manual labor" job as evidence that his preexisting back injury could not have been a hindrance. (Respondent Initial Br. p. 6). Interestingly, the Respondent failed to submit any evidence of any sort regarding the claimant's job responsibilities. As such, there is no evidence in the record of whether the claimant's job actually entailed "heavy labor." Accordingly, the Respondent's contentions and the Commissions reliance thereof would amount to surmise, conjecture or speculation, which is clearly prohibited under prevailing authorities. See Edwards v. Pettit Constr. Co., 273 S.C. 576, 579, 257 S.E.2d 754, 755 (1979).

The fact that the claimant was employed by Avcraft despite his preexisting impairment is irrelevant to the hindrance analysis. The primary purpose of the second injury fund legislation is to encourage employers to hire impaired workers or to retain them if they become impaired during the course of their employment. State Workers'

Compensation Fund v. South Carolina Second Injury Fund, 313 S.C. 536, 538, 443 S.E.2d 546, 547 (1994). The fact that the claimant was hired as a mechanic or in any other job is not indicative of whether his condition was a hindrance. The legal issue in question is not the ability to do a particular job but rather a hindrance or obstacle to employment or re-employment. The only evidence directly addressing the issue of hindrance to employment or re-employment is the medical affidavits completed by Dr. Sauer and Dr. Kang. Furthermore, the South Carolina Supreme Court held in Anderson v. Campbell Tile Co. that the unanimous opinion of medical experts on particular subjects may be conclusive, even if contradicted by lay witnesses. 202 S.C. 54, 24 S.E.2d 104.

For the reasons discussed herein the preceding sections, the only evidence in the record supports a finding that the claimant's preexisting condition was a hindrance or obstacle to employment. Therefore, the Full Commission's decision to deny reimbursement was clearly erroneous and not supported by the reliable, probative, and substantial evidence in the record.

B. The Respondent conceded the claimant had a preexisting condition and that the employer had knowledge of that condition and, thus, has conceded that the preexisting condition was a hindrance to employment.

During oral arguments before the Horry County Court of Common Pleas, the Respondent stipulated that the claimant had a pre-existing condition and the employer had prior knowledge of the condition. (Tr. p. 8:6-13). Moreover, the Respondent indicated that the "only issue in dispute" is whether the "pre-existing condition was permanent and serious enough to be a hindrance or obstacle to employment. . . ." (Tr. p. 8:7-9). As such, the Fund seemingly concedes that the Appellant has met the other requirements for reimbursement pursuant to S.C. Code § 42-9-400.

Under S.C. Code Ann. § 42-9-400(c) (2003), "the employer must establish . . . that employer had knowledge of the permanent physical impairment . . . ." Permanent physical impairment is defined by statute as "a permanent condition . . . of such seriousness as to constitute a hindrance or obstacle to obtaining employment . . . or reemployment . . . ." S.C. Code Ann. § 42-9-400(d) (2003). Therefore, a concession of employer knowledge under S.C. Code Ann. § 42-9-400(c) (2003) would constitute a concession that the preexisting conditions were permanent physical impairments under S.C. Code Ann. § 42-9-400(d) (2003).

"If a statute's language is plain, unambiguous, and conveys a clear meaning, then the rules of statutory construction are not needed and a court has no right to impose another meaning." Transp. Ins. Co. & Flagstar Corp., at 429, 699 S.E.2d at 690. Under the plain and unambiguous statutory language, by conceding employer knowledge of the claimant's pre-existing back injury also conceded that the back injury was permanent and of such seriousness so as to constitute a hindrance to the claimant's employment.

II. Respondent's continued reliance on the unauthenticated email despite its stipulation that the Appellant had satisfied the preexisting injury and employer knowledge requirements is misplaced.

The Respondent glosses over the evidentiary issues regarding the admissibility of its email and fails to appreciate the significant differences between that email and the Appellant's knowledge statement from an evidentiary and/or procedural standpoint. Rather, the Respondent takes the position that the admission of the email was acceptable because the Commission either assigned it no weight or assigned it equal weight to that of the Appellant's statement. (Respondent Initial Br. pp. 7-8). The erroneous admission

of the email, however, clearly had an unnecessary and disparate impact on the outcome of the Appellant's claim.

In the email allegedly sent by the claimant, the author denies having pre-existing back problems or ever having informed his employer of those problems. (R. p. ___). Nonetheless, the Respondent stipulated that the claimant did have pre-existing back problems and that the employer had knowledge of those conditions. (Tr. p. 8:6-13). As such, the Respondent conceded that the contents of that email were incorrect and, in turn, that the Appellant's employer knowledge statement was correct. Even if the inaccurate email was afforded no weight or was assigned equal weight to the Appellant's knowledge statement, without it, the Respondent put forth no evidence of any type to rebut the Appellant's arguments. Clearly, the email was afforded weight because without it, the Respondent could not meet its burden to rebut the substantial evidence submitted by the Appellant. Accordingly, its admission is not harmless error and cannot be disregarded.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Circuit Court affirming the Commission's Decision and Order as filed on December 29, 2011 on the basis that the reliable, probative, and substantial evidence of the whole record supports a finding that the appellant is entitled to reimbursement under S.C. Code Ann. §42-9-400.

Respectfully submitted,

April 14, 2014

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THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Case No.: 2012-CP-26-00955

Commerce and Industry Insurance Company (Carrier) and
Avcraft Support Services (Employer),.....Appellants,

v.

South Carolina Second Injury Fund,.....Respondent.

[In Re: Daniel Haidet v. Avcraft Support Services]

PROOF OF SERVICE

I do hereby certify that on the 14th day of April, 2014, I served a copy of the **APPELLANTS' INITIAL REPLY BRIEF** upon the attorney for the Respondent, and others as specified below, by placing a copy of the same in the United States Mail, with due and proper postage affixed thereto, to the following:

Latonya D. Edwards, Esq.
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Ms. Virginia L. Crocker
Judicial Director

S. C. Workers' Compensation Commission
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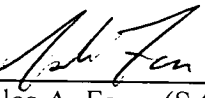
Columbia, SC 29202



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April 14, 2014

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
PO Box 11629
Columbia, SC 29111

Re: ***Commerce and Industry Insurance Company v. South Carolina Second Injury Fund***
Case No.: 2013-002487

Dear Ms. Kitchings:

Enclosed for filing please find the originals and three copies of Appellants Commerce and Industry Insurance Company and Avcraft Support Service's Initial Reply Brief, and a Proof of Service in the above-referenced matter. Please file the originals and return the clocked copies to us in the enclosed stamped envelope.

Thank you for your assistance in this matter. Should you have any questions or concerns, please do not hesitate to contact me.

Sincerely yours,

GALLIVAN, WHITE & BOYD, P.A.

Nicholas Farr

NAF/kd
Enclosures
cc: Ms. Latonya D. Edwards
Virginia L. Crocker, Judicial Director, S. C. Workers' Compensation Commission

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