

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 (Carrier),Appellant,

v.

Second Injury Fund of South Carolina,Respondent.

FINAL BRIEF OF APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

- I. Did the Circuit Court err in affirming the decision of the Full Commission in admitting into evidence the Fund's email when it was untimely, unsworn, and could not be authenticated?
- II. Did the Circuit Court err in affirming the decision of the Full Commission in finding as a fact and concluding as a matter of law that nothing contained in the medical reports indicated that the claimant had prior back problems when the medical reports and certificates of the treating physicians indicated that the claimant had a pre-existing back injury?
- III. Did the Circuit Court err in affirming the decision of the Full Commission in finding as a fact and concluding as a matter of law that the claimant's pre-existing condition was not a hindrance to employment?

STATEMENT OF THE CASE

This appeal arises from a denied claim in which the appellants, Avcraft Support Services and Commerce and Industry Insurance Company (hereinafter collectively referred to as "Appellants") seek to obtain reimbursement from the South Carolina Second Injury Fund (hereinafter referred to as "Respondent") for benefits paid to the injured employee, Daniel Haidet (hereinafter referred to as "the claimant") on the underlying workers' compensation claim pursuant to S.C. Code §42-9-400(a). The basis of the claim is that the medical evidence supports that the claimant had a pre-existing condition that was a hindrance or obstacle to employment that was known to his employer and aggravated by his work injury to significantly increase the Appellants' overall liability. The Respondent, denied the claim on the basis that the employer/carrier did not establish knowledge of the pre-existing condition or that the pre-existing condition was a hindrance or obstacle to employment or re-employment under §42-9-400(d). (R. pp. 99-107).

On May 2, 2011, Commissioner Susan S. Barden heard oral arguments on the Appellants' reimbursement claim. At the hearing, over the Appellants' objections, the Commissioner allowed the Fund to submit into evidence an email allegedly sent by the claimant which was unsworn and unsigned and could not be authenticated. (R. p. 2). The email, sent from the address jellybeanmax2002@yahoo.com, denied that the claimant had pre-existing back problems. On June 20, 2011, the Commissioner issued a Decision and Order determining that the claimant did not have a pre-existing back injury and that a preexisting condition was not an obstacle to employment. (R. pp. 7-9).

On July 5, 2011, the Appellants' filed an Application for Full Commission Review of the Hearing Commissioner's Decision and Order, containing eighteen (18) grounds for review and exceptions to the Hearing Commissioner's Decision and Order. (R. pp. 108-112). After hearing oral arguments, the Full Commission affirmed the decision of the Hearing Commissioner in its entirety on December 29, 2011.

On January 27, 2012, the Appellants timely filed a Notice of Appeal and Petition for Judicial Review to the Horry County Court of Common Pleas pursuant to §42-17-60 (as applied to injuries before July 1, 2007) and §1-23-380, of the Code of Laws of the State of South Carolina (1976) as amended. See Pee Dee Regional Transp. v. S.C. Second Injury Fund, 650 S.E.2d 464 (S.C. 2007) (holding that jurisdiction for appeals concerning injuries before July 1, 2007 lies in the Court of Common Pleas). On October 9, 2013, the matter was heard by the Honorable Benjamin H. Culbertson. Judge Culbertson, via a Form 4 Order, denied the Appellants' appeal on October 18, 2013. The Order was received by the Appellants on October 30, 2013. The Appellants timely filed its Notice of Appeal on November 14, 2013.

STATEMENT OF FACTS

Daniel Haidet was injured on January 1, 2005 when he fell from a ladder during the course and scope of his employment. According to the Emergency Room records on the date of the accident, x-rays revealed degenerative changes of the thoracic spine. (R. p. 26). On April 26, 2005, an MRI of the lumbar spine revealed a T12-L1 anterior wedging and multilevel degenerative changes which appeared to be chronic. (R. p. 47). On May 12, 2005, Dr. Scott Sauer indicated that the claimant had a T12-L1 wedging deformity which was not caused by the fall, but likely aggravated by the fall. (R. pp. 54-55). Thereafter, Dr. Gregory Kang diagnosed the claimant with an "old appearing T12-L1 thoracic compression fracture with aggravation due to work-related incident." (R. pp. 67-69). Dr. Sauer and Dr. Kang acknowledged that the claimant had a preexisting back injury that was a hindrance or obstacle to employment and was aggravated by his January 1, 2005 injury, resulting in substantial greater liability for Carrier. (R. pp. 97-98).

The claimant's Human Resource Manager with the Appellant, Mary Swindell, submitted a signed statement attesting her knowledge of the claimant's pre-existing back problems. (R. p. 96). Just days before the accident during an employer-sponsored holiday party, Ms. Swindell noticed the claimant was not drinking. Knowing that the claimant was a new employee, she approached him to remind him that the alcohol was free and was for the employees to enjoy. At that time, the claimant informed Ms. Swindell that he could not consume alcohol because he had back problems and was taking medication. Shortly thereafter, the claimant returned to work and was injured on New Year's Day.

On April 25, 2011, the SIF amended its prehearing brief to include an email allegedly sent from the claimant denying pre-existing back problems. Carrier objected to the submission of this email on two grounds. First, the email was submitted less than ten days prior to the hearing in violation of Reg. 67-611(b)(1). Due to its late submission, Carrier was substantially prejudiced and deprived of the opportunity to depose and/or call the claimant to testify at the hearing. Second, the email was unsigned, unsworn, and could not be authenticated. The email was sent from the address jellybeanmax2002@yahoo.com. The SIF included a chain of emails between Gail Deal and the claimant's attorney requesting permission to contact the claimant. However, at no point in the emails is the claimant ever identified with jellybeanmax2002@yahoo.com.

STANDARD OF REVIEW

A reviewing court may reverse or modify a decision of an agency if the findings, inferences, conclusions, or decisions of that agency are "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." Bursey v. South Carolina Dep't of Health and Envtl. Control, 360 S.C. 135, 141, 600 S.E.2d 80, 84 (Ct. App. 2004); S.C.Code Ann. § 1-23-380(A)(6)(e) (Supp.2003). Under the scope of review established in the South Carolina Administrative Procedures Act (hereinafter referred to as "APA"), an appellate court may not substitute its judgment for that of the commission as to the weight of the evidence on questions of fact, but may reverse where the decision is affected by an error of law. Stone v. Traylor Bros., Inc., 360 S.C. 271, 600 S.E.2d 551 (Ct. App. 2004); Frame v. Resort Servs., Inc., 357 S.C. 520, 593 S.E.2d 491 (Ct. App. 2004); S.C.Code Ann. § 1-23-380(A)(6)(d) (Supp.2003).

The substantial evidence rule of the APA governs the standard of review in a workers' compensation decision. Frame, 357 S.C. 520, 593 S.E.2d 491; Corbin v. Kohler Co., 351 S.C. 613, 571 S.E.2d 92 (Ct. App. 2002). 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 Grant v. Grant Textiles, 361 S.C. 188, 603 S.E.2d 858 (Ct. App. 2004). 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 administrative agency reached in order to justify its action. Pratt v. Morris Roofing, Inc., 357 S.C. 619, 594 S.E.2d 272 (2004); Jones v. Georgia-Pacific Corp., 355 S.C. 413, 586 S.E.2d 111 (2003); Etheredge v. Monsanto Co., 349 S.C. 451, 562 S.E.2d 679 (Ct.App.2002). The appellate panel is the ultimate fact finder in workers' compensation cases and is not bound by the single commissioner's findings of fact. The findings of an administrative agency 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); Frame at 528, 593 S.E.2d at 495.

ARGUMENTS

In order to obtain reimbursement from the Second Injury Fund, an employer or carrier must demonstrate that: (1) the employee has a permanent physical impairment from any cause or origin; (2) the employer retains the employee after knowledge of the prior impairment; (3) the employee sustains subsequent disability by way of an accident arising out of and in the course and scope of his employment; and (4) the

subsequent injury combines with or aggravates the preexisting condition to cause “substantially greater” disability than would have been caused by the subsequent injury alone. State Workers' Compensation Fund v. South Carolina Second Injury Fund, 313 S.C. 536, 538; 443 S.E.2d 546, 547-548 (1994), citing S.C. Code § 42-9-400(a), (c), and (g). During oral arguments before the Horry County Court of Common Pleas, the Respondent stipulated that the claimant had a pre-existing condition and the Appellants had prior knowledge of the condition. (R. p. 144, lines 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. . . .” (R. p. 144, lines 7-9). As such, the Fund seemingly concedes that the Appellants have met the other requirements for reimbursement pursuant to S.C. Code § 42-9-400.

I. The Circuit Court erred in affirming the decision of the Full Commission in admitting into evidence the Fund's email when it was untimely, unsworn, and could not be authenticated.

As an initial matter, the Circuit Court clearly erred in admitting the Fund’s email into evidence. While the Respondent now concedes that the claimant had a preexisting condition of which the Appellants were aware, the email remains an issue as can present evidence which factors into the Commission’s assessment of hindrance – a pre-accident evaluation. Even though the Commission purportedly assigned no weight to the email, there is no evidence in the record to support the Commission’s findings without it.

Despite the Respondent’s contention that its email was received from the claimant, there is no way to vary this account. The claimant’s name does appear at the bottom of the email; however, this name is nothing more than text and does not

authenticate that the email was actually sent by the claimant. Accompanying its submission, the Respondent provided a chain of emails beginning with its request to the claimant's attorney to contact the claimant. Absent from this chain of emails is any link between the claimant and the email address, jellybeanmax2002@yahoo.com, from which the email is ultimately received. With the evidence provided and the inability to depose the claimant on the subject due to the email's late submission, there is no way to authenticate that the email is that of the claimant. Accordingly, the Commission clearly abused its discretion in admitting the email into evidence.

While the Respondent's email was untimely, unsworn, and could not be authenticated, the Appellants submitted a knowledge statement executed by the employer. Despite the Commission's contention that the statement should be assigned equal weight as the Respondent's email because it was not notarized, the employer knowledge statement clearly carried more weight than the Respondent's unsworn, unsigned, unauthenticated email. The employer's statement was clearly signed by the employer. If the Fund questioned its authenticity, then it had ample opportunity to depose the employer prior to the hearing or call the employer to testify.

There are no statutes or regulations requiring employer knowledge statements to be notarized in order to obtain reimbursement from the Second Injury Fund. Employers are only required to submit written records to show that it had knowledge of the "permanent physical impairment at the time the employee was hired, or at the time the employee was retained in employment after the employer acquired such knowledge." Boone's Masonry Const. Co., Inc. v. South Carolina Second Injury Fund, 227 S.E.2d 659, 660 (S.C. 1976). The employer has met this requirement with its signed statement.

II. The Circuit Court erred in affirming the decision of the Full Commission in finding as a fact and concluding as a matter of law that nothing contained in the medical reports indicated that the claimant had prior back problems when the medical reports and certificates of the treating physicians indicated that the claimant had a pre-existing back injury.

As the Respondent conceded at the appellate hearing, the evidence in this case clearly demonstrates that the claimant had a back injury prior to his January 1, 2005 accident. First, in his Questionnaire dated November 17, 2010, Dr. Scott Sauer stated that the claimant's T12-L1 wedging deformity preexisted his injury of January 1, 2005. (R. p. 97). Further, Dr. Gregory Kang stated in his Questionnaire dated October 12, 2010 that the claimant had a pre-existing T12-L1 thoracic compression fracture which was permanent and serious enough to constitute a hindrance to employment. (R. p. 98).

Moreover, the medical records themselves support the statements of Dr. Sauer and Dr. Kang confirming the presence of a prior back injury. The Emergency Room report from the date of the accident indicates that x-rays revealed degenerative changes of the thoracic spine. (R. p. 26). During his first examination of the claimant on May 12, 2005, Dr. Sauer indicated that the claimant had an inflammatory condition at T12-L1 which was not "caused by the fall but was likely aggravated by the fall." (R. pp. 54-55). Further, Dr. Kang indicated that the claimant had an old T12-L1 thoracic compression fracture with "aggravation due to work-related incident." (R. pp. 67-69). The evidence is uncontested that the claimant's back injury preexisted his January 1, 2005 accident.

III. The Circuit Court erred in affirming the decision of the Full Commission in finding as a fact and concluding as a matter of law that the claimant's pre-existing condition was not a hindrance to employment.

The evidence in this case clearly indicates that the claimant's pre-existing back injury was a hindrance or obstacle to employment or re-employment. First, in his

Questionnaire dated November 17, 2010, Dr. Scott Sauer stated that the claimant's T12-L1 wedging deformity was aggravated by his injury of January 1, 2005. (R. p. 97). In addition, Dr. Sauer stated in his Questionnaire that the claimant's pre-existing T12-L1 wedging deformity was permanent and serious enough to constitute a hindrance or obstacle to employment or re-employment. (R. p. 97). Further, Dr. Gregory Kang stated in his Questionnaire dated October 12, 2010 that the claimant had a pre-existing T12-L1 thoracic compression fracture which was permanent and serious enough to constitute a hindrance to employment. (R. p. 98). The medical statements of Dr. Kang and Dr. Sauer are the only evidence in the record which speaks directly to the issue of hindrance.

On appeal, the Respondent argued that the lack of medical records prior to the accident indicated that pre-existing condition was not a hindrance. (R. p. 146, lines 2-6). However, the lack of prior medical records neither supports nor rebuts the Respondent's position. By examining the evidence that is actually in the record, it is clear that the claimant did have a preexisting back injury which was a hindrance to employment.

Dr. Sauer and Dr. Kang are the only persons in this case qualified to assert medical opinions. They have indicated on their signed questionnaires that the claimant had a back injury prior to January 1, 2005. Their opinions are supported by the medical evidence in the record, including their own reports during the claimant's treatment. The Respondent has presented no medical evidence to rebut the opinions of the treating physicians. Accordingly, the Appellants have clearly met its burden of proving that the claimant had a back injury prior to January 1, 2005 that was a hindrance to employment.

A similar issue was recently addressed by the Court of Appeals in Carolina Recycling Group, et al. v. South Carolina Second Injury Fund, 398 S.C. 480, 730 S.E.2d

324 (S.C. Ct. App. June 13, 2012). In that case, a claimant sustained a work-related injury in 2001. After he was assigned a 9% impairment rating to the lumbar spine, the carrier requested a second opinion. The doctor performing the independent medical evaluation opined that there was no evidence to support a permanent impairment rating and determined that the claimant had reached maximum medical improvement. Thereafter, the claimant returned to work and sustained another injury in 2004. In his treatment for the 2004 accident, his authorized treating physician determined that as a result of the 2001 accident, the claimant sustained ruptured and/or bulging discs and assigned him a 10% impairment rating.

The Carrier at the time of the 2004 accident submitted a claim to the Second Injury Fund. In support of its claim, the Carrier submitted evaluations from physicians who treated Claimant following the injuries. Each evaluation was accompanied by diagnostic imaging supporting the evaluations. In addition, the Carrier highlighted medical records following the 2004 accident that noted:

[T]he compression fracture *combined with the degenerative pre-existing changes* at the L4, L5 level *made the impairment and disability from the compression fracture worse than they would have been if he didn't have his degenerative changes from his pre-existing back injury.* (emphasis added).

Further the records specifically indicated that the impairment and medical costs were substantially greater because of the preexisting condition.

Despite this evidence, the single commissioner and Appellate Panel found that the claimant's 2004 injury was caused by the accident alone and his pre-existing condition was not aggravated by or combined with the 2004 injury to create a substantial increase in liability. The Court of Appeals, however, reversed, holding that the Appellate Panel's order was clearly erroneous. The Court noted that the only evidence in support of the

Fund's claim was the IME performed after the 2001 injury. Moreover, the Court stated that the Fund failed to present any expert testimony from a physician who evaluated the claimant to discredit the medical testimony and evidence submitted by the carrier.

Here, much like Carolina Recycling, the medical evidence clearly supports a finding of hindrance. Dr. Kang and Dr. Sauer both submitted questionnaires supported by the diagnostic reports and their medical records in which they indicated that the claimant's prior back condition was a hindrance or obstacle to employment. The Respondent has not presented any expert testimony to discredit the evidence submitted by the Carrier.

Moreover, the Commission found that the claimant's preexisting back injury could not have been a hindrance to employment because his job involved heavy labor as an aircraft mechanic. This finding, however, is not supported by the evidence in the record. The Commission indicated that this finding was based upon "all evidence in the record." The Commission is required to "make such specific and definite findings upon the evidence reported as will enable this court [appellate court] to determine whether the general finding or conclusion should stand. . . ." Gray v. Laurens Mill, 231 S.C. 488, 492, 99 S.E.2d 36, 38 (1957).

Not only is "all the evidence in the record" overly general and indefinite, the finding is clearly not supported by *any* evidence in the record. First, the Fund presented no evidence and made no argument that the preexisting back injury was not a hindrance to employment. Second, there was no evidence in the record as to the claimant's job description. The Commission is correct in that the claimant was an aircraft mechanic, but the record is silent as to what his position actually entailed.

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.


The Appellants have clearly met the burden of proving that the claimant's pre-existing back injury was permanent and serious enough to constitute a hindrance to his employment.

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,

May 28, 2014



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RULE 211, SCACR CERTIFICATION
FINAL BRIEF OF APPELLANT

I, Nicholas A. Farr, Esquire, hereby certify that the *Final Brief of Appellant* complies with the requirements of Rule 211(b) of the South Carolina Appellate Court Rules.



Nicholas A. Farr, Esquire

Greenville, South Carolina

May 28, 2014

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PROOF OF SERVICE

The undersigned hereby certifies that he is the attorney for the Appellant, Commerce and Industry Insurance Company, in the above-referenced matter and that he served the Final Reply Brief of Appellant and Final Brief of Appellant upon the attorney for the Respondent, by placing a copy of the same in the United States Mail, with due and proper postage affixed thereto, to the following:

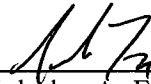
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