THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM
Court of Commons Pleas

Benjamin H. Culbertson, Circuit Court Judge

Appellate Case No.: 2013-002487

Commerce and Industry Insurance Co.,.....Appellant,

v.

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

FINAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Regulations

Other Authority

ISSUES ON APPEAL

1. Did substantial evidence in the record support the SC Workers' Compensation Commission's finding that Claimant's preexisting back injury was not permanent and serious enough to constitute a hindrance or obstacle to employment pursuant to S.C. Code Ann. § 42-9-400?

2. Did substantial evidence in the record support that the SC Workers' Compensation Commission's decision to admit the Fund's e-mail correspondence was consistent with the workers' compensation regulations?

STATEMENT OF THE CASE

This is a claim for reimbursement from the South Carolina Second Injury Fund (the "Fund") by Avcraft Support Services, Inc., Employer, and Commerce & Industry Insurance Company, Carrier (collectively "Carrier") pursuant to S.C. Code Ann. § 42-9-400. Carrier alleged that it incurred substantially greater liability for compensation and medical benefits when employee Daniel Haidet's ("Claimant") prior back problem was either aggravated by or combined with his January 1, 2005 work related back injury. Carrier further alleged that Claimant's prior back problem was permanent and serious enough to constitute a hindrance or obstacle to employment or reemployment. The Fund argued that Carrier did not have knowledge of Claimant's prior back injury and alternatively, if Carrier had knowledge, Claimant's prior back problem was neither permanent nor a hindrance to employment, and that Carrier was not entitled to reimbursement pursuant to S.C. Code Ann. § 42-9-400.

The Hearing Commissioner denied Carrier's request for reimbursement and the Appellate Panel and Circuit Court affirmed.

STANDARD OF REVIEW

The standard of review for decisions of the Workers' Compensation Commission is established in the Administrative Procedures Act. S.C. Second Injury Fund v. Liberty Mut. Ins. Co., 353 S.C. 117, 576 S.E.2d 199 (Ct. App. 2003). A reviewing court must not disturb the Workers' Compensation Commission's findings if those findings are supported by substantial evidence in the record. Pearson v. JPS Converter & Indus. Corp., 327 S.C. 393, 489 S.E.2d 219 (Ct. App. 1997). The fact that reasonable minds may differ or that there is the possibility of drawing inconsistent conclusions does not prevent an agency's findings from being supported by substantial evidence. Grant v. S.C. Coastal Council, 319 S.C. 348, 461 S.E. 2d 388 (1995).

ARGUMENT

I. THE COMMISSION'S FINDING THAT CLAIMANT'S PRIOR BACK PROBLEM WAS NOT A HINDRANCE TO EMPLOYMENT IS SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD.

The statutory reimbursement scheme requires that Carrier establish several elements in order to implicate reimbursement. S.C. Code Ann. § 42-9-400. One of the requisite elements of reimbursement is that Claimant have a "permanent condition, whether congenital or due to injury or disease, of such seriousness as to constitute a hindrance or obstacle to obtaining employment or to obtaining reemployment if the employee should become unemployed." S.C. Code Ann. § 42-9-400(d). While the statutory reimbursement scheme does not define what constitutes a hindrance to employment, the determination can be gleaned from other authority. Webster's 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). 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, 642-43, 738 S.E.2d 835, 843 (2013). Additionally, 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 LARSON'S WORKERS' COMPENSATION § 91.02(6).

Claimant's prior back injury does not come within the purview of any of the previously cited definitions. Claimant's prior back problem did not hinder his ability to work as an airport mechanic, as there are no documented problems with his back prior to the work injury. Claimant was hired by Avcraft Support Services, Inc. as an airport mechanic on November 8, 2004. R.p. 95. Approximately two (2) months after he began his employment with Avcraft Support Services, Inc., he sustained a work related injury when he fell eight (8') feet, initially injuring his elbow, which is noted as "minor", and his back. R.p. 95. While there are no medical narratives prior to this injury that document a preexisting condition, the Fund does not dispute that Claimant had a T12-LI wedging deformity/compression fracture, which is noted as "likely congenital." R.p. 47. However, there are no medical narratives by any treating physician indicating that the T12-L1 wedge deformity/compression fracture hindered Claimant's ability to perform the duties of this job or any other job prior to this injury. Furthermore, Carrier concedes this point at the Single Commissioner Hearing. R.pp. 128-129.

Carrier submitted a knowledge statement from the Human Resources Manager wherein she indicates that she was aware that Claimant was experiencing back pain and

had been taking medication for back pain prior to the work injury. R.p. 96. The Human Resource Manager also indicates that she was familiar with Claimant's work activities while he was on the aviation maintenance crew. R.p. 96. However, she does not indicate that he had problems performing his duties while he worked on the aviation maintenance crew. R.p. 96. Claimant's T12-L1 wedge deformity/compression fracture was not permanent and serious enough to constitute a hindrance to his employment because it did not hinder his ability to perform the duties of his job.

There are also two (2) medical questionnaires supporting reimbursement. R.pp. 97-98. One of the medical questionnaires was completed by Dr. Scott Sauer, who indicates that Claimant had a T12-L1 wedging deformity prior to the January 1, 2005 work injury. R.p. 97. Interestingly enough, this fact is not documented in any of Dr. Sauer's medical narratives. Dr. Sauer treated Claimant from 2006 to 2008, and all of his medical narratives indicate that Claimant's complaints were due to the work related injuries and that there was "no evidence of impairment." R.pp. 82-93.

The other medical questionnaire was completed by Dr. C. Gregory Kang, a physiatrist. R.p. 98. Dr. Kang treated Claimant post injury and his medical records note an old T12-L1 compression fracture. R.pp. 67-69. Dr. Kang's medical narratives also indicate that Claimant's musculoskeletal examination revealed normal range of motion with tenderness, normal gait, and that the left elbow was tender with excellent range of motion. R.p. 68. Dr. Kang indicated that Claimant was at maximum medical improvement and assigned a six (6%) percent impairment to the thoracic spine. R.p. 68.

Claimant's prior T12-L1 compression fracture did not require any specialized care or impact his ability to make or earn a living. Here, the record is devoid of any evidence

supporting Claimant's prior T12-L1 compression fracture as permanent and serious enough to constitute a hindrance or obstacle to his employment. Despite Claimant's old T12-L1 compression fracture, he obtained employment as an aircraft mechanic. There is no evidence that Claimant's T12-L1 compression fracture required specialized care that affected his ability to earn a living. In fact, the record does not reveal any type of care that Claimant may have received for the old T12-L1 compression fracture. R.p. 47. Claimant's T12-L1 compression fracture was not permanent and serious enough to constitute a hindrance or obstacle to employment because it did not require specialized care and did not affect his ability to earn a living.

Under the Larson's test, Claimant's old T12-L1 compression fracture also does not pass muster as a condition that was permanent and serious enough to constitute a hindrance or obstacle to his employment. Under Larson's, 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 LARSON'S WORKERS' COMPENSATION § 91.02(6). Here, Carrier is asserting that it had knowledge of Claimant's prior T12-L1 compression fracture. R.p. 96. Avcraft Support Services, Inc. is a reasonable employer and hired Claimant knowing these facts. Thus, Claimant's T12-L1 compression fracture was not permanent and serious enough to constitute a hindrance or obstacle to his employment based on the Larson's test.

Claimant subsequently began complaining of back pain that was attributed to the work injury when he fell eight (8') feet. Claimant's lumbar x-ray nine (9) days post injury notes some "mild" degenerative disc disease at L5-S1, but no fractures or lesions. R.p. 33. Claimant's post injury assessment and medical reports reveal "no evidence of

impairment." R.pp. 57, and 59-70. The Commission determined that the cause of Claimant's back pain was his eight (8') feet fall from a ladder onto the concrete. R.pp. 8-9. After sustaining this work injury, Claimant was not a candidate for surgery and was released with a six (6%) percent impairment rating to the back. R.p 68.

Other substantial evidence indicates that Claimant's preexisting T12-L1 deformity was not permanent and serious enough to constitute a hindrance or obstacle to his employment. Claimant denied previous injuries to his lumbar or upper back. R.p. 33. In considering whether the preexisting condition was permanent and serious enough to constitute a hindrance or obstacle to Claimant's employment, the Commission also considered the type of job Claimant performed, which consisted of heavy labor as an airport mechanic. R.pp. 8, Finding of Fact No. 4; and 33. On the issue of hindrance, the Commission weighed the knowledge affidavit referencing prior back problems against Claimant's heavy manual labor job, which he performed with no documented complaints. R.p. 96. Moreover, Claimant's post injury diagnostics and reports revealed "mild" degenerative disc disease, no fractures or lesions and no evidence of impairment. R.pp. 33, 57, 59-70, and 96.

Carrier disputes the weight given to the medical questionnaires. Since the weight of the evidence is accorded to the Commission, the Commission was well within its authority to give greater weight to more compelling evidence on the issue of hindrance. See Therrell v. Jerry's Inc., 370 S.C. 22, 25, 633 S.E.2d 893, 894-95 (2006). In Anderson v. Campbell Tile Co., the South Carolina Supreme Court held that opinions of medical experts may constitute substantial evidence sufficient to support a judgment. 202 S.C. 54, 24 S.E.2d 104 (1943). Anderson does not require that the opinions of

medical experts are the only evidence that may constitute substantial evidence nor does it exclude other sufficiently compelling evidence that would support a judgment. Anderson also held that the Commission determines the weight given to the opinion of medical experts. Id. While Carrier submitted medical certificates supporting the elements of reimbursement, the Commission is not required to give medical questionnaires conclusive effect to the exclusion of other more compelling medical evidence. Ballenger v. S. Worsted Corp. 209 S.C. 463, 467, 40 S.E.2d 681, 682-83 (1946). Here, the Commission considered the totality of the medical evidence in the record, which included the medical narratives, the lack of complaints about back problems, the medical evidence indicating "no evidence of impairment", and the lack of any evidence indicating that the preexisting condition impacted Claimant's ability to perform the duties of his job as an airport mechanic. All of these factors are probative on whether a preexisting condition is permanent and serious enough to constitute a hindrance or obstacle to employment. Likewise, all of these factors are within the purview of the Commission's discretion when considering whether a condition is permanent and serious enough to constitute a hindrance or obstacle to employment.

II. THE COMMISSION'S DECISION TO ADMIT THE FUND'S E-MAIL CORRESPONDENCE IS CONSISTENT WITH THE WORKERS' COMPENSATION REGULATIONS.

Carrier asserts that the Commission committed an error in admitting the Fund's e-mail into the record. It is noteworthy that the Commission did not place any weight on the e-mail about which Carrier makes much ado. R.p. 14, Finding of Fact No. 2. However, had the Commission given weight to the e-mail, they would have been well

within their discretionary authority. The Commission has discretion to admit any record that is submitted outside of the time requirements. Section 67-612(E) of the Commission's rules states, in relevant part, that "[f]ailure to provide reports and notices as required under this section may result in exclusion of such reports from the evidence of the case" and "[t]his paragraph shall not be construed to limit the discretionary authority of a Hearing Commissioner to accept reports, depositions or other evidence." Section 67-612(E). To be clear, there is no requirement that any evidentiary submission be sworn or notarized. However, when Carrier argued that point to the Commission, it failed to realize that its own knowledge statement would be subject to the same scrutiny; and as a result, the Commission placed the Fund's e-mail and the Carrier's knowledge statement on equal footing. R.pp. 7-8, Finding of Fact No. 2; and R.p. 14, Finding of Fact No. 2.

Thus, the knowledge statement signed by employer's representative and submitted by Carrier was admitted into evidence despite the fact that it was neither sworn nor notarized. R.p. 96. However, the Fund reiterates that the Commission assigned no weight to the e-mail correspondence between the Fund and Claimant. R.pp. 7-8, Finding of Fact No. 2; and R.p. 96. The Commission's decision to admit the Fund's e-mail correspondence was within its discretionary authority as outlined in the workers' compensation commission's regulations.

III. THE COMMISSION'S DECISION TO DENY CARRIER'S REIMBURSEMENT REQUEST IS CONSISTENT WITH RECENT CASE LAW.

The Commission's decision to deny Carrier's reimbursement request in this case is consistent with recent workers' compensation cases. In Carolinas Recycling Grp. v.

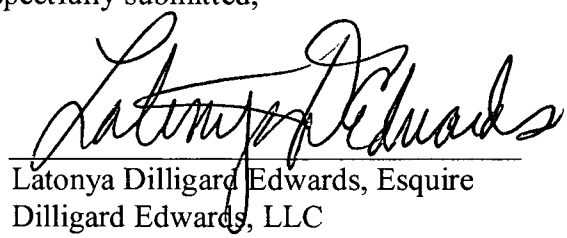
S.C. Second Injury Fund, this Court reversed the decision of the Commission because the Appellate Panel "relied exclusively upon an evaluation by a non-treating physician who only met with the Claimant on one occasion." 398 S.C. 480, 485, 730 S.E.2d 324, 327 (Ct.App. 2012). Carolinas Recycling Grp. was reversed solely on medical issues and the "hindrance" element was not at issue. Hindrance, which is the prevailing issue in this case, is not solely a medical issue but it is also a vocational issue that does not require an interpretation of diagnostic tests. A determination of whether a condition is a hindrance to employment does not require any analysis of medical data or diagnostic testing.

Also, in Burnette v. City of Greenville, the South Carolina Court of Appeals reversed and remanded the case with instructions that the Commission either reconsider or enter findings of fact concerning Claimant's injuries because the Commission's decision was based on the medical opinion of a single commissioner rather than a medical provider. 401 S.C. 417, 428, 737 S.E.2d 200, 206 (Ct. App. 2012). The Court's decision in Burnette was also based solely on medical issues that required an interpretation of diagnostic tests such as MRIs and CT scans. Here, the Commission's decision was based on whether the preexisting condition was a hindrance or obstacle to Claimant's employment. This issue is not solely a medical issue. In fact, the issue of whether a preexisting condition is a hindrance or obstacle to employment is more of a vocational issue than a medical one since most doctors are not aware of the day to day rigors of a Claimant's job. The Commission's decision is consistent with recent case law and is supported by substantial evidence in the record.

CONCLUSION

The Fund requests that this Court affirm the Commission's Decision because it was supported by substantial evidence in the record.

Respectfully submitted,

By: 

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June 2, 2014
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CERTIFICATE OF COUNSEL

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

June 2, 2014

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PROOF OF SERVICE

The undersigned employee of Dilligard Edwards, LLC, Attorney for the Appellant, does hereby certify that service of the **Final Brief of Respondent**, **Record on Appeal** and **Certificates of Counsel** to the South Carolina Court of Appeals in the above-captioned matter was made upon counsel of record for Appellant, Commerce and Industry Insurance Co., and the South Carolina Workers' Compensation Commission, by placing same in the United States Mail, first class postage prepaid, at the below listed address clearly indicated on said envelope on this 2nd day of June, 2014, addressed as follows:

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