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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE FULL COMMISSION
Of the South Carolina Workers' Compensation Commission

T. Scott Beck, Workers' Compensation Commissioner

WCC File No. : 1211338
Appellate Case No.: 2015-000693

Keith Case,

Employee, Appellant

v.

J Crawford Logging,

Employer

and

Palmetto Timber Fund, SIF,

Carrier, Respondents

INITIAL BRIEF OF RESPONDENTS

(A) TABLE OF CONTENTS AND CASES

B) STATEMENT OF ISSUES ON APPEAL

1. DOES THE RECORD CONTAIN SUBSTANTIAL EVIDENCE TO SUSTAIN THE FINDING OF THE APPELLATE PANEL THAT THE CLAIMANT FAILED TO CARRY HIS BURDEN OF PROOF OF ESTABLISING A COMPENSABLE INJURY TO HIS NECK?

(C) STATEMENT OF THE CASE

This was an admitted injury to the right lower extremity occurring on August 27, 2012. A Form 21 Stop Payment Request was issued by Defendants on July 26, 2013 based on a Form 14B signed by the treating physician for the leg injury. The matter initially came before the Single Commissioner on September 19, 2013. At the Hearing, a dispute arose regarding the compensability of the cervical spine. The carrier allowed Dr Charles Kanos to evaluate the claimant and authorized a lumbar MRI. The MRI was read as unremarkable. Dr Kanos directed the Claimant to undergo a cervical MRI. The defendants opposed this. Claimant's counsel moved and was granted a continuance to take the deposition of Dr Charles Kanos on the causation issue regarding the neck. The request was granted and the record was frozen and the Defendant's request for a credit of TTD was preserved from May 9, 2013 and continuing. (Order of Commissioner Beck, October 31, 2013)The Single Commissioner retained jurisdiction. The matter was reset and heard on all issues including stop payment of TTD, permanency of the RLE and compensability of the cervical spine as it may relate to the original lower extremity injury. The matter heard on April 23. 2014. The cervical MRI conducted on 4/17/2014 which would have been excluded by the prior ruling freezing the record was admitted pursuant to the stipulation of both parties. The Single Commissioner issued a Decision and Order on August 27, 2014 determining the Claimant was entitled to a 10% permanent partial disability to the right lower extremity, granting the stop payment request of the Employer, granting a credit to the employer for overpayment of temporary total disability paid beyond May 9, 2013, and denying the Claimant's request for benefits to his neck. The Claimant appealed the Decision to the Full Commission. The Full Commission adopted the Single Commissioner's decision in its entirety. This appeal followed.

(D) ARGUMENT

DOES THE RECORD CONTAIN SUBSTANTIAL EVIDENCE TO SUSTAIN THE FINDING OF THE APPELLATE PANEL THAT THE CLAIMANT FAILED TO CARRY HIS BURDEN OF PROOF OF ESTABLISING A COMPENSABLE INJURY TO HIS NECK?

Standard of review:

The substantial evidence rule of the Administrative Procedures Act governs the standard of review in a workers' compensation decision. Liberty Mut. Ins. Co. v. S.C. Second Injury Fund, 363 S.C. 612, 619, 611 S.E.2d 297, 300 (Ct. App. 2005). "In an appeal from the [Appellate Panel], neither this court nor the circuit court may substitute its judgment for that of the [Appellate Panel] 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., 360 S.C. 271, 274, 600 S.E.2d 551, 552 (Ct. App. 2004). 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." Bass v. Kenco Group, 366 S.C. 450, 457, 622 S.E.2d 577, 580 (Ct. App. 2005); S.C. Code Ann. § 1-23-380(A)(6)(e) (2005). "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." Liberty Mut. Ins., 363 S.C. at 620, 611 S.E.2d at 300. "The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence." Id. Where there are conflicts in the evidence over a factual issue, the findings of the appellate panel are conclusive. Etheredge v. Monsanto Co., 349 S.C. 451, 562 S.E.2d 679 (Ct. App. 2002).

Alleged Cervical injury and causation

The record is essentially devoid of evidence that Claimant sustained a cervical injury on the job on August 27, 2012. The Claimant injured his lower extremities in the fall. According to the Claimant's testimony, he fell face forward and got a "hole" knocked in his left leg and "slammed on his right knee" (Hearing transcript, page 11). At the Hearing, the Claimant testified for the first time that his neck "crunched down" and his back was jolted (Hearing transcript page 11). This testimony is unsupported by any of the medical evidence. The Claimant was treated at Pacolet Family Medicine after the accident and gave no history of neck pain or injury. (APA's pages 8-17). He was subsequently treated for 6 months by an orthopedic at Steadman Hawkins Clinic and again there is no history of neck pain or injury. (APA's pages 8-17, 157-58). He also attended six weeks of physical therapy and never mentioned injuring his neck or having cervical pain (APA's pages 22-64).
On April 24, 2013, Dr. Folk MD(Steadman Hawkins Clinic) released him for the lower extremities injury, but made a referral to Dr Charles Kanos MD for lumbar pain. His report makes no mention of neck or cervical complaints. The Claimant saw Dr. Charles Kanos MD on May 20, 2013 as a referral for low back pain. When the Claimant presented on the 20th, he made no cervical complaints. Dr. Kanos specifically noted lumbar spine/lower back in his assessment. A lumbar MRI was performed and read as unremarkable. No treatment was recommended. (Kanos Deposition pg. 12, L.10-13). On his return to Dr. Kanos on July 1, 2013, nearly 11 months post accident, the Claimant complained of neck pain and was positive for Hoffman's test, which could indicate some compression in the neck. Dr Kanos specifically noted this was not present in the May visit.(APA's pages 1-7).

Dr. Kanos was asked to address the issue of causation of the claimant's neck pain in his deposition. Specifically, he was asked if he could state with a reasonable degree of

medical certainty whether the cervical symptoms and neck pain are related to the original injury in light of the symptoms and complaints not showing up for 11 months post accident. He responded that he could not state such an opinion. (Kanos Deposition pg.14, L.15-23, pg 15, L.5-7). He affirmed this later in his deposition.

Q. "Yes. And the other issue is if it's (Hoffman's test) is negative in May because your notes indicate it was negative in May."
A. "Uh Huh"
Q. " It's not present"
A. "Right."
Q. "And suddenly it shows up two months later and 11 months after the accident"
A. "Yeah"
Q. "How can you make the leap that it's all causally related to the fall from 11 months ago."
A. **"I can't say to a reasonable degree of medical certainty" (emphasis added).**
A. **"I cannot say in that respect."(emphasis added).**

(Kanos Deposition, pgs 18-19).

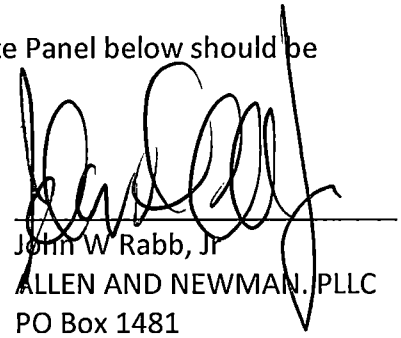
Appellant argues that the Single Commissioner failed to make findings about the cervical MRI. The findings of the MRI, normal cord with mild/minimum impingement, would not impact the causation issue. Dr Kanos addressed this issue directly in his deposition. (Kanos Deposition pg.17, L.8-22).

Clearly, based on the lack of medical documentation of a work related neck injury, combined with the failure of Dr. Kanos to provide the required medical causation, the appellate panel properly and correctly concluded the cervical/neck claim should be denied. The Claimant has the burden of providing facts that would bring his injuries within the workers' compensation law. See Jennings v. Chambers Dev. Co., 335 S.C. 249, 254, 516 S.E.2d 453, 456 (Ct. App. 1999) (stating, "[t]he claimant has the burden of proving facts that will bring the injury within the workers' compensation law, and such award must not be based on surmise, conjecture, or speculation"). Equally compelling is the evidentiary principle that an award may not rest upon surmise, conjecture, or speculation. Tiller v. Nat'l Health Care Ctr. of Sumter, 334 S.C. 333, 339, 513 S.E.2d 843, 845 (1999). Instead, "[an award] must be founded on evidence of sufficient substance to afford a reasonable basis for it." Wynn v. People's Natural Gas Co. of S.C., 238 S.C. 1, 12, 118 S.E.2d 812, 818(1961).

The substantial rule mandates an affirmation of the appellate panel decision unless "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." Bass v. Kenco Group, 366 S.C. 450, 457, 622 S.E.2d 577, 580 (Ct. App. 2005). The record here overwhelming supports the findings and decision of the Panel and thus should be affirmed in its entirety.

(E) CONCLUSION

For the reasons stated above, the Decision of the Appellate Panel below should be affirmed in its entirety.



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Dated: August 4, 2015

PROOF OF SERVICE OF INITIAL BRIEF

THE STATE OF SOUTH CAROLINA
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W.C.C. File No. 1211338

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PROOF OF SERVICE

I certify that I have served the corrected Initial Brief of Respondent on Keith Case by depositing a copy of it in the United States Mail First Class, postage prepaid, on August 4, 2015, addressed to his attorney of record Charles J. Hodge, Esquire, Hodge & Langley Law Firm, PC, Post Office Box 2765, Spartanburg, South Carolina 29304-2765 and the Honorable T. Scott Beck, South Carolina Workers' Compensation Commission, Post Office Box 1715, Columbia, South Carolina 29202.

August 4, 2015

ALLEN & NEWMAN, P.L.L.C.

By: _____

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