

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM THE SOUTH CAROLINA
Workers' Compensation Commission

NOV 06 2015
SC Court of Appeals

Case Tracking No.: 2015-001606

Jenna Foran, Employee..... Appellant,

v.

Murphy USA, Employer, and Liberty Insurance Corporation, Carrier,..... Respondents.

FINAL BRIEF OF RESPONDENTS

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STATEMENT OF ISSUES ON APPEAL

- I. WORKERS' COMPENSATION COMMISSION CORRECTLY FOUND APPELLANT'S INJURY WAS IDIOPATHIC

- II. THE WORKERS' COMPENSATION COMMISSION CORRECTLY FOUND THAT, BASED UPON THE GREATER WEIGHT OF EVIDENCE, APPELLANT DID NOT SUFFER A COMPENSABLE INJURY BY ACCIDENT WHICH AROSE OUT OF HER EMPLOYMENT AS SUCH FINDINGS WERE SUPPORTED BY SUBSTANTIAL EVIDENCE

STATEMENT OF THE CASE

This case arises from a denied claim for an idiopathic injury that occurred on April 29, 2014 which did not arise out of the course and scope of Appellant's employment with Murphy Oil USA, Inc. Substantial evidence, including actual video surveillance from two angles, proves the injury was the result of Appellant's ankle merely giving way due to an internal weakness while she was standing still. The Appellant's still photographs of the video are not reflective of the video footage and ignore the moment when the ankle gave way. Both the single Commissioner and the Full Commission viewed the video footage of the incident in detail.

Appellant had pre-existing issues and conditions of her left ankle. These left ankle conditions were originally documented in 2005 when the Appellant underwent surgical repair. At the time of the surgery, Dr. Kane of Hackensack University Medical Center, diagnosed Appellant with chronic instability of the left ankle. Additionally, Dr. Kane noted that the surgery was due to a protracted "history of recurrent injuries to the left ankle" and indicated that Appellant had "failed conservative treatment including physical therapy."

Appellant alleges that she was injured while working as a cashier for Murphy Oil when her left ankle rolled while stepping half on and half off of a mat that was located on the floor. Appellant testified to multiple inconsistencies during the hearing that are in direct conflict with

the actual video footage. Immediately following this incident, Appellant was evaluated by a physician who noted she had significant weakness of the lateral ligaments. This weakness was especially found “under the surgical scar of tendon repair that patient had at 14 years of age. There is numbness to light touch of entire foot up to the ankle which is old.”

At the hearing, the video footage was reviewed along with still shots taken by Appellant of the footage. When viewed in real time, the video clearly shows Appellant’s ankle gave way while she was standing still on a thin mat.

Of particular importance was the testimony from the Appellant and Mr. Rogers, the employer’s store manager. Appellant first testified that while she was stocking cigarettes, her ankle rolled as she got up from a kneeling position. Later, she testified that she was standing up when her ankle rolled. Appellant additionally testified that she had not complained to anyone in the store about having pre-existing left ankle problems. However, Mr. Rogers testified that prior to this injury, Appellant told him multiple times that “she had a bad ankle.” Mr. Rogers testified that Appellant would walk around the store with a limp, and that the limp was present every time he saw her.

The single Commissioner issued a Decision finding that Appellant’s testimony was “very confusing as to her description of the accident.” He additionally found she verified her personal description of the accident multiple times, which was different than what the video reflected. The single Commissioner also found the medical records specifically document prior left ankle issues and chronic instability. The single Commissioner held the surveillance was key to the issue of compensability in this case and found that Appellant was merely standing at the register with both feet forward when her left ankle rolled due to preexisting instability or weakness.

Following this decision, Appellant appealed to the Full Commission and a hearing was held on April 21, 2015. On July 14, 2015, the Full Commission issued an Order with full

affirmation of the single Commissioner specifically finding the video footage, medical evidence, and testimony support the findings that this is an idiopathic injury and therefore not compensable under the Workers' Compensation Act. This appeal followed.

STATEMENT OF THE FACTS

This incident was captured on video surveillance which was reviewed by the Appellate Panel and single Commissioner. The Appellant testified at the hearing on her own behalf. She stated that in 2004, she underwent surgery on her left ankle. However, she testified that her physician "cleared me at 100% out of medical; therefore, I was able to do everything and anything." (R. p.136, lines 14-17). The Appellant then testified that after her surgery in 2004, her left ankle was fully healed and she had no physical limitations.

The Appellant testified she started working for Murphy Oil in December, 2013 as a third shift cashier. Her job duties included stocking cigarettes, stocking shelves, cleaning, and running the cash register.

The Appellant testified that her ankle "was really fine until I had stumbled onto the mat where my foot was half on, half off, and my ankle gave out." (R. p. 138, lines 20-22). The Appellant testified that immediately preceding her stepping on the mat, she was stocking cartons of cigarettes to put on the shelves.

Appellant testified "I noticed I had grabbed - - grabbed too many cartons of cigarettes to put up at the time; therefore I was going to - - I was getting up to put them on the table or the counter behind - - on the other side of me to see what else I needed to grab from the back room; so, I would put those away as well while I was trying to get the others. And I went to get up and my foot was half on, half off, of the mat and my ankle just rolled underneath me." (R. p. 139, lines 4-12). The Appellant testified that she was told by her supervisor that she would contact

the store manager, Mr. Stokes (Mr. Randolph Stokes Rogers, II is referred to in Appellant's testimony as "Mr. Stokes").

The Appellant testified that she told Mr. Stokes "I was stocking the cigarettes; my foot was half on, half off, the mat and my ankle had rolled." (R. p. 143, lines 23-24) The Appellant was then asked whether she had reviewed the store video footage for the time period when her fall took place. The Appellant testified that she had reviewed the video and that it was accurate.

On cross examination, the Appellant was asked specifically about her prior description of accident. She indicated she was kneeling while stocking the shelves, and that she got up from the kneeling position with her foot half on the mat and half off of the mat. The Appellant confirmed that her injury occurred while she was kneeling and went to stand up. When asked whether she would agree that the video actually shows that she had already stood up, turned around, gone over to where the cashier area was, the Appellant responded "I haven't - - I - - what I've seen was I was in the process of on the way up." (R. p. 148, lines 20-21)

The Appellant then reiterated on cross examination that she was injured while "in the process of standing up my foot was half on, half off, and my ankle had rolled". (R. p. 149, lines 2-3) When asked if she was still saying, contrary to the video evidence, that she was in the process of standing up from a kneeling position when she was injured, the Appellant testified "yes." (R. p. 149, line 14) Defense counsel referred the Commissioner to the video surveillance for the time of 5:33:47am.

Further on cross examination, the Appellant was asked whether she testified in her deposition that her ankle just rolled while she was standing up. She indicated she was "down on one knee as if I was proposing, and I had leaned up with this foot was up propping me the other one was underneath me, and when I had gone up my foot was half on, half off, of the mat and it rolled as I was getting up." (R. p. 150, lines 12-15) The Appellant again confirmed that this was

the exact way in which she was injured. The Appellant was again asked whether she watched the video surveillance from the store and whether she thought it was accurate and consistent. The Appellant testified that yes she had seen the video and felt the video was accurate.

The Appellant was asked regarding her testimony that after her 2004 surgery, she was told by the doctor she was 100%. The Appellant denied that she was actually diagnosed instead with “chronic instability of the left ankle.” (R. p. 151, lines 10-12) When asked whether she had been diagnosed by her current doctors with chronic instability of the left ankle, Appellant replied “no, they have not.” (R. p. 151, lines 16-19).

The Appellant then testified on cross examination that before this accident on April 29, 2014, she had not complained to anyone in the store about having left ankle pains and denied having any problems with her left ankle. She denied that any such complaints occurred. (R. p. 152, line 2).

On redirect examination, the Appellant testified that she had reviewed the video of the actual accident and that she was facing the register when her foot was half on and half off of the mat.

The Store Manager, Mr. Randolph Stokes Rogers, II, testified on behalf of the Respondents. He testified he is the Manager of Store 8717 for Murphy Oil Corporation and he has been with the company for four years. He testified the Appellant was hired in December, 2013.

Mr. Rogers testified that before this alleged accident on April 29, 2014, the Appellant would walk around the store with an obvious limp. He testified he asked her multiple times what was wrong with her left foot/ankle. He testified she always replied that “she had a car accident years ago and that’s what was bothering her.” (R. p. 156, lines 19-22).

He further testified that he noticed that the Appellant walked with an apparent limp about

every time he saw her. He does not recall whether there was ever a day that she walked without a limp. He also testified that before this alleged accident, she complained multiple times about having a “bad ankle.” (R. p. 157, line 7).

On cross examination, Mr. Rogers testified that prior to April 29, 2014 the Appellant was able to perform her job every time he asked her about the pain in her left ankle and that he did not know of any restrictions Appellant had that prevented her from doing her job duties. Mr. Rogers further testified as to his conversation with the Appellant after her alleged accident. He testified that he asked her how she was injured and she stated “she was stocking cigarettes and when she went to get up her ankle kind of gave way.” (R. p. 171, lines 23-25).

The medical records included in the file are those from Hackensack University from December 2005. These records reflect the Appellant was seen December 6, 2005 with a protracted history of recurrent injuries to the left ankle with now chronic instability that has failed conservative treatment. She underwent Open Watson-Jones reconstruction of the lateral ligament complex of the left ankle. (R. pp. 52-55).

The medical records from Doctor’s Care from April 29, 2014 through May 23, 2014 were submitted into evidence. The medical report from the date of injury indicates the Appellant’s history is significant for tendon reconstruction in the left ankle in 2004 (states after history of “multiple sprains”) but since surgery, had been pregnant, working and has had no issues until today. X-rays were reviewed and it was agreed that there was no evidence for any acute boney trauma, changes consistent with prior surgery and referred to a sub-specialist for continued symptoms. (R. pp. 58-99).

The medical records from Dr. Ross Taylor at Coastal Orthopedics dated June 12, 2014 indicates the Appellant “admits to having complete loss of sensation distal to the mid cap area since her previous surgery. This is not related to her most recent injury.” (R. p. 101). Dr.

Taylor found that the Appellant's previous repair was ruptured and recommended a revision lateral ankle ligament reconstruction using unalographt. The Appellant was taken out of work on June 12, 2014.

Respondents submitted the entire video surveillance for the store from two separate cameras showing the morning of April 29, 2014. (R. p. 204) These videos were reviewed in detail by the single Commissioner and Full Commission. The video surveillance clearly shows that at 5:33am, the Appellant turned around with her back to the register and squatted down on the ground stocking cigarettes. She then stood up without any incident whatsoever and did not roll her ankle contrary to her testimony. The Appellant turned around and went back to the register where she was standing on the mat. The Appellant partially stepped off of the mat and then stepped fully back on the mat with her left foot. While standing at the register on the floor mat, the Appellant's left ankle then rolled, causing her to lean forward into the counter. When Appellant's left ankle rolled, both of her feet were placed forward. The video surveillance also shows that Appellant was not rising from a crouching position such as a man proposing on one knee. The Appellant also was not half on half off of the mat when her ankle rolled. Photographs of the floor mat further were included with the evidence showing a thin slightly cushioned mat.

STANDARD OF REVIEW

The Administrative Procedures Act establishes the standard for judicial review of decisions of the Workers' Compensation Commission. Hargrove v. Titan Textile Co., 360 S.C. 276, 599 S.E.2d 604 (Ct. App. 2004). Upon review, appellate courts have the power to reverse or modify a decision if the findings and conclusions of the administrative agency are affected by an error of law, clearly erroneous in view of the reliable and substantial evidence on the whole record, arbitrary or capricious, characterized by an abuse of discretion, or a clearly unwarranted

exercise of discretion. Gray v. Club Group, Ltd., 339 S.C. 173, 528 S.E.2d 435 (Ct. App. 2000). The substantial evidence rule of the Administrative Procedures Act governs the standard of review in a workers' compensation decision. Frame v. Resort Servs., Inc., 357 S.C. 520, 593 S.E.2d 491 (Ct. App. 2004). This Court must affirm the findings of fact made by the Full Commission if they are supported by substantial evidence. Jordan v. Kelly Co., 381 S.C. 483, 486, 674 S.E.2d 166, 168 (2009). Substantial evidence is neither a mere scintilla of evidence, nor 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). Thus, substantial evidence is a lesser standard than by a preponderance of the evidence. Id.

ARGUMENT

I. THE WORKERS' COMPENSATION COMMISSION CORRECTLY FOUND APPELLANT'S INJURY WAS IDIOPATHIC

The Full Commission determined that under *Barnes, Nicholson* and *Crosby*, Appellant suffered an idiopathic injury and that her condition was caused by an internal breakdown of the left ankle. This decision was supported by substantial evidence and should be affirmed.

In *Barnes* and *Nicholson*, the South Carolina Supreme Court was presented with an opportunity to "clarify the idiopathic exception to workers' compensation benefits." *Barnes v. Charter 1 Realty*, Opinion No. 27479, 2015 WL 161731 at 1 (S.C. S. Ct. Jan. 14, 2015); *Nicholson v. S.C. Dep't of Social Servs.*, Opinion No. 27478, 2015 WL 161719 (S.C. S. Ct. Jan. 14, 2015). While the legal process of evaluating idiopathic injuries has changed, *Barnes* and *Nicholson* illustrate that the legal principles and policies behind idiopathic injuries remain intact. The Court reaffirmed the existing doctrine that an idiopathic injury is (1) brought on by a

condition particular to the employee that could have manifested itself anywhere and (2) does not stem from an accident. *Barnes*, Op. No. 27479 at 4 (emphasis added). It is on these unchanged principles that the single Commissioner and Full Commission correctly based their decision in favor of the Respondents.

The holding in *Barnes* establishes that an idiopathic injury is one that is brought on by a condition particular to the employee that could have manifested itself anywhere. Specifically, such a condition is characterized by a result of an internal failure or breakdown. *Barnes*, Op. No. 27479 at 4. The Court even provides an additional, broader category— permitting that such conditions could be classified as a “weakness.” *Barnes*, Op. No. 27479 at 5. This is explicitly discussed as the Court finds “whether [the Appellant] tripped because she was hurrying or she tripped over her own feet, neither [instance is] an internal breakdown or weakness that falls within the ambit of idiopathy.” *Id.* (emphasis added). Similarly, the facts in *Crosby v. Wal-Mart Store, Inc.* illustrate that the Appellant’s fall was characterized as idiopathic because it was a result of an internal breakdown of the knee. *Crosby*, 330 S.C. 489, 499 (Ct. App. 1998). *Barnes* confirms the holding in *Crosby* as the accident was “not simply unexplained, but indicated the cause was internal.” *Barnes*, Op. No. 27479 at 4.

Here, the Appellant’s assertion that there was no internal failure or breakdown is incorrect. The single Commissioner and Full Commission specifically found that medical history showed chronic instability of the left ankle, credible testimony provides she consistently complained of a “bad left ankle” and walked with a limp, and that the video surveillance shows Appellant’s ankle “giving out” while she was simply standing at the register.

This finding of weakness or an internal failure, as required by *Barnes*, is further supported by other evidence in the case. Appellant specifically testified that she underwent surgery on her left ankle. (R. p. 189) That a left ankle arthroscopy and Watson-Jones ligament

reconstruction was performed by Dr. Kane at Hackensack University Medical Center. (R. pp. 52-55) Those records indicate that the surgery was performed due to a history of recurrent sprains to the left ankle. (R. p. 56) Dr. Kane additionally noted that the left ankle had chronic instability and that the Appellant had failed conservative treatment. In spite of these medical records, at the hearing Appellant denied that she was actually diagnosed with “chronic instability of the left ankle.” At Doctors Care on May 23, 2015, Dr. Denton specifically noted that “the[re] is significant weakness of these lateral ligaments. This is under the surgical scar of [the] tendon repair that patient had at 14 years of age. There is numbness to light touch of entire foot up to the ankle, which is old.” (R. p. 85)

Additionally, it was the Appellant’s testimony that she had not complained to anyone in the store about having left ankle problems and that she had not had any issues since the surgery. (R. pp. 151-152) This testimony is contrary to that of Mr. Rogers, the store manager. Mr. Rogers testified that before the alleged accident on April 29, 2014, Appellant would walk around the store with an obvious limp. (R. p. 156) He also testified that he asked her multiple times what was wrong with her left foot/ankle. (R. p. 156) Additionally, he testified that before the alleged accident, she complained multiple times about having a “bad ankle.” (R. p. 157) Because the Appellant was found to have a prior weakness in her left ankle, walked with a visible limp, and complained to her employer that she had a “bad ankle,” the single Commissioner and Full Commission’s findings that Appellant suffered from a chronic instability, and subsequently an idiopathic injury, is not in error.

II. THE WORKERS' COMPENSATION COMMISSION CORRECTLY FOUND THAT, BASED UPON THE GREATER WEIGHT OF EVIDENCE, APPELLANT DID NOT SUFFER A COMPENSABLE INJURY BY ACCIDENT WHICH AROSE OUT OF HER EMPLOYMENT AS SUCH FINDINGS WERE SUPPORTED BY SUBSTANTIAL EVIDENCE

The Full Commission determined that under *Nicholson*, Appellant's injury was not a compensable injury by accident within the course and scope of her employment. This decision was supported by substantial evidence and should be affirmed.

Nicholson sets forth a new standard in determining whether an injury arose out of, or was proximately caused by, the employment. Opinion No. 27478, 2015 WL 161719 (S.C. S. Ct. Jan. 14, 2015). In *Nicholson*, the Court found that when an employee tripped as she was hurrying down the hall, there was a causal connection between the "conditions under which the work [was] required to be performed and the resulting injury." *Nicholson*, Op. No. 27478 at 7. Additionally, the Court held that whether specific objects or conditions posed a special risk or hazard is now immaterial.

The facts in *Nicholson* are starkly different from the case at hand. In *Nicholson*, the employee's injury was due to a trip and fall, not an internal condition or breakdown. *Nicholson*, Op. No. 27478 at 5. There is no mention in *Nicholson* about prior weakness or internal conditions that caused the employee to fall. In contrast to *Nicholson*, the video surveillance reveals that Appellant's ankle gave out when she was standing at the register with both of her feet placed on the mat. When Appellant was initially in a kneeling position, her ankle did not roll, and when she subsequently walked over to the other side of the counter and placed her feet on the mat, her ankle again, did not roll. Not until after she was stationary did the Appellant's ankle fail.

The Appellant's testimony regarding how her ankle failed was also unclear and contrary

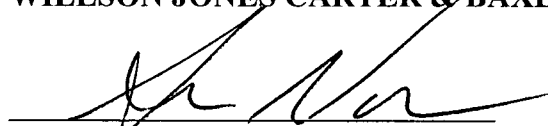
to the video surveillance. She testified repeatedly that she was in a kneeling position and she stated that when she “had gone up my foot was half on, half off, of the mat and it rolled.” (R. p. 150) Based on this evidence, the single Commissioner and Full Commission found no causal connection between the conditions under which the work was required to be performed and the injury. The Appellant’s injury did not stem from an accident and instead, arose from a purely personal physical weakness, unrelated to employment. These decisions are supported by substantial evidence and should be affirmed.

CONCLUSION

For the reasons stated herein, the South Carolina Workers’ Compensation Commission’s decision should be affirmed in full.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned certifies that the Final Briefs comply with Rule 211(b), SCACR.



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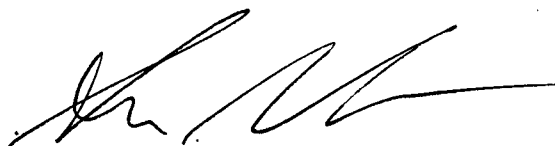
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Corporation,.....Respondents/Respondents.

PROOF OF SERVICE

I certify that copies of the FINAL BRIEF OF RESPONDENTS TO BE INCLUDED IN THE RECORD ON APPEAL were served this day on Appellant by depositing a copy of it in the United States Postal Service, first class to Appellant's attorney of record C. Scott Masel, Palmetto Injury Lawyers, P.O. Box 808, Myrtle Beach, SC 29577.



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