

APPELLATE PANEL
DECISION AND ORDER
OF THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
W.C.C. FILE NO.: 1414851

RECEIVED

CLAIMANT/APPELLANT
JUN 14 2016

SC Court of Appeals

MICHAEL THOMPSON, EMPLOYEE

VS

KMS, INC., EMPLOYER,

AND

BRIDGEFIELD CASUALTY INSURANCE COMPANY
C/O SUMMIT HOLDINGS, INC., CARRIER. DEFENDANTS/RESPONDENTS.

Appellate Panel Review Hearing
held in Columbia, South Carolina,
on February 22, 2016, per notices
timely and properly served upon
all parties of interest.

Appellate Panel Decision and Order

filed, May 6, 2016

APPEARANCES: CLAIMANT/APPELLANT appeared pro se, and

DEFENDANTS/RESPONDENTS represented by Nicolas L. Haigler, Esquire, of
Columbia, South Carolina.

STATEMENT OF THE CASE

This is an appeal by Michael Thompson ("Claimant" or "Appellant") from the Decision and Order of Commissioner Avery B. Wilkerson, Jr., filed on November 18, 2015. This claim was before the South Carolina Workers' Compensation Commission pursuant to the defendants' Form 21 filed on July 14, 2015. The defendants admit the claimant sustained an injury to his back on October 8, 2014, as alleged; however, the defendants now assert the claim is barred by fraud in the application for employment as outlined by the Supreme Court of South Carolina in Cooper v. McDevitt & Street Co., 260 S.C. 463, 196 S.E.2d 833 (1973). As such, the defendants requested permission to stop payment of temporary total disability and future medical benefits to the claimant; and requested reimbursement for all benefits paid to date based upon the claimant's fraud in the application for employment. The claimant did not raise any additional issues but did deny the assertion of fraud in the application for employment.

The Hearing in this matter was held on September 15, 2015, in Columbia, South Carolina, before Commissioner Avery B. Wilkerson, Jr. ("Hearing Commissioner"). By way of the Decision and Order filed on November 18, 2015, the Hearing Commissioner determined the defendants established, by the greater weight of the evidence, the three factors required by the Court in Cooper to vitiate the employer-employee relationship and bar the claimant from further benefits under the Act. Specifically, the Hearing Commissioner found as a fact that the defendants established (1) the claimant knowingly and willfully failed to disclose his prior back injury and/or condition; (2) the defendant-employer relied upon the false representation in further employing and placing the claimant, and that the reliance was a substantial factor in his continued employment; and (3) the causal relationship between the false representation and the work-related injury. As such, the Hearing Commissioner concluded as a matter of law that the claimant was barred from further benefits under the Act and, moreover, that the defendants were entitled to reimbursement by the claimant of all benefits paid to and on behalf of the claimant, by the defendants, under the Act.

On or about November 10, 2015, prior counsel for the claimant filed a Petition to Withdraw As Counsel citing the claimant's "verbally abusive [statements] . . . , repeated expressions of dissatisfaction, as well as various outlandish statements and accusations" as the reasons for her request. The Order relieving her as counsel for the claimant was executed on November 18, 2015.

On December 18, 2015, the claimant, now pro se, filed a Motion for Additional and Newly Discovered Evidence. By way of the Judicial Conference Decision and Order filed by Commissioner T. Scott Beck on January 11, 2016, the Motion was denied.

Claimant now appeals the Decision and Order of the Hearing Commissioner to the Full Commission Appellate Panel ("Full Commission"), based upon the following grounds identified on the Form 59 Appellants' Informal Brief:

1. All back issues from 2007 to 2013 were secondary to my anxiety/stress disorder or post trauma stress caused by those conditions which KMS were fully aware of all the problems. Ended up on FMLA while I was still employed.
2. The company held no reliance upon the questionnaire to hire me and said so. The questionnaire form at the very start said it's not being used as the basis for deciding whether to employ us.
3. Commissioner saw my testimony flawed and unbelievable. I don't have memory when I'm confused and dealing with my stress and anxiety disorders. I become confused quickly.

The claimant proceeds to ask the Appellate Panel to "either reverse the decision . . . or let me have a good lawyer and do it again due to unacceptable negligence by my past lawyer."

After careful review in the instant case of all grounds raised, the evidence in the record, and oral arguments from both the claimant, who was advised by the panel of his right to legal counsel, but choose to appear pro se, and counsel for the defendants, the Commission finds that, by unanimous vote, the Decision and Order of the Hearing Commissioner must be Affirmed in its entirety.

FINDINGS OF FACT

After careful review and consideration of all the evidence presented by the parties, including the testimony of the claimant, the deposition testimony of Joe Canfield, Wayne Frye and Dr. Kimberly Hicks, the medical evidence and other evidence submitted through the APA, WE FIND AS A FACT THAT:

1. All parties to the proceeding are subject to and bound by the terms of the South Carolina Workers' Compensation Act with Michael Thompson as employee, KMS, Inc., as employer, and Bridgefield Casualty Insurance Company c/o Summit Holdings, Inc., as carrier.
2. The claimant was hired by KMS, Inc. in September 2012 as a Press Brake Operator.
3. Claimant completed a post-hire medical questionnaire on September 7, 2012. See Defendants' Ex. A; H.T. pp. 43-45.
4. We find defendants initially admitted the claimant sustained a compensable injury to his low back, but denied his other alleged injuries. Thereafter, defendants discovered information which was inconsistent with claimant's answers on the post-hire medical questionnaire. Specifically, defendants discovered claimant had a prior back injury arising from a 2003 motor vehicle accident which claimant failed to disclose on his post-hire medical questionnaire. This finding is based upon the greater weight of the evidence in the record, including but not limited to the post-hire medical questionnaire, the medical records, the testimony of the claimant, and the deposition testimony of Joe Canfield and Dr. Hicks.
5. We find the claimant understood all questions on the post-hire questionnaire and authenticated his signature. Claimant understood the cautionary language and understood that false answers could result in his loss of workers' compensation benefits. This finding is based upon the greater weight of the evidence in the record, including but not limited to the post-hire medical questionnaire, the medical records, the testimony of the claimant, and the deposition testimony of Joe Canfield and Dr. Hicks.
6. We find the claimant knowingly and willfully made a false misrepresentation as to his prior back condition. Claimant answered the first question on the post-hire medical questionnaire, which asked if claimant had ever had a back injury, in the negative. The claimant subsequently admitted he had prior low back problems related to but not limited to a motor vehicle accident in 2003. Claimant further admitted he knew at the time he completed the post-hire questionnaire in 2012 that he sustained a back injury in 2003 and that he did not disclose the back injury on the questionnaire. This point was supported by his family physician, Dr. Hicks. This finding is based upon the greater weight of the evidence in the record, including but not limited claimant's hearing testimony, the post-hire medical questionnaire, the medical records submitted by the defendants, and the

deposition testimony of Dr. Hicks. See H.T., pp. 29-30, 47-48, 51, 56, lines 10-22; Deposition of Dr. Hicks, pp. 32-34; 47-50.

7. We find the claimant has an extensive history of low-back pain which pervades the record. The medical records show that claimant sought medical treatment with Dr. Troyer between July and August 2003 for a low back injury, amongst other injuries, arising from a 2003 motor vehicle accident. Claimant then began treating with Dr. Hicks, his primary care physician, in May 2008. On May 5, 2008, claimant reported that he was frequently having serious back trouble. In 2013, claimant treated with Lexington Sleep Solutions and reported that he was experiencing back pain. Moreover, claimant testified that he was frequently having serious back pain from approximately 2007 until at least 2013. This finding is based upon the greater weight of the evidence in the record. See Defendants' APA #1, #3, p. 40, and #2, p. 13; Deposition of Dr. Hicks, pp. 27-28; and H.T., p. 41.
8. We find the defendant-employer relied on the claimant's misrepresentations on his post-hire medical questionnaire. Specifically, the defendant-employer relied on the claimant's responses in determining the placement of the claimant and in making risk management decisions. Mr. Canfield testified that because claimant's prior back issues were not disclosed, KMS was not given the opportunity to investigate claimant's prior back injury and, if necessary, to make reasonable accommodations which may have prevented claimant's at-work injury. As claimant's job involved physical labor which included the lifting of 40-50 pounds and bending, claimant's prior back injury was material. This Finding is based upon the deposition testimony of Joe Canfield. See Deposition of Joe Canfield, pp. 10-11; 15; 18; 26-27; 31-34; 36-41.
9. We find a causal relationship exists between claimant's prior back problems and the subsequent back problems arising from his alleged work-related accident. Claimant testified that his prior back problems and subsequent back problems involved the same area, the lower-back. This finding is based upon the greater weight of the evidence in the record, including but not limited to the medical records submitted by the parties and the testimony of the claimant. See H.T., pp. 59-60.
10. We find the claimant not to be a credible witness. This Finding is based upon the testimony of the claimant, the medical reports and deposition testimony of Dr. Hicks, and the personal observations of the claimant by the Hearing Commissioner. Specifically, the claimant's testimony at the Hearing was replete with inconsistencies in comparison to medical reports, claimant's deposition testimony, claimant's post-hire medical questionnaire, and other documents entered into evidence. In addition, the Hearing Commissioner observed the claimant's testimony was not forthright and was wholly inconsistent with the record as a whole. It is impossible to place much credibility in the testimony of the claimant given the repeated testimony regarding matters that defendants were able to clearly disprove. For example, claimant initially denied ever receiving medical treatment for lower back injuries as a result of a 2003 motor vehicle

accident. Upon being shown various medical records, claimant denied knowing that the individual he saw was a doctor. Furthermore, claimant attempted to avoid answering questions related to treatment arising from the 2003 motor vehicle accident by asserting he was not responsible for the treatment because it was set-up by claimant's attorney in that case. Moreover, claimant tried to explain his dishonesty on the post-hire medical questionnaire by blaming another employee without any corroboration. The patent inconsistencies throughout claimant's testimony caused the Hearing Commissioner to give little weight to his testimony except as to admissions ultimately made upon pressing examination by defense counsel. See H.T., pp. 28-30, 36-37, 47-48, 51; Deposition of Dr. Hicks, pp. 32-34; 47-50.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, and as provided by the Code of Laws of South Carolina, § 42-17-40, it is the determination of the Full Commission Appellate Panel that:

1. Pursuant to Cooper v. McDevitt & Street Co., 260 S.C. 463, 196 S.E.2d 833 (1973), three factors must be present before a false statement in an employment application will vitiate the employer-employee relationship and bar an employee from benefits: (1) The employee must have knowingly and willfully made a false representation as to his physical condition. (2) The employer must have relied upon the false representation and this reliance must have been a substantial factor in the hiring. (3) There must have been a causal connection between the false representation and the injury.
2. The first prong outlined under Cooper is satisfied as the claimant knowingly and willfully failed to disclose his prior back injury and/or condition.
3. Pursuant to the requirements set forth in Cooper, the defendant-employer relied upon the false representation in further employing and placing the claimant, and that the reliance was a substantial factor in his continued employment. Therefore, the second prong outlined under Cooper is satisfied. See also Brayboy v. Workforce, 383 S.C. 463, 681 S.E.2d 567 (2009) (the Court held that the second prong of the Cooper test is satisfied if the employer relies on an employment application for job placement purposes).
4. Pursuant to the requirements set forth in Cooper, a causal relationship existed between claimant's false representation and his subsequent work-related injury and, therefore, the final prong outlined under Cooper is satisfied. See also Jones v. Georgia-Pacific Corp., 355 S.C. 413, 586 S.E.2d 111 (2003) (A causal connection existed between the claimant's injuries and the false representation as she had documented back problems prior to employment and alleged a back injury while working for the company).

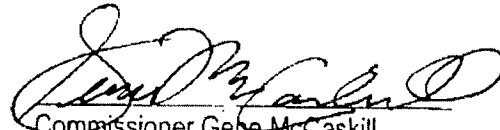
5. Pursuant to § 42-1-130 and Cooper, the claimant committed fraud in the application for employment, vitiating the employer-employee relationship and barring him from further benefits under the South Carolina Workers' Compensation Act.

ORDER

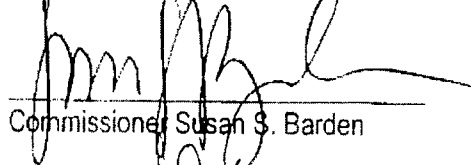
IT IS, THEREFORE, ORDERED, that the Decision and Order of the Hearing Commissioner filed in the above-captioned matter on November 18, 2015, is hereby AFFIRMED.

AND IT IS SO ORDERED.

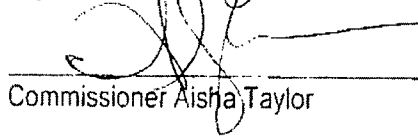
SOUTH CAROLINA WORKERS' COMPENSATION
COMMISSION



Commissioner Gehe McCaskill
For the Appellate Panel



Commissioner Susan S. Barden



Commissioner Aisha Taylor

CERTIFICATE OF SERVICE

This is to certify that the undersigned has on this date served a copy of this order in the above entitled action upon all parties to this case by sending an electronic copy hereof by electronic mail addressed to the attorneys for said parties; or if there is an unrepresented party(ies), by depositing a copy hereof, postage paid in the United States mail, first class, addressed to the unrepresented party(ies) and to the attorney(s) for the represented party(ies).

By Eugenia Hollmon on May 6, 2016