

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA WORKERS'
COMPENSATION COMMISSION

RECEIVED

OCT 17 2016

Appellate Case No.: 2016-001398
WCC Number: 1405219

SC Court of Appeals

Kevin Wikel, Employee, Claimant,Respondent,

v.

PC Metro Bottling, Employer, and Indemnity Insurance Co. of NA, Carrier,Appellants.

APPELLANTS' FINAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

1. Whether the Commission erred in finding the Claimant sustained a compensable injury by accident that arose out of and in the course of his employment with PepsiCo, as the Claimant could not recall when or how he allegedly injured himself?
2. Whether the Commission erred in finding the Claimant sustained an injury by accident that arose of and in the course of his employment on May 9, 2014, as all of the medical evidence is to the contrary?
3. Whether the Commission erred in finding the Claimant was merely "confused," and it should have held the Claimant not credible?

STATEMENT OF THE CASE

This matter was initially scheduled to be heard before a single Commissioner on September 30, 2014 in Yemassee, South Carolina. The hearing was pursuant to the Claimant's Form 50. The Claimant sought a finding that he sustained a compensable injury by accident to his lumbar spine and left lower extremity on May 12, 2014. Per the Claimant's Form 50, the Claimant allegedly injured his lower back and left lower extremity after "pulling pallet of Pepsi products to floor, bending, twisting & lifting when he felt pain in his back." (R. p. 199) The Claimant sought all benefits to which he may be entitled to under the Act.

In preparation for the hearing, the Defendants conducted the Claimant's deposition on September 5, 2014. During the deposition, the Claimant did not allege an injury by accident on May 12, 2014, as alleged on his Form 50. The Defendants maintained their denial. Just prior to the scheduled hearing, the Claimant withdrew his Form 50, request for a hearing.

The Claimant applied for a position with Wal-Mart on May 10, 2014, which is just two days prior to the date the Claimant allegedly injured himself at PepsiCo per his initial Form 50. The Claimant stopped working for PepsiCo in June of 2014.

After the Claimant voluntarily resigned from PepsiCo, he sought treatment on his own accord through Dr. Strohmeyer, an orthopedic spine specialist. Dr. Strohmeyer's note of July 11, 2014 states, "Lumbar radiculopathy that is resolving." (R. p. 82) On November 11, 2014, while working for Wal-Mart, the Claimant again returned to Dr. Strohmeyer's office. Dr. Strohmeyer's office note states, "He returns back, today. He is

doing fine . . . 100% better.” (R. p. 85) This is obviously five months after he stopped working for PepsiCo that he had complete relief of his symptoms.

To the Defendants’ surprise, on October 7, 2015, the Claimant filed a new Form 50 alleging a date of accident of May 9, 2014, rather than May 12, 2014. The Claimant alleged on the new Form 50 the same mechanism of injury due to “pulled pallet of Pepsi products to floor, bending, twisting & lifting when he felt pain in his back.” (R. p. 199) Per the second Form 50, he claimed May 12, 2014 was when he provided notice to the Defendants. Just prior to the hearing before the single Commissioner, the Claimant filed a Motion To Amend his Form 50, dated November 16, 2015, alleging a repetitive trauma claim to the lower back and left lower extremity and/or a date of accident of May 9, 2014.

During the Prehearing Conference, Commissioner Wilkerson informed the Claimant that he may only proceed on either an injury by accident or a repetitive trauma claim, not both. The Claimant elected to proceed on an alleged date of accident of May 9, 2014, rather than a repetitive trauma claim.

Of note, the Claimant could not obtain any recovery under an alleged repetitive trauma claim, as a matter of law, since he did not have an opinion from a physician regarding causation as required by S.C. Code Ann. § 42-1-72. From a practical standpoint, the Claimant had to move forward before the single Commissioner on an injury by accident claim or risk voluntary dismissal of his claim pursuant to Regulation 67-609(C). The Regulation states, “Withdrawing a Form 50 or Form 52 the second time without good cause may operate as a voluntary dismissal of the claim when the form is

withdrawn by a Claimant who has once withdrawn a Form 50 or a Form 52 based on the same set of facts. . .”

Before the single Commissioner, the Claimant sought an order of compensability to the lower back and left lower extremity, the Defendants to pay for all causally-related medical treatment, temporary total disability from April 2, 2015 through June 29, 2015 and a finding of permanent loss of use to the Claimant’s lower back as well as his left lower extremity.

The Defendants denied the Claimant sustained a compensable injury by accident on May 9, 2014, as the Claimant previously alleged dates of accident on May 2, 2014, per the 12A, on May 6, 2014 per the Claimant’s deposition testimony on September 5, 2014 and on May 12, 2014 per the Claimant’s prior Form 50. This is in addition to the Claimant’s amended Form 50, alleging a repetitive trauma injury. Based on the Claimant’s testimony during the course of his deposition on September 5, 2014, the Defendants also sought a credibility finding.

Not only did the Defendants deny the Claimant injured himself on a specific date, as the Claimant alleged a number of different dates of accident during discovery, but the Defendants also denied the claim as the Claimant could not provide a plausible acute mechanism of injury.

Per the single Commissioner’s Order dated, January 29, 2016, he found the Claimant sustained an injury by accident on May 9, 2014 to his lower back and left lower extremity, after lifting a case of Aquafina. He held the Defendants liable for casually related medical treatment, temporary total disability benefits and permanent loss of use to the Claimant’s spine and left lower extremity.

The Defendants appealed to the Full Commission arguing the single Commissioner erred as follows: 1) He erred in finding the Claimant sustained an injury by accident; 2) He erred in finding an alleged injury by accident occurred on May 9, 2014; 3) He erred in finding the Claimant sustained a compensable injury on May 9, 2014, as all the medical evidence is to the contrary; 4) He erred in finding the Claimant was merely “confused,” rather than not credible.

The Full Commission, per Order dated June 23, 2016, affirmed the single Commissioner. From that Order, the Defendants appeal to this Honorable Court, requesting a reversal of the Commission’s Finding of Fact and Conclusions of Law that the Claimant sustained an injury by accident that arose out of and in the course of his employment on May 9, 2014, as there is not substantial evidence in the record to support the Commission’s findings.

Standard of Review

A Claimant has the burden of proving facts sufficient to allow recovery under the Workers’ Compensation Act. Hall v. Desert Aire, Inc., 376 S.C. 338, 656 S.E.2d 753 (S.C. App. 2007). The burden lies with the Claimant to demonstrate causation by a preponderance of the evidence. South Carolina Second Injury Fund vs. Liberty Mut. Ins. Co., 353 S.C. 117, 576 S.E.2d 199 (S.C. App. 2003). The Claimant has the burden of proving facts that will bring the injury within the Workers’ Compensation Law. Bartley v. Allendale County School Dist., 381 S.C. 262, 672 S.E.2d 809 (S.C. App 2009).

In a workers’ compensation case, the scope of the Court of Appeals’ review of the Commission is to determine whether there is substantial evidence of record to support the findings of the Commission. Holcombe v. Dan River Mills/Woodside Div., 286 S.C.

223, 333 S.E.2d 338 (S.C. App. 1985). Substantial evidence as required for affirmation of findings of fact made by the Commission is not a mere scintilla of evidence, but evidence which, considering the record as a whole, would allow reasonable minds to reach the same conclusion. Tiller v. National Health Care Center of Sumter, 334 S.C. 333, 513 S.E.2d 843 (S.C. 1999) In a workers' compensation action, where evidence is susceptible of but one reasonable inference, the question is one of law for the court rather than one for the workers' compensation Commission. Mullinax v. Winn-Dixie Stores, Inc., 318 S.C. 431, 458 S.E.2d 76 (S.C. App. 1995). The function of the Commission as to whether the evidence is sufficient is like that of a jury in actions of law. Windham v. City of Florence, 221 S.C. 350, 70 S.E.2d 553 (1952). For purposes of judicial review of an agency decision, substantial evidence on which to affirm an agency decision 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. Etheredge v. Monsanto Co., 349 S.C. 451, 562 S.E.2d 679 (S.C. App. 2002).

ARGUMENT

- 1. The Commission erred in finding the Claimant sustained a compensable injury by accident that arose out of and in the course of his employment with PepsiCo, as the Claimant could not recall when or how he allegedly injured himself.**

The Commission held the Claimant injured himself on May 9, 2014, after lifting a case of Aquafina. At the hearing, the Claimant testified it only took him fifteen (15) minutes from the time he allegedly injured his back, lifting a case of Aquafina on May 9,

2014, and when he called 1-800-Job-Hurt. The Claimant testified at the hearing as follows:

Q. Okay. And how long did that take from that transition from when you lifting that case of Aquafina till when you called the 1-800-JOB-HURT operator?

A. Less than, probably, fifteen (15) minutes

(R. p. 33, lines 19-22)

The 1-800-Job-Hurt call is the most compelling evidence that the Claimant did not injure himself on May 9, 2014, after lifting a case of Aquafina. The Defendants provided a recorded copy as well as a transcription of the recording to the Commission. The transcription reads as follows:

Operator: Let me verify you are calling to report a work related injury?

Claimant: Yes Ma'am

Operator: And the date of the incident?

Claimant: Uhh, it would have been *pause* uh, it started hurting me May 2nd.

Operator: Occurred May 2nd. And that occurred at what time?

Claimant: Uhh, like 11 o'clock in the afternoon. Uh, in the morning

Operator: Okay, and a description of what happened?

Claimant: Uhm, I started having pain in my lower back. I can't really tell you exactly what all happened with it. *laughs*

Operator: And what were you doing at the time?

Claimant: Uh, workin'

Operator: Were you lifting a case? Or are you not sure what you were doing? The work process?

Claimant: I was doing the work process, yeah

Operator: And what were you particularly doing at the time?

Claimant: Uh, I can't . . . honestly, I can't really remember. I know I didn't lift anything incorrectly or anything. It might just have been from exhaustion Uh, I worked a couple hours today, and told them I wasn't going to be able to do it. My back was killing me too bad, and they [Landon Papay and Eric Smith] told me I had to call y'all. So

Operator: Is there a location name?

Claimant: Uh, I could have been . . . I believe it was a Publix

Operator: Any products or packages involved in the incident?

Claimant: Uh, I probably was down stacking a pallet

(R. pp. 253-259)

Within fifteen minutes of the alleged accident, the Claimant's own statement to the operator was that it occurred on May 2, 2014 at a Publix, and he could not provide a description as to the mechanism of injury. Even at the hearing, under cross-examination, the Claimant testified that he could not recall when he injured himself.

Q. You don't recall exactly what date you injured yourself?

A. No, sir.

(R. p. 32, lines 5-7)

At the hearing, under direct examination, the Claimant testified that he injured himself after “lifting a pack of Aquafina Nice...,” (R. p. 35, line 6) not down stacking a pallet, as he reported to the 1-800-Job-Hurt operator. Also, he testified at the hearing that the alleged accident occurred at Wal-Mart, not Publix, as he reported to the operator.

Not only do the Defendants have the 1-800 Job-Hurt call, but the Claimant also called Sedgwick, just three days after the alleged date of accident. This is further evidence of the fact the Claimant does not know when or how he allegedly injured himself. On May 12, 2014, the Claimant called a representative for Sedgwick, Mark Drutch. He reported essentially the same set of circumstances as he did to the 1-800-Job-Hurt operator. According to the screen notes by the carrier, the Claimant reported an injury date of May 2, 2014, and he could not recall any specific event at work to cause the injury. He stated that he had worked thirteen days straight when his back started hurting him, so he called 1-800-Job-Hurt. (R. p. 248)

At the hearing, during direct examination, the Claimant obviously alleged injuring himself due to an injury by accident on May 9, 2014, after lifting a case of Aquafina at Wal-Mart. However, during cross-examination, the Claimant admittedly did not know the dated of the alleged injury or the mechanism of injury. He testified as follows:

Q. So, we’re not just looking at May 2nd, May 9th; we’re looking at thirteen (13) days. So, are you alleging you – you injured yourself over thirteen (13) days or on a specific date?

A. I don’t – it transpired over the time I was working. There was no – I can’t remember exactly what day, what item exactly hurt me –

Q. So, you cannot recall –

A. -- but I remember on May 9th when I picked up a Aquafina – a pack of Aquafina Nice and that's when I gave in –

Q. -- do you think that was the mechanism –

A. -- I couldn't deal with the pain.

Q. -- mechanism of injury or do you think it was working for the thirteen (13) days prior to due to repetitive lifting?

A. It was probably through the whole time.

Q. Probably due to repetitive lifting?

A. Yes.

(R. p. 34, line 22 – p. 35, line 15)

Under cross-examination, the Claimant's testimony is consistent with the 1-800-Job-Hurt call and the statement provided to Mark Drutch. He does not recall the date of injury, nor does he recall the mechanism of injury. If anything, the Claimant's testimony is consistent with an alleged repetitive trauma claim, not an injury by accident on May 9, 2014, due to lifting a case of Aquafina.

There is not substantial evidence in the record to support the Commissions finding as to the date and the mechanism of injury. The Commission erred as a matter of law in failing to find the Claimant, if anything, reportedly sustaining a repetitive trauma type injury, rather than an injury by accident. Not only is a repetitive trauma type injury solidified by the 1-800-Job-Hurt call, the Claimant's statement to Mr. Drutch and his testimony on cross-examination at the hearing, but it is also consistent with the medical evidence.

2. The Commission erred in finding the Claimant sustained an injury by accident that arose of and in the course of his employment on May 9, 2014, as all of the medical evidence is to the contrary.

On May 9, 2014, just after the 1-800-Job-Hurt call, the Claimant went to Doctors Care. The Doctors' Care note, dated May 9, 2014, indicates, "low back pain x1 week after long shifts at work of lifting and bending." (R. p. 220) It does not make mention of any specific mechanism of injury, such as lifting a case of Aquafina, or a work-related accident on May 9, 2014. Instead, the Doctors' Care note is consistent with the 1-800-Job-Hurt call, his statement to Mr. Drutch and his testimony under cross-examination that he did not sustain an injury by accident on May 9, 2014, rather on May 2, 2014 performing repetitive type work.

On June 6, 2014, the Claimant sought treatment from an orthopedic spine specialist, Dr. Strohmeyer. He sought the treatment on his own accord and not at the direction of the Defendants. The Claimant indicated on his in-take questionnaire with Dr. Strohmeyer's office that there had been "no accident." (R. p. 236) In addition, Dr. Strohmeyer's office note states, "There was no one incident, but six weeks ago he began having back and left lower extremity pain. . . . There was no trauma associated with it." (R. p. 75) There is absolutely no mention of a specific mechanism of an acute injury, such as lifting a case of Aquafina, as the Commission found, nor is there mention of an accident occurring on May 9, 2014.

Dr. Strohmeyer did refer the Claimant to Dr. Batson for injections. Similarly, Dr. Batson's notes indicate, "The pain occurred prolonged lifting, loading and driving, while performing his job." (R. p. 106) Again, there is not a specific mechanism of injury

mentioned in his report, nor was there mention of a work-related injury occurring on May 9, 2014.

There is absolutely no medical evidence reflecting a date of accident on May 9, 2014, and the Claimant has failed to provide any medical evidence to support his alleged mechanism of injury or a work-related injury on May 9, 2014. Based on the medical evidence, there is not substantial evidence in the record to support the Commission's finding that the Claimant injured himself by an injury by accident, after lifting a case of Aquafina, on May 9, 2014.

3. The Commission erred in finding the Claimant was merely "confused," and it should have held the Claimant not credible.

The Defendants did ask for a credibility finding, since the Claimant's credibility was called into question in a number of respects. Specifically, during his deposition testimony on September 5, 2015, the Claimant was questioned as to whether he had ever injured his back prior to working for PepsiCo. The Claimant denied ever hurting his back prior to working for PepsiCo. He was also specifically questioned as to whether he had ever sought treatment or had been seen by a medical care provider for back complaints. The Claimant denied ever seeking prior treatment for his back before his alleged injury at PepsiCo.

Following the deposition, the Defendants subpoenaed records from hospitals surrounding the Claimant's residential radius. The Defendants received records from Beaufort Memorial Hospital, dated November 8, 2008, indicate the Claimant needed to be seen due to a report of lower back pain extending down into his left lower extremity. These are the exact same symptoms that are at issue in the pending proceeding. The

notes from Beaufort Memorial Hospital, dated November 8, 2008 indicate, "PT C/O sharp 'shooting' pains down left leg x 2 ½ weeks." (R. p. 207)

Also, despite the Claimant's testimony that he denied ever previously having back pain or seeking medical treatment for back pain, on July 21, 2011, the Claimant was seen at Beaufort Memorial hospital for back pain and was provided with muscle relaxers and pain medication. (R. p. 212) In addition, an x-ray was conducted of the Claimant's lumbar spine. Simply based on these records, it is the Defendants' position he was not being truthful with the Defendants during the course of his deposition testimony.

Again, in regard to the Claimant's credibility, he was questioned during the course of his deposition as to whether he had ever injured himself on-the-job. The Claimant denied ever injuring himself on-the-job prior to his alleged injury at PepsiCo. The record from Beaufort Memorial Hospital, clearly states, "the patient states that he was lifting something heavy and had taken it to the roof of Golden Corral where he works as a manager. The patient states now having shooting pains to the lower back, mainly into his left leg that radiates . . ." (R. p. 208)

In further support of the Defendants' position that the Claimant knew he had a prior back injury and was not truthful and forthcoming during his deposition, the Defendants called his supervisor, Landon Papay. The Claimant informed Mr. Papay two weeks prior to his alleged injury that he did have a prior back injury and had been treated for back pain. The testimony at the hearing is as follows:

A. Yes. Kevin had actually come to me previous to that because I – well, we had talked about back issues before since he knew that I had had back surgery and he had stated at that point in time that he

has back injury – as well. He had stated that he had two (2) slipped disks.

Q. Can we clarify it for the Court's sake, when did you have this conversation?

A. Prior to that date, several weeks before that.

Q. Several weeks before which date, sir?

A. May 9th.

(R. p. 37, lines 10-20)

During the Claimant's deposition testimony he admitted to working for Dollar General. Under oath, he claimed he "voluntarily" left after he was investigated for theft. Following the deposition, the Defendants subpoenaed the employment records from the Dollar General. It is clear that the Claimant did not leave after the investigation. On the Personnel Action Form from the Dollar General, dated April 1, 2015, it states, "[√] resigned during investigation. (R. p. 238)

The Defendants also requested a finding that the Claimant is not credible, since the Claimant applied for a position at Wal-Mart on May 10, 2014, just one (1) day after his alleged date of accident of May 9, 2014. On the application form Wal-Mart inquires, "If you are currently employed, may we contact your current employer? yes [] no [√]." (R. p. 240).

The Wal-Mart application also inquired as to the "Date you can start work" (R. p. 239) The Claimant reported he could work "ASAP." (R. p. 239) His availability, per his signature on May 10, 2014, was clear that he represented to Wal-Mart that he was

immediately able to work days, evenings, over-nights, Saturdays and Sundays, and is available to work Monday through Sunday. (R. p. 239)

As already stated, following the Claimant's call to 1-800-Job-Hurt, on May 9, 2014, he was seen the same day at Doctor's Care. He was placed on light duty for one week per the physicians orders. (R. p. 222) Yet, he applies for a position at Wal-Mart the next day indicating he is ready, willing, and able to work full duty every day of the week, evening or day shifts as of May 10, 2014. It does not appear that the Claimant was truthful with his current employer when completing his employment application, since he was on light duty and could not work "ASAP" full duty.

The Defendants submit the Claimant was not merely "confused," as the Commission found, but is not credible considering the record as a whole, and the record allows for but only one reasonable inference that the Claimant is not credible.

Conclusion

The Defendants submit there is not substantial evidence in the record to support the Commissions finding as to the date and the mechanism of injury. The Commission erred as a matter of law in failing to find the Claimant, if anything, reported sustaining a repetitive trauma type injury, rather than an injury by accident on May 9, 2014, after lifting a case of Aquafina. Not only is a repetitive trauma type injury solidified by the 1-800-Job-Hurt call, the Claimant's statement to Mr. Drutch and his testimony on cross-examination at the hearing, but it is also consistent with the medical evidence.

There is absolutely no medical evidence reflecting a date of accident on May 9, 2014, and the Claimant has failed to provide any medical evidence to support his alleged mechanism of injury on May 9, 2014. Based on the medical evidence, there is not any

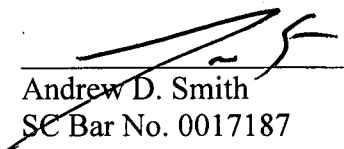
evidence in the record to support the Commission's finding that the Claimant injured himself by an injury by accident, after lifting a case of Aquafina, on May 9, 2014. Rather, all of the medical evidence clearly demonstrates that the Claimant does not know when or how he injured himself.

The Defendants further submit the Commission erred in finding the Claimant was merely "confused" rather than not credible. The credibility finding should have been based upon his deposition testimony that he was not seen or treated for a back injury prior to the alleged injury at PepsiCo when the medical evidence clearly shows to the contrary as well as his statement to Mr. Papay regarding his prior back injury. Moreover, the records from the Dollar General clearly show he did not leave after his investigation for theft but during, and the records from Wal-Mart are extremely compelling that he was not being truthful to his current employer at the commencement of his employment.

Based upon the aforesaid facts and overwhelming evidence contrary to the Commission's Findings of Fact and Conclusions of Law, the Defendants respectfully request that the Honorable Court find that there is not substantial evidence in the record to support the Commission's Findings of Fact and Conclusions of Law that the Claimant injured himself on May 9, 2014, after lifting a case of Aquafina and reverse accordingly.

October 12, 2016
Charleston, South Carolina

Respectfully submitted,



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In the Court of Appeals

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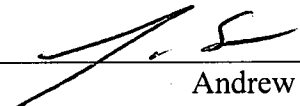
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PC Metro Bottling, Employer, and Indemnity Insurance Co. of NA, Carrier,Appellants.

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that Appellants' Final Brief complies with Rule 211(b)
SCACR.

October 13th, 2016



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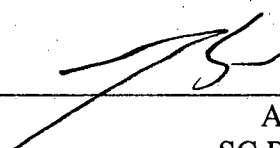
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v.

PC Metro Bottling, Employer, and Indemnity Insurance Co. of NA, Carrier,Appellants.

PROOF OF SERVICE

I certify that I have served the APPELLANTS' FINAL BRIEF, RECORD ON APPEAL and SUPPLEMENT on the following parties by depositing a copy of these documents in the United States mail, first class postage prepaid, addressed as follows: William T. Bacon, IV, Esq., McDougall Law Firm, 115 Lady's Island Commons, Beaufort, SC 29907; and Amy Bracy, Judicial Director, South Carolina Workers' Compensation Commission, Post Office Box 1715, Columbia, South Carolina 29202-1715 on this the 13th day of October, 2016.



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October 13, 2016

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
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OCT 17 2016
SC Court of Appeals

Re: Kevin M. Wikel v. Pepsi Bottling Group
Appellate Case No.: 2016-001398
Our File No.: 1100-0235

Dear Ms. Kitchings:

Please find enclosed fifteen (15) copies of Appellants' Final Brief, Record on Appeal and Supplement in the above-referenced matter. By copy of this letter and Proof of Service, I have served all parties with a copy of same.

Very truly yours,

Andrew D. Smith

ADS:tdw
Enclosures

cc: Kelli Pofahl, Sedgwick
Ms. Amy Bracy, South Carolina Workers' Compensation Commission
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