THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Appellate Case No. 2017-000684

RECEIVED
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SC Court of Appeals

Stephen Livingston, Appellant,

v.

The Building Center, Inc. and Old Republic Insurance Company, Respondents.

INITIAL BRIEF OF RESPONDENTS

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II. DID THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION COMMIT AN ERROR OF LAW IN FINDING THAT APPELLANT FAILED TO CARRY HIS BURDEN OF PROVING A COMPENSABLE REPETITIVE TRAUMA INJURY TO HIS RIGHT SHOULDER?

III. DOES SUBSTANTIAL EVIDENCE SUPPORT THE CONCLUSION OF THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION THAT APPELLANT'S RIGHT SHOULDER LIPOMA WAS NOT AGGRAVATED BY HIS WORK DUTIES?

STATEMENT OF THE CASE

Appellant filed a Form 50, Request for Hearing, on or about April 22, 2016, alleging either a specific injury to his right shoulder on February 12, 2016, or a repetitive trauma injury while he was "carrying heavy items on his shoulder." Respondents filed a Form 51 on April 27, 2016, denying both a specific injury and a compensable repetitive trauma injury. A hearing was held before Commissioner T. Scott Beck on July 21, 2016, in Columbia, South Carolina. At the hearing, Appellant contended he had sustained a repetitive trauma injury to his right shoulder, resulting in impingement syndrome and aggravation of a lipoma. He also requested medical treatment and all related benefits under the Act. Appellant did not seek temporary benefits.

At the hearing, it was Respondents' position that Appellant cannot satisfy his burden of proving a compensable repetitive trauma injury pursuant to S.C. Code Ann. § 42-1-172 (2007). Specifically, Respondents denied that Appellant's job responsibilities are repetitive in nature. In addition, Respondents contended that the greater weight of the evidence does not support a conclusion that Appellant has impingement syndrome which was directly caused by his work activities. Respondents also maintained that the greater weight of the evidence does not support a finding that Appellant's lipoma was either directly caused or aggravated by his work duties or the conditions under which his work was performed. Accordingly, Respondents sought a denial of the claim.

The parties were heard by Commissioner T. Scott Beck, on July 21, 2016, in Columbia, South Carolina. On September 21, 2016, the Single Commissioner issued the Decision and Order, whereby he found: (1) Claimant did not suffer a compensable injury to his right shoulder pursuant to S.C. Code Ann. § 42-1-160; and (2) Claimant failed to

carry his burden of proving he sustained a repetitive trauma injury, aggravation of a preexisting condition, or any other alleged injury to his right shoulder arising out of his employment, pursuant to S.C. Code Ann. § 42-1-172.

On September 23, 2016, Appellant timely appealed the Decision and Order via filing of a Form 30, Request for Commission Review. Briefs were filed by both parties, and oral arguments were held before the Appellate Panel of the South Carolina Workers' Compensation Commission on December 12, 2016. By Decision and Order dated February 23, 2017, the Appellate Panel unanimously affirmed the Order of the Single Commissioner. Appellant timely filed a Notice of Appeal to this Court, and this appeal follows.

STATEMENT OF THE FACTS

Appellant is a box truck driver for The Building Center. He drives a truck and unloads trim, hollow doors, and windows. These materials weigh no more than 40 pounds. (Hr' g Tr. p. 36, l. 19-20) Appellant works with a partner ninety-eight percent of the time and shares the unloading with his partner. (Id. p. 34, l. 24-25) It takes about 20 to 30 minutes to unload materials for a house from a truck. (Id. p. 22, l. 3-5) Appellant spends 80% of his time at work driving and only 20% of his time unloading. (Id. p. 31, l. 11-15) Appellant frequently delivers from Columbia to Calabash and Shallotte, N.C, on the coast. On these days, he drives at least six hours of his workday and spends comparatively little time unloading the truck as opposed to driving. (Id., p. 21, l. 14-25) Claimant generally works five days a week. (Id. pp. 9, l. 14-15)

In February of 2015, Appellant told his supervisor, Bo Koon, that he had a lump on his right shoulder and he didn't know what had caused it. He later said he thought must be from carrying trim because he could not "think much of anything else that would have caused it." (Id. p. 42, l. 22-23)

Appellant saw his family doctor, Dr. Stephen Mullaney for the lump on his shoulder on February 12, 2015. He reported the mass had been present for six to eight months and was painful only when carrying a heavy bag with a strap across his shoulder. (APA p. 3) He does not carry a bag with a strap at work. (Hr' g Tr. p. 24, l. 22-23) Dr. Mullaney ordered an ultrasound which confirmed that the lump was a soft tissue fat induration without discreet mass. (APA p. 103) Dr. Mullaney subsequently definitively diagnosed a lipoma. Appellant saw Dr. Mullaney on at least eight occasions from February 12, 2015 through March 17,

2016. At each visit, Dr. Mullaney recorded that the Appellant lifts weights for exercise. (APA pp. 3, 8, 25, 32, 41, 48, 57, 63)

Appellant's attorney sent him for an independent medical examination by Dr. David Lee, an orthopedic surgeon, on January 28, 2016. Contrary to the history provided to Dr. Mullaney, Dr. Lee records that the Appellant recalled carrying "large obvious [objects] over his RIGHT shoulder" on a specific day in March. (APA p. 21) He noted a type III acromion based on X-rays and a large soft tissue mass. He also noted 5/5 rotator cuff strength and no atrophy, but some positive impingement signs. Dr. Lee opined that carrying objects over the right shoulder "could've aggravated this possible pre-existing soft tissue mass." He recommended an MRI of the right shoulder which would allow evaluation of the soft tissue mass as well as the rotator cuff which, again, "could've been aggravated from this work-related injury." Id.

Dr. Lee subsequently met with Appellant's attorney to discuss a questionnaire she had prepared for his signature. (Depo. of Dr. Lee p. 44, l.9-15) Only after the meeting with Appellant's attorney did Dr. Lee sign a questionnaire stating that the Appellant's "injuries were [most likely] caused by him repeatedly carrying heavy objects at work." (APA p. 19)

Appellant's attorney took Dr. Lee's deposition on July 12, 2016. Dr. Lee testified that it was his understanding Appellant carried large pieces of lumber at work. (Depo of Dr. Lee p. 10, l. 25) He was "pretty sure it was wood, but something long and heavy." (Id. at 11, 4-5) He testified, "I know it's pretty much what he does most of the day," (Id. at 28, l. 2-3) but he did not "know specific numbers." (Id. at 32, l. 4) He further testified that his diagnosis of shoulder impingement related to work is based on Appellant's description of what he does. (Id. p. 44, l. 4-8) Dr. Lee opined that Appellant's job required repetitive activity, but admitted

that in his opinion, doing anything more than once a day would be repetitive. (Id. p. 30, l. 10-12) He specifically said with regard to Appellant's case that "if he did it more than once a day and he did that fairly routinely, like almost every or every other day, then I think that would be repetitive." (Id. p. 32, l. 8-10) Dr. Lee also addressed the lipoma. He explained that a lipoma is a benign fat tumor which is idiopathic, meaning "nobody knows" what causes them. (Id. p. 20, l. 6-10) Nothing related to work caused the Appellant's lipoma. (Id., l. 15-18) He further conceded that no physical characteristic of the lipoma has increased or changed due to the Claimant carrying wood on his shoulder. (Id. pp. 22, l. 13-17)

Respondents secured an opinion from Dr. John Evans, also an orthopedic surgeon, on March 24, 2016.[1] Dr. Evans examined and moved the Appellant's right arm. (Hr' g Tr. p. 17, l. 2-5) Dr. Evans noted a mass measuring 13 cm. by 18 cm. and diagnosed a soft-tissue mass and non-specific right shoulder pain. (APA pp. 133-134) He opined, most probably to a reasonable degree of medical certainty, that the Appellant's lipoma was not caused by carrying lumber or other items on his right shoulder (APA p. 135) He also opined that it was impossible to diagnose shoulder impingement with the information in hand, but that the Appellant's nonspecific right shoulder pain was not caused by carrying items on his shoulder. (Id.)

[1] Respondents would note with particularity that, contrary to Appellant's assertions, Dr. Evans did not meet with Appellant at a personal residence for evaluation.

STANDARD OF REVIEW

In workers' compensation cases, the South Carolina Workers' Compensation Commission is the trier of fact. Hunter v. Patrick Construction Co., 289 S.C. 46, 344 S.E.2d 613 (1986). The final determination of witness credibility and the weight to be accorded evidence is reserved to the Commission, and it is not the task of courts to weigh the evidence as found by the single commissioner. Langdale v. Harris Carpets, 395 S.C. 194, 203, 717 S.E.2d 80, 84 (Ct. App. 2011). The appellate court's review of these findings of fact is limited to determining whether the findings are *clearly* unsupported by substantial evidence in the record. Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981); Howell v. Pacific Columbia Mills, 291 S.C. 469, 354 S.E.2d 384 (1987) (emphasis added). The appellate court is not permitted to re-weigh the evidence and to substitute its own findings of fact for those of the Commission. Brown v. R. L. Jordan Oil Co., 291 S.C. 272, 353 S.E.2d 280 (1987). However, an award from the Commission cannot be based upon mere possibilities, probabilities, surmise or conjectures. Broughton v. South Carolina Game & Fish Dept., 219 S.C. 50, 64 S.E.2d 152 (1951).

The Appellate Panel's decision must be affirmed if it is supported by substantial evidence in the record. Wise v. Wise, 394 S.C. 591, 597, 716 S.E.2d 117, 120 (Ct. App. 2011) (citing Shuler v. Gregory Elec., 366 S.C. 435, 440, 622 S.E.2d 569, 571 (Ct. App. 2005)). Substantial evidence is that evidence which, in considering the record as a whole, would allow reasonable minds to reach the conclusion that the Appellate Panel reached, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent the Appellate Panel's finding from being supported by substantial evidence. Hill v. Eagle Motor Lines, 373 S.C. 422, 436, 645 S.E.2d 424, 431 (2007). Where there are conflicts in evidence over a

factual issues, the findings of the Appellate Panel are conclusive. Etheredge v. Monsanto Co., 349 S.C. 451, 455, 562 S.E.2d 679, 681 (Ct. App. 2002).

Section 1-23-380(A)(5) of the South Carolina Code also provides, in part:

> The Court may reverse or modify the decision if substantial rights of the Appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are . . . (d) affected by other error of law; (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. . . .

S.C. Code Ann., § 1-23-380(A)(5) (2007).

Thus, appellate "review is limited to deciding whether the Commission's decision is unsupported by substantial evidence or is controlled by some error of law." Rodriguez v. Romero, 363 S.C. 80, 84, 610 S.E.2d 488, 490 (2005) (citing Hendricks v. Pickens County, 335 S.C. 405, 411, 517 S.E.2d 698, 701 (Ct. App. 1999)).

ARGUMENTS

I. THE COMMISSION'S FINDING THAT THE APPELLANT DID NOT SATISFY HIS BURDEN OF PROVING A COMPENSABLE REPETITIVE TRAUMA INJURY TO HIS RIGHT SHOULDER IS SUPPORTED BY SUBSTANTIAL EVIDENCE OF RECORD

Under the South Carolina Workers' Compensation Act, a repetitive trauma injury "means an injury which is gradual in onset and caused by the cumulative effects of repetitive traumatic events." S.C. Code Ann. § 42-1-172(A) (1976 & Supp. 2007). Compensability of a repetitive trauma injury must be determined only under the provisions of the statute. A repetitive trauma injury arises out of employment "only if it is established by medical evidence that there is a direct causal relationship between the condition under which the work is performed and the injury." S.C. Code Ann. § 42-1-172(D). An expert opinion under this statute must be stated to a reasonable degree of medical certainty.

A. Appellant's job is not repetitive.

Ample evidence supports the Commission's conclusion that Appellant's job duties are not repetitive in nature. He alleges his right shoulder pain is due to repetitively carrying heavy lumber and other material on his shoulder; however, he spends the majority of his time driving a box truck. (Hr' g Tr. p. 32,l. 3) Appellant testified he spends approximately 80% of his workday driving as opposed to lifting and carrying materials. (Id. p. 31, l. 11-15) He frequently travels to the coast of North Carolina, which requires driving at least six hours of his workday. (Id., p. 21, l. 14-15) On those days, any unloading is very limited. Appellant almost always has a partner working with him to share in unloading the box truck. (Id., p. 22, l. 7-9) Appellant's supervisor, Bo Koon, testified Appellant has a partner assigned to him ninety-eight percent of the time. (Id., p. 34, l. 14-15) When Claimant does

unload materials, they include trim, hollow core interior doors and windows which weigh no more than 40 pounds. (Id. at p. 36, l. 19-20)

B. Medical evidence supports the Appellate Panel's conclusion that Appellant's job duties did not directly cause his right shoulder pain.

First, Dr. John Evans, an orthopedic surgeon, clearly and unequivocally opined that the Appellant's nonspecific right shoulder pain was not caused by carrying items on his shoulder. (APA p. 135) He further noted that Appellant was so reluctant to move the shoulder that impingement could not be definitively diagnosed and that Appellant's subjective complaints outweighed any objective findings. (Id.) That evidence alone is enough to support the Commission's conclusion that Claimant's shoulder pain is not related to repetitive job activities.

Appellant did offer an opinion from Dr. David Lee in support of his claim, but as the Commission concluded, it is fraught with misinformation, speculation and surmise and should be accorded little weight. Dr. Lee's most reliable assessment can be found in his original narrative report which he drafted immediately after examining the Appellant and before interference from Appellant's counsel.[2] In that report, Dr. Lee suggested an MRI of the right shoulder to evaluate the rotator cuff which "***could've been aggravated*** [emphasis added] from this work-related injury." (APA p. 21) Clearly, this honest opinion does not meet the standard set out by the legislature in the repetitive trauma statute.

While Dr. Lee did subsequently meet with Appellant's attorney and sign a questionnaire for her stating that Appellant's "injuries were [most likely] caused by him

[2] Dr. Lee testified at his deposition that he met with Appellant's counsel privately after examining the Claimant and before signing a questionnaire she had prepared for him regarding causation. (Depo of Dr. Lee, p. 44, l. 9-15)

repeatedly carrying heavy objects at work, " (APA p. 19) his deposition makes clear that Dr. Lee relied on inaccurate information about Appellant's job when he rendered this revised opinion. As the Appellate Panel specifically noted in its Decision and Order, Appellant's attorney and Dr. Lee repeatedly refer to the Appellant carrying heavy "lumber." (Depo of Dr. Lee, p. 10, l. 25; p. 12, l. 12; p. 13,l. 7; p. 14, l. 2) Dr. Lee testified he was "pretty sure it [the item Appellant carried] was wood, but something long and heavy." (Id. at 1, l. 4-51) This is simply not accurate. Rather, Appellant's job involves unloading trim, hollow core doors, and windows which weigh no more than 40 pounds. (Hr' g Tr., p. 36, l. 19-20) Dr. Lee further testified that it was his understanding that carrying and lifting lumber was "pretty much what [Appellant] does most of the day." (Depo of Dr. Lee p. 28, l. 2-3) As noted above, Appellant and Bo Koon both testified the Appellant spends the majority of his time driving. (Hr' g Tr., p. 32, l. 3; p. 35, l.22) In fact, Appellant specifically testified he spends only 20% of his time unloading. (Id. p. 31, l. 11-15) Further, when he does unload trim, he has assistance 98% of the time. (Id. p. 34, l. 24-25) It only takes 20 to 30 minutes to unload materials for a house from a truck. (Id. p. 22, l. 3-5)

The Commission rightly chose to accord Dr. Lee's opinion little weight as it is blatantly speculative. Dr. Lee opined that Appellant's job was repetitive, but admitted that in his opinion, doing anything more than once a day would be repetitive. (Depo of Dr. Lee p. 30, l. 10-12) He specifically said with regard to Appellant's case that "if he did it more than once a day and he did that fairly routinely, like almost every or every other day, then I think that would be repetitive." (Id. p. 32, l. 8-10)

C. This Court should not disturb the Findings of Fact of the Commission with regard to the weight given the medical evidence.

As noted above, the South Carolina Workers' Compensation Commission is the trier of fact. Hunter v. Patrick Construction Co., 289 S.C. 46, 344 S.E.2d 613 (1986). The final determination of witness credibility and the weight to be accorded evidence is reserved to the Commission, and it is not the task of courts to weigh the evidence. Langdale v. Harris Carpets, 395 S.C. 194, 203, 717 S.E.2d 80, 84 (Ct. App. 2011). The Commission determines the weight and credit to be given to expert testimony. Tiller v. Nat'l Health Care Ctr. of Sumter, 334 S.C. 333, 340, 513 S.E.2d 843, 846 (1999). Although medical testimony is entitled to great respect, the fact finder may disregard it if there is other competent evidence in the record. Hargrove v. Titan Textile Co., 360 S.C. 276, 294, 599 S.E.2d 604, 613 (Ct.App.2004); *see* Tiller, 334 S.C. at 340, 513 S.E.2d at 846 (confirming that medical testimony should not be held conclusive irrespective of other evidence).

As detailed above, the Appellate Panel carefully considered the medical evidence offered by both sides, with particular attention to the deposition of Dr. Lee which it found to be very revealing. Again, while Dr. Lee had issued a cursory opinion relating Appellant's shoulder pain to his work activities, his testimony made it abundantly clear to the Panel that he knew little, if anything, about Appellant's actual job duties and was predisposed to offer an opinion favorable to the Appellant, regardless of the facts of the case.

The crux of Appellant's argument on appeal seems to be that this Court should ignore the Appellate Panel's findings of fact regarding the medical evidence and blindly accept the questionnaire prepared by the Appellant's attorney for Dr. Lee in which he agrees that repetitive activity caused the Claimant's [alleged] impingement syndrome.

(APA p. 19) Appellant contends all of the contradictions and misinformation encased in the transcript of Dr. Lee's deposition should be tossed out, leaving us with the one sentence which supports his position. Besides being nonsensical, that would be clearly outside the task this Court is charged with. The Commission is the fact finder. As such, the Appellate Panel is in the position to weigh the evidence presented in the record and make a determination regarding its impact on a claim. While Appellant encourages this Court to reweigh the medical evidence, there is substantial evidence in the record to support the findings of the Appellate Panel and, therefore, the findings must be affirmed by this Court. Appellant's argument is essentially that "they got it wrong," an argument for which there is no legal basis.

II. THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION DID NOT COMMIT AN ERROR OF LAW IN FINDING THAT APPELLANT FAILED TO CARRY HIS BURDEN OF PROVING A COMPENSABLE REPETITIVE TRAUMA INJURY TO HIS RIGHT SHOULDER.

Appellant clumsily attempts to frame his argument in a manner which asks this Court to decide the issue of compensability as a matter of law, rather than defer to the ultimate fact finder, the Appellate Panel. Appellant attempts to dodge the standard of review by claiming either that (1) the facts are entirely undisputed or (2) the Commission's decision is based on conjecture, speculation or surmise and therefore, therefore the issue is a matter of law for this Court.

Either contention is utterly without merit. First, the record is rife with disputed facts ranging from what Appellant was carrying on his shoulder, to whether he lifted weights at home, to what percentage of time he spent unloading as opposed to driving. Secondly, the Appellate Panel issued an order replete with a recitation of the evidence and

detailed findings of fact, indicating a thorough consideration of all evidence, including the deposition of Dr. Lee. To allege that the Appellate Panel's decision is premised on anything other than the statute and the application of the facts to that law is baseless. This is a substantial evidence case, plain and simple, and, as detailed above, while Appellant may not like it, substantial evidence clearly supports the Commission's conclusions.

III. SUBSTANTIAL EVIDENCE SUPPORTS THE APPELLATE PANEL'S CONCLUSION THAT APPELLANT'S LIPOMA WAS NOT AGGRAVATED BY HIS WORK DUTIES.

A claim for aggravation of a pre-existing condition is compensable where there is a dormant condition which has produced no disability but which becomes disabling by reason of the aggravating injury. Hines v. Pacific Mills, 214 S.C. 125, 51 S.E.2d 383 (1949), S.C. Code Ann. § 42-9-35 (1976 & Supp. 2007).

Appellant was examined by Dr. John Evans, an orthopedist, who opined Appellant's lipoma was not related to Appellant's work duties. (APA p. 136) Dr. Evans noted the lipoma was a "painless soft tissue mass" on the right shoulder and remarked "[t]he cause of lipomas is unknown," but genetics, age, and other disorders tend to increase the risk of developing a lipoma. (APA pp. 134-35) Specifically, Dr. Evans observed "a specific change at the time of the alleged 'injury' cannot be documented" and "[t]he dating of [Appellant]'s symptoms to the carrying lumber is subjective and not supported by objective findings that could relate his symptoms to his work." (APA p. 136)

Appellant attributes his subjective complaints of increased pain to an aggravation of his preexisting lipoma; however even evidence proffered from his

expert, Dr. Lee, does not support the conclusion that the lipoma was caused or aggravated by his work duties. In his narrative report, Dr. Lee opined that carrying objects over the right shoulder "***could've*** aggravated this possible pre-existing soft tissue mass." (APA p. 21) [emphasis added] At his deposition, Dr. Lee explained that a lipoma is a benign fat tumor which is idiopathic, meaning "nobody knows" what causes them. (Depo of Dr. Lee p. 20, l. 6-10) Nothing related to work caused the Appellant's lipoma. (Id., l. 15-18) He further admitted that carrying things on Appellant's shoulder would not alter the size, density, or blood flow of the lipoma. (Id., p. 22, l. 1-3) Dr. Lee finally conceded that there had not been any physical change to Appellant's lipoma as a result of his work. (Id., l. 13-17)

In sum, substantial evidence unquestionably supports the conclusion that Appellant's lipoma was not aggravated by carrying items on his shoulder at work.

CONCLUSION

Based on the foregoing, Respondents respectfully request the Decision and Order of the Appellate Panel of the South Carolina Workers' Compensation Commission be affirmed in its entirety.

Respectfully submitted,

WILLSON JONES CARTER & BAXLEY, P.A.

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July 3, 2017

THE STATE OF SOUTH CAROLINA
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APPEAL FROM THE SOUTH CAROLINA
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Appellate Case No. 2016-001180

Stephen Livingston, Appellant,

v.

The Building Center, Inc., Respondents.

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PROOF OF SERVICE

I certify that I have served the **Initial Brief of Respondents** and **Designation of Matter** on Stephen Livingston by depositing a copy of the same in the United State Mail on July 3, 2017, with sufficient postage affixed thereto and return address clearly marked, addressed to her attorney of record, Holly S. Atkins, Esquire, addressed as follows:

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Re: Stephen Livingston vs. The Building Center, Inc. DOI: 2/12/15
WCC File No.: 1501883 DOI: 2/12/2015
Carrier: Old Republic Insurance Company - Claim No.: 011260-041591-WC-01
WJC&B File No.: 0090.01984
Appellate Case No.: 2017-000684

Dear Ms. Kitchings:

Please find enclosed the following documents regarding the above-mentioned appeal with the corrected caption:

1. Respondents' initial brief;
2. Respondents' designation of the matter to be included in the record on appeal; and
3. Proof of service.

With kindest regards,

WILLSON JONES CARTER & BAXLEY, P.A.

Tracy Welsh Tiddy

TWT/hnj

Enclosures

cc: Holly Atkins, Esquire
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Mr. Coy Cooley

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