

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Worker's Compensation Commission
Appellate Panel

Appellate Case No. 2017-000379

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SC Court of Appeals

Errol D. Chapman, Claimant

.....

Appellant,

v.

Carolinas Construction
Solutions, LLC, Employer, and
StarNet Insurance Company,
Carrier,

.....

Respondents.

RESPONDENTS' INITIAL BRIEF

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Statement of the Issue on Appeal

- I. Is the determination of the Appellate Panel of the Worker's Compensation Commission supported by substantial evidence, such that the Worker's Compensation Commission properly concluded that the Appellant was not entitled to temporary disability compensation benefits, additional medical treatment, or permanent partial disability?

Statement of the Case

This appeal involves a worker's compensation matter. On January 20, 2016, Appellant ("Claimant") filed a Form 50 Request for Hearing. At that time, Claimant was represented by an attorney. The Form 50 Request for Hearing alleged injuries to the bilateral hands, left knee, bilateral shoulders, neck, back, heart, lungs, head, and bilateral arms sustained when the Claimant was shocked while wiring a light, causing him to fall from a ladder. (Form 50 Employee's Notice of Claim and/or Request for Hearing dated Jan. 20, 2016). In this hearing request, the Claimant sought additional medical treatment for all alleged body parts and temporary total disability benefits for a period of "to be determined." (*Id.*)

On March 7, 2016, Respondents filed a Form 51 Answer to Appellant's Request for Hearing, admitting Appellant had been involved in an accident within the course and scope of his employment, but admitting injuries to the lower back, left first finger, and bilateral shoulders only. (Form 51 Employer's Answer to Request for Hearing dated March 7, 2016). All other alleged injuries were denied. (*Id.*) Respondents denied the Claimant was entitled to any additional medical care as a result of the injury. (*Id.*) Temporary total disability payments had been paid from July 21, 2015 to August 4, 2015 and August 18, 2015 to November 9, 2015. (Form 18 dated Jan. 11, 2016).

A hearing was held before the Single Commissioner on May 18, 2016. Claimant, represented by his attorney, took the position that he had not reached maximum medical improvement and was entitled to additional medical treatment. (Transcript of Hearing before the Single Commissioner dated May 18, 2016, pages 5-6). Respondents maintained that Claimant had reached maximum medical improvement, was not entitled to any further causally related medical

care, and did not suffer any permanent total disability as a result of his work related accident. (*Id.* at 6-7).

Upon review of the medical evidence and Claimant's testimony, the Single Commissioner issued an Order dated August 9, 2016, finding that Respondents provided appropriate medical care and treatment and that Claimant had reached maximum medical improvement. (Decision and Order of the South Carolina Worker's Compensation Commission dated Aug. 9, 2016, page 7). The Single Commissioner further found that the Claimant was not entitled an award for permanent partial disability or any additional benefit pursuant to the Worker's Compensation Act. (*Id.* at 7-8).

On August 23, 2017, Claimant filed a Form 30 Request for Commission Review to appeal the findings of the Single Commissioner. Claimant was represented by counsel at the time of the initial hearing on May 29, 2016; however, he proceeded with his appeal to the Worker's Compensation Appellate Panel *pro se*. Claimant maintained that he had not reached maximum medical improvement and was entitled to ongoing temporary total disability benefits. (Form 30 Request for Commission Review dated August 23, 2016). Claimant asserted as grounds for review that the Single Commissioner should not have given controlling weight to the opinions of his authorized treating physicians and that the Single Commissioner should have determined he was entitled to carpal tunnel surgery. (*Id.*) He stated that the Single Commissioner erred in failing to investigate the facts of his claim and asserts that the opinions of his doctors were not supported by evidence of diagnostic studies. (*Id.*) He further argued that the Single Commissioner failed to investigate the reasons Claimant did not accept an offer to return to work with his employer and maintains that the offer made to him by his employer was outside of his physical restrictions. (*Id.*) He requested temporary total disability payments from November 9, 2015 and ongoing. Appellant

argued there were “inconsistencies and lack of clinical and physical findings to support any of the doctor’s opinions.” (*Id.*) Claimant requested the Appellate Panel “deem all medical opinions unreliable that are not supported by proper medical evidence” and appoint a doctor for further examinations. (*Id.*)

Respondents submitted a Brief of Defendants/Respondents to the Appellate Panel on October 31, 2016. Respondents argued that the findings of the Single Commissioner should be affirmed in full. Specifically Respondents argued that based on the substantial evidence in the record, the Single Commissioner properly held that the Claimant was not entitled to additional medical treatment, an award for permanent partial disability, nor an award of temporary total disability benefits. Oral arguments were presented before the Appellate Panel on November 15, 2016.

The Appellate Panel of the Worker’s Compensation Commission issued a Decision and Order dated January 25, 2017. By unanimous vote, the Appellate Panel fully affirmed the Single Commissioner’s Order and stated that all of the Single Commissioner’s Findings of Fact and Conclusions of Law were correct as stated in his Decision and Order dated August 9, 2016. (Appellate Panel Decision and Order dated January 25, 2017, page 10).

On February 17, 2017, Appellant filed his Notice of Intent to Appeal with the South Carolina Court of Appeals. This appeal follows.

Statement of the Facts

Claimant was involved in a work related accident on July 20, 2015. Claimant reported he was shocked while wiring a light, causing him to fall from his ladder. Following the accident, Claimant initially presented to Doctors Care of Sumter. These medical records state there was no loss of consciousness and a CT scan of the head demonstrated no acute abnormality. (APA #1, pages 2, 18).

Respondents provided evaluations and treatment with three orthopedic specialists, each of whom eventually released the Claimant and determined he had reached maximum medical improvement. First, Respondents sent the Claimant for evaluation and treatment of his bilateral shoulder and low back injuries with Dr. Thomas Armsey of Midlands Orthopedics on August 18, 2015. Dr. Armsey noted on October 13, 2015 that Claimant “is complaining of severe neck back and shoulder pain which does not correlate very well with his diagnostic studies.” (APA #2, pages 39-41). He further opined “[h]is clinical exam seems inconsistent with strength testing and his pain seems far out of proportion to any physical findings.” (*Id.* at 41). Dr. Armsey recommended a work hardening program and removed Claimant’s driving restrictions. (*Id.*). On November 24, 2015, Dr. Armsey stated he had nothing else to offer Claimant other than a pain management referral. (APA #2, pages 43-45). Claimant underwent a functional capacity evaluation on November 19, 2015, which concluded that Claimant demonstrated inconsistent and submaximal effort and concluded the results of the evaluation were not a reliable indication of his true functional abilities. (APA #8, page 143). The functional capacity test record further noted that Claimant’s test scores demonstrated “clinically significant symptom magnification.” (APA #8, page 166).

Respondents provided a second opinion medical evaluation with Dr. Michael Peelle to address Claimant's continued reports of back pain. Dr. Peelle stated on February 5, 2016 that Claimant's "symptoms are over magnified and discordant with the mechanism of injury and imaging findings." (APA #9, pages 163-164). Dr. Peelle continued, "His atypical pain behaviors may be construed [as] malingering or similar secondary gain issues." (APA # 9, page 164). Dr. Peelle placed Claimant at maximum medical improvement, stated there was no impairment to the back, and indicated Claimant would not require further medical care causally related to this injury for the lumbar or cervical spine. (*Id.*).

Claimant was further provided a second opinion evaluation for his bilateral shoulder complaints with Dr. David Fulton at Palmetto Health Orthopedics. Following an MRI of each shoulder, Dr. Fulton placed Appellant at maximum medical improvement on March 26, 2016, assigning a 0% impairment rating to the left shoulder, 0% impairment to the right shoulder, no work restrictions, and a recommendation of no causally related future medical care. (APA #10, page 170).

At the May 18, 2016 hearing before the Single Commissioner, Claimant testified that on July 20, 2015 he had been electrocuted and had fallen from a ladder while installing lights. (Transcript of Hearing, pages 6, 2-4). Contrary to the records from Doctors Care, he testified he lost consciousness from the shock or fall. (*Id.* at 25). He testified that he had not returned to work since the date of the accident despite being offered a job with the same employer, and he maintained that his injuries prevented him from performing the physical requirements of his job; however, his attorney confirmed there was no claim for back due or ongoing temporary total disability payments. (*Id.* at 7). He further testified that he requires a cane to walk and cannot drive. (*Id.* at 21-25). Respondents presented medical evidence documenting the treatment provided and

opinions of the authorized treating physicians as well as surveillance video. The surveillance video demonstrated Claimant walking without use of a cane and driving his car, despite his testimony to the contrary. (Exhibits 1A and 1B to the May 18, 2016 Hearing).

The Single Commissioner issued a Decision and Order dated August 9, 2016. In this Order, the Single Commissioner found as fact that the Claimant had suffered an admitted work-related accident on July 20, 2015 and the Respondents provided medical care and treatment. (Decision and Order of South Carolina Worker's Compensation Commission, Commissioner Gene McCaskill, August 9, 2016, page 5). The Single Commissioner noted that he "read with interest" the note of Dr. Armsey indicating that Claimant's subjective reports of pain did not correlate with his diagnostic studies, his clinical exam was inconsistent with strength testing, and subjective pain reports disproportional to any physical findings. (*Id.*). The Single Commissioner determined that although Appellant testified on his continuing pain and the debilitating impact of this accident, the totality of the evidence led him to conclude that Claimant had reached maximum medical improvement. (*Id.* at p. 6-7).

The Appellate Panel of the Worker's Compensation Commission issued a Decision and Order dated January 25, 2017, fully affirming the Single Commissioner's Order.

Standard of Review

In worker's compensation cases, the South Carolina Worker's Compensation Commission is the trier of fact. Hunter v. Patrick Construction Co., 289 S.C. 46, 344 S.E.2d 613 (1986). The South Carolina Administrative Procedures Act, S.C. Code Ann. §1-23-380(A)(6)(1976), establishes the "substantial evidence rule" as the standard for judicial review of a decision of the Commission:

The Court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the administrative agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because of the administrative findings, inferences, conclusions or decisions are:

(d) affected by error of law; [or]

(e) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record.

An appellate court, in worker's compensation appeals, may overturn a conclusion of the Worker's Compensation Commission if that conclusion is "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981).

The test is whether the decision of the Commission is supported by substantial evidence. Substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached in order to justify its action.

Mullinax v. Winn-Dixie Stores, Inc., 318 S.C. 431, 458 S.E.2d 76 (Ct. App. 1995).

While a finding of fact of the Commission will normally be upheld, such a finding may not be based upon surmise, conjecture, or speculation; instead it must be founded on evidence of sufficient substance to afford a reasonable basis for it. Edwards v. Pettit Constr. Co., 273 S.C. 576,

257 S.E.2d 754 (1979). Absent an error of law, a decision of the Worker's Compensation Commission must be upheld if substantial evidence within the record supports the determination the Commission such that reasonable minds could reach the same conclusion. Thus, so long as the decision is not clearly erroneous in view of this substantial evidence, the decision of the Commission must be held.

Argument

I. The finding of the Worker's Compensation Appellate Panel that Appellant Claimant is not entitled to further benefit pursuant to the Worker's Compensation Act is supported by substantial evidence in the record.

Pursuant to the substantial evidence standard of review, the Worker's Compensation Commission is the trier of fact in worker' compensation matters such that this Court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact unless the finding of the agency is clearly erroneous and not supported by substantial evidence.

The unchallenged medical opinions of three orthopedic specialists indicate Claimant has not only reached maximum medical improvement, but has also made complaints of neck, back, and shoulder pain that do not correlate to his diagnostic studies and has made subjective reports of pain far exceeding any physical findings. (Report of Dr. Armsey dated Oct. 13, 2015 APA 32 p. 39-41). Despite such findings from the initial orthopedist, Respondents provided second opinion evaluations for both the back and the shoulder complaints. Dr. Peelle, who performed the second opinion evaluation for Claimant's back, concluded that Claimant had reached maximum medical improvement, had no impairment to his back, and did not need further medical treatment for his back causally related to this claim. Dr. Peelle went on to opine that Claimant's pain behaviors could be indicative of malingering or attempts at secondary gain. (APA #9, page 164). Dr. Fulton, who provided a second opinion for the bilateral shoulders, determined Claimant had reached

maximum medical improvement with no impairment to either shoulder, required no work restrictions, and would not require future causally related medical care. (APA #10, page 170). Further, Claimant underwent a functional capacity evaluation on November 19, 2015, which demonstrated clinically significant symptom magnification and submaximal effort, such that the results of the evaluation could not be relied upon as an indication of his physical abilities. (APA #8, page 143, 166).

Claimant maintains on appeal that he is entitled to an award of permanency based on impairment he sustained. However, there is no evidence of any impairment rating assigned to any body part by a treating physician in the record. Conversely, two orthopedists and a functional capacity evaluation specifically noted concerns for symptom magnification, malingering, and secondary gain issues. In this appeal, Claimant disagrees with the opinions of these medical professionals whose opinions are adverse to him. He argues that their opinions interpreting his physical evaluations and diagnostic testing are inconsistent or otherwise invalid. Yet Claimant, represented by counsel, never deposed these doctors or otherwise challenged their opinions. He now asks this Court to substitute its judgment for that of the Commission and weigh the medical evidence. He further seeks to have this Court invalidate the unchallenged medical opinions that are adverse to him and substitute its judgement for that of the medical professionals, whose opinions were presented to the Commission. This Court should decline such an invitation.

The testimony and evidence presented at the initial May 18, 2106 hearing before the Single Commissioner provides further support for the Commission's conclusion that Claimant had reached maximum medical improvement and was not entitled to additional medical care or a permanency award. Claimant testified at this May 18, 2016 hearing that he was unable to drive and had not done any driving since August or September of 2015. (Transcript of Hearing before

the Single Commissioner, May 18, 2016, p. 21-24). Claimant further testified at that proceeding that he had been using a cane to walk since August 2015. (*Id.* at p. 24). The surveillance videos from October 6, 2015 and October 13, 2015 were presented by Respondents at the May 18, 2016 hearing and demonstrated Claimant driving and walking without a cane within the time period at issue. Claimant further asserts as part of this appeal that the Commission erred in failing to award a carpal tunnel surgery recommended by Dr. Michael Green. In reviewing Claimant's submissions to the record at the May 18, 2016 hearing, Defendants are unable to find a record of such a recommendation and would assert that no evidence of such a recommendation was provided to the Commission or is preserved in the record for appeal. However, even if such evidence of a surgical recommendation is in the record, treatment records pre-dating this work accident demonstrate that Claimant had complained of bilateral hand pain and been diagnosed with carpal tunnel in October 2014, before this alleged work accident. (APA #6 p. 115). Contrary to these treatment records, in his sworn testimony, Claimant denied having a problem with his arms prior to this July 20, 2015 work accident. (Transcript of Hearing before the Single Commissioner, May 18, 2016, p. 30). No evidence has been presented establishing an aggravation of this condition.

Claimant now additionally argues that he is entitled to an award of temporary total disability benefits dating back to November 9, 2015 and ongoing. However, a claim for temporary total disability benefits is not properly before this Court because such claim has not been preserved for appellate review. In *Wilder Corp. v. Wilke*, the Court stated “[i]t is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.” (330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998)). Claimant did not request any back due temporary total disability benefits at his initial May 18, 2016 hearing before the Single Commissioner. This issue was specifically addressed when the

parties placed their respective positions on the record. Claimant through his counsel answered that there was no request for any back due temporary total disability benefits before the Commission at the time of the hearing. (Transcript of Hearing before the Single Commissioner, May 18, 2016, p. 7). The Single Commissioner's Order states that temporary total disability benefits were not an issue in the claim. (Decision and Order of South Carolina Worker's Compensation Commission dated Aug. 9, 2016, Finding of Fact 19, page 7). As this claim for temporary total disability compensation was not raised, the Single Commissioner ordered that the Claimant was not entitled to any such benefits. Though Claimant raised the issue of his entitlement to back due and ongoing temporary total disability benefits in his oral argument before the Appellate Panel on November 15, 2016, Defendants asserted that no request for temporary total disability benefits had been made at the initial hearing and temporary total disability compensation was not an issue before the Commission. (Full Commission Panel Hearing Transcript dated Nov. 15, 2016, page8). After hearing Claimant's arguments regarding temporary total disability compensation, the Appellate Panel concluded that temporary total disability benefits were not an issue in the claim, and the Claimant was not entitled to an award of temporary total disability compensation. (Appellate Panel Decision and Order dated January 25, 2017, pages 9-10).

While Respondents maintain that Claimant's request for temporary total disability benefits has not been preserved for appellate review, if this Court reaches the merits of the claim for temporary total disability benefits, there is also substantial evidence in the record to support the Commission's denial of temporary total disability benefits. Claimant argues that although he was offered a return position with his employer, he remains entitled to temporary total disability benefits because he was assigned continued driving restrictions from Dr. Armsey so the position offered him by his employer was not within his restrictions. Not only did Dr. Armsey remove the

driving restriction on October 13, 2015, but two subsequent orthopedic specialists found that Claimant required no work restrictions. If this Court determines that the issue of temporary total disability benefits was raised to and rule upon by the Appellate Panel, the medical evidence in the record provides ample evidence to support the Commission's determination that Claimant was not entitled to temporary total disability benefits.

In the case at hand, the determination of the Worker's Compensation Commission is not supported only by a mere scintilla of evidence; but rather, ample and substantial evidence in the record supports the Commission's denial of further benefits to the Claimant. The medical opinions, testimony, and surveillance video in the record would allow reasonable minds to reach the same conclusion denying further benefits. Because this test is met and substantial evidence supports the decision of the agency, the inquiry into the Claimant's fact-based challenge of the Commission's determination ends here. The determination of the Worker's Compensation Commission must be upheld in the absence of an error of law because an inquiry beyond whether there is substantial evidence to support the agency's decision requires a re-weighing of the evidence and makes this Court the finder of fact.

II. The Worker's Compensation Commission has not committed and the Appellant Claimant has not asserted any error of law constituting grounds for reversal of the agency's decision.

In his brief, Claimant sites several statutes in the Worker's Compensation Code and makes conclusory factual challenges to the finding of the Worker's Compensation Commission by stating he has suffered a problem for which that statute is the controlling authority. All of Claimant's challenges regarding this statutory law appear factual in nature as he appears to challenge the ultimate factual determination or weighing of the evidence performed by the Worker's

Compensation Commission. As such, all of Claimant's challenges are controlled by the substantial evidence analysis, detailed above. He has raised no error of law.

Because no error of law has been raised or explained, there is no asserted error of law before this Court for review. This Court has stated that, "An issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority." Snow v. Smith, 416 S.C. 72, 91 n.7, 784 S.E.2d 242, 252 n.7 (Ct. App. 2016)(quoting Bryson v. Bryson, 379 S.C. 502, 510, 662 S.E.2d 611, 615 (Ct. App. 2008)). The majority of Claimant's brief asserts a variety of grievances against the Commissioners, his counsel, his doctors, and counsel for the Respondents. His complaints are unsubstantiated by anything in the record and are not grounds for reversal. Claimant alleges no error of law and provides only conclusory citations to the Worker's Compensation Code without explanations of how the Commission failed to properly apply those statutes.

There is no evidence in the record that the Worker's Compensation Commission has failed to properly apply the controlling statutes and case law and Claimant has not asserted or detailed any allegation that an error of law was committed.

Conclusion

This Court should affirm the Decision and Order of the Worker's Compensation Appellate Panel.

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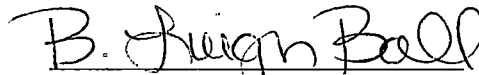
Errol D. Chapman, Claimant Appellant,
v.
Carolinas Construction Respondents.
Solutions, LLC, Employer, and
StarNet Insurance Company,
Carrier,

PROOF OF SERVICE

I certify that I, Leigh Ball, Legal Assistant to Michael W. Burkett, have properly served Respondents' Initial Brief, by mailing a copy of the same by United States Mail Certified mail and with first class postage prepaid and to the following addresses:

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SC Court of Appeals

Re: Errol D. Chapman v. Carolinas Construction Solutions, LLC
WCC File No.: 1509337
DOI: 07/20/2015
Appellate Case No.: 2017-000379

Dear Ms. Kitchings:

Pursuant to Rules 208 and 209, SCACR, please find enclosed for filing one copy of the Respondents' Initial Brief and Designation of Matter to be Included in the Record on Appeal, along with Proof of Service for the same.

By copy of this letter, I am also serving a copy of the Respondent's Initial Brief and Respondent's Designation of Matter to be Included in the Record on Appeal on the pro se Claimant (Appellant). I would also appreciate you returning a clocked copy to me in the self-addressed stamped envelope that I have provided.

With kindest regards,

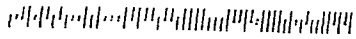
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Michael W. Burkett

MWB/blb

Enclosure

cc: Mr. Errol D. Chapman (via Certified Mail -RRR and US Postal Service)
Ms. Becky Dula (via email)



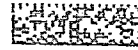
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