

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Appeal from the South Carolina Workers' Compensation Commission

Derrick L. Williams, Commissioner
G. Bryan Lyndon, Commissioner
Andrea C. Roche, Commissioner

W.C.C. File No. 1016367

Marshall C. Johnson,..... Respondent,

v.

Kohler Company, Employer, Self-Insured,Appellant.

FINAL BRIEF OF APPELLANT

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SC Court of Appeals

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STATEMENT OF ISSUE ON APPEAL

Did the Commission err in finding Johnson suffered a compensable
injury arising out of his employment at Kohler?

STATEMENT OF THE CASE

On October 25, 2010, Claimant/Respondent Marshall Johnson allegedly suffered an injury to his back while performing his duties as a caster for Appellant Kohler Company. (R. p. 1.) Based on the information provided by Johnson to his supervisor and Kohler's senior safety specialist, at the time of the accident, Kohler denied the claim. (R. p. 2.)

On February 24, 2011, Commissioner Avery Wilkerson heard testimony on the compensability of Johnson's claim. (R. p. 22.) Commissioner Wilkerson found Johnson had sustained a compensable injury to his back and legs and was entitled to receive temporary total disability benefits as long as his authorized physician writes him out of work. (R. p. 15.)

Kohler appealed the Commissioner's Order to the full Commission. (R. p. 3.) On September 20, 2011, an appellate panel of the Commission heard oral arguments on this matter. (R. p. 118.) After oral arguments, the full Commission affirmed Commissioner Wilkerson's Order. (R. pp. 20-21.) Kohler thereafter appealed. (R. p. 152.)

STATEMENT OF FACTS

Marshall Johnson was working as a caster for Kohler when he allegedly injured his back. (R. p. 30.) Johnson provided the Commission, his supervisors at Kohler, and his treating physician three different versions of how the accident allegedly occurred. Shortly after the injury, Johnson demonstrated how he was injured to his immediate supervisor, Sam Barnwell, and Kohler's safety manager, Michael Tolleson. At that time, Johnson said he felt a "small pain" in his back when he was merely "turning around taking a step or two, not doing any job task." (R. pp. 94-95.) A few days later, Johnson told his physician that he had been "pulling and twisting toilets." (R. p. 144.) By the time of the hearing before Commissioner Wilkerson, Johnson's story had changed yet again. Johnson testified to the Commissioner that he was reaching around from the back side of a commode with a pallet,¹ coming around to the front, with one leg off the ground at the time of the injury when he set his foot down and felt a pinching and burning sensation in his back. (R. p. 34.) It is undisputed that on the day of the alleged injury, Johnson finished his entire shift. (R. p. 37.) It is also undisputed that Johnson continued working for two weeks following the alleged injury, albeit at a slower pace. (R. p. 51.)

¹ A "pallet" is a small device used to scrape off excess porcelain from the casting process. (R. p. 49-50.)

Based on Johnson's contemporaneous description of how the injury occurred, Kohler denied his workers' compensation claim. (R. pp. 96-97.) Notably, however, Tolleson testified that the version of events related by Johnson at the hearing would have been a compensable event. (R. pp. 98-99.)

Despite Johnson's changing story, Commissioner Wilkerson held that the greater weight of the evidence supported Johnson's claim of injury. (R. p. 14.) Kohler appealed this decision to the full Commission, which affirmed the single Commissioner's Order. (R. p. 20-21.) Kohler thereafter filed this appeal. (R. p. 152.)

SUMMARY OF THE ARGUMENT

Commissioner Wilkerson erroneously found, and the appellate panel agreed, that Johnson suffered a compensable injury while in the course of his employment. In light of Johnson's changing descriptions of how the injury occurred, however, the evidence does not support the finding that Johnson's injury was caused by an accident as defined by the Worker's Compensation Act (the "Act.")

ARGUMENT

I. THE SUBSTANTIAL WEIGHT OF THE EVIDENCE DOES NOT SUPPORT THE FINDING THAT JOHNSON SUSTAINED A COMPENSABLE INJURY WHILE IN THE COURSE OF HIS EMPLOYMENT.

A. Applicable Law

In South Carolina, the claimant has the burden of proving the facts essential to his right to compensation by a preponderance of the evidence. *Shealy v. Algernon Blair, Inc.*, 250 S.C. 106, 110, 156 S.E.2d 646, 648 (1967). This Court “may reverse or modify an agency’s decision if the findings, inferences, conclusions or decisions of that agency are clearly erroneous in view of the reliable, probative and substantial evidence on the whole record.” *Gadson v. Mikasa Corp.*, 368 S.C. 214, 220, 628 S.E.2d 262, 266 (Ct. App. 2006). “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 the administrative agency reached in order to justify its action.” *Frame v. Resort Servs., Inc.*, 357 S.C. 520, 527-28, 593 S.E.2d 491, 495 (Ct. App. 2004). For an injury to be compensable it must “arise out of” and “in the course of employment.” *Broughton v. South of the Border*, 336 S.C. 488, 497, 520 S.E.2d 634, 636 (Ct. App. 1999). These requirements are not synonymous and must exist simultaneously for the

injury to be compensable. *Osteen v. Greenville County Sch. Dist.*, 333 S.C. 43, 49, 508 S.E.2d 21, 24 (1998). “‘Arising out of’ refers to the injury’s origin and cause, whereas ‘in the course of’ refers to the injury’s time, place, and circumstances.” *Id.* An injury arises out of employment when an injury can be seen to have followed as a natural incident of the work. *Douglas v. Spartan Mills, Startex Div.*, 245 S.C. 265, 269, 140 S.E.2d 173, 175 (1965).

B. The substantial weight of the evidence does not support the finding that Johnson’s injury arose out his employment at Kohler.

The substantial weight of the evidence does not support the Commission’s finding that Johnson’s injury was proximately caused by his employment at Kohler. Johnson has provided three distinct versions of how his injury occurred, only the last of which would satisfy the requirement of an injury arising out of employment. Johnson’s testimony before Commissioner Wilkerson is controverted by the demonstration Johnson provided to Barnwell and Tolleson shortly after the accident occurred. Both Barnwell and Tolleson testified that Johnson’s demonstration showed that he was not engaged in any work-related activity but was “simply walking across the floor from point A to point B.” (R. pp. 94, 96, 99-100.) An injury caused by Johnson performing the simple act of walking, or even walking and turning, without any other contributing

factor, does not fall within the realm of compensable injuries under the Act.

Johnson was working as a caster for Kohler when he allegedly injured his back. (R. p. 30.) Johnson testified that he was reaching around from the back side of a commode with a pallet, coming around to the front, with one leg off the ground, and when he placed his foot on the floor he felt a pinching and then burning sensation in his back. (R. p. 40.) Johnson however, demonstrated a different version of how his injury occurred the day after it occurred, and yet a third version when he saw his doctor a few days later. And, although Johnson works in close proximity to other casters, he testified that there were no witnesses to any event which caused him injury. (R. p. 50.)

While investigating the incident, Tolleson asked Johnson to demonstrate how he was injured. (R. p. 94.) According to this demonstration, Johnson was merely turning around taking a step so he could complete the next process of his job. (*Id.*) Tolleson specifically asked Johnson if he had tripped, fallen or was lifting anything heavy at the time his back began to hurt, to which Johnson replied, "No" and stated he was only turning around to complete the next part of the job. (*Id.*) Tolleson also asked Johnson if he was engaged in any specific activity at the time when his

back began to hurt and Johnson again replied “No.” (R. p. 95.) After reporting the injury to Barnwell, Johnson continued to work out his entire shift and then worked making one commode a day for the next two weeks. (R. p. 51.)

Johnson’s first medical treatment for this injury was two days after he first reported the incident. On October 27, 2010, Johnson was seen at Spartanburg Regional Medical Center. (R. pp. 136-43.) The hospital noted that Johnson was injured while turning. (R. p. 139.) The day after being treated at the emergency room, Johnson was seen by Dr. Mark Miles at Family Physicians of Spartanburg. (R. p. 144.) Dr. Miles’s treatment notes do not match with Johnson’s testimony at the hearing. Dr. Miles’s notes state that Johnson was “pulling and twisting toilets” at the time of his injury. (*Id.*)

The substantial weight evidence presented in this case does not support the finding that Johnson suffered a compensable injury arising out of his employment. Other than Johnson’s own testimony, which is clearly disputed by the testimony of Barnwell and Tolleson, there is insufficient evidence to show that Johnson’s injury arose out of his employment.

The emergency room record supports the testimony that Johnson was not engaged in any activity other than turning at the time of injury.

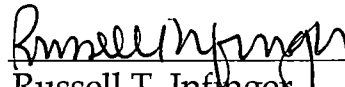
While Johnson will likely argue that the hospital records show he was turning because turning is one of four printed options on the hospital forms, it must be noted that the hospital forms also provide additional space for a description of the accident, yet nothing else is noted. (R. p. 139.)

The emergency room treatment notes however, support Barnwell and Tolleson's testimony regarding the version of events Johnson told them during the initial investigation of the incident. The treatment notes of Dr. Miles also do not corroborate Johnson's testimony. Without more evidence to support his testimony, Johnson did not provide the level of proof required support his claim of a compensable injury arising from his employment at Kohler and the Commission erred in finding that he should be awarded temporary total disability and causally related medicals for as long as his doctor writes him out of work.

CONCLUSION

For the reasons set forth above, Kohler Corporation respectfully asks this Court to reverse the Order awarding temporary total disability benefits and causally related medical benefits to Marshall Johnson.

Respectfully submitted,



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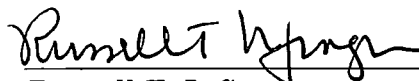
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Kohler Company, Employer, Self-Insured, Appellants.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Appellant complies
with South Carolina Supreme Court's August 13, 2007 Order.



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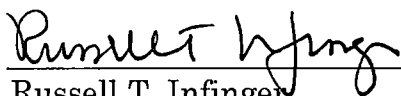
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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Appellant complies with Rule 211(b), SCACR.



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PROOF OF SERVICE

I certify that I have served the foregoing Final Brief of Appellant by depositing a copy of same in the United States Mail, postage prepaid on July 20, 2012, addressed to his attorney of record, Patrick Knie, P.O. Box 5159, Spartanburg, SC 29304.



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