

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.

BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

Did the Commission correctly find that Johnson suffered a compensable injury arising out of his employment at Kohler?

STATEMENT OF THE CASE

On October 25, 2010, the Claimant/Respondent, Marshall Johnson, reported an injury to his back while performing his duties as a caster reaching around a commode on which he was working. (R. p. 1). The Appellant, Kohler Company, denied the claim. (R. p. 2).

On February 24, 2011, Commissioner Avery Wilkerson heard testimony and considered documents submitted pursuant to the Administrative Procedures Act regarding the compensability of Johnson's claim. (R. pp. 22-117). Commissioner Wilkerson found that Johnson had sustained a compensable injury to the back and both legs and was entitled to receive temporary disability benefits from the date he was first written out of work and continuing until his authorized treating physician finds that he is able to return to work. (R. p. 16). Commissioner Wilkerson further found the Claimant was entitled to his causally related medical treatment and expenses. *Id.*

Kohler appealed the Commissioner's Order to the Full Commission. (R. pp. 3-5). On September 20, 2011, the Appellate Panel of the Commission heard oral arguments on this matter. (R. pp. 118-133). After oral arguments, the Full Commission affirmed Commissioner Wilkerson's Order. (R. p. 21). Kohler thereafter appealed. (R. pp. 152-154).

STATEMENT OF FACTS

Marshall Johnson, an eleven (11) year employee of Kohler Company, (R. p. 30, line 15), was working as a caster for Kohler when he suffered an injury to his back and both legs while reaching around the back side of a commode bowl leaning on one foot and using a tool called a metal pallet, while twisting and turning to make sure that he properly finished the bowl. (R. p. 34, lines 13-17). Johnson reported the injury shortly after it happened to his immediate supervisor, Sam Barnwell. (R. p. 36, line 2, lines 17-18). Johnson testified that during this procedure he had foot off the ground, and when he came around to set his foot back down, he felt something pinching in his back. Then, some few seconds after that, he felt a "real bad burn, stinging, sensation." (R. p. 34, lines 17-22). When Johnson visited the emergency room on October 27, 2010, the initial triage note stated, "Patient reports lower back pain relating to injury at work Monday." (R. p. 143). The emergency room patient history under the heading of "How" provides five choices: lifting, turning, bending, fall/near fall, and coma. (R. p. 139). The term "turning" was circled. (R. p. 139). On October 28, 2010, when Johnson saw his family doctor, the office note indicates, "Patient stated that he hurt his back the other night at work while pulling and twisting toilets." (R. p. 144).

Some ten (10) minutes after his injury, Johnson's supervisor, Sam Barnwell, walked by the area where Johnson was working. (R. p. 36, lines 2-3).

Johnson reported his injury to his supervisor who simply walked off. (R. p. 36, lines 17-20). When Johnson reported to work on October 26, 2010, he located his supervisor and reported his injury once again. (R. p. 38, lines 5-8). His supervisor was disciplined for failing to timely report the injury. (R. p. 93, lines 1-3). Two days later, Johnson was approached by Sam Barnwell and Mike Tollison, who was the senior safety specialist, whereupon a discussion ensued concerning why Kohler did not believe this was a work-related injury since Johnson was not lifting anything heavy at the time. (R. p. 40, lines 14-18). Johnson took issue with Kohler's position after which Johnson, along with Mr. Tollison and Mr. Barnwell, went to look at Mr. Barnwell's computer concerning how the accident report was completed by Kohler. (R. p. 40, line 19 - p. 41, line 1). Johnson testified that on the way to the computer he stopped and demonstrated to Mr. Barnwell and Mr. Tollison how the injury took place. (R. p. 41, lines 7-11). Upon arriving at Mr. Barnwell's computer, Johnson was allowed to view the incident report at which time he took issue with the description of the incident. (R. p. 41, lines 14-20). Johnson was informed by Mr. Barnwell and Mr. Tollison that the description could be changed. (R. p. 41, line 23). Nonetheless, the description was never changed by Kohler. (R. p. 42, lines 3-9). The Single Commissioner found Johnson to be credible. (R. p. 13). Mr. Barnwell acknowledged that he did not complete the accident report on a timely manner and remarkably claimed that the reason he did not fill out the accident report was because he considered it a "near miss." (R. p. 66, lines 6-10). The Commissioner examined Mr. Barnwell who acknowledged that Johnson was

using a pallet tool. (R. p. 79, lines 7-9). In cross-examination, Mr. Barnwell acknowledged that Johnson had demonstrated to him and Mr. Tollison how he had used the pallet tool and how he got hurt. (R. p. 85, lines 16-18). Mr. Barnwell further acknowledged that the Incident Report reflected an action plan which recommended that the Claimant receive instructions on slowing down his procedures and being more careful “when turning and lifting.” (R. p. 87, lines 17-22).

ARGUMENT

I. SUBSTANTIAL EVIDENCE EXISTS IN THE RECORD SUPPORTING THE FINDING THAT JOHNSON SUSTAINED A COMPENSABLE INJURY WHILE IN THE COURSE OF HIS EMPLOYMENT.

The Administrative Procedures Act (“APA”) provides the standard for judicial review of workers’ compensation decisions. Bartley v. Allendale County School District, 392 S.C. 300, 709 S.E.2d 619 (SC 2011). The decision of the Workers’ Compensation Commission can only be reversed if the substantial rights of the Appellant have been prejudiced because the decision is affected by an error of law or is clearly erroneous in light of the reliable, probative, and substantial evidence on the whole record. S.C. Code Ann., Section 1-23-380 (5)(d), (e). The Commission is the ultimate finder of fact in workers’ compensation cases. Jordan v. Kelly Co., 381 S.C. 483, 674 S.E.2d 166 (2009); Shealy v. Aiken County, 341 S.C. 448, 535 S.E.2d 438 (2000). As a general rule, this Court must affirm the findings of fact made by the Commission if they are supported by substantial evidence. Pierre v. Seaside Farms, Inc., 386 S.C. 534, 589 S.E.2d 615 (2010), at 618. “Substantial evidence is that evidence which, in considering the record as a whole, would allow reasonable minds to reach the conclusion the Commission reached.” Hill v. Eagle Motor Lines, 373 S.C. 422, 436, 645 S.E.2d 424, 431 (2007). “The possibility of drawing two inconsistent conclusions from the evidence does not prevent the Commission’s finding from being supported by substantial evidence.” Id.

Substantial evidence exists supporting the Commission's finding that Johnson's injury was proximately caused by his employment at Kohler. Johnson's description of his injury on the record is supported by his description reported at the emergency room and by his treating physician. Kohler argues that the term "turning" at the emergency room is somehow different than the term "twisting" used at the doctor's office. The word "turn" has a multitude of definitions and meanings. One of the many uses of the word "turn" is to "change position, to move in a rotary manner so as to change position, to shift or twist the body as if on its axle..." (Webster's New World Dictionary, College Edition, at 1571).

Kohler attempts to perform grammatical microsurgery on the terms used by Johnson in an effort to somehow demonstrate that his descriptions of the events were inconsistent. It is unreasonable to expect employees to understand the need to provide medical providers with a detailed description of the mechanism of their injuries. Moreover, it is reasonable to assume that the medical provider reporting the information most likely did not fully record the description provided as such a description is not necessary to the treatment to be provided.

As seen in the emergency room patient history, there were pre-printed descriptive words provided such as the word "turning" which was circled by the medical provider. Of note, the word "twisting" was not one of the choices on the pre-printed form. Therefore, the Commission had substantial evidence in the form of Johnson's testimony and two medical providers in support of its decision.

In addition, the Single Commissioner had the opportunity to review the demeanor of the witnesses during the course of their testimony. The Single Commissioner found Johnson to be credible. (R. p. 13). There were several reasons to question the credibility of Mr. Barnwell as did the Single Commissioner. First, Mr. Barnwell failed to timely report the injury, (R. p. 66, lines 6-10), and was disciplined as a result. (R. p. 93, lines 1-3). Secondly, Mr. Barnwell claimed the reason he did not fill out an accident report was that he considered it a "near miss." (R. p. 66, lines 9-10). Thirdly, upon being examined by the Single Commissioner, Mr. Barnwell acknowledged that Johnson was using a pallet tool, (R. p. 79, lines 7-9), thus supporting Johnson's description of the injury. On cross-examination, Mr. Barnwell also acknowledged that Johnson had demonstrated to him and Mr. Tollison how he had used the pallet tool and how he got hurt. (R. p. 85, lines 16-18). Finally, in the portion of the Incident Report referred to as "Action Plan," the report indicated that the Claimant receive instructions on being more careful when turning and lifting. (R. p. 87, lines 17-22). In his Findings of Fact, the Single Commissioner found, "Mr. Barnwell appeared to be very nervous during his testimony and on cross-examination conceded the Claimant attempted to demonstrate the manner in which he was injured in a manner consistent with his testimony at the hearing, however, that description was not recorded on the report of injury." (R. p. 13). The Commissioner further found that Mr. Tollison admitted that he never asked Johnson if he twisted. (R. p. 14).

In the end, while there were conflicts in the testimony by and

among Johnson and Kohler's two witnesses, there was substantial evidence in the record as a whole which allow reasonable minds to reach the conclusion which the Commissioner reached, and therefore, the Decision and Award of the Commission should be affirmed.

CONCLUSION

For the reasons set forth above, Johnson respectfully asks this Court to affirm the Order of the Commission awarding temporary total disability benefits and causally related medical benefits to Johnson.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Brief of Respondent complies with Rule 211(b).

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May 15, 2012

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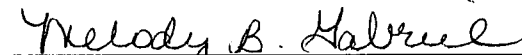
The undersigned hereby certifies that she is employed in the law office of Patrick E. Knie, P.A., 250 Magnolia Street, Spartanburg, South Carolina, and is a person of such age and discretion as to be competent to serve papers.

That on May 17, 2012, she served a copy of the Brief of Respondent in the above-action on the attorneys for the Appellant by placing said copies in post-paid envelopes, addressed to the persons hereinafter named, at the places and addresses stated below, by depositing said envelopes and contents in the United States Mail at Spartanburg, South Carolina.

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