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IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
APPELLATE PANEL

Avery B. Wilkerson, Jr., Commissioner;
Melody L. James, Commissioner, and R. Michael Campbell, II, Commissioner, concurring

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Appellate Case No. 2017-001757

Sarah White.....Appellant,

v.

NHC Parklane, Employer, and Premier Group Insurance, Carrier.....Respondents.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. **Did the Appellate Panel err in affirming the Single Commissioner's finding that the Claimant did not sustain any injury on May 18, 2011 as a result of an accident arising out of and in the course of her employment relationship with the Employer?**

STATEMENT OF THE CASE

This case was originally heard by Commissioner Aisha Taylor on February 4, 2016, to determine those issues set forth on the Forms 50 and 51 including whether Claimant had suffered a compensable injury on May 18, 2011, and any other matters which timely came before the Commissioner. Vannie Williams, Jr., Esquire represented the Claimant before the Single Commissioner and Clarke W. McCants, III represented the Employer. Commissioner Taylor issued an Order addressing the issues before the Commission on July 26, 2016. Within the statutory period, Claimant's counsel filed an Application for Review in this case, appealing the findings and conclusions of the Single Commissioner.

Specifically, Claimant asserts that it was an error of law to determine that the Claimant did not sustain any injury on May 18, 2011 as a result of an accident arising out of and in the course of her employment relationship with the Employer. On December 12, 2016 the parties presented oral argument to the Appellate Panel comprised of Commissioners Avery B. Wilkerson, Jr., Melody L. James, and R. Michael Campbell, II. On July 24, 2017, the Appellate Panel filed its Decision and Order affirming the findings and conclusions of the Single Commissioner. Appellant filed her Notice of Appeal on August 22, 2017 and served a copy of the same on Respondents' counsel that same day.

STATEMENT OF FACTS

Claimant alleges she suffered a work-related injury to her back on May 18, 2011 within the course and scope of her employment. (R. p. 21). The Claimant in this matter is 42 years-old and resides in Columbia, South Carolina. (R. p. 65, line 20). She is married and has no natural children. She has worked in healthcare and as a nurse most of her adult life.

The Claimant alleges that she injured her lower back on May 18, 2011 when a co-worker violently shook her chair while she sat working at a nursing station at the Employer's long-term residential care facility in Columbia. (R. p. 21). She testified that she immediately felt pain in her lower back following this incident and that she sought medical treatment that same day. (R. p. 76, line 11-p. 77, line 16).

The Claimant previously filed a claim against the Defendants in this case for injuries to her lower back and pelvis which she alleged occurred on March 14, 2011, and as further set forth in SCWCC File No. 1103876. (R. pp. 353-359).

The Claimant initially sought treatment at Moncrief Army Hospital at Fort Jackson in Columbia on March 21, 2011 and complained of menstrual problems. (R. pp. 172-252). The report for that visit also reflects that the Claimant was currently using Hydrocodone. (R. pp. 172-252). The Claimant next sought treatment at Moncrief on March 24, 2011. (R. pp. 172-252). The report for that visit reflects that the Claimant had experienced pelvic pain for one month. (R. pp. 172-252). Neither of these reports makes reference to any type of injury related to any type of accident (R. pp. 172-252).

The Claimant sought treatment at Moncrief on March 30, 2011. (R. pp. 172-252). The report for this visit reflects that the Claimant complained of right flank pain for two days. (R. pp. 172-252). The report also makes reference to the Claimant experiencing such problems for two months. (R. pp. 172-252). There is no mention in this report to any type of injury or accident. (R. pp. 172-252).

In a report for a visit at Moncrief on March 30, 2011 reference is made to the Claimant experiencing low back and left buttock pain which began gradually (R. pp. 172-252). On May 18, 2011, the day of the alleged injury, Claimant went to Moncrief where

she was seen by her primary treating physician for evaluation of "new" back pain. (R. pp. 172-252). On this day, the physician ordered an MRI and neurological consult. (R. pp. 172-252). An MRI of the Claimant's lower back was previously performed on March 31, 2011, prior to the alleged injury date, which revealed a central annular tear L3-4 and a paracentral disc protrusion L4-5. (R. p. 142). Another MRI was performed on August 12, 2011, following the alleged injury date. (R. pp. 143-144). This second MRI revealed a change since the previous MRI. (R. pp. 143-144). Specifically, in addition to the prior findings, the August MRI revealed a new slight posterior deflection of the right L-5 nerve root.

The Claimant submitted a medical questionnaire completed by Larry Dillard, a physician's assistant, and his supervising physician, Dr. Richard Cheng. (R. p. 150). In this questionnaire, both medical professionals offer the opinion that this new finding of a posterior deflection of the right L-5 nerve root developed as a result of her injury on the job on May 18, 2011. (R. p. 150). Both medical professionals also offered the opinion that her pre-existing annular tear L3-4 and paracentral disc protrusion L4-5 were aggravated by her injury on the job on May 18, 2011. (R. p. 150).

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act governs judicial review of decisions by the Workers' Compensation Commission. S.C. Code Ann. § 1-23-380 (Supp. 2015). An appellate court's review is limited to the determination of whether the Commission's decision is supported by substantial evidence or is controlled by an error of law. *Grant v. Grant Textiles*, 372 S.C. 196, 201, 641 S.E.2d 869, 871 (2007).

The Court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact; however, the Court may reverse or modify a decision of the Commission if it is affected by an error of law or is clearly erroneous in view of the substantial evidence on the record as a whole. S.C. Code Ann. § 1-23-380(5). While the findings of an administrative agency are presumed correct, they may be set aside if they are unsupported by substantial evidence. *Rodney v. Michelin Tire Corp.*, 320 S.C. 515, 519, 466 S.E.2d 357, 359 (1996) (citing *Kearse v. State Health & Hum. Servs. Fin. Comm'n*, 318 S.C. 198, 200, 456 S.E.2d 892, 893 (1995)). "'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 or must have reached in order to justify its action." *Adams v. Texfi Indus.*, 341 S.C. 401, 404, 535 S.E.2d 124, 125 (2000) (quoting *Lark v. Bi-Lo, Inc.*, S.C. 130, 135, 276 S.E.2d 304, 306 (1981)).

ARGUMENT

I. The Appellate Panel erred in affirming the Single Commissioner's finding that the Claimant did not sustain any injury on May 18, 2011 as a result of an accident arising out of and in the course of her employment relationship with the Employer.

A. The objective medical evidence in the record shows that on May 18, 2011, Claimant suffered both an aggravation of a preexisting injury or condition and a new injury.

S.C. Code Ann. § 42-9-35 provides in part, "[t]he commission may award compensation benefits to an employee who has a permanent physical impairment or preexisting condition and who incurs a subsequent disability from an injury arising out of and in the course of his employment for the resulting disability of the permanent physical impairment or preexisting condition and the subsequent injury." Further, the Workers'

Compensation Act is intended for the benefit of workers' and must be liberally construed. *Ham v. Mullins Lumber Co.*, 193 S.C. 66, 7 S.E.2d 712 (1940).

It is undisputed here that Claimant had complaints of back pain prior to the alleged date of injury, May 18, 2011. Claimant alleges that on May 18, 2011, she suffered an aggravation of her preexisting back injury and that she suffered a new back injury, diagnosed as posterior deflection of the right L-5 nerve root. As the medical evidence submitted in this case indicates, Claimant has had two MRIs performed. The first MRI, performed on March 31, 2011, prior to the alleged date of injury, revealed (1) a central annular tear at L3-4 and (2) a paracentral disc protrusion at L4-5. The second MRI, performed August 12, 2011, subsequent to the alleged date of injury, revealed (1) a central annular tear at L3-4, (2) a paracentral disc protrusion at L4-5, ***and*** (3) a slight posterior deflection of the right L-5 nerve root. Both MRIs are consistent except as to the finding of a slight posterior deflection of the right L-5 nerve root, which only presented after the May 18, 2011 date of injury.

The MRIs are objective medical evidence of a change in Claimant's condition prior to and after May 18, 2011. As noted above, this injury occurred when a co-worker violently shook the chair where Claimant was seated. When asked at the hearing what symptoms she immediately experienced as a result of this incident, Claimant responded, "pain, severe pain." (R. p. 76, lines 11-13). It is undisputed in the record that Claimant immediately reported the incident and corresponding injury to her supervisor and sought medical treatment at Moncrief Army Hospital that same day where she was treated for "new" back pain.

The objective medical evidence showing the change in Claimant's back condition following the May 18, 2011 work incident, coupled with Claimant's testimony of when her condition worsened is substantial evidence that Claimant suffered a compensable injury on May 18, 2011.

B. The only medical opinions in the record agree that Claimant's current diagnoses are causally related to the May 18, 2011 event.

The Appellate Panel affirmed the Single Commissioner's finding that on May 26, 2011, Dr. Toussaint of University Specialty Clinics opined that the Claimant's complaints and diagnoses were related to her March 2011 work related incident. The Appellate Panel erred in affirming this finding because no such opinion is offered. Included in the APA submissions is a letter from Dr. Toussaint to Larry Dillard dated May 26, 2011. (R. p. 145). This is the only record provided by Dr. Toussaint. In his letter, the only reference made to a March injury is found in the second sentence which reads in full: "As you may recall, she is a 37-year-old female with a reported work related injury in March 2011 with progressive back and lower extremity complaints." The letter goes on to recite a brief medical history of Claimant and ends with a review of the March 31, 2011 MRI along with a recommendation for further diagnostics. Nowhere in this letter does Dr. Toussaint offer any opinion as to the causation of Claimant's condition after the May 18, 2011 date of injury.

The only medical opinions on causation come from Larry Dillard and his supervising physician Richard Cheng, both of whom have provided primary care to Claimant prior to and following May 18, 2011. Not only are these medical opinions the only ones in the record for this matter, Larry Dillard and Richard Cheng are the only medical professionals qualified to offer an opinion as to causation because they are the

only medical professionals to have reviewed all of the relevant medical evidence, including the August 12, 2011 MRI. Dr. Toussaint's letter to Larry Dillard came nearly three months prior to the second MRI. Accordingly, any medical evidence of a change in the MRI would not have been considered by Dr. Toussaint.

Again, the only medical opinion in the record as to causation comes from Larry Dillard and Dr. Richard Cheng. In the medical questionnaire submitted, after considering all of the medical and anecdotal evidence from the time of the first MRI to the time of the second MRI they offer the following opinions: First, based upon Ms. White's history, evaluations, and symptoms, her posterior deflection of the right L-5 nerve root developed as a result of her injury on the job on May 18, 2011. Second, based upon Ms. White's history, evaluations, and symptoms, her pre-existing annular tear L3-4 and paracentral disc protrusion L4-5 was aggravated by her injury on the job on May 18, 2011.

Employer argues that the opinions offered by Larry Dillard and Dr. Richard Cheng should be discounted because they are not offered to a reasonable degree of medical certainty. While it's unclear what weight was given to this argument by the Appellate Panel and Single Commissioner, it is noted in both Decision and Orders. In complex medical cases and cases alleging injury by repetitive trauma, South Carolina law provides for heightened scrutiny and requires that opinions as to causation be stated to a reasonable degree of medical certainty. See *Smith v. Southern* Builders, 202 S.C. 88, 24 S.E.2d 109 (1943) and S.C. Code Ann. § 42-1-172(C) respectively. This case is not a complex medical case and was never designated as such by the Single Commissioner. Neither does the Claimant in this case allege any injury by repetitive trauma. Accordingly, there is no heightened evidence burden on Claimant and no requirement that the medical opinions

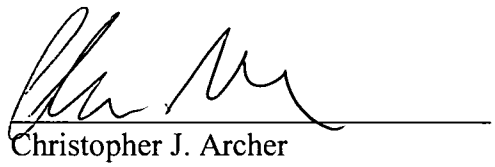
offered by Larry Dillard and Dr. Richard Cheng be stated to a reasonable degree of medical certainty. These opinions being the only opinions in the record as to the causation of Claimant's injuries, they are undisputed, not outweighed any other medical evidence, and warrant a finding of compensability.

CONCLUSION

Pursuant to S.C. Code Ann. § 42-1-160 (1976), and other applicable law and regulation, the Claimant did sustain a compensable injury on May 18, 2011 as a result of an accident arising out of and in the course of her employment relationship with the Employer, and is thereby entitled to compensation and benefits under the Act.

Respectfully Submitted,

GOODWYN LAW FIRM, LLC



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CERTIFICATE OF COUNSEL

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

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March 5, 2018