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April 3, 2018

RECEIVED
APR 05 2018
SC Court of Appeals

Via U.S. Mail
The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RE: Clarence B. Jenkins v. Amazon.com and Insurance Company of the State of Pennsylvania c/o Sedgwick Claims Management Services, Inc.
Date of Accident: February 10, 2013
WCC File No.: 1303989
Our File No.: 20194.13164
Claim No.: 30130262998
Appeal No.: 2016-000598

Dear Ms. Kitchings:

Respondents are in receipt of a copy of the additional copies of the Supplemental Record on Appeal provided to the Court. However, there is a page discrepancy between the version received by the Court on September 28, 2017 (*see* Exh. A containing the date-stamped cover and Index) and the version served on Respondents on March 30, 2018 (*see* Exh. B containing the cover and Index). The differences in the page numbering appear to be due to a correction made by Appellant in the March 30, 2018 version: the September 2017 version contained duplicate copies of p. 87 of the transcript from the May 21, 2015 hearing, as pages 23 & 24 of the Supplemental Record on Appeal; whereas, the March 30, 2018 version contains page 87 only once.

As a result of this correction, a number of record cites in the final Brief of Respondents, which was bound and filed with this Court on October 10, 2017, are now off by one page. This affects pages 1, 2, 5, 13, 14, 20, 24, 25, and 26 of the final Brief of Respondents. Those pages are attached hereto as Exh. C, with the revised references to the March 30, 2018 Supplemental Record on Appeal highlighted in bold face. If this Court requires Respondents to revise their final Brief of Respondents with these corrected references to the March 30, 2018 Supplemental Record on Appeal, they will be glad to do so; however, Appellant should pay the cost of any re-printing and binding, the need for which are the result of his changing the Supplemental Record on Appeal as filed with this Court (and served on Respondents) in September 2017. Alternatively, this Court could order Claimant to file multiple copies of the same version of the Supplemental Record on Appeal that he originally filed and served in September 2017.

If you have any questions, please do not hesitate to contact me.

Yours truly,

McAngus Goudelock & Courie, LLC

Helen F. Hiser

Enclosures

cc: Clarence B. Jenkins, *pro se*

(6)

ORIGINAL

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA WORKER'S COMPENSATION
Full Appellate Board

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SEP 28 2017
SC Court of Appeals

Case No. 2016-000598

Clarence B. Jenkins, Employee, ...Appellant,

v.

Amazon.Com DEDC, LLC, Employer,
and American Zurich Ins. Co, Carrier, ...Respondents.

SUPPLEMENTAL RECORD ON APPEAL

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IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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Full Appellate Board

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

W.C.C. File No.: 1303989

Clarence B. Jenkins, Employee, ... Appellant,

v.

Amazon.Com DEDC, LLC, Employer, and
American Zurich Ins. Co., Carrier, ... Respondents.

BRIEF OF RESPONDENTS

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STATEMENT OF THE CASE

Appellant Clarence B. Jenkins, Claimant below, filed his first Form 50 Request for Hearing in June 2013, alleging he was injured on February 10, 2013 when he "bent down to pick up a fallen object when he hit his head on [a] metal shelf." He claimed compensable injury to his "head, double vision, headaches, and dizziness" as a result of the February 10, 2013 accident. At that time, he was represented by counsel. (Form 50, dated June 24, 2013, R. p. 205). Respondents admitted the accident but denied both the extent of Appellant's alleged injuries and that his alleged condition at that time was work-related. (Form 51, dated July 18, 2013, R. p. 204). The parties entered into a Consent Order in which Respondents agreed to authorize an evaluation with Dr. Mohammed Abu-Ata, due to Appellant's claims that he suffered "from headaches, dizziness, and vision blurriness ..." (Consent Order, served August 13, 2013, R. pp. 42-44).

Sometime in September or October of 2013, Appellant dismissed his attorney and began to represent himself *pro se*. He filed a Form 50 alleging injury to his "head, eyes, neck and ears," and seeking mileage reimbursement. (Form 50 dated November 23, 2013, R. p. 202). Respondents' Form 51 explained that the mileage had been denied because it had been incurred for medical treatment that was unauthorized. (Form 51, dated January 9, 2014, R. p. 201). Commissioner Andrea C. Roche heard the parties on March 12, 2014,[1] and later held that Appellant was entitled to reimbursement for travel for authorized medical treatment with Dr. Abu-Ata and Dr. Jervey. However, she found

[1] At some point, Commissioner Roche ordered the parties to mediation. (R. p. 119, lines 1-11) (Supp. R. p. **26**, lines 2-4).

that Appellant was not entitled to reimbursement for medical treatment provided by non-authorized healthcare providers, including Dr. Eden[2] and Dr. Paysinger. (Single Commissioner Decision and Order, filed May 27, 2014, R. pp. 38-41) ("2014 Single Commissioner Decision").

Appellant appealed the 2014 Single Commissioner Decision to the Full Commission. The Commission affirmed the 2014 Single Commissioner Decision and also found that the treatment Appellant had sought at the Providence Hospital Emergency Room on September 19, 2013 was not causally related to his workplace injury.[3] (Commission Decision, filed Nov. 18, 2014, R. pp. 33-37). This Commission Decision was not appealed.

Appellant filed additional Form 50s in October 2014, (Form 50, dated Oct. 6, 2014, R. pp. 199-200) (Form 50, dated Oct. 13, 2014), to which Respondents responded. (2nd Amended Form 51, dated Oct. 17, 2014, R. p. 198) (3rd Amended Form 51, dated Oct. 23, 2014, R. p. 197). Both parties requested mediation pursuant to S.C. Code Reg. § 67-1801(B). A hearing was scheduled before Commissioner T. Scott Beck, (Notice of Hearing, dated Nov. 25, 2014); however, the parties agreed to mediation in lieu of a hearing. Both this mediation and the prior one ordered by Commissioner Roche were unsuccessful. (R. p. 102, lines 8-11) (Supp. R. p. **26**, line 2 – p. **28**, line 5).

The instant proceeding was initiated when Appellant filed a Form 50 in February 2015 claiming injury to his "head, eyes, neck, legs and feet" and seeking additional medical treatment. Appellant asserted that "Amazon and Sedgwick has refused to allow

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[2] Dr. Eden is Appellant's family doctor. (R. p. 150, lines 13-18).

[3] Medical reports from Providence Hospital's ER indicate that Appellant sought treatment for pain and swelling in his left ear. (R. pp. 256-259).

the record. (Supp. R. p. **25**, line 22 – p. **30**, line 14) (Supp. R. p. **32**, line 18 – p. **34**, line 1) (Supp. R. p. **41**, line 6 – p. **42**, line 5) (Supp. R. p. **45**, line 1 – p. **48**, line 23).

Commissioner Campbell issued his decision on August 14, 2015, finding that Appellant had reached MMI on or before October 23, 2013, that "the medical evidence supported a causal relationship from the work injury to [Appellants] complaints of initial headaches only," and that Appellant's current symptoms were not related to his work-related incident. (Single Commissioner Decision & Order, Aug. 14, 2015, R. pp. 23-27) ("Single Commissioner Decision"). He further found that Appellant "lacks credibility." (R. pp. 27-28).

Appellant filed a Form 30, Request for Commission Review on August 25, 2015. Attached to his Form 30 were 38 separately-stated questions regarding the Single Commissioner Decision, including, among other things, whether Commissioner Campbell erred in refusing to allow Appellant to submit the documents that he brought with him to the hearing, whether Appellant had reached MMI, and whether the credibility finding was improper. In addition, Appellant attempted to attach numerous exhibits to his Form 30 that had not been submitted either prior to or at the hearing before Commissioner Campbell. (Form 30, dated Aug. 25, 2015, R. pp. 185-190).

On September 24, 2015, Respondents filed a motion to exclude the evidence attached to Appellant's Form 30. Citing S.C. Code Ann. § 42-17-50 and S.C. Code Reg. § 67-707, Respondents argued that these materials were not "properly before the Workers' Compensation Commission as after-discovered evidence, or as admissible evidence in any other manner ..." (Respondents Motion to Exclude Appellant's Exhibits to the Form 30, filed Sept. 24, 2015, R. pp. 65-66) ("Motion to Exclude").

injury. (R. p. 170, lines 8-15). Nothing in Dr. Stickler's exam suggested Appellant needed any further medical examination or treatment as a result of his work-related injury. (R. p. 179, line 23 – p. 180, line 22). Finally, Dr. Stickler opined that Appellant reached MMI within the time frame of October 23, 2013. (R. p. 175, line 17 – p. 176, line 11). All of Dr. Stickler's opinions were "stated within a reasonable degree of medical certainty." (R. p. 181, lines 21-25).

At the May 21 hearing, Appellant testified that, although he has seen 13 or so medical practitioners, his condition has gotten worse. He testified that he has "headaches, nervousness, even when typing on the computer my shoulder and stuff gets so tight and so hurting until I have to stop." (R. p. 152, lines 3-16). He testified that he cannot shop as much, noise bothers him, bright lights bother him, smells bother him, all of which prevents him from working. (R. p. 152, line 21 – p. 154, line 4). Although he testified that working on his computer was hard and wore him out, (R. p. 158, lines 9-17), he sends emails on a regular basis, (R. p. 147, line 21 – p. 148, line 12), and communicates on Twitter regularly, sending 1066 tweets over the course of a year. (R. p. 159, line 3 – p. 160, line 25) (Supp. R. pp. **50-99**). Appellant agreed that Defendants' Exhibit #4 was his Facebook account. (R. p. 162, lines 15-25; Supp. R. p. 5, line 1). He also agreed that, despite his alleged problems and sensitivity to noise, he participated in a rally at the State House for South Carolina State, and attended the Springfield Democrats Rally. (Supp. R. p. 7, lines 9-22) (Supp. R. pp. **100**-104).

Appellant was able to continue working during the initial months following his accident. (R. p. 144, lines 18-24) (R. pp. 206-208, 211, 221, 226, 234-235). Appellant testified that, "on at least three occasions," he was sent home from work due to high

blood pressure, (R. p. 120, line 24 – p. 121, line 14) (Supp. R. p. **32**, lines 2-10); however, that condition pre-dated his injury, (R. pp. 223-228), and has not been causally linked to his February 2013 accident.

STANDARD OF REVIEW

Judicial review of a Commission decision is directed by the substantial evidence rule of the Administrative Procedures Act, S.C. Code Ann. § 1-23-380(5) (Supp. 2013). Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981). A reviewing court should affirm the decision of the Full Commission unless it is clearly erroneous in view of the substantial evidence of the whole record. Lark, 276 S.C. at 136, 276 S.E.2d at 307. The reviewing court may not substitute its own judgment for that of the Full Commission as to the weight of the evidence on a question of fact, but may reverse if the decision is affected by an error of law. S.C. Code Ann. § 1-23-380(5). The Administrative Procedures Act "mandates that the commission take the evidence, judge the credibility and weight of that evidence, and from that judgment determine the facts of the case." Rogers v. Kunja Knitting Mills, Inc., 312 S.C. 377, 381, 440 S.E.2d 401, 403 (Ct. App. 1994).

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 same conclusion the administrative agency reached in order to justify its action. Pierre v. Seaside Farms, Inc., 386 S.C. 534, 540, 689 S.E.2d 615, 618 (2010). The findings of the Full Commission are presumed correct and can be set aside only if unsupported by substantial evidence or based on an error of law. McGuffin v. Schlumberger-Sangamo, 307 S.C. 184, 186, 414 S.E.2d 162,

Finally, Respondents perpetuated no "fraud" in this case. Instead, they properly and timely submitted the medical records and evidence that support their case. (R. p. 98, lines 1-2 (explaining to Appellant that Respondents "are allowed to submit what they want to and what they don't want to")) (Supp. R. p. **35**, lines 4-9 (same)). Respondents are not required to make Appellant's case for him. There simply is no evidence of any "fraud" or error in this case.

This Court should hold that the Commission properly excluded the documents Appellant brought with him to the May 21 hearing.

III. The Appellate Panel properly denied Appellant's motion to add evidence to the record after the May 21 hearing.

The Commission properly excluded both the documents Appellant attached to his Form 30 and that he submitted with his Motion to Include. Regulation 67-707 provides that, in order to present additional and newly discovered evidence after the close of the evidentiary hearing, the moving party must establish that the new evidence is of the same nature and character required for granting a new trial *and* show that "the evidence was not known to the moving party at the time of the first hearing, by reasonable diligence the new evidence could not have been secured, and the discovery of the new evidence is being brought to the attention of the Commission immediately upon its discovery." S.C. Code Reg. § 67-707.

The criteria for evidence that warrants granting a new trial include: "(1) … the evidence is such as will probably change the result if a new trial is granted, (2) … it has been discovered since the trial, (3) … it could not have been discovered before the trial by the exercise of due diligence, (4) … it is material to the issue, and (5) … it is not merely cumulative or impeaching." Bettis v. Busbee, 283 S.C. 502, 505, 323 S.E.2d 536,

Appellant states that, matters resolved via informal conference or through settlement must include a Form 14B Physicians' Statement. While a "Form 14B or a narrative report from the treating physician is required for proper filing by the Defense to request stop payment of compensation," it is not required when the Employer files a request for hearing, which is the case here. (South Carolina Workers' Compensation Commission Regulatory Procedures Advisory, Jan. 25, 2012, R. pp. 281-282) (Form 51, dated April 2, 2015, R. p. 194).

Furthermore, there is no evidence that Dr. Abu-Ata ever refused either to fill out a Form 14B or to provide a medical rating. There simply is no indication that he has been requested to do either of those things. Although Appellant testified that, "Nurse Kelly Wells asked Dr. Ata for a medical rating," and "[h]e told her no," Respondent's counsel objected twice to testimony about what the doctor said, and those objections were sustained. (R. p. 125, lines 4-25). Thus, there is no evidence that Dr. Abu-Ata was asked and/or refused to provide either a medical rating or complete a Form 14B.

Because the Commission's determination that Appellant reached MMI as of October 23, 2013 is supported by substantial evidence in the record, this Court should affirm that finding.

V. Appellant's other issues have no merit.

The remaining issues raised by Appellant have no merit and should be dismissed. At the hearing, Appellant argued that Commissioner Campbell was being biased because he allowed Respondents to enter certain things into the record that had not been listed on their APA submission. (Supp. R. p. **25**, lines 10-19). These included pages from Appellant's Facebook account and from his Twitter account, both of which are part of the

public record and both of which Appellant acknowledged were his. (R. p. 159, line 16 – p. 162, line 25; Supp. R. p. 5, lines 1-20). Commissioner Campbell did not exhibit any bias against Appellant. Instead, Appellant also was allowed to enter certain items that were part of the public record, including a page from the Mickle & Bass, LLC website, (Supp. R. p. **25**, line 22 – p. **29**, line 5), and an internet definition of "syncope." (Supp. R. p. **32**, line 18 – p. **34**, line 1).

Appellant's accusations that the Appellate Panel also was biased appear to be based on the facts that they: 1) upheld Commissioner Campbell's ruling regarding the four folders of documents Appellant brought to the May 21 hearing, and 2) denied his attempts to supplement the record. (R. p. 83, line 1 – p. 84, line 18). As explained in more detail above, those decisions were correct and, as a result, do not support Appellant's claim of bias.

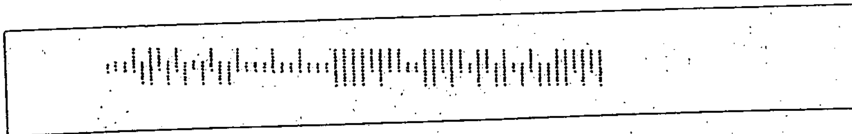
Appellant takes issue with the fact that Respondents noticed Dr. Abu-Ata's deposition but did not take it. Respondents were under no obligation to take Dr. Abu-Ata's deposition. Instead, Appellant could have noticed and taken Dr. Abu-Ata's deposition if he desired to have this testimony in the record. As noted above, Appellant was provided advance notice of Dr. Stickler's deposition but chose not to attend. (R. p. 129, line 24 – p. 130, line 25). Any failure to produce and preserve evidence to support his case lies solely with Appellant. Goodson, 295 S.C. at 403, 368 S.E.2d at 689; State v. Burton, 356 S.C. at 265, 589 S.E.2d at 9.

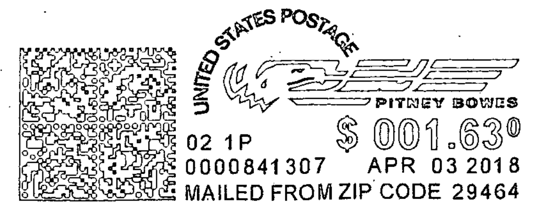
Finally, Appellant's Brief contains numerous factual assertions that are incorrect and/or not supported by any evidence in the record. These include that Dr. Abu-Ata "refused to provide a medical rating," that he was referred to Dr. Abu-Ata "because of

post concussion syndrome ... which is compensable," that he has "post syndrome concussion which has become disabling with other medical problems," that he "was placed on a leave of absent from Amazon Fulfillment Center at least three times due injury, medical symptoms and medical documentations,"[9] and that he has been diagnosed with any work-related repetitive trauma injury. There is no evidence in the record to support these factual assertions, which should be rejected. "This court may not consider a fact which does not appear in the record on appeal. Rule 209(h), SCACR .... where there is no stipulation, a representation of fact by counsel in written briefs, memoranda or made during oral argument, may not be considered by the court where it is unsupported by the record." Cobb v. Benjamin, 325 S.C. 573, 581, 482 S.E.2d 589, 593 (Ct. App. 1997).[10]

[9] Appellant was sent home from Amazon due to his hypertension, (R. p. 120, line 24 – p. 121, line 14) (Supp. R. p. **32**, lines 2-10), which pre-dated his injury and has never been causally related to his work injury. (R. pp. 223-228). The medical symptoms that prevented Appellant from continuing to work, such as avoiding loud noise and bright lights, have not been causally related to his work injury. (R. p. 176, lines 16-25; R. p. 178, line 1 – p. 179, line 17).

[10] Furthermore, these assertions appear in Appellant's Statement of the Case, in violation of Rule 208(b)(1)(C), SCACR, which provides that "[t]he statement shall not contain contested matters ..."





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