

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Administrative Law Court
The Honorable G. Thomas Cooper, Jr., Judge

Appellate Case No. 2016-000422

Clifford Pasley, Claimant/Appellant,

v.

TransAgri, Inc./Leonard Enterprises, Employer,

And

South Carolina Uninsured Employer's Fund, Insurer,
Respondents.

RECEIVED
APR 23 2018
SC Court of Appeals

**FINAL BRIEF
OF APPELLANT**

Frank A. Barton
Attorney at Law, P.A.
Post Office Box 3972
West Columbia, South Carolina 29169
803-739-1824 / fax 803-739-1888
ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....ii

STATEMENT OF ISSUES ON APPEAL.....1

STATEMENT OF CASE.....2

STATEMENT OF FACTS.....3

STANDARD OF REVIEW.....7

ARGUMENT

I. **THE LOWER TRIBUNALS ERRED IN CONCLUDING THE APPELLANT’S INJURIES HAD FULLY RESOLVED BY JANUARY 1, 2004, AND THEREFORE HE WAS NOT ENTITLED TO FURTHER MEDICAL OR DISABILITY BENEFITS. (ISSUES 1, 2, 3, AND 4).....8**

CONCLUSION.....13

TABLE OF AUTHORITIES

CASES:

Anderson v. Baptist Medical Center 343 S.C. 487, 541 S.E.2d 526 (2001)..... 12

Bass v. Isochem, 365 S.C. 454, 467, 617 S.E.2d 369, (Ct. App. 2005) 7

Bass v. Kenco Group, 366 S.C. 450, 457, 622 S.E.2d 577, 580 (Ct. App. 2005).....7

Burnette v. City of Greenville, 401 S.C. 417, 737 S.E.2d 200 (Ct. App. 2012).....12

Burse v. S.C. Dep’t of Health & Env’tl. Control, 360 S.C. 135, 600 S.E.2d 80,
(Ct. App. 2004) aff’d, 369 S.C. 176, 631 S.E.2d 899 (2006).....8

Corbin v. Kohler Co., 351 S.C. 613, 617, 571 S.E.2d 92, 94-95 (Ct. App. 2002).....7

Ellison v. Frigidaire Home Products, 371 S.C. 159, 638 S.E.2d 664 (2006).....11

Frame v. Resort Servs., Inc., 357 S.C. 520, 527, 593 S.E.2d 491, 494 (Ct. App. 2004)....7

Gadson v. Mikasa Corp., 368 S.C. 214, 221, 628 S.E.2d 262, 266 (Ct. App. 2006).....7

Grant v. Grant Textiles, 372 S.C. 196, 200, 641 S.E.2d 869, 871 (2007).....7

Hall v. United Rentals, Inc., 371 S.C. 69, 77, 636 S.E.2d 876, 881, (Ct. App. 2006).....8

Hargrove v. Titan Textile Co., 360 S.C. 276, 288, 599 S.E.2d 604, 610 (Ct. App. 2004)....7

Lark v. Bi-Lo, Inc., 276 S.C. 130, 134, 276 S.E.2d 304, 306 (1982).....7

Lockridge v. Santens of America, Inc., 344 S.C. 511, 515, 544 S.E.2d 842, 844 (Ct. App.
2001).....7

Shuler v. Gregory Elec., 366 S.C. 435, 440, 622 S.E.2d 569, 571 (Ct. App. 2005)..... 8

STATUTES and RULES:

S.C. Code Ann. Section 1-23-380(A)(5) (Supp. 2006).....7

S.C. Code Ann. Section 1-23-380(A)(5)(d)(e)(Supp. 2006).....8

S.C. Code Ann. Section 1-23-380(A)(5)(e)(Supp. 2006).....8

SC Code Section 42-9-10,11

SC Code Section 42-9-20.....11

SC Code Section 42-9-30.....11

SC Code Section 42-9-400(a), (2003).....11

SC Code Section 42-15-60.....10

STATEMENT OF ISSUES ON APPEAL

1. Did the lower tribunals err in concluding Appellant's worker compensation injuries had resolved by January 1, 2004?
2. Did the lower tribunals err in concluding Appellant was not entitled to additional medical treatment after January 1, 2004?
3. Did the lower tribunals err in concluding Appellant's condition after January 1, 2004, was related solely to a military injury?
4. Did the lower tribunals err in concluding Appellant was not entitled to additional disability benefits?

STATEMENT OF CASE

The Claimant-Appellant Clifford Pasley suffered an on the job injury on January 17, 2002, while tying down a load of steel on an eighteen wheel truck. He immediately sought medical treatment and worker's compensation benefits for the injury, but treatment was denied as there was no worker's compensation insurance coverage in effect. Proceedings on this claim were delayed because no worker's compensation insurance and the Employer denied it was subject to the Worker's Compensation Act in South Carolina. Defense of the claim was subsequently assumed by the South Carolina Uninsured Employer's Fund. By Form 50, dated October 27, 2011, Mr. Pasley sought medical and disability benefits. By Form 51, dated November 7, 2011, the claim was denied.

After hearing on June 27, 2012, the Hearing Commissioner determined the accident was compensable based upon stipulation; that the Claimant was entitled to temporary total disability benefits for the time he was out of work immediately after the accident; and that Claimant was entitled to be reimbursed for related medical expenses incurred prior to January 1, 2004. The Commissioner further held Claimant was not entitled to any benefits for permanent disability, loss of use, or any additional medical treatment.

Claimant appealed to the Full Commission by Form 30 dated January 17, 2013. The Full Commission heard Claimant's appeal on January 15, 2013. The Appellate Panel issued its Decision on December 3, 2013, affirming the Order of the Hearing Commissioner with the modification the average weekly wage of the Claimant was

changed to \$781.25.

Because of the accident date of January 17, 2002, this claim was governed by the appeals process requiring an appeal to be heard by the Circuit Court. The Claimant appealed by Notice of Appeal dated December 31, 2013. The Circuit Court initially heard the appeal on November 13, 2014, and fully affirmed the decision of the Commission by order issued on December 17, 2014. By Order issued on January 14, 2016, the Circuit Court denied Appellant's Motion for New Hearing and Amendment of Order, again fully affirming the Worker's Compensation Commission.

Notice of the final Order of the Circuit Court was received by counsel for Appellant on January 27, 2016. Notice of Appeal was served on February 25, 2016.

STATEMENT OF FACTS

On January 17, 2002, the Claimant–Appellant Clifford Pasley injured his lower back while tying down a load of steel on an eighteen wheel truck. He reported the accident to his Employer and requested medical treatment. Medical treatment was denied, however, as the Employer did not have worker's compensation insurance coverage. Mr. Pasley was forced to seek medical treatment at his own expense and was seen by Dr. Steven Suits, at Lexington Medical Center Irmo six days later. The report of Dr. Suits assessed on January 23, 2002, Claimant had suffered a lumbosacral herniated disc, with pain radiating into his right leg, and right foot drop. Dr. Suits further noted “He has not had pain like this before, though he has had back pain in the past more superior to where

this is located.” (APA p. 66).

Although Mr. Pasley was unable to obtain permission or payment from the Employer, on March 25, 2002, Mr. Pasley obtained a MRI at his own expense at the Lexington Medical Center. The MRI did show a disc bulge/protrusion at the L5-S1 level. (R., p. 199).

On April 15, 2002, Dr. Brett Gunter noted that Claimant complained of a right-sided foot drop that had presented after an accident at work in January 2002. Dr. Gunter reported, Mr. Clifford Pasley is a 40 year old right-handed male who presents with a right-sided foot drop that presented after an on-the-job injury in January 2002. The foot drop lasted a month or month and a half. He then developed severe right hip and leg pain. He said his strength has continued to improve, but he still walks with a limp. He also has some consistent persistent pain. Dr. Gunter noted his opinion that Claimant had a foot drop along with L5 nerve root compression from what appeared to be spondylolisthesis at L5-S1. (R., p. 193).

Mr. Pasley was unable to return to work, but continued to seek medical treatment at his own expense to the extent he could afford it with Dr. Green B. Neal. He was also treated at the Veterans Administration Hospital. In May 2006, Dr. Neal reported Mr. Pasley was in need of additional medical treatment but opined if an impairment rating had to be assigned at that time, Mr. Pasley had suffered a fifty-five percent (55%) impairment rating to his lumbar spine, a three percent (3%) impairment to his thoracic spine, and a fifteen percent (15%) impairment to his right leg as a result of the on-the-job accident of January 17, 2002. Dr. Neal recommended an EMG and nerve conduction

study. (R., p. 154). He had also previously determined in September 2005, Mr. Paisley had suffered a twenty percent (20%) impairment to the cardiovascular system as a result of hypertension caused by chronic pain from the accident. (R., p. 158).

Mr. Paisley was seen by Dr. Don Johnson, an orthopedic surgeon, in June 2010. Dr. Johnson noted the symptoms suffered by Mr. Pasley on June 22, 2010, were consistent with the complaints noted by Dr. Neal over the years. Dr. Johnson agreed with Dr. Neal's recommendations for treatment including an EMG and nerve conduction study. Dr. Johnson stated Mr. Pasley was not at maximum medical improvement, suggested spinal injections would probably be helpful after obtaining the EMG and nerve conduction studies, and surgical intervention might be required. (R., p. 167-168).

By his Form 50, Claimant sought a Commission Order of medical treatment; benefits for temporary total and partial disability, benefits for permanent and total disability, permanent partial disability, and/or loss of use to his back and legs. A hearing before the Hearing Commissioner was held on June 27, 2012, with a resulting decision being issued on January 4, 2013. With some modification, that decision was affirmed by Decision of the Appellate Panel of the Commission, issued December 3, 2013. The Commission determined Mr. Pasley suffered a compensable accident; Claimant was entitled to temporary total disability benefits from January 17, 2002, through February 18, 2003; and Claimant was entitled to reimbursement for out-of-pocket medical expenses incurred from January 17, 2002, through December 31, 2003.

The Commission determined Mr. Pasley was not entitled to any additional medical benefits after December 2003, and found Claimant did not suffer any permanent injury,

disability, or loss of use as a result of his employment related accident. Significantly, the Commission determined any injuries from which Mr. Pasley continued to suffer after December 31, 2003, were solely related to a prior “alleged injury” suffered by Mr. Pasley during his military service in 1982. The Decision of the Appellate Panel was fully affirmed by the Circuit Court.

The uncontested medical records submitted to the Commission conclusively showed Mr. Paisley suffered immediate onset of pain at the time of his accident on January 17, 2002. The medical records also documented a disc herniation/bulge/protrusion at the L5-S1 level, with continuous pain in the back and right leg suffered by Mr. Pasley from the time of the accident through the time of the Single Commissioner hearing on June 27, 2012. Despite the uncontroverted medical evidence, the Commission concluded Mr. Pasley’s current physical problems were the result of an “injury” suffered in 1982.

At the hearing before the Single Commissioner, Mr. Pasley testified he served in the Army for approximately seven years, serving in Operation Desert Storm, and leaving with an honorable discharge in 1983. Claimant testified, “In, I guess, ’82, I went to sick call maybe twice for a sore back. It was nothing major. I guess just, you know, march and carrying those rucksacks. But I was able to go through my military career without any problems.” (R., p. 378, lines 11 – 15). He went on to testify he started driving trucks in 1984 or 1985 and never had any problems with his back prior to his on the job accident of January 17, 2002. (R., p. 378, line 23 – p. 379, line 6.)

Based on evidence Mr. Pasley went to sick call twice in 1982 the Commission determined the problems he was suffering in 2012 were solely a result of an injury he

suffered in the Army back in 1982. The Commission made this determination despite the fact there was no medical evidence or testimony of any injury which occurred in 1982. Furthermore, the Commission completely ignored uncontested evidence Mr. Pasley began work as a truck driver in 1984 or 1985 and did not suffer from back or leg problems prior to the on the job accident of January 17, 2002.

STANDARD OF REVIEW

“The South Carolina Administrative Procedures Act governs judicial review of a decision of the workers’ compensation commission.” Lark v. Bi-Lo, Inc., 276 S.C. 130, 134, 276 S.E.2d 304, 306 (1982); Bass v. Isochem, 365 S.C. 454, 467, 617 S.E.2d 369, (Ct. App. 2005) cert. dismissed as improvidently granted Aug. 2007; Hargrove v. Titan Textile Co., 360 S.C. 276, 288, 599 S.E.2d 604, 610 (Ct. App. 2004). Pursuant to the APA, an appellate Court’s review is limited to deciding whether the Appellate Panel’s decision is unsupported by substantial evidence or is controlled by some error of law. Grant v. Grant Textiles, 372 S.C. 196, 200, 641 S.E.2d 869, 871 (2007); S.C. Code Ann. Section 1-23-380(A)(5) (Supp. 2006).

The judicial review of the Appellate Panel’s factual findings is governed by the substantial evidence standard. Gadson v. Mikasa Corp., 368 S.C. 214, 221, 628 S.E.2d 262, 266 (Ct. App. 2006); Frame v. Resort Servs., Inc., 357 S.C. 520, 527, 593 S.E.2d 491, 494 (Ct. App. 2004); Corbin v. Kohler Co., 351 S.C. 613, 617, 571 S.E.2d 92, 94-95 (Ct. App. 2002); Lockridge v. Santens of America, Inc., 344 S.C. 511, 515, 544 S.E.2d

842, 844 (Ct. App. 2001). The Appellate Panel's decision must be affirmed if supported by substantial evidence in the record. Shuler v. Gregory Elec., 366 S.C. 435, 440, 622 S.E.2d 569, 571 (Ct. App. 2005) (citing Sharpe v. Case Produce, Inc., 366 S.C. 154, 160, 519 S.E.2d 102, 105 (1999)). A reviewing court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. S.C. Code Ann. Section 1-23-380(A)(5)(d)(e)(Supp. 2006), see also, Hall v. United Rentals, Inc., 371 S.C. 69, 77, 636 S.E.2d 876, 881, (Ct. App. 2006). However, a reviewing court may reverse or modify a decision of the Appellate Panel if the findings, inferences, conclusions, or decisions of them are "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." S.C. Code Ann. Section 1-23-380 (A)(5)(e)(Supp. 2006); Bass v. Kenco Group, 366 S.C. 450, 457, 622 S.E.2d 577, 580 (Ct. App. 2005); Burse v. S.C. Dep't of Health & Env'tl. Control, 360 S.C. 135, 141, 600 S.E.2d 80, 84 (Ct. App. 2004) *aff'd*, 369 S.C. 176, 631 S.E.2d 899 (2006).

ARGUMENT I

THE LOWER TRIBUNALS ERRED IN CONCLUDING THE APPELLANT'S INJURIES HAD FULLY RESOLVED BY JANUARY 1, 2004, AND THEREFORE HE WAS NOT ENTITLED TO FURTHER MEDICAL OR DISABILITY BENEFITS. (ISSUES 1, 2, 3, AND 4)

The Workers' Compensation Commission, affirmed by the Circuit Court, concluded Mr. Pasley was not entitled to receive medical benefits after January 1, 2004. The Commission concluded Appellant's injuries from his on the job accident had fully

resolved by that date. The Commission determined any remaining medical problems suffered by Appellant were a result of an "injury" suffered during his military service in 1982. Using this reasoning, the Commission further concluded Appellant was not entitled to any additional disability benefits. For the following reasons, it is respectfully submitted the Commission erred in reaching these conclusions.

The medical records of Dr. Neal, Dr. Johnson, Dr. Gunter, and Dr. Suits detailed the injuries Mr. Pasley suffered as a result of his accident of January 17, 2002. Those medical records also documented the continued medical treatment received by Claimant and the recommendations for future treatment. At no point do the medical records submitted into evidence indicate Mr. Pasley had fully recovered from his accident or that no future medical treatment was needed.

Although Claimant did testify while in the Army in 1982 he went to sick call twice for a sore back, there was no testimony of any accident and Mr. Pasley thought the pains were related to carrying a rucksack. He further testified he had no further problems with his back during the completion of his military service and had no problems with his back while working as a truck driver from approximately 1985 until the time of his accident in January 2002. The only reasonable conclusion from the submitted medical evidence and testimony of Claimant is he injured his back and leg as a result of the on-the-job injury of January 2002, and those injuries continued to plague him through the time of the hearing before the Single Commissioner. The medical reports further evidenced his need for and the recommendation for additional medical treatment, including the possibility of future surgery.

In ruling Claimant was not entitled to any additional medical treatment or disability benefits, the Commission concluded the evidence of record showed his current back and leg condition were the result of his two 1982 visits to military sick call. Such a conclusion relies on testimony of the Claimant which simply states he went to sick call on the two occasions for back pain. That conclusion also completely ignores the further testimony of Claimant the back problems did not persist or interfere with the completion of his military duties until he was honorably discharged in 1983. The conclusion by the Commission further ignores the testimony of record showing Mr. Pasley worked as a truck driver from 1984 or 1985 until the accident in January 2002, without suffering from back or leg problems. It is respectfully submitted the conclusions of the Commission are clearly erroneous in view of the reliable, probative, and substantial evidence on the record as a whole and should be reversed.

The Commission ruled Mr. Pasley did sustain an injury as a result of his on the job accident. The medical reports submitted as evidence prove he suffered injuries to his back, leg, and cardiovascular system as a result of that accident. The records further show he continued to suffer from the injuries from the date of the accident until the time of the hearing before the Single Commissioner and required additional medical treatment. It is respectfully submitted the evidence of record is compelling to show Mr. Pasley suffered a new injury as a result of his on the job accident of January 17, 2002, and is entitled to medical benefits and treatment pursuant to SC Code Section 42 – 15 – 60. Furthermore the evidence showed he had not reached maximum medical improvement at the time of the Single Commissioner Hearing. For that reason a finding in regard to disability

benefits pursuant to SC Code Sections 42-9-10, 42-9-20, or 42-9-30 was premature. In the event Claimant was at maximum medical improvement, however, the submitted medical records showed Mr. Pasley had suffered permanent injuries and loss of use to his back, right leg, and cardiovascular system. The permanent injuries were detailed in the reports of Dr. Neal. (R., p. 154, 158).

In the event the evidence of record is viewed as indicating Claimant was suffering from a prior military injury at the time of his on the job accident of January 17, 2002, the only conclusion to be drawn is the workers compensation accident clearly aggravated a pre-existing condition. Thus, Mr. Pasley's injuries and medical treatment would still be compensable. SC Code Section 42-9-400(a),(2003); Ellison v. Frigidaire Home Products, 371 S.C. 159, 638 S.E.2d 664 (2006).

Although there is scant evidence as to the nature of any pre-existing injury from Claimant's military service, if it was determined he did have a pre-existing condition the current case is a text book example of a compensable aggravation of a worker's pre-existing, but not previously disabling condition. The undisputed evidence shows after he was released from the military, Mr. Pasley worked as a truck driver from 1984 through the time of the accident in 2002, of approximately 18 years without experiencing back problems. It is undisputed he experienced back and leg pains as an immediate result of his workers compensation accident and those pains continued through the time of his hearing.

Claimant's pre-existing military back condition (if existent) was certainly worsened and aggravated by the subsequent work injury. Therefore, he was entitled to

benefits for the resulting disability. Burnette v. City of Greenville, 401 S.C. 417, 737 S.E.2d 200 (Ct.App. 2012). It is no defense that the accident, standing alone, would not have caused the claimant's condition, because the employer takes the employee as he finds him. Likewise, a showing that the accident resulted only in the exacerbation of existing problems does not preclude recovery. Anderson v. Baptist Medical Center 343 S.C. 487, 541 S.E.2d 526 (2001).

It is respectfully submitted the substantial evidence of record, including testimony of Claimant and the submitted medical records, when viewed as a whole requires a finding Mr. Pasley suffered a new injury to his back and leg as a result of his workers compensation accident of January 17, 2002. The substantial evidence of record also shows Mr. Pasley suffered from those injuries from the time of the on the job accident through the time of the hearing before the Single Commissioner. Even if the substantial evidence indicated Mr. Pasley had a preexisting condition at the time of his accident of January 17, 2002, the evidence shows he worked as a truck driver for many years without back or leg problems before his accident of January 17, 2002. Assuming he had a preexisting condition, the only reasonable conclusion to be drawn from the medical records and testimony of record is his accident of January 17, 2002, caused an aggravation of a preexisting condition, which was dormant, and Mr. Pasley would still be entitled to medical and disability benefits after January of 2004.

For all of the above reasons it is respectfully submitted the decision of the Commission should be reversed.

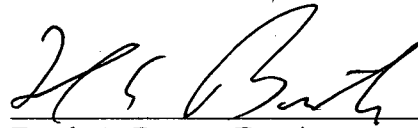
CONCLUSION

Upon discharge from the army, Clifford Pasley worked approximately seventeen to eighteen years as a truck driver. He suffered no problems with his back or right leg during those seventeen to eighteen years until he suffered his workers compensation injury on January 17, 2002. He suffered from back pain and right leg pain from the time of the workers compensation accident through the time of his hearing before the Single Commissioner on January 17, 2002. The substantial evidence of record, when viewed as a whole, requires a finding Mr. Pasley suffered an injury to his back and right leg as a result of the workers compensation accident and those problems continued through the date of his hearing. Even though there is no medical evidence of any preexisting condition to Mr. Pasley's back or leg, if it is assumed there was a preexisting condition, the only reasonable conclusion thereafter would be that he suffered an aggravation of that preexisting condition. Under either determination, Mr. Pasley would still be entitled to receive medical and disability benefits continuing after January of 2004.

It is respectfully submitted the decision of the Workers Compensation Commission, as affirmed by the Circuit Court, should be reversed. The case should be remanded to the Commission with a determination Mr. Pasley is entitled to additional medical benefits after January of 2004, and for a determination of any additional disability benefits he may be entitled to.

Respectfully submitted,

April 19, 2018
West Columbia, South Carolina

A handwritten signature in black ink, appearing to read "F. A. Barton", written over a horizontal line.

Frank A. Barton, Esquire
ATTORNEY AT LAW, P.A.
Post Office Box 3972
West Columbia, South Carolina 29170
803-739-1824 / fax 803-739-1888

ATTORNEY FOR APPELLANT