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SC Court of Appeals

THE STATE OF SOUTH CAROLINA  
IN THE  
COURT OF APPEALS

APPEAL FROM THE SOUTH CAROLINA  
WORKERS' COMPENSATION COMMISSION  
Appellate Panel

SCWCC No.: 1205647

O'Shea L. Brown, Claimant .....Appellant,

v.

Steel Technologies, Employer and

Twin City Fire Ins. Co., Carrier.....Respondents.

Appellate Case No. 2016-001992

REPLY BRIEF OF APPELLANT

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## ARGUMENT

- I. Did the Commission err in finding that Claimant's alleged additional injuries for the vascular condition and associated right hip and lower back are not supported by the greater weight of the evidence and thus are not compensable, when such a finding was against the greater weight and preponderance of reliable and substantial evidence in the record and is based on erroneous legal conclusions?**

Respondents argue that the Appellate Panel relative to the compensability of the chronic lymphedema and associated hip and lower back are all supported by substantial evidence and as such cannot be set aside. Respondents' entire argument is flawed and misleading. The greater weight of the evidence shows otherwise. The evidence is clear that the Appellant has a venous stasis disease and resulting hip and back pain that was either caused by the work injury or the venous stasis disease was aggravated by the work injury. Either option leads you to the same conclusion. That being the venous stasis disease and resulting hip and back pain are compensable.

Appellant suffered a knee injury that resulted in surgery and permanent swelling to the surgical leg along with resulting hip and back problems followed. These facts are not disputed. In their argument, Respondents used excerpts from Dr. Morrison's deposition wherein he stated that the condition that Appellant finds himself in with respect to his vascular condition and resulting back and hip problems are not directly related to the arthroscopy that he underwent and are thus not work related. (Resp. Br. R. pp. 66-68) Respondents also point to an excerpt from Dr. Morrison's deposition wherein he indicated that the meniscus tear did not precipitate the Appellant's edema. (Resp. Br. R. 68) Despite the obvious evidence showing that Dr. Morrison changed his position at

the end of his deposition and concluded that knowing whether Claimant had swelling prior to his work injury would have been important to know and that if he did not have swelling pre-injury, it would be his position that the work injury and subsequent swelling were temporal, the Commission still made a finding that the resulting lymphedema/chronic swelling was not caused, activated, or aggravated by the compensable right knee injury or the treatment received as a result of said injury.

To be clear that the Commission overlooked the substantial evidence, Dr. Morrison testified in his deposition that the vascular condition was probably a chronic pre-existing condition. (R. p. 230 lines 12-13) In his deposition, Dr. Morrison also opined that the venous stasis disease was present prior to the work injury and that the irreversible edema in his surgical leg post-surgery is not work related but was probably a pre-existing condition that was dormant until it was exacerbated/aggravated by the work injury. (R. p. 379) If this was a pre-existing condition, whether the pre-existing condition was work related is a question of law and outside Dr. Morrison's profession.

The law expressly provides that an injured worker may recover benefits if the pre-existing condition was aggravated by a work-injury. (App. Brief pp. 18, 19) (Burnette v. City of Greenville (S.C. APP. 2012) 401 S. C. 417, 737 S.E.2d 200, rehearing denied, certiorari denied) If the Commission gave greater weight to Dr. Morrison, the authorized treating physician, the evidence clearly shows that it was Dr. Morrison's opinion that the work injury aggravated a pre-existing chronic venous stasis disease.

In the alternative, there was independent evidence from Dr. Gabor Winkler wherein he opined that Appellant's chronic swelling is a direct result of the work injury to his right knee and the impact of the injury could have caused the immediate

swelling, as well as the ultimately resulting permanent swelling to “a reasonable of medical certainty.”(App. Brief p. 15)

Notwithstanding, it is undisputed that the vascular condition caused the hip and back condition. (See Single Commissioner Finding of Fact #15, R. p. 8) (Respondent’s Brief to the Full Commission R. pp. 66-68) So if the Court finds that the vascular condition is compensable, the hip and back should also be compensable.

**II. Did the Commission err in finding that Claimant was not permanently and totally disabled when such a finding was against the greater weight and preponderance of reliable and substantial evidence in the record and is based on erroneous legal conclusions?**

Appellant has presented evidence in his initial brief to prove his loss of earning capacity. Appellant seeks a finding that he is permanently and totally disabled based on the following reasoning:

A. The venous stasis disease was caused by the knee injury.

Dr. Gabor A. Winkler, at McLeod Physician Associates opined that the injury and subsequent surgery caused the swelling.

B. The venous stasis disease was a pre-existing disease that was aggravated by the knee injury and the combination of the Appellant’s condition renders him permanently and totally disabled.

The substantial evidence clearly shows that the knee injury either caused the venous stasis disease or Appellant had a pre-existing condition (as defined in S. C. Code Ann. Section 42-9-35) that was aggravated by the knee injury. If the Court finds the

venous stasis disease and hip and back condition inclusive in determining permanency, then S. C. Code Ann. Section 42-9-10 should be applicable in this case. With the combination of his impairments and his vocational assessments, all discussed in the initial brief, he would have met his burden of proving that he is permanently and totally disabled. Both vocational assessments included all doctors Mr.

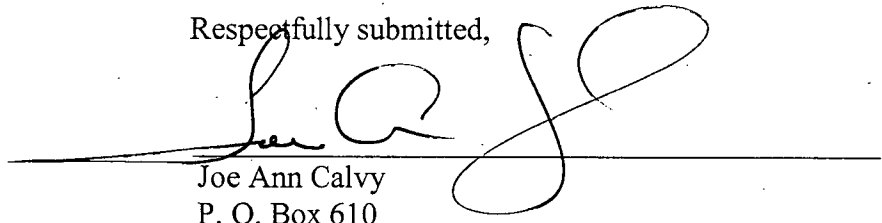
In addition to S. C. Code Ann. Section 42-9-35, in the case of Ellison v. Frigidaire Home Prods., is also applicable in this case. 371 S. C. 159, 161, 638 S.E.2d 664, 665 (2006), the claimant suffered a leg injury but also had pre-existing physical conditions including hypertension, sleep apnea, prostate cancer, diabetes and congestive cardiac disease, which, in combination with his workplace injury, rendered him physically unable to return to work after his accident. *Ellison II*, Ellison v. Frigidaire Home Prods., 371 S. C. 159, 161, 638 S.E.2d 664, 665 (2006) The Court in that case found the claimant permanently and totally disabled because of the combined effects of his disability. The court cited S. C. Code Ann. Section 42-9-400 (a) which stated at the time that [i]f an employee who has a permanent physical impairment from any cause or origin incurs a subsequent disability from injury by accident arising out of and in the course of his employment, resulting in compensation and medical payments liability or either, for disability that is substantially greater, by reason of the combined effects of the preexisting impairment and subsequent injury or by reason of the aggravation of the pre-existing impairment, than that which would have resulted from the subsequent injury alone, the employer or his insurance carrier shall in the first instance pay all awards of compensation and medical benefits provided by this Title;... A note at the end of Ellison II indicates that Section 42-9-400(a) was later amended to refer to a “disability that is

substantially greater and is caused by aggravation of the pre-existing impairment than that which would have resulted from the subsequent injury alone,” and it has omitted the “combined effects” language. Act No. 111, Pt. II, Section 3, 2007 S. C. Acts 599 (emphasis added). However, this change is applicable only to injuries that occurred on or after July 1, 2007.

**CONCLUSION**

For all the reasons stated herein and in Respondents’ Brief, this Court should reverse the Commission Decision on all the issues raised in the Appellant’s Initial Brief.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Joe Ann Calvy', is written over a horizontal line. The signature is stylized and cursive.

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April 12, 2017

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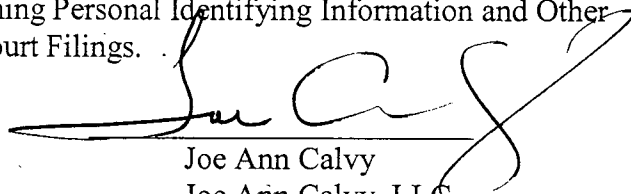
Twin City Fire Ins. Co., Carrier.....Respondents.

Appellate Case No. 2016-001992

CERTIFICATE OF COUNSEL

The undersigned certifies that this Reply Brief of Appellant, O'Shea Brown, complies with 211 (b), SCACR and with the South Carolina Supreme Court's Order dated April 15, 2014 as to Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings.

April 12, 2017



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