THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA WORKERS COMPENSATION COMMISSION

Appellate Case No. 2018-000922

Robert L. Evans, Employee ..... Appellant,

v.

Aqua Seal Manufacturing & Roofing,
and Builders Mutual Insurance Company,..... Respondents.

FINAL BRIEF OF APPELLANT

Charles E. Johnson, Esquire
Post Office Box 12426
Columbia, South Carolina 29211
(803) 256-1964
Bar No: 6474
Attorney for Appellant

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2. DID THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION ERR IN FINDING THAT THE CLAIMANT HAD NOT MET HIS BURDEN OF PROVING THAT HE SUFFERED A COMPENSABLE AGGRAVATION OF A PRE-EXISTING CONDITION ARISING OUT OF AND IN THE COURSE OF HIS EMPLOYMENT UNDER SECTION 42-9-35?

STATEMENT OF THE CASE

The Claimant filed a Form 50, on May 22, 2017, seeking compensability for a heat related injury, arising out of and in the course of his employment on June 3, 2016. Defendants filed their Form 51 on June 21, 2017 denying the claim on the grounds that: (1) Evidence does not support Claimant's allegations of a compensable injury by accident; (2) Claimant's Medical condition is unrelated to an injury at work.

Single Commissioner Gene McCaskill heard the claim on August 4, 2017. He issued an Order on November 9, 2017, denying Claimant's claim holding that Claimant had not met his burden of proving he suffered a compensable injury by accident arising out of and in the course of his employment under Section 42-1-160.

Claimant filed his Request for Commission Review, Form 30, on November 15, 2017 for review of the findings of the Single Commissioner. The grounds stated

as a question(s) were, did Claimant's heat related incident on June 3, 2016 aggravate and accelerate his unknown pre-existing condition "rhabdomyolysis" and as such, is it a compensable injury by accident arising out of and in the course of his employment pursuant to Section 42-1-160?

A hearing before the Appellate Panel of the South Carolina Workers' Compensation Commission was held on February 20, 2018. The Appellate Panel issued it's Decision and Order on May 1, 2018. In said order it affirmed the Order of the Single Commissioner in full and adopted additional Findings of Fact and Conclusions of Law. The Appellate Panel held that the Claimant had not proven by a preponderance of the evidence that he suffered an injury by accident - rhabdomyolysis - on June 3, 2016. The Panel stated "while the Claimant clearly suffers from this condition, he has not met his burden as to compensability set forth in the Act." (R. p. 9, para 13). The Panel additionally found that "when the evidence is viewed as a whole, the Claimant has not proven by a preponderance of the evidence that he suffered an aggravation of a pre-existing condition of rhabdomyolysis on June 3, 2016." (R. p. 9, para 14). The Panel concluded as law that; (1) Under Section 42-1-160, the Claimant has not met the burden of proving he suffered a compensable injury by accident arising out of and in the course of his employment. (R. p. 9, para 4)., and (2) Under Section 42-9-35, the Claimant has not met the burden of proving he suffered a compensable aggravation of a pre-existing condition arising out of and in the course of his employment. (R. p. 7, para 7). This appeal than followed.

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act (APA) establishes the standard for judicial review of decisions of the Workers' Compensation Commission. S.C. Code Ann. § 1-23-380 (Supp. 2011); Gibson v. Spartanburg School Dist. No. 3, 338 S.C. 510, 516, 526 S.E. 2d 725, 728 (S.C. App. 2000). In workers' compensation cases, the Full Commission is the ultimate fact finder. Thompson v. South Carolina Steel Erectors, 632 S.E. 2d 874, 369 S.C. 606 (S.C. App. 2006). As provided by the APA, a reviewing court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on question of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrate findings, inferences, conclusions or decisions are affected by either error of law; [or] are clearly erroneous in view of the reliable, probative and substantial evidence on the whole record. S.C. Code § 1-23-380 (Supp. 2011); See also Hall v. United Rentals, Inc., 371 S.C. 69, 77, 636 S.E. 2d 876, 881 (S.C. App. 2006).

The appellate court's review is limited to deciding whether the Commission'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). The findings of an administrative agency are presumed correct and will be set aside only if unsupported by substantial evidence. Corbin v. Kohler Co., 351 S.C. 613, 616, 571 S.E. 2d 92, 95, (S.C. App. 2002).

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 the administrate agency reached in order to justify its action. Id.

ARGUMENT #1

THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION ERR IN FINDING THAT THE CLAIMANT HAD NOT MET HIS BURDEN OF PROVING THAT HE SUFFERED A COMPENSABLE INJURY BY ACCIDENT ARISING OUT OF AND IN THE COURSE OF HIS EMPLOYMENT UNDER SECTION 42-1-160, SINCE IT'S FINDING IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD.

Claimant was working as a roofer for his employer, Aqua Seal, on June 1, 2016 when he had to leave the job site because of cramping. He had arrived at the job site that morning around 5:00am and worked until around 2:30pm when he begun to cramp. The cramping was so severe that he could not drive and had to call his wife to pick him up from the job site. (R. p. 52, lines 1-23). He returned to work the next day at the same time but he started to cramp again around 10:00am that morning. (R. p. 53, lines 2-14). His cramping was so severe, (legs, hands, toes), that his supervisor had to get his son to take him home. (R. p. 53, lines 15-20). Claimant returned to work the next day, Friday, and began working on the roof when he threw up. (R. p. 54, lines 22-24, p. 55, lines 8-12). He was told to go home and he was transported by the supervisor son again. (R. p. 55, lines 13-14). This was Friday June 3, 2016. Claimant went home, took a cold shower, and rub himself down in alcohol. (R. p. 55, lines 15-17). Claimant did not work on Saturday

and advised his foreman as to his reasons and was told to come back on Monday, June 7, 2016. (R. p. 56, lines 8-25, p. 57, lines 1-2). The next day Claimant went to church where he was helping prepare for service. He was moping a spilled and began to sweat so bad that he did not know what was going on. He continued to sweat during the service and wonder what was going on with him, since the church was air conditioned. So after church he went to the hospital. (R. p. 57, lines 4-14). Claimant testified that after his arrival at the hospital he was told that his CPK level was in the thousands, that his kidneys could shutdown, and something about Rhabdomyolysis. (R. p. 57, lines 17-25). Claimant's emergency room report states that Claimant presented complaining of abdominal cramping and pain which had been ongoing for the last 3 days. (R. p. 105). After physical examination it was determined that Claimant was suffering from acute rhabdomyolysis, anterior abdominal wall pain/cramps, generalized muscle cramps, moderate to severe dehydration, and heat exhaustion. (R. p 107). Claimant was admitted to the hospital on June 5, 2016. Claimant was release from hospital, three days later, on June 8, 2016. (R. p 113).

Prior to his admission on June 5, 2016, Claimant was never diagnose as having the condition rhabdomyolysis. Claimant testified that he did not know what rhabdomyolysis was or what triggered it, nor what CPK level was prior to his admission. (R. p. 58, lines 10-25). The Appellate Panel adopted the Decision and Order of the Hearing Commissioner dated November 9, 2017, which found as a fact that "while there is clearly evidence that the Claimant has had previous heat related episodes, the Claimant does not have a diagnosis of rhabdomyolysis until this

event. There is no evidence in the record that the Claimant knew prior to this event that he suffered from rhabdomyolysis...." (R. p. 5, para 7). After his release from the hospital, Claimant contact his employer and advised of his diagnose and was told to take his time to come back to work. Claimant stayed out of work for 30 days, still feeling dizzy and "not out of the woods". (R. p. 59, lines 4-13). But he stayed in touch with the company during this time. Id. Aqua Seal terminated Claimant on June 27, 2016. (R. p. 59, line 13).

The Claimant sustained a compensable heat related injury, heat exhaustion/heat prostration, as a result of becoming overheated and suffering abdominal cramping and pain on the job. In Smith v. Southern Builders, Inc., 24 S.E. 2d 109, 115 (1943) the court stated ,"a workman who sustains heat prostration as the result of the working conditions under which he labors, has sustained an injury 'arising out of and in the course of his employment'; and the fact that other workman may not have been affected or that he may have been rendered more readily susceptible to injury than they were by reason of his physical condition cannot affect the matter." Claimant suffered heat exhaustion three days in a row, the last been on June 3, 2016. As stated in the Commissioner's Decision and Order, adopted by the Appellate Panel, "When the evidence is reviewed as a whole, there is no question that the Claimant had a heat-related incident on June 3, 2016". (R. p. 4, para 4).

Claimant testimony along with the medical record clearly shows that he suffered a heat related incident, "heat exhaustion", on June 3, 2018. The Appellate Panel Decision and Order dated May 1, 2018 concluded that "under Section 42-1-

160, the Claimant has not met the burden of proving he suffered a compensable injury by accident arising out of an in the course of his employment." (R. p 9, para 4). The Appellate Panel adopted the Commissioner's Findings of Fact which stated, "when the evidence is reviewed as a whole, the Claimant has not proven by a preponderance of the evidence that he suffered an injury by accident - rhabdomyolysis - on June 3, 2016." (R. p 6, para 13). "While Claimant clearly suffered from this condition, he has not met his burden as to compensability set forth in the Act."Id.

The Claimant claim is based not upon the condition, rhabdomyolysis, but upon the heat exhaustion he suffered on June 3, 2016. The Claimant's condition, while permanent, is not the grounds upon which his claim that he suffered an injury by accident arising out of and in the course of his employment is based. In Smith v. Southern Builders, the court stated that "....the fact that other workman may not have been affected or that he may have been rendered more readily susceptible to injury than they were by reason of his physical condition cannot affect the matter." (Id. at 115). Claimant condition, rhabdomyolysis, makes him more susceptible to heat exhaustion/heat prostration, but it is not the cause. (R. p. 98, lines 14-15). Claimant's unknown condition had no impact upon his ability to work prior to June 3, 2016. Since that date, he has not being able to return to the type of work he had been during for the previous eight years. (R. p. 50, lines 23-25, p. 61 lines 22-25, p. 62 lines 1-25, p. 63 lines 1-19).

Claimant has proven by the preponderance of the evidence that he suffered an injury by accident, heat exhaustion/heat prostration. The Appellant Panel,

adopting and affirming the Commissioner's Decision and Order, stated that "When the evidence is reviewed as a whole, there is no question that the Claimant had a heat-related incident on June 3, 2016". (R. p 4, para 4).

The courts in determining compensability under the Workers' Compensation Act have liberally construed toward the end of providing coverage rather than noncoverage in order to further the beneficial purposes for which it was designed. (Shealy v. Aiken County, 535 S.E. 2nd 438, 445). Any reasonable doubt as to the construction of the Act will be resolved in favor of coverage. (Id.)

Claimant would submit that based upon the medical evidence, testimony and all of the evidence in the record as a whole that his injury, "heat exhaustion/heat prostration" suffered on June 3, 2016, arose out of and in the course of his employment, and is compensable under Section 41-1-160.

ARGUMENT #2

THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION ERR IN FINDING THAT THE CLAIMANT HAD NOT MET HIS BURDEN OF PROVING THAT HE SUFFERED A COMPENSABLE AGGRAVATION OF A PRE-EXISTING CONDITION ARISING OUT OF AND IN THE COURSE OF HIS EMPLOYMENT UNDER SECTION 42-9-35, SINCE IT'S FINDING IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD.

The question as to Claimant's pre-existing condition "rhabdomyolysis" being compensable under Section 42-9-35 is a different issue. Section 42-9-35 applies to the aggravation of a pre-existing condition and provides in relevant part:

(A) The employee shall establish by a preponderance of the evidence, including medical evidence, that:

(1) the subsequent injury aggravated the preexisting condition or permanent physical impairment; or

(2) the preexisting condition or the permanent physical impairment aggravates the subsequent injury.

(B) The commission may award compensation benefits to an employee who has a permanent physical impairment or preexisting condition and who incurs a subsequent disability of the permanent physical impairment or preexisting condition and the subsequent injury.

(D) The provisions of this section apply whether or not the employer knows of the preexisting permanent disability.

A "claimant's right to compensation for aggravation of a pre-existing condition arises when the claimant has a dormant condition that becomes disabling because of the aggravating injury." (Murphy v. Coming, 393 S.C. 77, 86, 710 S.E. 2d 454, 458 (S.C. App. 2011).

Claimant's rhabdomyolysis was a latent pre-existing condition unknown to the Claimant that become acute on June 3, 2016. This condition was aggravated and accelerated by Claimant's "heat exhaustion" on June 3, 2016. Dr. Floyd in a letter dated April 12, 2017 stated that Claimant had a "heat related illness which appeared to have resulted from a cauldron of chronic medical condition(HIV), medications and repeated heat exposure. How each contributed to his heat illness could not be determined." (R. p 139.). But, it was his opinion "that working on the roof top contributed to" Claimant's "acute illness" rhabdomyolysis. Id. It was also Dr. Floyd's opinion that Claimant's condition was permanent and restricted his ability

to work. Dr. Floyd stated in his Deposition that Claimant "...can permanently never ever work in that type of environment where heat and extreme activities are involved, yes, it's permanent." (R. p 99, lines 16-18). The Appellate Panel found that "...the Claimant had a heat-related incident on June 3, 2016." (R. p 4, para 4). The Appellate Panel also found that "...Rhabdomyolysis is a specific diagnosis which is different than heat exhaustion or dehydration." (R. p 5, para 7). Dr. Floyd in his deposition explained that:

"Rhabdomyolysis is a breakdown of the muscle tissue. It can be caused by several things. Most common thing is trauma, but it can be caused by extreme exertion, heat, immobility for a period of time. Anything that can cause a breakdown of muscle can cause rhabdomyolysis and what it is, the myoglobin is released from the muscle itself. That's the primary protein that's in the muscle, releases massive amounts in the bloodstream and it does damage primarily to the kidneys filtered urine, the nephrons,...." (R. p 84, Lines 7-15). Dr. Floyd was also asked whether he thought the condition was acute and he replied that it was "acute" (R. p 84, Lines 16-19). As stated earlier, Claimant testified that after his arrival to the hospital on June 5, 2016 he was told by his care provider(s) that his CPK level was in the thousands, that his kidneys could shutdown, and something about Rhabdomyolysis. (R. p. 57, lines 17-25). Claimant's emergency room report states that Claimant presented complaining of abdominal cramping and pain which had been ongoing for the last 3 days. (R. p 105). After physical examination it was determined that Claimant was suffering from acute rhabdomyolysis, anterior abdominal wall pain/cramps, generalized muscle cramps, moderate to severe dehydration, and

heat exhaustion. (R. p 107). There is ample medical evidence that casually connect Claimant's heat incident to the acute onset of his rhabdomyolysis.

Claimant would submit that based upon the medical evidence, testimony and all of the evidence in the record as a whole he has established by a preponderance of the evidence that he sustained an injury arising out of and in the course of employment, heat exhaustion/heat prostration, that aggravated a pre-existing condition, rhabdomyolysis, that was dormant but which became acute and disabling.

CONCLUSION

For the reasons stated, the Appellant submit that the Appellate Panel Decision and Order is clearly erroneous in view of the reliable, probative and substantial evidence on the whole record and should be reversed and the claimant's claim be held compensable.

Respectfully submitted,

October 2, 2018

Charles E. Johnson, Esq.
Post Office Box 12426
Columbia, South Carolina 29211
(803) 256-1964
Bar #: 6474
Attorney for Appellant

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CERTIFICATE OF COUNSEL

The undersigned certified that the Final Brief of Appellant complies with Rule 211(b), SCACR.

October 2, 2018

Charles E. Johnson, Esq.
Post Office Box 12426
Columbia, South Carolina 29211
(803) 256-1964
Bar #: 6474
Attorney for Appellant