

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE WORKERS COMPENSATION COMMISSION

Appellate Case No. 2018-002087

Dale Brooks, Employee,

Appellant,

v.

Benore Logistic Systems, Inc.,
Employer, and Great
American Alliance Insurance
Company, Carrier,

Respondents.

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SC Court of Appeals

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TABLE OF AUTHORITIES

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STANDARD OF REVIEW

The Court of Appeals held in Burnette v. City of Greenville, 401 S.C. 417, 737 S.E.2d 200 (Ct. App. 2012), cert den. (2014):

The Administrative Procedures Act (“APA”) provides the standard for judicial review of decisions by the Commission. Under the APA, this Court can reverse or modify the decision of the Commission if the substantial rights of the appellant have been prejudiced because the decision . . . is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. [citing S.C.Code Ann. § 1–23–380(5)(d), (e) (Supp.2011)]. This Court can also reverse the Commission if its ruling is affected by an error of law.

The Commission is the ultimate factfinder in workers' compensation cases. As a general rule, this court must affirm the findings of fact made by the Commission if they are supported by substantial evidence. Substantial evidence is that evidence which, in considering the record as a whole, would allow reasonable minds to reach the conclusion the Commission reached. The possibility of drawing two inconsistent conclusions from the evidence does not prevent the Commission's finding from being supported by substantial evidence.

Id. at 401 S.C. 417, 426, 737 S.E.2d 200, 205 (internal citations and quotations omitted except as noted).

The findings of the Commission will be set aside if unsupported by substantial evidence. Hicks v. Piedmont Cold Storage, Inc., 335 S.C. 46, 515 S.E.2d 532 (1999).

FACTS

Evidence from the hearing before the Single Commissioner. Appellant worked for Respondent Benore Logistics System, Inc. (Benore) as a switcher truck operator for approximately five months before he alleges he suffered the repetitive trauma injury. (Hr. Tr. p. 85, ll. 4-7). Appellant’s duties basically required him to use a truck to move trailers or sea containers across a huge yard at the BMW manufacturing plant, which he estimated to be 2 miles wide. Id. at p. 17, ll. 14-24. He worked 12 hour shifts. Id. at p. 18, ll. 6-7.

7. Next, he walked through the door, and hooked the trailer to the truck. This required him to bend over at least 90 degrees for a few minutes. (H. Tr. p. 25, ll. 11-19).
8. After hooking up the trailer, he got back in the truck. (H. Tr. p. 26, ll. 6-9). He pulled the truck up 4 to 5 feet. Id. at ll. 10
9. Then he got up again, went back out, walked to the rear of the trailer and closed the trailer doors. (H. Tr. p. 26, ll. 11-13).
10. Then he returned to the cab to drive it to the designated area. (H. Tr. p. 26, ll. 13-15).
11. Once he arrived at the drop off, he reversed the whole process. (H. Tr. p. 26, ll. 16-p.27, ll. 3).

The whole process took about 15 minutes. (H. Tr. p. 27, ll. 5-8). On average, Appellant completed the process 45 times a shift. Id. at ll. 9-11. Appellant agreed his job description required him to do up to 50-60 trailer moves a shift. Id. at p. 28, ll. 3-9, *citing* Cl. APA 6 at p. 39). Appellant agreed he got in and out of the truck 225 times on an average shift. Id. at p. 28, ll. 14 p.29, ll. 10. When asked if the repetitive part of his job was getting in and out of the truck, Appellant responded every aspect of his job was repetitive. Id. at p. 84, ll. 7-p. 85, ll. 3).

Appellant testified about sea containers as “a switcher operator’s worst nightmare.” (H. Tr. p. 29, ll. 17-22). The reason is, salt and contaminants the containers pick up on their ocean voyage “make it exceptionally hard to open the doors.” Id. at p. 29, li.. 22-p.30, li. 5. The trailer is higher off the ground and has a ceramic seal on the back, which has to be cut with a 2-foot bolt cutter held over the switcher operator’s head. Id. at p. 30, ll. 5-11. After that, the operator must open four latches on the back of the trailer. Id. at ll. 12-14. Appellant related, “Most of the time, it took two people to open the doors.” Id. at ll. 17-19. But if no one could help, time restraints required Appellant to do it alone. Id. at ll. 20-p.31, ll. 2. And sometimes the drivers bringing the

Emergency Room for his injuries. Appellant stated he got in and out of trucks about 150 times per shift. (C. APA at 3).

On February 1, 2017, Appellant reported to WorkWell. (C. APA at 11). He reported low back pain climbing into the truck. He also reported feeling sharp low back pain while stepping into the truck and pulling himself in.

The doctor ordered an MRI. The report states, “in his case specifically, I think it best to get the imaging first.” (C. APA at 16).

WorkWell records reflect Appellant left the appointment at 9:36am. (C. APA at 19). Two minutes later, the doctor’s office received notice the claim was denied. (C. APA at 20).

Appellant reported to Dr. Loudermilk on May 1. (C. APA at 22). Appellant reported climbing up and down stairs approximately 150 times a day, moving a minimum of 30 trailers per shift. He reported “switching trucks in and out multiple times during the day, opening and closing doors, bending and stooping, and climbing ladders.” (C. APA at 22). Dr. Loudermilk ordered an MRI. (C. APA at 23). Appellant got the MRI June 27. (C. APA at 4). On July 7, Dr. Loudermilk concluded the MRI showed a disc protrusion at L4-5, which Dr. Loudermilk deemed the source of his symptoms. (C. APA at 30).

Defense ergonomic report. Respondents hired ergonomist Glen Adams to review Appellant’s job and to issue an ergonomics report. (Full Commission Order at p. 8, Finding of Fact 5, *citing* Def. APA p. 52). The report is at D. APA 52-58. Adams reviewed Appellant’s deposition, his medical records, and visited the job site where Appellant worked. (Full Commission Order at p. 8, at Finding of Fact 6, *citing* Def. APA p. 52-58). Adams found that, contrary to Appellant’s testimony, Appellant would be able to enter and exit the cab of the truck without having to bend over. *Id.*, *citing* Def. APA. p. 57 and Hr. Tr. pp. 77-78. He further found

Specifically, he found “a direct causal relationship between the repetitive acts and the employment.” Id. He based the finding “on the entire record.” Id. Additionally, he held, “Under § 42-1-172 and Murphy v. Owens Corning, 710 S.E.2d 454 (Ct.App 2011), medical evidence established a causal connection between [Appellant]’s repetitive activities in regular employment duties and the injury.” Id. at p.16, Conclusion of Law 3.

Full Commission reversal. The Full Commission reversed the Single Commissioner, concluding Appellant failed to prove a repetitive trauma injury under S.C. Code Ann. § 42-1-172. (Full Comm. Ord. p. 9, Finding of Fact 11). First, the Commission held there was no finding of fact by the Single Commissioner that Appellant’s job activities were repetitive as required under S.C. Code Ann. § 42-1-172(B). Id.

Second, the Commission noted Respondents presented ergonomics evidence that the job was not sufficiently repetitive and noted Appellant presented no ergonomics evidence. Id. at p. 8, Finding of Fact 7-8; p. 9-10, Finding of Fact 11). The Commission found Respondents’ “unbiased” ergonomics report “entitled to greater weight than [Appellant]’s testimony on that issue.” Id. at p. 9-10, Finding of Fact 11.

Third, the Full Commission found Dr. Loudermilk’s opinion entitled to less weight than the ergonomics report because the doctor appeared to rely on “Appellant’s own self-serving statements as to the alleged repetitive job activities,” and a description of them from Appellant’s attorney in questionnaires. Id. at p. 10, Finding of Fact 12, *citing* C. APA pp. 25-26, 31-32. The Full Commission found it “especially troubling” because the record from Appellant’s initial visit with Dr. Loudermilk showed Appellant reporting symptoms “since around January 3, 2017”, but at the hearing Appellant testified he did not tell Dr. Loudermilk “a specific date.” Id., *citing* Cl. APA p. 22; Hr. Tr. p. 65, ll. 19-22. Additionally, the Full Commission noted the lack of

Appellant satisfied both aspects of the law, requiring reversal for lack of substantial evidence to support the Full Commission's denial of benefits.

A. Repetitive trauma injury law.

"Repetitive trauma injury" means an injury which is "gradual in onset and caused by the cumulative effects of repetitive traumatic events." S.C.Code Ann. § 42-1-172(A).

A repetitive trauma injury is compensable only under the explicit terms of § 42-1-172. *Id.* at sub-§(A). "Indeed, section 42-1-172(C) commands that the '[c]ompensability of a repetitive trauma injury must be determined *only* under the provisions of this statute.'" Michau v. Georgetown Cty. ex rel. S.C. Ctys. Workers Comp. Tr., 396 S.C. 589, 594, 723 S.E.2d 805, 807 (2012) (internal citations omitted).

Specifically, a repetitive trauma injury is covered under workers' compensation "only if it is established by medical evidence that there is a direct causal relationship between the condition under which the work is performed and the injury." S.C.Code Ann. § 42-1-172(D).

"Medical evidence" means an expert opinion "stated to a reasonable degree of medical certainty, documents, records, or other material that is offered by a licensed and qualified medical physician." S.C.Code Ann. § 42-1-172(C).

B. The Full Commission's decision erroneously elevates the ergonomics report to outweigh medical evidence, which subverts the legal standard.

In determining whether Appellant's injury was repetitive, the Full Commission accorded Respondent's ergonomics report more weight than Appellant's doctor's medical conclusions. (Full Comm. Ord. p. 11, Finding of Fact 14). The Full Commission also noted Appellant presented no ergonomic evidence. *Id.* at p. 8, Finding of Fact 8. Likewise, the Full Commission gave more weight to the ergonomic report's "unbiased opinion" than Appellant's testimony the job was repetitive. *Id.* at p. 9-10, Finding of Fact 11. The Full Commission's unjustified over-

Next, the Court held, “The plain reading of the statute requires that [medical] ‘opinion or testimony’ must be ‘stated to a reasonable degree of medical certainty.’” *Id.* at 396 S.C. 589, 595, 723 S.E.2d 805, 808 (2012). The Court then deemed respondent’s medical opinion “an ‘opinion or testimony’ that must be “stated to a reasonable degree of medical certainty”” under § 42–1–172. *Id.* at 396 S.C. 589, 596, 723 S.E.2d 805, 808 (2012). In reversing the Full Commission, the Supreme Court held the opinion inadmissible because it did not conform to the statutory standard.

Here, the Full Commission creates a new, strict standard for repetitive trauma injuries – the requirement of an ergonomics report for claimants to prove compensability. This requirement is especially evidenced by the finding Appellant presented no ergonomics evidence. (Full Comm Ord., p. 8, Finding of Fact 7-8; p. 9-10, Finding of Fact 11). The Full Commission’s ergonomics standard is not what the law requires.

Section 42-1-172 is the law. It requires medical evidence of causation, which Appellant presented and Respondent did not dispute. Here, the only causation evidence conforming to § 42-1-172 came from Appellant. The Full Commission should be reversed, as Appellant proved causation using the proper legal standard.

2. Finding Appellant less credible than the ergonomics report is unsupported by substantial evidence.

Because the Full Commission gave Dr. Loudermilk’s conclusion less weight in part because he relied on Appellant’s “self-serving statements” about the job’s repetition, the Court should consider the credibility of Appellant’s account of his job activities compared to the ergonomist’s. *See* Full Comm. Ord. p. 10, Finding of Fact 12. In weighing the ergonomist’s credibility against Appellant’s, the Court should first understand the prime distinction in their experience: Appellant did the job, day in, day out, for months. The ergonomist watched someone

didn't intentionally expose Appellant to a known risk of injury.

Additionally, the report does not observe the "sea container nightmare" described by Appellant in his testimony at H. Tr. 29, li. 17 – p. 32, li. 4. That's a major part of his job the report leaves completely unaddressed.

Nothing in the report makes Appellant's injury impossible. Note the word "increased" before "risk." (Def. APA at 58). There's still risk of injury, especially due to the repetitive nature of the work. It would be different if the report said **no** risk of injury. But it doesn't. Because it can't. Appellant's job carries the risk of getting injured just like he did, which happened here.

Most importantly, the ergonomics report does not evaluate the impact of the job on Appellant. That's why the statute requires a doctor to provide evidence of causation, which is what Dr. Loudermilk did.

Giving the ergonomist report more weight here endorses the opinion of a witness who never saw Appellant do the job and isn't qualified to assess the job's impact on Appellant's medical condition. Appellant credibly testified in painstaking detail about the repetitiveness of his work, work he actually did instead of merely watching it done for a day. Substantial evidence does not support the Full Commission's credibility determination here.

3. Appellant provided the only evidence of causation sufficient to withstand legal scrutiny: the medical evidence of Dr. Loudermilk.

"Although medical testimony is entitled to great respect, the fact finder may disregard it if there is other competent evidence in the record." Hargrove v. Titan Textile Co., 360 S.C. 276, 288, 599 S.E.2d 604, 610 (Ct.App.2004). The ergonomics report falls short of competent evidence, as expressed by arguments first made by counsel at the Single Commissioner hearing, cited at p. 13-14, *supra*. Those same concerns reveal why the report should not override the medical conclusion here.

especially troubling because according to the record from [Appellant]’s initial visit with Dr. Loudermilk, [Appellant] reported his back and leg pain had ‘been present since **around** January 3, 2017,’ however, at the hearing [Appellant] testified he did not tell Dr. Loudermilk “a specific date.” Id., citing Cl. APA 22, H. Tr. p. 65, ll.19-22) (emphasis added).

This finding does not reflect how the law views these injuries, as the Supreme Court revealed:

Repetitive trauma injuries . . . have a gradual onset caused by the cumulative effect of repetitive traumatic events or “mini-accidents.” As noted by other courts, it is difficult to determine the date an accident occurs in a repetitive trauma case because there is no definite time of injury.

Schulknicht v. City of N. Charleston, 352 S.C. 175, 178, 574 S.E.2d 194, 195 (2002).

Thus, by their nature, repetitive trauma injuries do not support a specific date of injury. As Schulknicht wisely intimated, courts expect the date of injury to require some estimation. Oddly here, the Full Commission was “especially troubled” by Appellant doing exactly what the Supreme Court expects him to.

The finding does not reflect all the facts, as it infers Dr. Loudermilk contrived a date of injury, contrary to the evidence. At the hearing before the Single Commissioner, Appellant confirmed he told Dr. Loudermilk approximate dates of onset. (H. Tr. p. 67, li. 23-68, li. 2). The record in question states Appellant suffered symptoms since “**around** January 3, 2017.” (Cl. APA 22). Common sense tells us when you state you got hurt **around** a specific date, that means you’re approximating. And Appellant testified he told Dr. Loudermilk those approximate dates were two weeks before January 17 or 18. Id. That timeframe definitely encompasses “around January 3.” Unfortunately, by the terms of its order, the Full Commission attacks the credibility of Dr. Loudermilk with a hairsplitting detail that doesn’t reflect all the facts- or the law. “[I]t is difficult to determine the date an accident occurs in a repetitive trauma case because there is no definite time of injury.” Schulknicht, *supra*.

Dr. Loudermilk also plainly indicated he reviewed at least one description of Appellant's job – the ergonomist report. In the more recent questionnaire, counsel asked, “Does the attached ergonomics report change your opinion in any way?” Doctor Loudermilk answered the question, “No.” (Cl. APA 32). This presents the clear inference the doctor read the ergonomics report and remained steadfast in his medical conclusion the job was repetitive. Respondent never deposed the doctor to challenge this answer.

The Full Commission found Dr. Loudermilk “assume[d] the job is sufficiently repetitive,” based on the double-indented question above. (Full Comm. Ord. p. 10, Finding of Fact 12, *citing* Cl. APA 25). This overlooks the fact the doctor could've answered the question “No.” It also forgets the doctor's records- part of the entire record on which the Single Commissioner based the finding- which describe Appellant's repetitive job tasks. (C. APA at 22-32; Single Comm. Ord. p. 15, Finding of Fact 14). It also overlooks the more recent questionnaire, where Dr. Loudermilk declared the ergonomics report describing the ergonomist's view of Appellant's job duties changed nothing in his medical conclusion. Cl. APA 31-32.

In the end, the paramount consideration in repetitive motion cases is proving causation with medical evidence, which is exactly what Appellant did here. The medical evidence is rooted in a doctor's conclusion founded on discussions with Appellant about the cause, a diagnosis confirmed with an MRI, a course of treatment, and uncontroverted evidence Respondent's ergonomics report made no impact on the doctor's conclusion. Appellant satisfied the repetitive motion statute.

Requiring anything further creates a legal requirement for workers with repetitive motion injuries to pay for their own ergonomics report. It's a requirement that does not exist. The additional cost it imposes could prevent workers with legitimate repetitive motion injuries from

[Murphy's] job and the aggravation of her ... condition. This finding is based on the medical records....” The Commission sustained the commissioner's order in its entirety, and found in part: (1) Murphy suffered an aggravation of her underlying condition by the repetitive trauma of performing overhead work on her job; (2) the finding was based on the record as a whole, including the medical record; and (3) there was a direct causal connection between the repetitive activities of Murphy's job and the aggravation of her condition.

As Murphy dictates, the Single Commissioner in this case found:

1. by the preponderance of the evidence, a direct causal connection between the repetitive activities of Appellant’s job and the injury.

The Single Commissioner held:

Based on the preponderance of the evidence before me in this case, I must conclude that [Appellant] has suffered a compensable repetitive trauma injury to his low back affecting his right leg.

A. I find a direct causal relationship between the repetitive acts and the employment.

B. This finding is based on the entire record.

(Single Comm. Ord. p. 15, Finding of Fact 14).

Additionally, he held, “Under § 42-1-172 and Murphy v. Owens Corning, 710 S.E.2d 454 (Ct.App 2011), medical evidence established a causal connection between [Appellant]’s repetitive activities in regular employment duties and the injury.” Id. at p.16, Conclusion of Law

3. Thus, the Single Commissioner expressly relied on Murphy to make his findings.

If needed, the specific repetitive acts can be inferred from a prior factual finding, to which we now turn.

2. work caused the repetitive trauma.

Here, the Single Commissioner cites the medical record:

Dr. Loudermilk answers, “yes” in a questionnaire dated 08/11/17 to the question, “Did the repetitive activities of [Appellant]’s job, including but not limited to going up and down stairs, getting in and out of a truck, opening and closing doors, bending and stooping and climbing ladders, most probably cause low back pain with the right leg radiculopathy?” He also answers “yes” to the question, “Did the work injuries from repeated work activities above cause an L4-5 disc

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PROOF OF SERVICE

I certify that I have served the **Appellant's Initial Brief and Designation Of Matter To Be Included In The Record On Appeal** on the following by depositing a copy of it in the United States Mail, postage prepaid, on **January 30, 2019**, addressed to:

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January 30, 2019

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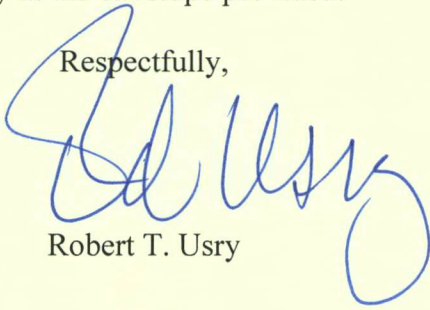
Dear Ms. Kitchings:

Enclosed for filing is an original and 1 copy of:

1. Appellant's Initial Brief
2. Appellants' Designation Of Matter To Be Included In The Record On Appeal
3. Proof of service of the same on the respondent[s].

Please do send me a filed copy in the envelope provided.

Respectfully,


Robert T. Usry

RTU:cmm
cc: Daniel Eller
Client



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