THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

APPELLATE PANEL
The Honorable Michael Campbell
The Honorable Avery B. Wilkerson, Jr.
The Honorable T. Scott Beck

Appellate Case No. 2018-000922

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

v.

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

FINAL BRIEF OF RESPONDENTS

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STATEMENT OF ISSUE ON APPEAL

Did the South Carolina Workers' Compensation Commission ("the Commission") properly find as a matter of fact that the Claimant failed to prove he suffered a compensable injury by accident – rhabdomyolysis – or an aggravation of a pre-existing condition of rhabdomyolysis?

STATEMENT OF THE CASE

This is an appeal in a workers' compensation case. This case arises from an alleged injury by accident on June 3, 2016.[1] The Claimant alleged he suffered a heat-related injury to his entire body resulting in the diagnosis of rhabdomyolysis. The claim was denied from inception.

This matter was heard before the Single Commissioner on August 4, 2017, pursuant to a Form 50 filed by the Claimant/Respondent on May 22, 2017, and a Form 51 filed by: (1) Defendant/Respondent Aqua Seal Manufacturing & Roofing ("Aqua Seal") and its carrier Builders Mutual Insurance Company ("BMIC") on June 21, 2017. The parties each submitted Form 58, Pre-Hearing Briefs. Pursuant to Claimant's Form 50 and Form 58, the issue before the Hearing Commissioner on August 4, 2017 was whether the Claimant suffered an injury by accident on June 3, 2016; the Claimant did not allege an aggravation of a pre-existing condition. The Hearing Commissioner ruled that the Claimant failed to prove he suffered a compensable injury resulting in his diagnosis of rhabdomyolysis.

The Claimant thereafter timely filed a Form 30, Request for Commission Review, and a hearing was held before the Workers' Compensation Commission's Appellate

[1] The Claimant has alleged only an injury by accident. No claim was made of illness, repetitive trauma or occupational disease.

Panel on February 20, 2018. The Form 30 provides that the grounds for seeking review by the panel is as follows: "Did claimant's heat related incident on June 3, 2016 aggravite (sic) and accelerate his unknown pre-existing condition "radabdomyolysis" (sic) and as such, is it a compensable injury by accident arising out of and in the course of his employment pursuant to SC Code Section 42-1-160?" After review of the record and oral argument, the Appellate Panel issued its decision on May 1, 2018, affirming the Single Commissioner's Decision and Order and ruling that the Claimant did not prove he suffered an aggravation of a pre-existing condition of rhabdomyolysis.

Claimant appealed the Appellate Panel's Order to the South Carolina Court of Appeals. The Claimant seeks a ruling that his condition – rhabdomyolysis – is a result of an injury by accident and therefore compensable.

STATEMENT OF THE FACTS

The Claimant has a long history of cramping and other heat-related problems that predate his workers' compensation claim. The medical records include multiple notes where the Claimant sought medical treatment for his prior heat-related episodes. The Claimant reported to Lexington Medical Center on July 7, 2015 (11 months prior to his alleged injury) reporting cramping of his chest, abdomen, back and extremities following work as a roofer. (Defendants APA p. 40) (R. p. 144). He remained out of work for an entire week following that incident. (Hr. Tr. 24:4-22) (R. p. 64:4-22). The Claimant also reported cramping to Providence Hospital on February 27, 2016 and to Wellspring Family Medicine on March 9, 2016. (Defendants' APA p. 72-77; 60-61) (R. pp. 176-181; 164-165). According to the Claimant, he saw a doctor in February 2016, prior to the summer heat setting in, in order to prevent another heat-related episode like

he had in July 2015. (Hr. Tr. 25:10-12) (R. p. 65:10-12). Additionally, the Claimant suffers from human immunodeficiency virus (HIV) and is treated for the condition primarily in the form of medications and regular office visits. (Defendants APA p. 39; 58-69) (R. pp. 143; 162-173). The Claimant was diagnosed with HIV in 2000. (Evans Dep. 28:18-22) (R. p. 229:18-22).

The Claimant testified that he had heat-related episodes in the days leading up to June 3, 2016. In fact, the Claimant left work early on both June 1 and June 2 after cramping episodes. (Hr. Tr. p. 11:25 – 12:1-6) (R. pp. 51:25 – 52:1-6). On June 2, 2016, the Claimant left work at 10:00 a.m. after cramping in his legs, thighs, hand and toes and feeling like he could not do any work. (Hr. Tr. p. 13:7-25) (R. p. 53:7-25). He treated himself with home remedies after each of the incidents with a cool shower, by drinking pickle juice and by rubbing his body down with green alcohol. (Hr. Tr. p. 14:14-16) (R. p. 54:14-16). By the morning of June 3, the Claimant had experienced so many issues with cramping in the prior days he packed ice around his limbs in braces in an effort to stop another heat-related episode. (Hr. Tr. p. 31:8-24) (R. p. 71:8-24). June 3, 2016 was the third day in a row where the Claimant went home early. The Claimant did not see a doctor until June 5, 2016.

The Claimant was diagnosed with rhabdomyolysis when he presented to Palmetto Health Baptist on June 5, 2016. The medical record states that the Claimant worked on June 5, 2016: "...he went to work today, but he was able to complete only a complete (sic) a couple of hours of work before he noticed the increasing abdominal cramping and pain again..." (Defendants' APA p. 80) (R. p. 184). The Claimant's

testimony, however, is that he *did not* do any work for Aqua Seal after June 3, 2016. (Hr. Tr. p. 16:10-12; 17:3-16) (R. pp. 56:10-12; 57:3-16).

In an effort to establish that the Claimant's diagnosis of rhabdomyolysis was related to a work injury on June 3, 2016, the Claimant submitted a letter from Dean Floyd, MD of Eau Claire Cooperative Health Center. Dr. Floyd began treating the Claimant on December 15, 2016, over 6 months after the alleged injury. Dr. Floyd is a general practitioner. Dr. Floyd opined in a letter dated April 12, 2017 to the Claimant's attorney as follows:

> After talking with him and reviewing his hospital record, no discrete moment can be determined when he suffered an injury. He 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 cannot be determined.

(Claimant's APA p. 35) (R. p. 139).

In his deposition, Dr. Floyd was unable to state which of the several factors contributed most significantly to the Claimant's diagnosis of rhabdomyolysis. (Floyd Dep. Tr. 14:9-13) (R. p. 92:9-13). He further testified that there is no way to determine the length of time that repeated occasions of heat exposure took to result in or contribute to the Claimant's diagnosis of rhabdomyolysis. (Floyd Dep. Tr. 14:3-6) (R. p. 92:3-6). Moreover, Dr. Floyd testified that he was not aware that the Claimant had heat-related injuries prior to May 2016 and was unaware of the Claimant's hospitalization in July 2015. (Floyd Dep. Tr. 17:10-21) (R. p. 95:10-21).

The Claimant offered no other medical opinion or testimony to show that his diagnosis of rhabdomyolysis was causally related to his work on June 3, 2016.

STANDARD OF REVIEW

The standard for judicial review of Workers' Compensation decisions is provided by the Administrative Procedures Act ("APA"). Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981). Under the APA, the appellate court can reverse or modify a decision of the Workers' Compensation Commission ("Commission") if the substantial rights of the appellant have been prejudiced because the decision is affected by an error of law or is clearly erroneous in view of reliable, probative and substantial evidence in the record. Transp. Ins. Co. v. South Carolina Second Injury Fund, 389 S.C. 422, 427, 699 S.E.2d 687, 689-90 (2010) (citing S.C. Code Ann. § 1-23-380(5)(d-e). The appellate court may not substitute its judgment for that of the Commission on the weight of the evidence on questions of fact, but may reverse where the decision is affected by an error of law. Stephen v. Avins Const. Co., 324 S.C. 334, 337, 478 S.E.2d 74, 76 (Ct. App. 1996). Substantial evidence is evidence that would allow reasonable minds to reach the same conclusion as the appellate panel. Lark v. Bi-Lo, Inc., 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981).

ARGUMENT

The Claimant failed to show by a preponderance of the evidence that he suffered a compensable injury by accident – rhabdomyolysis – or that he suffered an aggravation of a pre-existing condition of rhabdomyolysis. "'Injury' and 'personal injury' mean only injury by accident arising out of and in the course of employment and shall not include a disease in any form, except when it results naturally and unavoidably from the accident..." S.C. Code § 42-1-160 (A). The burden is on the Claimant to prove facts which render a claim compensable. Mims v. Nehi Bottling Co., 218 S.C. 513, 517, 63

S.E.2d 305, 306 (1951). Causation must be established by a preponderance of the evidence. South Carolina Second Injury Fund v. Liberty Mut. Ins. Co., 353 S.C. 117, 126, 576 S.E.2d 199, 204 (Ct. App. 2003).

When medical opinion is relied upon to establish a causal connection between an accident and disability, *the opinion must be that disability most probably resulted from the accident.* Grice v. Dickerson, Inc., 241 S.C. 225, 230, 127 S.E.2d 722, 725 (1962) (emphasis added). In order for medical testimony to have probative value in establishing a causal relationship between an injury and work conditions, it is not enough that a physician opine that an ailment may flow from an assigned cause, but the physician must go further and state that the result in dispute most probably came from the assigned cause. Brady v. Sacony of St. Matthews, 232 S.C. 84, 93, 101 S.E.2d 50, 55 (1957).

The term "accident" has been defined to mean an "unlooked for or untoward event that the injured person did not expect, design or intentionally cause." Capers v. Flautt, 305 S.C. 254, 256, 407 S.E.2d 660, 661 (Ct. App. 1991).

Where a Claimant alleges an aggravation of a pre-existing condition, he must show by a preponderance of the evidence, including medical evidence, that the subsequent injury aggravated the pre-existing condition. S.C. Code § 42-9-35(A).

a. The Claimant failed to prove an injury by accident.

The Claimant left work early on June 3, 2016, after experiencing cramping and nausea, just as he had the two days prior. On June 5, 2016, two days after his alleged injury, the Claimant was diagnosed with rhabdomyolysis. The Claimant reported to the treating practice he had been working that day. The evidence simply does not support

Claimant's assertion that he suffered an injury by accident on June 3. The Claimant's own doctor, Dean A. Floyd, MD, has stated only that "*repeated* heat exposure" was one of several causes that appeared to contribute to his illness, but makes no specific reference to any particular day. (Claimant's APA p. 35; Floyd Dep. Tr. p. 14:3-6) (R. p. 139; R. p. 92:3-6). Dr. Floyd's attribution to heat exposure playing some role in Claimant's condition falls far short of the standard that requires a worker prove an injury resulted from an accident arising out of and in the course of his employment. S.C. Code § 42-1-160 (A).

Moreover, Dr. Floyd's medical notes make reference to several of the Claimant's prior heat-related incidents occurring before June 3, 2016, including an occasion where the Claimant was attempting to play softball in May 2016. (Claimant's APA p. 36) (R. p. 140). Dr. Floyd was unaware of the Claimant's heat episode the prior summer, but that occasion, as well as others, may just as likely been the heat episode, or one of many episodes that contributed to the ultimate diagnosis. (Floyd Dep. Tr. p. 14:3-6; 17:10-21) (R. pp. 92:3-6; 95:10-21). The Claimant has shown only that he has a diagnosis of rhabdomyolysis and that he experienced some type of heat episode on June 3, just as he had numerous times before, and just as he did on June 5.

Dr. Floyd's letter and sworn testimony fail to establish the requisite causal connection between the Claimant's diagnosis of rhabdomyolysis and the work conditions on June 3, 2016. Dr. Floyd does not state that Claimant's condition of rhabdomyolysis flowed from Claimant's work conditions on June 3. However, even if such a causal connection could somehow be deduced, Dr. Floyd's opinion is not stated to be "most probable." See Brady, 232 S.C. at 84. Instead, Dr. Floyd only offers that

repeated heat exposure with an unknown timeframe "appears" to be one factor, among several, to have contributed to the Claimant's illness. A greater degree of medical certainty is required under the Act. S.C. Code § 42-9-36(A); Brady, 232 S.C. at 93, 101 S.E.2d at 55.

b. The Claimant's injury was not an unlooked for and untoward event.

To the extent that Claimant's heat episode on June 3, 2016 caused his diagnosis of rhabdomyolysis, the injury was not accidental. In Capers v. Flautt, this Court denied an award of compensation to a dishwasher who had contracted dermatitis as a result of exposure to detergent where the employee had previously contracted the same condition in an earlier dishwashing job. This Court held that "accident" means an "unlooked for or untoward event that the injured person did not expect, design or intentionally cause." Capers, 305 S.C. at 256, 407 S.E.2d at 661. The employee should have expected his injury where he had previously suffered from the same condition while doing the same work. Id. at 257, 407 S.E.2d at 663.

This case is markedly similar to Capers. Here, the Claimant had experienced debilitating heat-related episodes in the past. The Claimant was well aware by June 3, 2016, that he was having significant negative reactions to heat exposure. He missed a week of work and was hospitalized for heat-related injuries the previous summer. In February 2016 the Claimant preemptively sought medical treatment to stave off future heat-related episodes in anticipation of the higher summer temperatures. He had an episode in May 2016 where he was unable to play softball. On the two days preceding his alleged injury, the Claimant left work early because of cramping, which he attributed to the heat. By June 3, the Claimant was taking specific, discrete steps to prevent a

heat injury. The Claimant undoubtedly knew by June 3, that he would have the same problems while working in the heat. Accordingly, any injury or aggravation of an injury that allegedly occurred on June 3rd was not an "unlooked for or untoward event that the [Claimant] did not expect." Id. at 256, 407 S.E.2d at 661. Contrarily, the Claimant was in fact expecting his symptomology to reappear on June 3, 2016, and for that very reason packed ice around his limbs before beginning work.

c. The Claimant did not suffer an aggravation of a pre-existing condition.

The Claimant alleges in his appeal that "[r]habdomyolysis was a pre-existing condition unknown to the Claimant that become (sic) acute on June 3, 2016." The Claimant offered no evidence to support this conclusion. Dr. Floyd did not opine that the Claimant suffered an aggravation of a pre-existing dormant condition of rhabdomyolysis. None of the medical records support such a conclusion. All that Claimant has shown is that he had a series of heat episodes in early June 2016 (as he had the prior summer) and that he was eventually diagnosed with rhabdomyolysis. The medical records do, however, show that the Claimant had a history of heat-related episodes that resulted in him leaving work or seeking medical attention.

In Havird v. Columbia YMCA, this Court ruled an employee had not proven a compensable aggravation of a pre-existing condition where he knew his work activities would worsen his condition. 308. S.C. 397, 400, 418 S.E.2d 329, 330 (Ct. App. 1992). In Havird the employee sought an order of compensability for varicose veins as they had worsened as a result of the employee's long days on his feet. The employee had knowledge standing for extended periods without elevating his legs would worsen his condition. "The injury to his legs was real, but it was not injury by accident." Id.

As in Havird, the Claimant knew working in heat was causing him significant problems. He had been hospitalized just one year earlier as a result of working in the heat. He went home early on June 1 and June 2 after heat episodes. By June 3 the Claimant was packing ice in braces around his extremities in an effort to prevent a heat episode. To the extent that the work conditions on June 3, 2016 aggravated a pre-existing condition, the injury was not by accident.

CONCLUSION

The Commission properly found as a matter of fact and ruled as a matter of law that the Claimant failed to prove by a preponderance of the evidence that he suffered a compensable injury by accident – rhabdomyolysis – or an aggravation of a pre-existing condition of rhabdomyolysis. Because there is substantial evidence in the record to support the Commission's ruling, this Court should affirm the Decision and Order of the Commission in full.

Respectfully submitted,

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October 16, 2018
Columbia, South Carolina

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCRACR.

October 16, 2018

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