

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Appeal from the South Carolina Workers' Compensation Commission

Avery B. Wilkerson, Jr., Commissioner
Derrick L. Williams, Commissioner
G. Bryan Lyndon, Commissioner

W.C.C. File No. 1007031

Kenneth Lawter, Respondent,

v.

Kohler Company, Employer, Self-Insured, Appellant.

FINAL BRIEF OF APPELLANT

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SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

- I. Did the Commission err in finding Lawter's injuries were caused by the minor accident he suffered at work on January 25, 2010, when such a finding is contrary to the substantial weight of the evidence?
- II. Did the Commission err in finding Lawter had suffered psychological injury when there is no evidence to support such a finding?
- III. Did the Commission err in finding that Dr. Poole's opinion was flawed?

STATEMENT OF THE CASE

On January 25, 2010, Claimant/Respondent Kenneth Lawter suffered an injury to his back while performing his duties as a maintenance technician for Appellant Kohler Company. (R. p. 14.) Since the filing of his claim, Lawter has complained of injury to his lower spine and right leg. (R. p. 1.) Lawter added a claim for psychological injury almost a year after his initial filing. (R. p. 3.) Kohler admits Lawter suffered a medical-only incident on January 25, 2010, but denies Lawter's current condition is related to that incident. (R. p. 5.)

On March 4, 2011, Commissioner Andrea C. Roche heard testimony on this matter. Commissioner Roche found Lawter had: i) sustained a compensable injury; ii) not reached maximum medical improvement; iii) was in need of continuing medical and psychological treatment; and iv) was entitled to temporary total disability payment and medical expenses from January 25, 2010 until further order. (R. pp. 66-67.)

On May 27, 2011, Kohler appealed the Commissioner's Order to the full Commission. (Form 30, May 27, 2011). On October 24, 2011, an appellate panel of the Commission heard oral arguments on this matter. (R. pp. 73-82.) After oral arguments, the panel affirmed Commissioner Roche's Order. (R. pp. 83-89.) Kohler thereafter appealed. (R. p. 260.)

STATEMENT OF FACTS

Kenneth Lawter is 52-year-old man, with a long history of back problems, who suffered a minor fall during the course of his employment at Kohler Company. The fall consisted of Lawter tripping over a piece of angle iron and falling forward onto his hands and knees. (R. p. 17.) Kohler admitted the accident and sent Lawter to its authorized physician, Dr. Mack Poole. Shortly after his initial visit to Dr. Poole, Lawter added a claim of psychological overlay. (R. p. 3.) Dr. Poole treated Lawter for a period of three months and then authorized Lawter's return to work with no rating. (R. p. 94.) After being released to work, Lawter sought further medical treatment from Drs. Mitchell and Behr at Orthopaedic Associates. At Lawter's request, Dr. Mitchell took Lawter out of work until he could "get better control of his pain." (R. p. 135.) Lawter now seeks payment for his continued medical treatments and temporary total disability for this injury.

On March 4, 2011, Commissioner Roche took testimony on this matter. Lawter and his friend and co-worker, Richard Lewis, both testified as to Lawter's injuries, work history, and attendance. On cross-examination, however, Lewis admitted he was not Lawter's supervisor and had no personal knowledge of the extent of Lawter's previous injuries

or his attendance record. (R. pp. 51-52.) Commissioner Roche found that Lawter had suffered a compensable injury to his back and right lower extremity, as well as a psychological injury for which he was entitled to temporary total disability and causally related medicals for the period beginning May 25, 2010, and continuing until further order. (R. pp. 66-67.) The Appellate Panel held oral arguments on this matter and thereafter affirmed the single Commissioner's Decision and Order. (R. p. 88.) Kohler thereafter filed this appeal. (R. p. 260.)

SUMMARY OF THE ARGUMENTS

The single Commissioner erroneously found, and the panel agreed, that Kenneth Lawter suffered a compensable injury while at work. The Commission incorrectly held that Lawter's ongoing lower back pain, right lower extremity pain, depression, and anxiety were caused by the January 25, 2010 incident in which Lawter tripped over a piece of angle iron and fell forward onto his hands and knees. The Commission incorrectly held that Kohler was responsible for temporary total disability payments and all causally related medical and psychological expenses from January 25, 2010 to present and continuing thereafter until a further order by the Commission.

The Commission based its findings and order on the oral testimony of Lawter, his friend Richard Lewis, and the APA submissions of Drs. Mitchell, Behr, and Wells. (R. pp. 86-87.)

ARGUMENTS

I. The substantial weight of the evidence does not support the Commission's finding that Lawter's injuries are causally related to the minor accident he suffered at work.

A. Applicable Law

This Court "may reverse or modify an agency's decision if the findings, inferences, conclusions or decisions of that agency are clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." *Gadson v. Mikasa Corp.*, 368 S.C. 214, 220, 628 S.E.2d 262, 266 (Ct. App. 2006). "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 administrative agency reached in order to justify its action." *Frame v. Resort Servs., Inc.*, 357 S.C. 520, 527-28, 593 S.E.2d 491, 495 (Ct. App. 2004). In short, this Court is not a rubber stamp; the parties are entitled to meaningful review of the Commission's decision.

B. The substantial weight of the evidence does not support the finding that Lawter's injuries are related to the minor accident he suffered at work.

Kenneth Lawter asserts that his lower back and right lower extremity injury were caused by the minor accident he suffered at Kohler on January 25, 2010. The accident consisted of Lawter tripping over a piece of iron and falling forward onto his hands and knees. (R. p. 17.) Lawter claims the fall aggravated his existing back problems such that he should be awarded worker's compensation benefits. (R. p. 1.) While Lawter did suffer a back sprain due to the January 25, 2010 fall, Kohler's authorized physician opined, and the record supports the finding, that Lawter's ongoing pain stems from his long history of back problems at his L4-L5 vertebra. (R. pp. 90-91, 109.)

Lawter told Drs. Mitchell and Behr that he had "been doing well until the fall." (R. p. 121.) Lawter's medical records, however, provide evidence that Lawter had suffered with back pain since 2004 and had been diagnosed with L4-L5 problems long before the incident at Kohler.

Kenneth Lawter's history of back problems dates back to 2004. (R. p. 252.) In April 2004, Lawter sought treatment from Dr. Harley of Orthopaedic Associates for back pain he had suffered for over a year and a half. (*Id.*) An MRI showed a large left-sided L4-L5 disc herniation. (*Id.*) Dr. Harley

performed a left L4-L5 laminectomy with discectomy to relieve Lawter's pain. (R. p. 253.) At that time, Dr. Harley noted that Lawter's complaints were the result of swinging a golf club. (R. p. 252.) Prior to the surgery, Lawter had been treated with epidural injections, oral anti-inflammatories and exercises. (*Id.*) In June 2004, Lawter was admitted to the hospital for severe pain in his lower back with radiculopathy down his legs. (R. p. 242.) On December 14, 2004, Dr. Harley performed a fusion of Lawter's L4-L5 vertebra in the hopes of curing Lawter's chronic lower back pain. (R. pp. 215, 220-21.) Throughout 2004-2005, Lawter was treated by Dr. Harley for severe pain in his lower back and left leg. (R. pp. 201, 203-05.)

On April 18 2008, Lawter was referred by his family physician, Dr. Ware, to Dr. Black for pain in his right knee. (R. pp. 187, 192, 195-97.) At that time, Lawter was using both Lyrica and 50 mg Fentanyl patches for the chronic pain in his lumbar spine. (R. pp. 193, 198.) Lawter told Dr. Black that he had injured his right knee as he stepped on a step and he felt a "pop" in his knee that "sounded like a .22 gun going off." (R. p. 187.) After an MRI, Lawter was diagnosed with a ruptured cyst, a lateral meniscal tear and bone edema in his right knee. (R. p. 189.) He was given a brace to wear at work. (*Id.*) The record shows that a month after this accident, Lawter was still wearing a knee brace to work and reported only

a 30% reduction in pain in his right knee. (R. p. 184.)

Then in May 2009, just 8 months prior to his accident at Kohler, Lawter fell backwards at his home injuring both his wrist and back. (R. pp. 175-83.) At the time of this accident Lawter was still using the Fentanyl patch and Lyrica for pain. (R. p. 176.) The initial review of Lawter's condition after this fall showed "postoperative changes at L4-L5." (R. p. 183.) Due to the broken wrist Lawter suffered in this accident, he was out of work for almost 3 months. (R. p. 173; R. p. 19.)

At the time of the January 25, 2010 incident, Kohler's authorized physician, Dr. Mack Poole, diagnosed Lawter with a back sprain. (R. p. 93.) Dr. Poole took x-rays of Lawter's lumbar spine. (R. p. 91.) The x-rays revealed degenerative spurs at L3, L4, and L5. (*Id.*) After treating Lawter for three months, Dr. Poole released Lawter back to work with no limitations on April 23, 2010. (R. p. 94.) After being released by Dr. Poole, Lawter sought additional treatment from Dr. Mitchell at Orthopaedic Associates. (R. p. 103.) Dr. Mitchell ordered an MRI which confirmed Dr. Poole's findings of postoperative changes. The MRI report noted, "status post L4-L5 fusion with mild foraminal stenosis. ... Mild facet arthropathy and mild spondylosis throughout the lumbar spine." (R. p. 109.) Dr. Mitchell agreed with the MRI's findings and ordered physical therapy for

core strengthening and a back brace to support “weak spinal muscles and/or deformed spine.” (R. p. 112.) Dr. Mitchell’s orders for physical therapy focus on Lawter’s L4-L5 problems and do not prescribe any treatment specifically related to the January 25, 2010 accident. (R. pp. 112, 116, 117.)

As Lawter continued to complain of pain, Dr. Mitchell referred Lawter to Dr. Behr, a pain specialist at Orthopaedic Associates. (R. p. 117.) Dr. Behr treated Lawter with epidural steroid injections for lumbar radiculopathy, degenerative disc disease, and lower back pain. (R. p. 125.) Dr. Behr cleared Lawter to return to work on August 10, 2010, however a week later Lawter asked to be taken out of work. (R. p. 135.) On August 17, 2010, Dr. Behr noted that the electromyography (EMG) report demonstrated chronic L4-L5 radiculopathy on the right side. (R. pp. 130-33.) Dr. Behr went on to opine that Lawler suffered from chronic L4-L5 radiculopathy. (R. p. 137.)

Lawter’s medical records and his testimony to the Commission do not provide substantial evidence that Lawter’s current problems are related to the minor fall he suffered on January 25, 2010. Lawter testified to having a fusion in 2004, however he failed to report that, prior to the fusion, Dr. Harley had treated Lawter for a herniated disc by performing a

laminectomy with diskectomy on his lumbar spine. (R. p. 247.)

Lawter's friend and coworker, Richard Lewis, testified that Lawter did not have a problem with absences prior to January 2010. (R. p. 50.) However, Lawter testified that he was out of work for ten weeks in 2009 due to the injury to his wrist. (R. p. 19.) Although Lewis felt confident testifying to Lawter's attendance record, on cross-examination he admitted that he was not Lawter's supervisor and he did not have any personal knowledge of Lawter's attendance records. (R. pp. 51-52.) Lewis also testified that he was not aware that Lawter was taking any pain medication at the time of the January 25, 2010 accident. (R. p. 52.)

The Single Commissioner and Full Commission relied on statements made by Lawter and Lewis, and the records of Drs. Behr and Mitchell, when deciding to award benefits to Lawter. (R. pp. 86-87.) The substantial weight of the evidence shows that Lawter's problems are related to his previous back injury and not the minor fall he suffered on January 25, 2010. While Dr. Behr's assessment that Lawter's L4-L5 radiculopathy was likely a result of the fall based on the fact that Lawter was "doing well until the fall," this assessment should be read in conjunction with the findings of L4-L5 postoperative changes evident in 2009. (R. p. 162.) Other than Dr. Behr's statement that because Lawter was doing well prior to the

incident, therefore the incident was likely the cause of his problems, Dr. Behr's records do not focus on treatment related to the injury but instead, continue to focus on Lawter's L4-L5 problems.

Based on this information, when considering the record as a whole, the substantial weight of the evidence does not support the finding that Lawter's lumbar spine and lower right extremity problems are causally related to the January 25, 2010 accident. Therefore, this Court should reverse the finding that Lawter is entitled to temporary total disability and causally related medicals for the period from May 25, 2010.

II. The Commission erred in finding Lawter had suffered psychological damages when there is no evidence to support such a finding.

A. Applicable Law

In South Carolina, the claimant has the burden of proving the facts essential to his right to compensation by a preponderance of the evidence. *Shealy v. Algernon Blair Inc.*, 250 S.C. 106, 110, 156 S.E.2d 646, 648 (1967). An award which is without support in evidence should be reversed on appeal whether or not it is legally sufficient as to form and content. *Id.* Claims for psychological injury are compensable only if the claimant proves by a preponderance of evidence they are caused by physical injury or by extraordinary and unusual conditions of employment. *Pack v. State Dept. of*

Transp., 381 S.C. 526, 673 S.E.2d 461 (Ct. App. 2009). Factual findings of the panel must be founded on the evidence and may not be based on surmise, conjecture or speculation. *Houston v. Deloach & Deloach*, 378 S.C. 543, 552, 663 S.E.2d 85, 89 (Ct. App. 2008).

B. Lawter failed to provide any evidence of compensable psychological damages.

The record as a whole does not support the finding that Lawter is entitled to psychological treatment or damages. The Commissioners relied on the testimony of Lawter and records of Dr. Wells in finding that Lawter was entitled to psychological care.

Since the time of the January 25, 2010 accident, Lawter has only had three visits for psychological care. The first visit was a mandatory visit to Dr. Harbin for the express reason of having Lawter approved for a permanent spine stimulator. At that time, a phone call was also made to Dr. Wells to obtain his consent for the spine stimulator. The other two visits were those made by Lawter to Dr. Wells in late 2010. (R. pp. 150, 254-57.) Dr. Wells's treatment notes show that Lawter has suffered from depression and lethargy for years prior to the January 2010 accident and do not provide any evidence that the incident at Kohler exacerbated his pre-existing mental conditions. Furthermore, Dr. Wells expressly notes that Lawter's current psychological problems are "secondary to lack of

income and conflict between workman's comp." (R. p. 256.)

Lawter testified to the Commissioner that due to the accident he spends most of his days "laying around watching TV." (R. p. 31.) But Dr. Wells's records show that Lawter has been experiencing this type of lethargy since 2008. In July 2008, Lawter told Dr. Wells that when he is at home he "doesn't have much ability or drive to do things." (R. p. 255.) In October 2008, Lawter reported that he comes home and is "pretty inactive." (*Id.*) In February 2009, Lawter told Dr. Wells that "he finds himself staying in bed all the time when he is not working." (*Id.*) In addition to feelings of lethargy and depression, throughout 2008-2009, Lawter reported that he had "intense pain." (*Id.*)

Lawter failed to seek any psychological help from Dr. Wells until September 2010, at which time Dr. Wells noted that he had not seen Lawter in over a year. (R. p. 256.) At that time, Dr. Wells noted that Lawter had some anxiety "secondary to lack of income and conflict between workman's comp." (*Id.*) Then, on November 13, 2010, Dr. Wells's notes show that Lawter seemed relieved, was in a better mood and, "All in all he seems a bit better." (R. p. 257.) These are the only two visits Lawter has made to Dr. Wells since the accident. Lawter's two visits to Dr. Wells in 2010 do not support the finding that he requires additional psychological

care, as even Dr. Wells noted that Lawter seemed better. (*Id.*)

Based on the lack of evidence, the Commission's finding of fact that the January 25, 2010 accident aggravated Lawter's depression and anxiety is unsupported by the record and should be reversed. Lawter's lethargy and anxiety is not attributable to any injury he suffered in the course of his employment. Lawter's claim of psychological injury does not meet the standard for compensation under worker's compensation jurisprudence and should therefore be denied.

III. The Commission's finding of fact stating Dr. Poole's opinion was flawed is not sufficiently detailed to enable the court to determine whether the facts are supported by the evidence and should therefore be overturned.

A. Applicable Law

An appellate panel's findings must be sufficiently detailed to enable the reviewing court to determine whether the findings are supported by the evidence. *Turner v. S.C. Dept. of Health & Envtl. Control*, 377 S.C. 540, 544, 661 S.E.2d 118, 120 (Ct. App. 2008). A court's finding of facts must be made upon the essential factual issues and must be sufficiently definite and detailed to enable the appellate court to properly determine whether the findings of facts are supported by the evidence and whether the law has been properly applied to those findings. *Hill v. Jones*, 255 S.C. 219, 224, 178 S.E.2d 142, 144 (1970).

B. The Commission's findings do not provide sufficient detail to conclude that Kohler's authorized physician's opinion was flawed.

The panel upheld the Commissioner's finding that the opinion of Dr. Poole, Kohler's authorized physician, was flawed because the opinion was based on incomplete medical testing. (R. p. 87.) Neither the single Commissioner nor the panel gave any specific reasoning for this finding and therefore, this finding should be reversed.

Kohler cannot decipher what treatment the Commission believes was incomplete. Dr. Poole treated Lawter from Feb. 1, 2010 through April 23, 2010. (R. pp. 90-94.) Dr. Poole examined Lawter, noting that Lawter dressed and undressed and was able remove and replace his boots without any trouble. (R. p. 90.) Dr. Poole took x-rays of Lawter's lumbar spine which showed the fusion of his L4-L5 and some osteoarthritic spurs. (*Id.*) After almost three months of treatment, Dr. Poole released Lawter back to work with no limitations and no rating. (R. p. 94.)

After being released back to work, Lawter sought additional medical treatment. The first piece of medical evidence received by Lawter from his next treating physician, Dr. Mitchell, supports Dr. Poole's findings. While Dr. Mitchell did order an MRI, which Lawter testified Dr. Poole refused to do, he only did so to rule out disc herniation. (R. p. 105.) The results of the

MRI corroborated Dr. Poole's finding. The MRI impression states, "Status post L4-L5 fusion with mild forminal stenosis. No evidence of recurrent disc herniation. ... There is mild facet arthropathy and mild spondylosis throughout the lumbar spine." (R. p. 109.) While it may have made Lawter feel better that a physician did as he requested and ordered an MRI, the results of the MRI show nothing more than Dr. Poole's x-ray showed. Dr. Poole's assessment of the situation was correct and the results of the MRI taken a month after Dr. Poole released Lawter support Dr. Poole's findings.

Based on this information and without any further guidance from the Commission as to how it specifically believes Dr. Poole's treatment or medical testing of Lawter was incomplete, it is impossible to determine whether this finding of fact is supported by the evidence and, as such, the finding must be reversed.

CONCLUSION

For the reasons set forth above, Kohler Company respectfully asks this Court to: a) reverse the Order awarding temporary total disability benefits and causally related medical benefits to Kenneth Lawter; b) reverse the Order establishing Kenneth Lawter is entitled to psychological

treatment; and c) reverse the finding that Dr. Poole's medical opinion was flawed.

Respectfully submitted,

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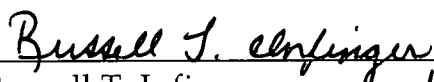
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CERTIFICATE OF COUNSEL

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

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PROOF OF SERVICE

I certify that I have served the foregoing Final Brief of Appellant on Kenneth Lawter by depositing a copy of same in the United States Mail, postage prepaid, addressed to his attorney of record, Toney J. Lister, Lister Flynn & Kelly, PA, P.O. Box 2929, Spartanburg, South Carolina 29304-2929.

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