

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

WCC File No. 0823063

Kenneth Lawter, Respondent,

vs.

Kohler Company, Employer/Self-Insured, Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

- I. Is there substantial evidence in the record from which the Commission could have reasonably determined that Claimant's radiculopathy was caused by his work-related accident on January 25, 2010?
- II. Is there substantial evidence in the record from which the Commission could have reasonably determined that the work-related accident on January 25, 2010 aggravated Claimant's pre-existing depression and anxiety?
- III. Is there substantial evidence in the record from which the Commission could have reasonably determined that Dr. Poole's opinion was flawed?

STATEMENT OF THE CASE

The Claimant was injured in an admitted accident on January 25, 2010. Despite his complaints of ongoing pain in his back and leg, the company doctor refused Claimant's request for an MRI and released him to work. Claimant was unable to perform his job duties and sought treatment on his own.

Claimant filed an Amended Form 50 on September 27, 2010, alleging injury to his lower spine and right leg. On January 4, 2011, Claimant again amended his Form 50 to add a claim for aggravation of his preexisting psychological condition. Kohler admitted the January 25, 2010 incident, but denies that Claimant's current condition is causally related to it. (R. p. 5).

Commissioner Andrea Roche conducted a hearing on March 4, 2011, following which she ruled that Claimant sustained a compensable work-related injury to his back and right lower extremity, as well as aggravation of his preexisting psychological condition. She further ruled that Claimant had not reached maximum medical improvement and ordered Kohler to pay temporary total benefits and all causally related medical treatment. (R. p. 56).

Kohler appealed to the Full Commission. An appellate panel heard oral arguments on October 24, 2011 and thereafter affirmed Commissioner Roche's order in full. (R. p. 83). This appeal follows.

STATEMENT OF FACTS

The Claimant is a 52-year-old man who has worked at Kohler Company for over thirty years. (R. p. 13, l. 22-p. 14, l. 2). For most of those years, including at the time of this accident, Claimant worked as a maintenance technician. (R. p. 14, ll. 11-20).

On January 25, 2010, there was a power outage at the plant and Claimant was called in to work in the middle of the night. In the early pre-dawn, Claimant and the maintenance foreman, Richard Lewis, were working together to move a generator when Claimant tripped over a piece of angle iron and fell onto the concrete floor. (R. pp. 15-17). Mr. Lewis witnessed the accident and also testified that Claimant told him at the time that his back was hurt. (R. pp. 15-47).

Six years prior to this incident, Claimant had undergone a back fusion surgery, which was not work-related. (R. pp. 17, 217). He had also broken his wrist in 2009. (R. p. 19). Due to these prior injuries, Claimant was on a Fentanyl patch for pain. (R. pp. 19-20). However, at the time of the incident, he was working with no restrictions and was able to fully perform the functions of his job without special accommodation of any kind. (R. pp. 15, 20, 33). Mr. Lewis confirmed that Claimant was an excellent worker and able to fully perform his job without restrictions prior to the January 25 accident. (R. pp. 43-44). The only doctor Claimant was seeing at the time of his fall was his family doctor, Dr. Ware. (R. p. 33, ll. 15-20).

Following the January 25, 2010 accident, Claimant was seen by the company nurse on more than one occasion. (R. pp. 20-21). When he continued to complain of back pain after a week, he was sent to the company doctor, Dr. Poole. (R. p. 21).

Claimant noted that his prior back pain had been on his left side, but after the accident, he was experiencing pain on his right side, which had never hurt before. (R. p. 21, ll. 1-10). Claimant saw Dr. Poole five times over the next three months. (R. p. 21, ll. 21-24). Dr. Poole x-rayed Claimant's lower back and prescribed a Fentanyl patch. (R. p. 22). He refused Claimant's request for an MRI. (R. p. 26).

Dr. Poole did not take Claimant out of work, but Claimant was unable to work due to pain in his lower back on the right side and right leg, so he took 12 or 13 vacation days. (R. pp. 22-23). Prior to this, he had no attendance problems. (R. pp. 23, 49-50). When Claimant's back pain continued, he asked the company nurse if he could see a back doctor, and was told he could go but the company would not pay for it. (R. p. 24). This was confirmed by Claimant's supervisors. (R. pp. 24-25). Mr. Lewis also testified that he could tell that Claimant was not ready to be back at work. (R. p. 48, ll. 3-7).

Eventually, Claimant did go to Dr. Mitchell, the orthopedist who had treated his wrist the year before. Dr. Mitchell sent Claimant for an MRI. On May 25, 2010, Dr. Mitchell diagnosed right lower radiculopathy and took Claimant out of work. (R. pp. 25-27; 110-112). In July of 2010, Dr. Mitchell referred Claimant to Dr. Behr in his office for pain management. After trying some epidural injections and physical therapy, Claimant was ultimately implanted with a spinal stimulator in December of 2010. (R. pp. 26-28;).

Claimant testified that following his January 25, 2010 accident until the time Dr. Mitchell took him out of work on May 25, 2010, he was unable to perform the functions of his job without help from co-workers. (R. pp. 28-29). Mr. Lewis

confirmed that claimant was able to perform his job well prior to the January 25 accident, and was unable to perform his job after the accident. (R. p. 49). Claimant again attempted to return to work in August of 2010, following his epidural injections, but was unable to tolerate it. (R. pp. 135-138).

Since the accident and continuing, Claimant has lower back pain, with increased pain with walking, sitting, and standing, requiring frequent changes of position. (R. pp. 29-30). He is unable to climb a ladder and is limited in his ability to bend over. (R. p. 30). His ongoing diagnosis is chronic right L4-5 radiculopathy. (Supp. R. p. ____, ll. 8-11). Dr. Behr concluded unequivocally that Claimant's radiculopathy and inability to work was a result of his January 25, 2010 fall. (Supp. R. p. ____, ll. 19-25). Furthermore, although the company denies that Claimant's disability is work-related, Claimant was denied short term disability benefits on June 16, 2010 due to the company's determination that his injury was work related. (R. p. 142).

Prior to Claimant's fall, he had been treated for depression, but had not seen his psychiatrist, Dr. Wells, for approximately a year and was doing well on maintenance with his family doctor. (R. pp. 31-32; 256). After the January 25 accident, Claimant returned to Dr. Wells complaining of difficulty sleeping and increased anxiety due to being out of work, lack of income, and conflict with workers' compensation. (R. p. 256).

ARGUMENTS

I. **Substantial evidence in the record supports the Commission's finding that Claimant's radiculopathy was caused by his work-related accident on January 25, 2010.**

Appellant first argues that the substantial weight of the evidence does not support the Commission's finding that Claimant's injuries are related to his admitted work-related accident. This argument should be rejected out of hand for the complete distortion of this Court's standard of review that it is.

The South Carolina Administrative Procedures Act (APA) establishes the standard for judicial review of decisions of the Workers' Compensation Commission. See Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981). Under the APA, the reviewing court "may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact." S.C. Code Ann. § 1-23-380(5). As the Supreme Court explained in Lark, "the language of the statute clearly indicates that its application is only in those cases where a manifest or gross error of law has been committed by the administrative agency." Lark, 276 S.C. at 136, 276 S.E.2d at 307.

The findings of an administrative agency are presumed correct and this 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. Anderson v. Baptist Med. Ctr., 343 S.C. 487, 541 S.E.2d 526 (2001). 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. Etheredge v. Monsanto Co., 349 S.C. 451, 562 S.E.2d 679 (Ct. App. 2002).

In contrast to this well-established standard of review, Appellant argues that “*the substantial weight of the evidence does not support*” the Commission’s findings. (App. Brief pp. 6-11). This argument states that the Commission weighed the evidence incorrectly, *not* that there was a lack of substantial evidence in the record to support the Commission’s conclusion. Appellant spends several pages of its brief detailing the facts of Claimant’s pre-existing injuries and arguing that the preponderance of the evidence leads to the conclusion that Claimant’s current problems are not related to his admitted accident. However, Appellant does not and cannot deny that there is abundant evidence in the record to support the Commission’s contrary conclusion, including the company’s own determination that Claimant’s disability was work-related, as stated in the letter denying his application for short-term disability benefits. (R. p. 142).

The overwhelming, uncontroverted evidence in the record is that Claimant was performing his job well and without any restrictions of any kind prior to the January 25, 2010 accident, and that he has experienced continuous pain and has been unable to work, despite having made every effort to do so, since the accident. This is supported by testimony from the Claimant and a co-worker, as well as medical records from Dr. Behr and Dr. Mitchell. Even if this evidence were less compelling than it is, under the substantial evidence standard of review, this Court may not substitute its judgment for that of the Appellate Panel as to the weight of

evidence. S.C. Code Ann. § 1-23-380(5). Whether there is any causal connection between employment and an injury is a question of fact for the Commission. Sharpe v. Case Produce, Inc., 336 S.C. 154, 159, 519 S.E.2d 102, 105 (1999). Furthermore, the final determination of witness credibility and the weight to be accorded evidence is reserved to the Appellate Panel. Hargrove v. Titan Textile Co., 360 S.C. 276, 289, 599 S.E.2d 604, 611 (Ct. App. 2004).

The existence of Claimant's prior conditions does not make his current problems any less compensable. A work-related accident which aggravates or accelerates a pre-existing condition is compensable. Brown v. R.L. Jordan Oil Co., 291 S.C. 272, 353 S.E.2d 280 (1987); Sturkie v. Ballenger Corp., 268 S.C. 536, 235 S.E.2d 120 (1977); Mullinax v. Winn-Dixie Stores, Inc., 318 S.C. 431, 458 S.E.2d 76 (Ct. App. 1995). A condition is compensable unless it is due solely to the natural progression of a pre-existing condition. Mullinax, 318 S.C. at 437, 458 S.E.2d at 80. It is no defense that the accident, standing alone, would not have caused the claimant's condition, because the employer takes the employee as it finds him or her. Id.

The right of a claimant to compensation for aggravation of a pre-existing condition arises where there is a dormant condition which has produced no disability but which becomes disabling by reason of the aggravating injury. Hines v. Pacific Mills, 214 S.C. 125, 51 S.E.2d 383 (1949). A determination of whether a claimant's condition was accelerated or aggravated by an accidental injury is a factual matter for the Appellate Panel. Brown, 291 S.C. at 275, 353 S.E.2d at 282. Where there

is a conflict in the evidence from the same or different witnesses, the Panel's findings of fact may not be set aside. Id.

Appellant does not even try to argue that there is no reasonable factual basis for the Commission's findings. In fact, Appellant details the evidence relied upon by the Commission. (App. Brief p. 10).

Even if everything Appellant argues were correct, the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence. Sharpe, 336 S.C. at 160, 519 S.E.2d at 105. Where there are conflicts in the evidence over a factual issue, the findings of the Appellate Panel are conclusive. Etheredge, 349 S.C. at 455, 562 S.E.2d at 681. This Court is prohibited from overturning findings of fact of the Appellate Panel, unless there is no reasonable probability the facts could be as related by the witness upon whose testimony the finding was based. Id. Thus, Appellant's argument that the Commission improperly weighed the evidence should be rejected and the Appellate Panel's order affirmed.

II. Substantial evidence in the record supports the Commission's finding that the work-related accident on January 25, 2010 aggravated Claimant's pre-existing depression and anxiety.

Appellant next argues that the Commission erred in finding that Claimant had suffered psychological damages because, according to Appellant, there is "no evidence to support such a finding." (App. Br. p. 11). On the contrary, the record shows that Claimant had been treated for depression in the past, but had not seen his psychiatrist, Dr. Wells, for approximately a year prior to his admitted accident

and was doing well on maintenance with his family doctor. (R. pp. 31-32; 256). After the January 25, 2010 accident, Claimant returned to Dr. Wells complaining of difficulty sleeping and increased anxiety due to being out of work, lack of income, and conflict with workers' compensation. (R. p. 256).

As noted above, a work-related accident which aggravates or accelerates a pre-existing condition is compensable. Brown v. R.L. Jordan Oil Co., 291 S.C. 272, 353 S.E.2d 280 (1987). This includes a psychological condition aggravated by a work-related injury. Anderson, 343 S.C. at 494, 541 S.E.2d at 529. Whether there is any causal connection between employment and an injury is a question of fact for the Commission. Sharpe, 336 S.C. at 159, 519 S.E.2d at 105. Here, as in argument I above, the standard of review requires this Court to affirm because there is substantial evidence in the record, in the form of Claimant's testimony and the medical records of Dr. Wells, to support the Commission's finding that the January 25, 2010 accident aggravated Claimant's preexisting depression and anxiety.

III. Substantial evidence in the record supports the Commission's finding that Dr. Poole's opinion was flawed.

Finally, Appellant argues that the Commission's finding that Dr. Poole's opinion was flawed was not sufficiently detailed to enable this Court to determine whether it is supported by substantial evidence.

The Commission found that the company doctor's opinion was flawed because it was based on incomplete medical testing. Appellant argues that the Commission failed to give specific reasoning for this finding. However, such reasoning is apparent from the evidence in the record. The company doctor

refused Claimant's request for an MRI and released him back to work, despite his continued pain and inability to complete the tasks of his job. Claimant sought a second opinion from an orthopedist, Dr. Mitchell, who sent Claimant for an MRI, diagnosed him with right lower radiculopathy, and took Claimant out of work. (R. pp. 25-26; 110-112). Under these facts, the Commission reasonably chose to give greater weight to the opinion of Dr. Mitchell than to the opinion of Dr. Poole.

Even if Appellant were correct in its assertion that the Commission's explanation of its findings was insufficient, the remedy would be remand to the Commission for more detailed findings, not reversal of the award of benefits. More importantly, as discussed in detail above, there was abundant evidence in the record from which the Commission could have determined that Claimant's injuries were compensable. Even if the Commission had not found Dr. Poole's opinion flawed, it would not change the result in this case, because it is the Commission's job to resolve inconsistent evidence. The possibility of drawing two inconsistent conclusions from the evidence does not prevent the Commission's finding from being supported by substantial evidence. Sharpe, 336 S.C. at 160, 519 S.E.2d at 105. The fact that the Commission could, arguably, have agreed with Dr. Poole's opinion does not undermine its conclusions in this case, which were based upon substantial testimony and medical records.

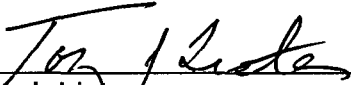
CONCLUSION

The Commission's findings are supported by Claimant's testimony, the testimony of the maintenance foreman Mr. Lewis, the deposition testimony of Dr. Behr, and the medical records of Dr. Mitchell, Dr. Behr, and Dr. Wells. Respondent

respectfully requests that the Commission's findings of fact and conclusions of law be affirmed in full.

Respectfully submitted,

August 30, 2012



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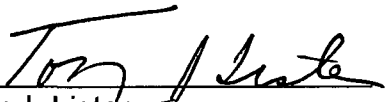
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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with Rule 211(b), SCACR.

August 30, 2012


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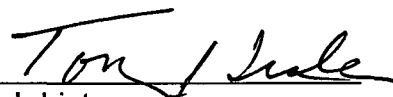
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date he served the Final Brief of Respondent on the Appellant by placing copies in the United States Mail addressed to:

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