THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Kristi Lea Harrington, Circuit Court Judge

Appellate Case No. 2012-211873
Case No. 2011-CP-08-00396

Robert Russell,.....Employee/Claimant, Respondent,

v.

Department of Health and Environmental Control, Employer, and
The State Accident Fund, Carrier,.....Appellants.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

This case involves a workers' compensation claim wherein Respondent (hereinafter "Mr. Russell') was injured in the course and scope of his job with the Department of Health and Environmental Control on June 11, 2004. Mr. Russell filed a Form 50 with the South Carolina Workers' Compensation Commission seeking payment of causally-related medical treatment, past temporary total disability benefits, mileage reimbursement and permanent and total disability benefits. A hearing was held and, thereafter, the Hearing Commissioner issued a Decision and Order on August 26, 2008, that held Mr. Russell was totally and permanently disabled pursuant to the Ellison decision and that Appellant (hereinafter "the Fund") must pay all past and future causally-related medical care and mileage reimbursement.

The Fund filed an appeal with the Full Commission on September 8, 2008. The Appellate Panel of the Full Commission ruled on March 27, 2009, to remand the case to the Hearing Commissioner and instructed that a new order be issued resolving the conflict between Finding of Fact No. 18 and Finding of Fact No. 24. On April 13, 2010, the Hearing Commissioner issued a new Decision and Order that again found Mr. Russell totally and permanently disabled; however, Finding of Fact No. 18 from the prior Decision and Order dated August 26, 2008, was deleted thereby resolving the conflict as

ordered by the Appellate Panel. On April 22, 2010, The Fund again appealed the Hearing Commissioner's Decision and Order. The Appellate Panel again ruled on January 19, 2011, to uphold the Hearing Commissioner's Decision and Order that Mr. Russell was totally and permanently disabled pursuant to the Ellison decision and that The Fund must pay all past and future causally-related medical care and mileage reimbursement.

Thereafter, The Fund filed its third appeal of Mr. Russell's award rendered by the Appellate Panel's Decision and Order and submitted a Notice of Intent to Appeal and Petition for Judicial Review with the Berkeley County Court of Common Pleas on February 3, 2011. The Circuit Court ruled on April 16, 2012, and fully affirmed the Appellate Panel's Decision and Order. The Fund then filed its appeal with the South Carolina Court of Appeals on April 27, 2012.

STATEMENT OF FACTS

Mr. Russell began working for the Department of Health and Environmental Control (hereinafter "DHEC") in 1990. (R. p. 376, line 21—p. 377, line 4). (Transcript p. 12, line 21 to p. 13, line 4). He was an environmental health manager and his job duties included drafting paperwork and citations and heavy lifting involved in taking soil borings to determine if a septic tank could be placed on certain parcels of land. (R. p. 377, lines 7-22). (Transcript p. 13, lines 7-22). On June 11, 2004, Mr. Russell was involved in a car wreck while working and injured his back and thereafter filed a workers' compensation claim. (R. p. 379, line 16—p. 381, line 7; R. p. 48; R. pp. 60-61). (Transcript p. 15, line 16 to p. 17, line 7; Claimant's APA Ex. 1, p. 1; Claimant's APA Ex. 4, p. 13; Claimant's APA Ex. 5, p. 14). Mr. Russell also had pre-existing depression, bi-polar disorder and anxiety. (R. p. 396, lines 1-12; R. pp. 105-149; R. p. 213).

(Transcript p. 32, lines 1-12; Claimant's APA Ex. 10, p. 58-102; Claimant's APA Ex. 16, p. 166). Mr. Russell returned to work with DHEC after his injury but missed numerous days as a result of his back pain, depression, bi-polar disorder and medical appointments. (R. p. 384, line 8—p. 389, line 20; R. pp. 218-227; R. pp. 214-215). (Transcript p. 20, line 8 to p. 25, line 20; Claimant's APA Ex. 18, p. 171-180; Claimant's APA Ex. 17, p. 167-168). Eventually, Mr. Russell was forced to retire from DHEC on July 16, 2005, as a result of his back pain, depression and bi-polar disorder. (R. p. 391, lines 7-23; R. p. 216; R. pp. 286-289). (Transcript p. 27, lines 7-23; Claimant's APA Ex. 17, p. 169; Employer/Carrier's APA Ex. 5, p. 266-269).

STANDARD OF REVIEW

The Administrative Procedures Act establishes the standard of judicial review of decisions by the Appellate Panel of the Workers' Compensation Commission. Lark v. Bi-Lo, 276 S.C. 130, 276 S.E.2d 304 (1981). A reviewing court may only reverse or modify a decision of an administrative agency if "such decision is affected by errors of law, characterized by abuse of discretion, or clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." Suburban Propane Gas Co. v. Deschamps, 298 S. C. 230, 379 S.E.2d 301 (S.C. App. 1989). The Appellate Panel is the ultimate fact-finder in workers' compensation cases. Jordan v. Kelly Co., 381 S.C. 483, 674 S.E.2d 166 (2009). As a general rule, this court must affirm the findings of fact made by the Appellate Panel if they are supported by substantial evidence. Pierre v. Seaside Farms, Inc., 386 S.C. 534, 689 S.E.2d 615 (2010). "Substantial evidence is that evidence which, in considering the record as a whole, would allow reasonable minds to reach the conclusion the [Appellate Panel] reached." Hill v. Eagle Motor Lines, 373 S.C.

422, 645 S.E.2d 424 (2007). "The possibility of drawing two inconsistent conclusions from the evidence does not prevent the [Appellate Panel's] finding from being supported by substantial evidence." Id. Substantial evidence is more than a mere scintilla, but less than a preponderance. Bilton v. Best Western Royal Motor Lodge, 282 S.C. 634, 321 S.E.2d 63 (S.C. App. 1984).

ARGUMENTS

I. THE COURT DID NOT ERR IN FINDING THAT MR. RUSSELL WAS PERMANENTLY AND TOTALLY DISABLED PURSUANT TO ELLISON.

Based on the medical, documentary and testimonial evidence, the Hearing Commissioner, the Appellate Panel and the Circuit Court properly ruled as a Finding of Fact and Conclusion of Law that Mr. Russell's work-related back injury combined with his pre-existing psychological condition to make him permanently and totally disabled pursuant to Ellison v. Frigidaire Home Products, 371 S.C. 159, 638 S.E.2d 664 (2006). The Workers' Compensation Act is intended for the benefit of workers and must be liberally construed. Ham v. Mullins Lumber Co., 193 S.C. 66, 7 S.E.2d 712 (1940).

The Fund argues that since Mr. Russell injured a single body part, his compensation is limited to an award for the single member under §42-9-30 pursuant to Singleton v. Young Lumber Company, 298 S.C. 454, 114 S.E.2d 837 (1960). The Fund's position is a misinterpretation of Ellison. The Supreme Court in Ellison explained the distinction between the application of Singleton and §42-9-400, the statutory basis of Ellison. The Court held that Singleton "involved a sole injury to a scheduled member – no other condition was claimed to have contributed to disability. The argument was that the injury to the scheduled member, a leg, was itself so disabling that the claimant should

be found totally disabled." Ellison p. 665. In the case sub judice, the Hearing Commissioner and the Appellate Panel clearly ruled that Mr. Russell not only had a work-related injury to his back, but that he had a significant pre-existing psychological history that combined with his work-injury to make him permanently and totally disabled. (R. p. 12). (Decision and Order, Finding of Fact No. 23).

Furthermore, the Supreme Court in Ellison stated that Singleton "stands simply for the proposition that impairment involving only a scheduled member is compensated under the scheduled injury statute and not the general disability statute." Ellison p. 666. Since Mr. Russell clearly presented his back injury and his pre-existing psychological condition at the Hearing, the Hearing Commissioner and the Appellate Panel correctly ruled that Ellison, and not Singleton, applied.

Secondly, the Fund claims that since Mr. Russell's pre-existing psychological condition was not aggravated by his compensable injury to the back, the Hearing Commissioner and the Appellate Panel erred in applying Ellison. Again, the Fund is misinterpreting the holding of Ellison. The statutory foundation of the decision reached in Ellison, which is on-point with Mr. Russell's case, is found in §42-9-400 which provides in pertinent part:

> (a) If an employee who has **a permanent physical impairment from any cause or origin** incurs a subsequent disability from injury by accident arising out of and in the course of his employment, resulting in compensation and medical payments liability or **either,** *for disability that is substantially greater, by reason of the* ***combined effects*** *of the preexisting impairment and subsequent injury* ***or*** by reason of the

aggravation of the preexisting impairment, than that which would have resulted from the subsequent injury alone, the employer or his insurance carrier shall in the first instance pay all awards of compensation and medical benefits provided by this Title; but such employer or his insurance carrier shall be reimbursed from the Second Injury Fund...

...

(d) As used in this section, **"permanent physical impairment"** means any permanent condition, *whether congenital or due to injury or disease,* of such seriousness as to constitute a hindrance or obstacle to obtaining employment or to obtaining reemployment if the employee should become unemployed.

(emphasis added). Ellison p. 665.

The Ellison Court held that "[t]here is no requirement that the pre-existing condition aggravated the injury, or that the injury aggravated the pre-existing condition, so long as there is a greater disability simply for the "combined effects" of the injury and the pre-existing condition." Ellison p. 666.

The key component of Ellison is the combined effects created by the compensable injury and the pre-existing condition. Based on the testimony and medical evidence, the Hearing Commissioner and the Appellate Panel set forth how Mr. Russell's work-injury to his back and his pre-existing psychological condition combine to render him permanently and totally disabled. First, the Hearing Commissioner and the Appellate Panel ruled that Mr. Russell injured his back at work and the treating physician opined he had sustained a disc bulge. (R. pp. 9-10). (Decision and Order, Finding of Fact Nos. 1

and 9 respectively). It was also ruled that the treating physician had assigned Mr. Russell a 5% impairment rating to his back as a result of his work-injury and had placed permanent physical restrictions on him of no lifting of more than 35 pounds occasionally and 20 pounds on a frequent basis and no prolonged periods of climbing, bending and stooping. (R. p. 11). (Decision and Order, Finding of Fact Nos. 16 and 17 respectively).

Secondly, the Hearing Commissioner and the Appellate Panel ruled that six days after his work-injury, Mr. Russell was hospitalized for psychiatric care. (R. p. 10). (Decision and Order, Finding of Fact No. 7). It was ruled that Mr. Russell "has a significant psychological history as documented in the evidence." (R. p. 10). (Decision and Order, Finding of Fact No. 8). Furthermore, the Hearing Commissioner and the Appellate Panel ruled that Mr. Russell was permanently and totally disabled based on the application of the Ellison decision because the "evidence is not just persuasive, but overwhelming." (R. p. 12). (Decision and Order, Finding of Fact No. 19). Lastly, the Hearing Commissioner and the Appellate Panel unequivocally ruled that the decision to find Mr. Russell permanently and totally disabled pursuant to Ellison was "based upon the substantial evidence" of "the combined effects" of Mr. Russell's work-injury to his back and his pre-existing psychological condition. (R. p. 12). (Decision and Order, Finding of Fact No. 23).

As set forth above, the Hearing Commissioner and the Appellate Panel correctly applied the holding in Ellison to the facts, testimony and medical and documentary evidence presented to determine that Mr. Russell's work-injury to his back combined with his pre-existing psychological condition to render him permanently and totally

disabled. Substantial evidence is more than a mere scintilla, but less than a preponderance. Bilton v. Best Western Royal Motor Lodge, 321 S.E.2d 63 (1984).

It is important to note that despite his extensive psychological history, Mr. Russell continued to work for DHEC before his compensable work-related injury occurred. After his back injury occurred at work on June 11, 2004, the Hearing Commissioner and the Appellate Panel found that Mr. Russell was hospitalized for psychiatric care "six days after the accident[.]" (R. p. 10). (Decision and Order, Finding of Fact No. 7 – emphasis in original). Lastly, the Hearing Commissioner and the Appellate Panel ruled that "Claimant's psychological condition has resulted in Claimant's perceived worsening of his physical condition." (R. pp. 10-11). (Decision and Order, Finding of Fact No. 11). Mr. Russell testified that his back and left hip still hurt and that his depression and bi-polar are worse. (R. p. 392, lines 2-6). (Transcript p. 28, lines 2-6). Mr. Russell also testified that after his work-injury, his pain was so bad he could kill himself, he would cry a lot and was worried, anxious and got depressed. (R. p. 396, lines 6-12). (Transcript p.32, lines 6-12).

Mr. Russell testified that he had bipolar and depression since the early 1980s. (R. p. 402, lines 21-25). (Transcript p. 38, lines 21-25). Mr. Russell testified that after his injury on-the-job, he was out of work for two days (R. p. 382, lines 13-17) (Transcript p. 18, lines 13-17) and then he returned to work (R. p. 383, line 9—p. 384, line 6) (Transcript p. 19, line 9 to p. 20, line 6). Mr. Russell's work-injury occurred on June 11, 2004 and he testified that he retired from DHEC on July 16, 2005. (R. p. 391, lines 17-23). (Transcript p. 27, lines 17-23). Mr. Russell also testified that he was unable to perform his job with DHEC or any work as a result of his work-injury and his

psychological condition. (R. p. 411, lines 3-7). (Transcript p. 47, lines 3-7). The Hearing Commissioner found that:

> Claimant's limb shaking and tremors observed by the undersigned at the hearing are also documented in the evidence by various providers. A video of the hearing (obviously, hearings are not recorded) would have shown that Claimant's demeanor/psychological condition would be next to impossible to fake or feign. (R. p. 10). (Finding of Fact No. 8).

This finding was accepted by the Appellate Panel and is part of their Decision and Order. It is logical for the [Appellate Panel of the] Full Commission, which did not have the benefit of observing the witness, to give weight to the hearing commissioner's opinion. Green v. Raybestos-Manhattan, 250 S.C. 58, 156 S.E.2d 318 (1967). The Hearing Commissioner and the Appellate Panel clearly stated that Mr. Russell was permanently and totally disabled in light of his testimony and medical evidence based on the application of the Ellison decision.

The Fund also claims that because Finding of Fact No. 11 discounted the opinion of Mr. Russell's psychologist that Mr. Russell's back injury worsened his depression and bi-polar disorder, it was error to find him permanently and totally disabled. This argument is without merit as Ellison clearly holds that "[t]here is no requirement that the pre-existing condition aggravated the injury, or that the injury aggravated the pre-existing condition, so long as there is a greater disability simply from the 'combined effects' of the injury and the pre-existing condition." Ellison p. 666. In addition, the Hearing Commissioner and the Appellate Panel explained that even though Mr. Russell's psychologist's opinion regarding aggravation of Mr. Russell's psychological conditions

was not accepted, the finding that Mr. Russell was permanently and totally disabled was because "[t]he remainder of the evidence is not just persuasive, but overwhelming (Claimant's APA #10, page 100; evidence as a whole)." (R. p. 12). (Finding of Fact No. 19).

Thus after reviewing the testimony and medical evidence in this case and viewing the Appellate Panel's Decision and Order in its entirety, it was correctly ruled that Mr. Russell's work-injury to his back had combined with his pre-existing psychological condition to render him permanently and totally disabled. (R. p. 12). (Decision and Order, Finding of Fact Nos. 19 and 23 respectively and Conclusion of Law No. 4). Substantial evidence is more than a mere scintilla, but less than a preponderance. Bilton v. Best Western Royal Motor Lodge, 321 S.E.2d 63 (1984). Any reasonable doubts as to construction of the Act should be resolved in favor of coverage. Mauldin v. Dyna-Color/Jack Rabbit, 308 S.C. 18, 461 S.E.2d 639 (1992).

II. THE COURT DID NOT ERR IN AWARDING PAYMENT FOR ALL PAST AND FUTURE CAUSALLY-RELATED MEDICAL BENEFITS AND MILEAGE REIMBURSEMENT.

As set forth above, once the Hearing Commissioner and the Appellate Panel correctly ruled that Mr. Russell was permanently and totally disabled based upon the combined effects of his work-injury to his back and his pre-existing psychological condition, the Fund must provide payment of medical and mileage reimbursement. § 42-9-400 mandates, in pertinent part, that "the employer or his insurance carrier shall...pay all awards of compensation and medical benefits provided by the Title" to an employee who has a "disability that is substantially greater, by reason of the combined effects of the preexisting impairment and subsequent injury." (Emphasis provided).

As past and future lifetime medical payments and travel costs for medical treatment and care are provided for by § 42-15-60 and mileage reimbursement for past and future lifetime medical treatment is provided for by Regulation 67-1601 of the South Carolina Workers' Compensation Commission, there is no error in the order of the Appellate Panel and the Circuit Court that the Fund provide these awards and benefits to Mr. Russell.

CONCLUSION

Accordingly, based on the foregoing, Mr. Russell respectfully requests that the Court affirm the Decision and Order of the Appellate Panel and Circuit Court in full and rule as a Finding of Fact and Conclusion of Law that Mr. Russell is permanently and totally disabled as a result of the combined effects of his work-related back injury and his pre-existing psychological condition; is entitled to 500 weeks of disability benefits; is entitled to payment of all past and future causally-related medical treatment; and is entitled to mileage reimbursement for all past and future causally-related medical treatment.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

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

November 19, 2012

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PROOF OF SERVICE

I certify that I have served the Respondent's Final Brief on Appellant by depositing a copy of the same in the United States Mail, postage prepaid, on November 5, 2012, addressed to their attorneys of record, Margaret M. Urbanic, 126 Seven Farms Drive, Suite 200, Charleston, SC 29492 and Ellen Goodwin, P.O. Box 102100, Columbia, SC 29221-5000.

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