

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Kristi Lea Harrington, Circuit Court Judge

Appellant 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.

BRIEF OF APPELLANT

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SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

I. THE COURT ERRED IN HOLDING THAT THE APPELLANTS ARE RESPONSIBLE FOR MEDICAL CARE RELATED TO RESPONDENT'S NON WORK RELATED PSYCHOLOGICAL CONDITION.

II. THE COURT ERRED IN FINDING THAT THERE IS SUBSTANTIAL EVIDENCE TO SUPPORT THE RULING THAT THE RESPONDENT IS PERMANENTLY AND TOTALLY DISABLED.

III. THE COURT ERRED IN FINDING THAT THE PHYSICAL INJURY WAS AGGRAVATED BY THE PSYCHOLOGICAL CONDITION.

STATEMENT OF THE CASE

This case arises out of worker's compensation accident that occurred on June 11, 2004 while the Respondent was employed with the South Carolina Department of Health and Environmental Control. Respondent was involved in a minor motor vehicle. A Form 50 was filed on March 25, 2008 alleging injury to his back, neck, left arm, headaches, depression and bipolar disorder. (R. p. 38). A Form 51 was filed on April 23, 2008 admitting that an accident occurred but denying the extent of injury and body parts effected. (R. p. 41). A hearing was held on July 1, 2008. As a result of that hearing, the Single Commissioner issued an order dated August 26, 2008 finding that the Respondent was permanently and totally disabled and that the Respondent's pre existing psychological condition alone would have rendered the Respondent disabled. (R. p. 29). This Order was appealed and as a result of that appeal the Full Commission remanded the case back to hearing commissioner to resolve the

conflict as to whether the Respondent was permanently and totally disabled as a result of the injuries sustained in the on the job accident or due to his pre existing psychological condition. In an order dated April 13, 2010, the Single Commissioner found that the Respondent was permanently and totally disabled based on the on Ellison v. Frigidaire Home Products, 371 S.C. 159, 638 S.E.2d 664 (2006) decision. (R. p. 15). The Single Commissioner found that the combined effects of the Respondent's pre existing psychological condition and the back injury made him permanently and totally disabled. This order was appealed and on January 19, 2011, the Full Commission issued an order affirming the order of the Single Commissioner. Appellant then appealed to circuit court. On April 16, 2010, the circuit court issued a ruling affirmed the order of the Full Commission. This appeal then followed.

STATEMENT OF FACTS

Respondent was injured on June 11, 2004 when he was involved in a motor vehicle accident in the course and scope of his employment. EMS was called to the scene and noted that the damage to vehicle was very minor. (R. p. 49). Respondent followed up with his family doctor at Berkeley Family Practice and also sought out chiropractic treatment on his own from Palmetto Spine Center. Respondent's APA Submissions, include some of his psychiatric records. Following the motor vehicle accident of June 11, 2004, Respondent treated with Dr. Stovall of Lowcountry Orthopaedics and Sports Medicine. Respondent was diagnosed with mild degenerative disc disease at L5-S1 with small central disc bulging. (R, p. 175). Respondent underwent two epidural

injections in his back. (R. p. 172). Respondent also underwent a course of physical therapy. No surgery was done and Respondent was released with a 5% impairment rating on January 13, 2005. Dr. Stovall specifically noted that “[h]e should be able to maintain a reasonable level of activity and continue working.” (R. p. 178).

Part of Respondent’s extensive psychiatric records were made part of the record. In 2001, Respondent was hospitalized for depression and suicidal ideation. The notes also reflect a history of depression, issues with sexual orientation and problems with personal relationships. (R. pp. 248-253). On June 6, 2005, Respondent underwent a psychiatric evaluation for a disability exam and complained of being unable to focus, being indecisive, forgetful and making bad decisions. (R. p. 259). The motor vehicle accident is only mentioned in the past medical history. (R. p. 261).

STANDARD OF REVIEW

In a workers’ compensation appeal, no court can substitute its judgment from that of the Commission. The court may reverse or modify the decision of the Commission only if the claimant’s substantial rights have been prejudiced because the decision is affected by an error of law or is clearly erroneous in view of the reliable, probative and substantial evidence. Substantial evidence is not a mere scintilla of evidence nor evidence viewed from one side, but such evidence, when the whole record is considered, as would allow reasonable minds to reach the conclusion reached by the Full Commission. Jane Doe v. Department of Disabilities and Special Needs, 364 S.C. 411, 613 SE 2nd 785, (Ct. App. 2005).

ARGUMENTS

I. THE COURT ERRED IN HOLDING THAT THE APPELLANTS ARE RESPONSIBLE FOR MEDICAL CARE RELATED TO RESPONDENT'S NON WORK RELATED PSYCHOLOGICAL CONDITION.

The order of the circuit court finds that the Appellants are responsible for the Respondent's medical care related to his pre existing psychological condition. Respondent was found to be permanently and totally disabled based on a combination of his worker's compensation injury and his pre existing psychological condition based on Ellison v. Frigidaire Home Products, 371 S.C. 159, 638 S.E.2d 664 (2006). Ellison stands for the proposition that a claimant may recover for a greater disability than that incurred from a single injury to a particular body part if the combination with any pre-existing condition hinders reemployment. There is no requirement that the pre - existing condition aggravate the injury or that the injury aggravate the pre existing condition so as long as there is great disability simply from the combined effects fo the injury and pre existing condition. Ellison is based on S.C. Code § 42-9-400 which is the statute that allows recovery under the Second Injury Fund. Respondent's psychological condition was found not to be aggravated by the back injury.

Section 42-9-400 is entitled "[m]anner in which employer or insurance carrier shall be reimbursed from Second Injury Fund when disability results from pre existing impairment and subsequent injury". The intent of this statute deals with the carriers recovery from the Second Injury Fund not with creating

additional ways for claimants to recover benefits. The statute provides a mechanism of medical expenses paid for the compensable injury and disability benefits. Section 42-9-400(a) states that “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 ...” The statute is clear that the benefits are worker’s compensation paid out under Title 42, there is no provision for payment for non work related conditions.

In Finding of Fact number 11, finds that the Respondent’s physical injury aggravated the psychological condition of the Respondent, and that Respondent’s psychological condition had resulted in the Respondent’s perceived worsening of his physical condition. (R. p. 4). Furthermore, Finding of Fact number 13 (which has not been appealed) finds that the Single Commissioner did not give any weight to the opinion of Dr. Burke regarding the aggravation of Respondent’s pre-existing psychological condition. (R. p. 4). Dr. Burke is the Respondent’s psychologist. In Finding of Fact number 19 (which has not been appealed), the Single Commissioner again stated that she would find the Respondent was permanently and totally disabled even if she completely discounted the opinion of Dr. Burke. (R. p. 5). Furthermore, in Finding of Fact number 11, the Single Commissioner specifically finds there is no aggravation of this pre-existing psychological condition, and at the time of the accident the Respondent’s psychological condition was already spiraling downward from sexual issues and harassment at work and death of a close male friend. (R. p.

4).

To hold the Appellants responsible for medical treatment for Respondent's psychological condition is inherently unfair as Respondent's psychological condition is extreme and not aggravated by the job injury. The law of the case is that the psychological condition was not aggravated so logically no future psychological treatment would be considered related to the work injury.

Finding of Fact # 7 finds that:

Six days after the accident, Respondent was hospitalized for psychiatric care including suicidal ideation and "extreme depression". This was Claimant's 2nd hospitalization, the first having occurred about 20 years ago before. There is no mention in any of these records (i.e., the second hospitalization) about Claimant's accident/injury/pain. Rather, these records focus on issues of sexual orientation, sexual harassment at work, and the death of a close male friend. Claimant's mother and sister also suffered from depression. Claimant admitted at the hearing that he missed days from work for depression immediately prior to the work accident.¹
R. p. 3)

There is no reason for the Appellants to be responsible for medical treatment that would have occurred regardless of the on the job car accident. This finding that was unappealed and is now the law of the case. Furthermore, Finding of Fact # 8 details Respondent's extensive psychological history:

Claimant has a significant psychological history as documented in the evidence. When Claimant was a

¹Neither side appeal this Finding of Fact, the medical record referred to in this finding is actually dated June 18, 2001, three years before the Respondent's work comp accident occurred. (R. p. 248).

child, he watched his father shoot his mother in the eye, and he was molested by an older brother. When he was in his 20's, he jumped off a bridge while intoxicated. 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. 3).

Nothing in Ellison or §42-9-400 requires or even suggests that a worker's compensation carrier pick up lifetime benefits for a non work related condition. Section 42-9-400 deals with reimbursement from the Second Injury Fund for the medical benefits and compensation related to the compensable injury, this statute does not create a windfall the Claimant that a non work related condition will suddenly be covered. Section 42-9-400 requires that the disability results from a pre existing condition and that as a result of an aggravation or combination of the pre existing condition and work related injury.

The Order repeatedly finds that the psychological condition was not aggravated by the work accident. Furthermore, it is extensively documented throughout the medical records that the Respondent's psychological condition long pre-existed this work accident. Moreover, Respondent admits that he missed days from work due to his depression, immediately prior to his work accident. (R. p. 409). In Finding of Fact number 8, the Order chronicles how the Respondent had witnessed his father shooting his mother as a child in the eye and was molested by an older brother. (R. p. 3). Additionally, while he was in his twenties, he jumped off a bridge while intoxicated. Again, in Finding of Fact

number 11, the Order notes that there is no aggravation of a psychological condition as it was already spiraling downward at the time of this accident. Regardless of this accident, there is such a long history of psychological problems with the Respondent that clearly he is going to need additional treatment for his psychological condition for the rest of his life. (R. p. 4). As there is no finding of aggravation of his psychological condition, the Appellants should not be responsible for such.

II. THE COURT ERRED IN FINDING THAT THERE IS SUBSTANTIAL EVIDENCE TO SUPPORT THE RULING THAT THE RESPONDENT IS PERMANENTLY AND TOTALLY DISABLED.

The circuit court erred in finding that the Respondent was permanently totally disabled. The Respondent suffered a single member injury to his back and was ultimately assigned a five (5%) percent impairment rating by Dr. Stovall back in 2004. Therefore, only a single body part was injured and any recovery should be limited by Singleton v. Young Lumber Company 236 S.C. 454, 114 S.E. 2d 837 (1960). The Order specifically noted that the Respondent's lower extremity complaints were not supported by the medical evidence and that the Claimant's own IME records are devoid of any mention of leg pain or problem. (R. p.4). Therefore, as the Commission, as affirmed by the circuit court, only found that the Claimant suffered an injury to one scheduled member, this case should be limited under Section 42-9-30. Respondent has a four year college degree and in the past has worked sedentary type positions. Dr. Stovall, the authorized treating physician, assigned a twenty pound frequent lifting restriction.

Respondent was not a surgical candidate and underwent physical therapy in a work hardening program. Dr. Stovall noted that the Respondent should be able to maintain a reasonable level of activity through working. (R. pp. 48-185).

Respondent has not returned to Dr. Stovall since 2004. Respondent had additional treatment through a chiropractor that was not authorized and it was never requested to be authorized by the Respondent. No authorized doctor has ever recommended surgery or additional treatment.

Respondent underwent a psychiatric exam when he applied for disability this report details the Respondent's extensive psychiatric problems that prevent him for working and does not find that the back injury prevents him from working. If Respondent is disabled from his psychiatric condition alone, it appears that he would become disabled regardless of this accident. (R. pp. 259-266).

At the hearing, Respondent admitted that his prior position at DSS was a sedentary type job and that he was able to sit without any problems, and he had been sitting at the hearing for at least an hour when that question was asked. (R. p. 406.) Respondent admitted he is able to drive a car and use a computer. (R. pp. 405-406.) Clearly, Respondent is not permanently and totally disabled.

III. THE COURT ERRED IN FINDING THAT THE PHYSICAL INJURY WAS AGGRAVATED BY THE PSYCHOLOGICAL CONDITION.

As previously pointed out in this brief, the law of the case is that the psychological condition was not aggravated by the work accident. The order specifically discounts the affidavits of Dr. Burke who opined that the

psychological condition was aggravated. If the psychological condition was not aggravated how could the order then state that the physical injury aggravated the psychological condition which in turn aggravated the physical condition. (Finding of Fact #11). (R. p. 4). Clearly, the order is inconsistent.

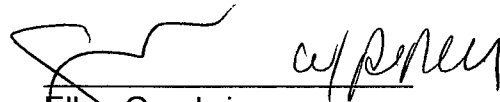
CONCLUSION

For all of the foregoing reasons the order of the circuit court should be reversed and remanded.

Respectfully submitted,



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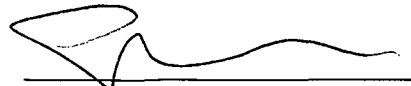
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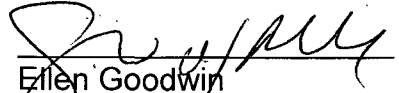
I certify that I have served the Final Brief of Appellant and Reply Brief of Appellant on Robert Russell by depositing a copy of it in the United States Mail, postage prepaid, on November 8, 2012, addressed to his attorney of record, J. David Murrell, 1517 Sam Rittenberg Boulevard, Charleston, SC 29407.

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