

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA WORKERS'
COMPENSATION COMMISSION

Appellate Case No. 2013-000414

Tina Mayers,..... Appellant,

v.

OSI Group, LLC/Amick Farms, and
Federal Insurance Co.,..... Respondents.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

1. DID THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION ERR IN FINDING THAT THE CLAIMANT FAILED TO SATISFY THE COMPENSABILITY REQUIREMENTS OF S.C. CODE § 42-1-172?

STATEMENT OF THE CASE

The Claimant filed a Form 50, on September 7, 2011, seeking compensability for repetitive trauma injuries to her wrists in the form of carpal tunnel syndrome, alleging a date of injury of November 1, 2009. Defendants denied the claim on the grounds: (1) Claimant failed to establish a repetitive trauma injury pursuant to §42-1-172 for lack of medical causation; (2) Claimant failed to prove a direct causal relationship between the work and carpal tunnel syndrome; and (3) the claim was barred by the statute of limitations.

Single Commissioner Gene McCaskill heard the claim on April 10, 2012. He issued an Order on July 12, 2012, denying the claim as being barred by the statute of limitations. Both parties appealed. Claimant argued the Single Commissioner erred in denying the claim based on the statute of limitations. Defendants argued the Single Commissioner erred in failing to also deny the claim on the alternative ground that Claimant did not satisfy the compensability requirements of §42-1-172. Defendants also appealed the Single Commissioner's decision to admit Claimant's APA p. 17 over Defendants' objection. A hearing before the Full Commission Appellate Panel was held on November 14, 2012.

The Appellate Panel affirmed in part and reversed in part the Single Commissioner Order. The Appellate Panel affirm the denial on the alternative ground that Claimant failed to satisfy the compensability requirements of Section 42-1-172, and reversed the finding that the claim was barred by the statute of limitations. This appeal than followed.

ARGUMENT

- I. THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION ERRED IN FINDING THAT THE CLAIMANT FAILED TO SATISFY THE COMPENSABILITY REQUIREMENTS OF S.C. CODE §42-1-172, SINCE IT'S FINDING IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD.

The South Carolina Administrative Procedures Act (APA) establishes the standard for judicial review of decisions of the Workers' Compensation Commission. S.C. Code Ann. § 1-23-380 (Supp. 2011); Gibson v. Spartanburg School Dist. No. 3, 338 S.C. 510, 516, 526 S.E. 2d 725, 728 (S.C. App. 2000). In workers' compensation cases, the Full Commission is the ultimate fact finder. Thompson v. South Carolina Steel Erectors, 632 S.E. 2d 874, 369 S.C. 606 (S.C. App. 2006). As provided by the APA, a reviewing court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on question of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are affected by other error of law; [or] are clearly erroneous

in view of the reliable, probative and substantial evidence on the whole record. S.C. Code § 1-23-380 (Supp. 2011); See also Hall v. United Rentals, Inc., 371 S.C. 69, 77, 636 S.E. 2d 876, 881 (S.C. App. 2006).

The appellate 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. Grant v. Grant Textiles, 372 S.C. 196, 200, 641 S.E. 2d 869, 871, (2007). The findings of an administrative agency are presumed correct and will be set aside only if unsupported by substantial evidence. Corbin v. Kohler Co., 351 S.C. 613, 616, 571 S.E. 2d 92, 95, (S.C. App. 2002).

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. Id.

The Appellate Panel Decision and Order of the South Carolina Workers' Compensation Commission, dated February 5, 2013, affirmed in part and reversed in part the Single Commissioner's Findings of Fact and Ruling of Law. The Appellate Panel affirm the denial by the Single Commissioner of Claimant's claim on the alternative ground that Claimant failed to satisfy the compensability requirements of Section 42-1-172 and reverse the finding that the claim was barred by the statute of limitations.

The Appellate Panel Decision and Order made the following Findings of Fact:

1. Claimant alleged repetitive trauma to both hands and wrists with a date of accident of November 1, 2009.

2. On November 18, 2009, Claimant presented to the emergency room. Two reports completed by different people indicate Claimant reported a prior history of carpal tunnel syndrome. One record indicates prior problems with carpal tunnel syndrome “for years.” We find Claimant was diagnosed with carpal tunnel syndrome prior to November 1, 2009.

3. Claimant adamantly denied making statements about prior carpal tunnel syndrome and repetitive arm injuries as documented in her medical records from November 18, 2009, and May 2, 1997, but offered no explanation for why the statements were in the records.

4. The medical evidence shows Claimant was treated for an overuse injury to the right wrist on May 2, 1997. Her wrist was placed in a “cock-up splint”. Additionally, she reported at the time that her job “requires her to do ...gripping activities which she does eight hours a day Monday through Friday”.

5. We reverse Finding of Fact Number 7 of the Single Commissioner’s Order barring the claim by the statute of limitations. Thus, we also remove Findings of Fact 5 and 6 as irrelevant.

6. The Single Commissioner committed no error in accepting the late causation statement from Dr. Gray.

7. On May 12, 2011, Claimant reported to Dr. Charles Gray that she had no prior problems with her wrist and hands.

8. Dr. Gray's statement of causation is erroneously premised in that it is based upon Claimant's statement to Dr. Gray that she had no prior carpal tunnel syndrome problems. This incorrect history provided by Claimant to Dr. Gray is fatal and is too significant to overlook. Thus, we find Dr. Gray's opinion does not establish a direct causal relationship between the condition under which the work was performed and the injury.

9. Claimant failed to satisfy her burden to prove a repetitive trauma injury pursuant to the Act. Claimant is not entitled to treatment or compensation under the Act.

The Appellate Panel also concluded as a matter of law that:

1. A repetitive trauma injury is "an injury which is gradual in onset and caused by the cumulative effects of repetitive traumatic events." S.C. Code Ann. § 42-1-172.
2. "A repetitive trauma injury is considered to arise out of employment only if it is established by medical evidence that there is a direct causal relationship between the condition under which the work is performed and the injury." S.C. Code Ann. § 42-1-172.
3. "[A] claimant has the burden of proving the facts essential to his right to compensation, and an award may not be based

upon conjecture or speculation.” Shelby v. Algernon Blair, Inc.,
250 S.C. 106, 110, 156 S.E.2d 646, 648 (1967).

4. We reverse the Single Commissioner’s finding the claim is barred by the statute of limitations.
5. The Single Commissioner committed no error in accepting the late causation statement from Dr. Gray. However, the causation opinion is faulty because it is based on an erroneous history from Claimant that she had no prior problems with her wrist and hands.
6. Claimant failed to meet her burden in this claim to establish a repetitive trauma injury pursuant to Section 42-1-172. Therefore, the claim is denied.

The Appellate Panel held the following:

Upon review of the evidence presented and the applicable statutory sections and case law, the Order of the Single Commissioner is affirmed in part and reversed in part. We affirm the denial on the alternative ground that Claimant failed to satisfy the compensability requirements of Section 42-1-172. We reverse the finding the claim is barred by the statute of limitations.

IT IS HEREBY ORDERED that this claim is denied in its entirety.

Claimant begin working at Amick Farms on July 9, 2009. (R. p. 31, lines 3-5)
Her job title was Tray Packer on the third shift, which was from 11:30 p.m. to 8:30

a.m. each day on a five day work week. (R. p. 31, lines 8-9-p. 35, lines 3-4). Claimant testified that she had no prior problems with her hands or wrists prior to her employment with Amick Farms. (R. p. 32, lines 8-17).

She was first diagnose with Carpal Tunnel Syndrome on or about November 18 , 2009 after treatment for loss of feeling and pain in her hands at Self Regional Healthcare in Greenwood, South Carolina. (R. p. 87). She advised her employer of her diagnose and was out of work for two days. (R. p. 36, lines 16-24-p. 37, lines 4-6). Claimant continued to work from November 2009 through 2010. (R. p. 37, lines 7-23).

In January of 2011, Claimant pain became more pervasive and upon recommendation of her treating physician, Dr. Sawyers, she was referred to two specialists, Dr. Wayne B. Sida, M.D., Piedmont Health Group, L.L.C., and Dr. Charles D. Gray, MD, of Lakelands Orthopaedic & Sports Medicine Clinic, P.A.. (R. pp. 71,76-77), (R. p. 38, lines 5-13). She was seen on April 12, 2011 by Dr. Sida and was diagnosed with carpal tunnel syndrome bilaterally (Grade III-moderate to severe). (R. p. 76). She was seen on May 12, 2011 by Dr. Gray and was diagnosed with bilateral carpal tunnel syndrome and was restricted from working for two weeks. (R. p. 77-78). She was seen on May 26, 2011 by Dr. Gray and allowed to return to work on May 29, 2011, but light duty only. (R. p. 78). After a follow-up appointment on June 27, 2011, she was again authorized to return to work, with the restriction of light duty only, pending surgery. (R. p. 79-80).

Claimant received another Patient Work/School Status Report on July 25, 2011, which placed restrictions of no lifting above 10 pounds, and to avoid constant repetitive use of hands, with the duration being until the next appointment, pending surgery. (R. p. 81). Claimant reported to her treating physician, Dr. Wates, on August 19, 2011 complaining that her hands were swelling which caused her to call into work Wednesday night. (R. p. 75). Dr. Wates ordered Mobic 15 mg, one tablet daily, #30 with five refills and advised Claimant to notify him of any worsening symptoms or difficulties. (R. p. 75). Claimant employment with Amick Farms was terminated on August 24, 2011. (R. p. 41, line 1).

The Appellate Panel found that Claimant was diagnosed with carpal tunnel syndrome prior to November 1, 2009, but based that finding upon the medical records of November 18, 2009, when Claimant presented to the emergency room at Self Regional Healthcare. (R. p. 8, para. 2). That finding was based upon two small notations made in the medical reports of November 18, 2009 that indicated Claimant had a prior history of carpal tunnel syndrome. (R. p. 86, 89). Claimant denied making such statements and no testimony was put forth by the employer to dispute Claimant's denial. (R. p. 43, lines 19-25-p. 44, lines 1-25). Nor did Employer present any medical reports, written statements, or testimony from any health care provider that the Claimant was diagnosed or treated for bilateral carpal tunnel syndrome prior to November 18, 2009.

The finding by the Appellate Panel that Claimant was treated for a overuse injury on May 2, 1997 at a previous employment is so remote in time that it's

inclusion in the Order's findings of facts begs the question as to its relevance. (R. p. 8, para. 4). It was an injury to claimant's right arm, shoulder and wrist, with her chief complaint being her right arm. (R. p. 99). This injury occurred at a previous employment at which she had worked only one week when she presented to the emergency room at Self Memorial Hospital . (R. p. 99). She did not return for any further treatment after that initial visit. There is no mention in the medical records related to the May 2, 1997 visit of any diagnose of carpal tunnel syndrome, bilateral or otherwise. A reference to prior medical history in the reports of November 18, 2009 from Self Memorial Hospital can be explain simply by the staff review of Ms. Myers' prior medical history that was on file at the Self Memorial Hospital of which there is no prior diagnose of bilateral carpal tunnel syndrome.

On January 28, 2008, claimant presented to Newberry Hospital, complaining of pain and swelling in her left arm which started 1 ½ weeks prior. (R. p. 100). Claimant was diagnose with Bursitis left shoulder. (R. p. 101). She reported at the time that she had lifted a patient a week or so ago and now has pain and swelling to her left arm. (R. p. 102). The medical record shows that the Claimant presented with no "chest pain, difficulty breathing, sensory loss, motor loss or repetitive hand use at work." (R. p. 100).

There is no factual basis to support the conclusion that the Claimant was diagnosed with carpal tunnel syndrome prior to November 1, 2009. The first diagnosis of bilateral carpal tunnel syndrome was made on November 1, 2009 and not prior to that date.

The Appellant Panel find that Claimant failed to satisfy medical causation because Dr. Gray's statement of causation was erroneously premised in that it was based upon Claimant's statement to him that she had no prior carpal tunnel syndrome problems. (R. p. 10, para 8). The Appellant Panel stated that this "incorrect history provided by Claimant to Dr. Gray" was "fatal" and "too significant to overlook". (R. p. 11, para 8). The Appellant Panel concluded that Claimant failed to meet her burden.... to establish a repetitive trauma injury pursuant to section 42-1-172, and therefore was not entitled to treatment or compensation under the Act. (R. p. 11, para. 6).

Prior to Claimant's employment with Amick Farms the Claimant was a Certified Nursing Assistant for ten(10) years. (R. p. 31, lines 10-25-p. 32, lines 1-4). There was no repetitive hand use required at her previous employment of 10 years. Repetitive trauma injuries have a gradual onset caused by the cumulative effect of repetitive traumatic events or mini-accidents. Schulknicht v. City of North Charleston, 352 S.C. 175, 176, 574 S.E. 2d 194, 195 (S.C. 2002); S.C. Code Ann. § 42-1-172. The Claimant had no such problems at her previous employment and presented to the hospital only once complaining of injury to her left shoulder which was diagnosed as Bursitis left shoulder, on January 28, 2008. (R. p. 101).

Prior to July 2009 the Claimant's medical records and the record as a whole do not support the conclusion that Claimant was diagnose with carpal tunnel syndrome prior to November 2009 or that she misled Dr. Gray with an incorrect medical history.

A repetitive trauma injury is considered to arise out of employment only if it is established by medical evidence that there is a direct causal relationship between the condition under which the work is performed and the injury.” S.C. Code § 42-1-172. Dr. Gray in his opinion directly addressed whether the work Claimant was performing was the direct cause of her carpal tunnel syndrome. He stated that “it is my opinion, with a reasonable degree of medical certainty, that her carpal tunnel syndrome is a result of her working at Amick Farms.” (R. p. 82). The Appellate Panel finding that the claimant failed to meet her burden to establish a repetitive trauma injury pursuant to Section 42-1-172, is not supported by the substantial evidence in the whole record. (R. p. 11, para. 9).

The court may reverse or modify the decision of the Appellate Panel if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are affected by other error of law; [or] are clearly erroneous in view of the reliable, probative and substantial evidence on the whole record. S.C. Code § 1-23-380 (Supp. 2011); See also Hall v. United Rentals, Inc., 371 S.C. 69, 77, 636 S.E. 2d 876, 881 (S.C. App. 2006),

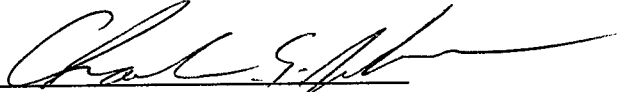
Based upon the above, the Appellate Panel findings are clearly erroneous in view of the reliable, probative and substantial evidence on the whole record. Id.

CONCLUSION

For the reasons stated, the Appellant submit that the Appellate Panel Decision and Order is in error and is not supported by substantial evidence in the whole record and should be reversed and the claimant's claim be held compensable.

Respectfully submitted,

June 10, 2013


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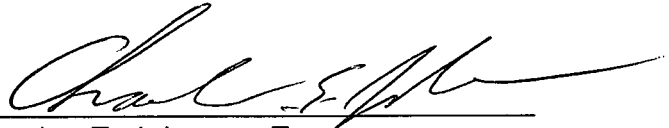
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CERTIFICATE OF COUNSEL

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

June 12, 2013


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PROOF OF SERVICE

I certify that I have served a copy of the **Final Brief of Appellant** on the following parties, Suzanne Boulware Cole, Esq., and Logan McCombs Wells, Esq., Attorneys for the Respondents, on June 12, 2013, by depositing a copy in the United States Mail, postage prepaid, to the address below:

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A handwritten signature in black ink, appearing to read "Charles E. Johnson", written over a horizontal line.

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