

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Melody James, Commissioner for the Appellate Panel

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DEC 18 2013

SC Court of Appeals

Case No. 2013-001763

Everett Davis, Employee, Claimant,

Appellant,

v.

Southlake Transport, Inc., Employer, and Lumberman's Underwriting Alliance,
Carrier, Defendants,

Respondents,

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. DID THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION ERR IN FINDING THAT APPELLANT'S CURRENT LEFT KNEE PROBLEMS ARE NOT CAUSALLY RELATED TO HIS WORK INJURY, BASED ON THE TESTIMONY OF DR. DASILVA?
2. DID THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION ERR IN FINDING THAT APPELLANT HAS NOT PROVEN THAT HIS CURRENT NEED FOR ADDITIONAL MEDICAL TREATMENT TO HIS LEFT KNEE, SPECIFICALLY A LEFT KNEE REPLACEMENT, IS CAUSALLY RELATED TO THIS WORK ACCIDENT?
3. DID THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION ERR IN FINDING THAT CLAIMANT IS AT MAXIMUM MEDICAL IMPROVEMENT FOR HIS LEFT KNEE AND HIS BACK?

STATEMENT OF THE CASE

This is an appeal from a Decision and Order of the South Carolina Workers' Compensation Commission. Appellant/Claimant Everett Davis suffered admitted injuries to the left knee and back in a work-related trucking accident on November 28, 2011. Claimant filed a form 50 seeking additional medical treatment, to include a total knee replacement, contending that he sustained an aggravation of pre-existing arthritis in the left knee and low back. Defendant denied that Claimant was entitled to additional medical treatment and sought an order finding Claimant at MMI for both injuries.

The Single Commissioner conducted a hearing and issued a Decision and Order filed January 29, 2013 denying Claimant's request for total knee replacement on the basis that said total knee replacement was not causally related to Claimant's accident in

that Claimant had pre-existing arthritis, and Claimant's complaints of pain were subjective. The Single Commissioner found Claimant at MMI for both injuries and denied Claimant's request for additional medical treatment.

Claimant timely filed a Form 30 requesting Full Commission review. By the Appellate Panel Decision and Order of the South Carolina Workers' Compensation Commission filed on August 12, 2013, the Full Commission affirmed the decision of the Single Commissioner. On August 16, 2013, the Appellant filed a Notice of Appeal to this honorable Court.

FACTS

Appellant is a forty-nine (49) year old tractor trailer driver who was in a motor vehicle accident with a passenger vehicle in the course and scope of his employment with Southlake Transport, Inc. In the accident, the front of Appellant's truck collided with the driver's side of the passenger vehicle. As a result of the collision, Appellant was "lunged" forward striking his left knee on the bottom of the dashboard, breaking the skin and causing bleeding. Appellant also injured his back in the accident.

Appellant had arthroscopic surgery on the left knee in 1991, approximately twenty (20) years prior to the accident, and was able to work without pain medication or medical treatment prior to the accident. Initially following the accident, Appellant did not have any discomfort in the knee other than an abrasion on the surface. Several days after the accident, Appellant began to experience knee pain when walking and moving about.

Approximately four (4) weeks after the accident on December 27, 2011, Appellant was examined by his primary care physician Dr. Arland H. Compton and diagnosed with contusion superimposed on degenerative joint disease and prescribed pain medication.

On January 30, 2012 Appellant was examined by Dr. Michael K. Drakeförd, an orthopedist, who recommended activity level modification, injections, physical therapy and or total knee replacement.

On May 31, 2012 Appellant was examined by Dr. Robert Dasilva for the left knee and Dr. Ivan E. Lamotta for the back. Dr. Dasilva recommended total knee replacement and Dr. Lamotta recommended medications and physical therapy.

ARGUMENTS

STANDARD OF REVIEW

S. C. Code Ann. § 1-23-380 governs this Court's review of workers' compensation decisions. *Shealy v. Aiken County*, 341 S.C. 448, 454, 535 S.E.2d 438, 442 (2000). This Court must determine whether the appellate panel's findings of fact are supported by substantial evidence in the record and whether the panel's decision is affected by an error of law. *See id.* at 455, 535 S.E.2d at 442 (holding that the full commission is "the ultimate fact finder")."

South Carolina Code Ann. § 1-23-380(5) provides as follows:

The court may not substitute its judgment for the judgment of the agency as to the

weight of the evidence on questions 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:

- (a) in violation of constitutional or statutory provisions;*
- (b) in excess of the statutory authority of the agency;*
- (c) made upon unlawful procedure;*
- (d) affected by other error of law;*
- (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or*
- (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.*

When the evidence gives rise to but one reasonable inference the question becomes one of law for the Court to decide. Lorrick v. S.C. Electric & Gas Co, 245 S.C. 513, 141 S.E.2d 662 (1965); Kinsey v. Champion American Service Center, 268 S.C. 177, 232 S.E.2d 720 (1977). Likewise, if there is absolutely no evidence in support of a finding of fact by the Commission, the question becomes a question of law. Scott v. Havner Motor Company, 226 S.C. 580, 86 S.E.2d 475 (1955). Also, where the evidence is not disputed, the question presented is one of law. Smith v. Union Bleachery/Cone Mills, 276 S.C. 454, 280 S.E.2d 52 (1981).

Findings of fact, on the other hand, can be reversed only if the determination was clearly erroneous in view of the reliable, probative and substantial evidence on the

whole record. Substantial evidence “is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached, or must have reached in order to justify its action.” Palmetto Alliance, Inc. v. S.C. Public Service Commission, 282 S.C. 430, 319 S.E.2d 695, 696 (1984)

I. THE FULL COMMISSION ERRED IN FINDING THAT CLAIMANT’S CURRENT LEFT KNEE PROBLEMS ARE NOT CAUSALLY RELATED TO HIS WORK INJURY, BASED ON THE TESTIMONY OF DR. DASILVA.

The Full Commission erred in finding that Claimant’s current left knee problems are not causally related to his work injury, based on the testimony of Dr. DaSilva, and is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record and should be reversed. Claimant submits that the only reasonable interpretation of Dr. DaSilva’s testimony is that Claimant’s current left knee problems are causally related, and the increased pain caused by the accident is one factor in the recommendation for total knee replacement.

In reviewing the evidence in this case, it is important to note that Defendants admit that Claimant injured his left knee, and the undisputed expert testimony of the authorized treating physician is that Claimant suffered an injury to the left knee. (R. p. 171, lines 18-20) (DaSilva Deposition, p. 29, lines 18-20). Claimant did have a pre-existing injury, however, the evidence is uncontradicted that Claimant worked for approximately twenty (20) years without complaints of pain. (R. p. 100, lines 5-12) (Single Commissioner Transcript, p. 30, lines 5-12). Furthermore, Dr. DaSilva testified that he was not presented with any medical evidence of Claimant complaining of pain over the past twenty (20) years (R. p. 161, lines 21-24) (DaSilva Deposition, p. 19, lines 21-24).

Dr. DaSilva also testified that he assessed Claimant with increased pain from the accident (R. p. 150, lines 14-19) (DaSilva Deposition, p. 8, lines 14-19), and testified that Claimant had

positive pain on the median and lateral joint line, and that this was an objective finding of pain. (R. p. 151, lines 11-16) (DaSilva Deposition, p. 9, lines 11-16). Dr. DaSilva further testified that Claimant's ability to work has been affected by the increase in pain (R. p. 159, lines 3-7) (DaSilva Deposition, p. 17, lines 3-7), and that if it is assumed that Claimant was able to get around for twenty years prior to the accident and then had increased pain following the accident, the logical conclusion would be that the work accident increased Claimant's pain and now he needs medical treatment as a result. (R. p. 162, lines 7-14) (DaSilva Deposition, p. 20, lines 7-14)

Dr. Michael K. Drakeford, Claimant's orthopedist prior to Dr. DaSilva, concurred with Dr. DaSilva and also testified that, in his opinion, Claimant's accident "seems to have precipitated or aggravated Claimant's pre-existing condition of the left knee." (R. p. 119, lines 7-12) (Drakeford deposition p. 8, lines 7-12).

Appellant submits that considering the record as a whole, reasonable minds would not reach the conclusion that the Full Commission reached and, therefore, the decision is clearly erroneous in view of reliable, probative, and substantial evidence on the whole record.

II. THE FULL COMMISSION ERRED IN FINDING THAT CLAIMANT HAS NOT PROVEN THAT HIS CURRENT NEED FOR ADDITIONAL MEDICAL TREATMENT TO HIS LEFT KNEE, SPECIFICALLY A LEFT KNEE REPLACEMENT, IS CAUSALLY RELATED TO THIS WORK ACCIDENT.

The Full Commission committed an error of law in finding, on the basis that his complaints of pain were subjective, that Claimant has not proven that his current need for additional medical treatment to his left knee, specifically a left knee replacement, is causally related to this work accident.

The proper test under South Carolina law to determine whether a Claimant is entitled to benefits for a pre-existing condition is not whether the complaints or findings are subjective versus objective, but whether a dormant condition becomes disabling because of the aggravating injury. *Anderson v. Baptist Med. Ctr.*, 343 S.C. 487, 541 S.E.2d 526 (2001); *Murphy v. Owens Corning*, 393 S.C. 77, 710 S.E.2d 454 (Ct. App. 2011). Dr. DaSilva gave uncontradicted expert testimony that Claimant's ability to work has been affected by the increase in pain. (R. p. 159, lines 3-7) (DaSilva Deposition, p. 17, lines 3-7).

Claimant submits that the case at bar fits squarely on the reasoning and holding in *Murphy*. In that case, Claimant was awarded benefits for injuries arising from repetitive trauma based on subjective complaints of pain. The Court upheld the Commission's award of benefits on the Commission's finding that "the aggravation has manifested itself in neck pain, arm pain, and hand pain." *Murphy* at 454.

In this case, not only did Claimant give testimony that his pain increased from the accident (R. p. 83, lines 4-11) (Single Commissioner Transcript p.13, lines 4-11), but there was uncontradicted expert medical testimony by the authorized treating physician and Dr. Drakeford that Claimant suffered an increase in pain.

As Dr. DaSilva explained, Claimant had an injured knee before the accident; and the recommended total knee replacement would be treating the pre-existing injured knee, but that the total knee replacement is only recommended because of the increased pain following the accident. While Dr. DaSilva's opinion is that total knee replacement is not being recommended solely because of the aggravation and increased pain suffered in the accident, and that aggravation and pain is not the main reason, but the increased pain from the accident is one of the factors in his decision. (R. p. 177, line 19-p. 178, line 19) (DaSilva Deposition, p. 35, lines

19-25, p. 36, lines 1-19) Since increased pain is one factor, Claimant is entitled to total knee replacement as a result of aggravation of a pre-existing condition under §42-9-35, and Murphy v. Owens Corning, 393 S.C. 77, 710 S.E.2d 454 (Ct. App. 2011).

Defendants argued that the fact that Claimant continued to work after the accident was evidence that the recommendation for total knee replacement was not causally related to Claimant's accident. However, Dr. DaSilva testified that the fact that Claimant continued to work does not mean he does not need total knee replacement (R. p. 168, lines 12-17) (DaSilva deposition p. 26, lines 12-17), but that whether a person continued to work after an accident when injured like Claimant depends on other factors like the person themselves, the pay of the job and economic times. (R. p. 179, line 8-p.180, line 7) (DaSilva deposition p. 37, lines 8-25, p. 38, lines 1-7). Moreover, the Full Commission found that Appellant was "hard working individual." (R. p. 17, Fact Finding #4) (Full Commission Decision, Fact Finding #4)

III. THE FULL COMMISSION ERRED IN FINDING THAT CLAIMANT IS AT MAXIMUM MEDICAL IMPROVEMENT FOR HIS LEFT KNEE AND HIS BACK.

The Full Commission's finding that Claimant is at maximum medical improvement for his left knee and his back is an error of law and clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record.

First, the Full Commission's Decision and Order finding Claimant at MMI for the back must be reversed because it is not based upon specific and written detailed findings of fact substantiating the award as required by S.C. Code Ann. §42-9-5. There is not a specific and detailed finding of fact regarding Claimant's back in the Decision and Order.

Under S.C. Code Ann. §42-15-60, Claimant is entitled to medical treatment that will tend to lessen the period of disability. The Full Commission failed to make any findings in this regard

for the back. The only finding of fact that could be argued to support a finding of MMI to the back is finding of fact # 9 stating "I base this finding on the medical evidence in the record." Claimant submits that this is not sufficiently specific and detailed to support a finding of MMI to the back.

The Full Commission's finding that Claimant is at MMI to the left knee is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. Although the Full Commission found that Claimant's requested total knee replacement was not causally related to the work accident, Dr DaSilva testified that there was one other option for treatment to the left knee as a result of increased pain, injections or pain medications. (R. p. 153, line 23-p.155, line 9) (DaSilva deposition p. 11, lines 23- p. 13, line 9). Even if the Full Commission was correct in denying total knee replacement, it committed error in denying the alternative form of treatment in the nature of injections or pain medications that were causally related to Claimant's accident per the testimony of Dr. DaSilva.

CONCLUSION

For the reasons stated, this court should reverse the Decision of the South Carolina Worker's Compensation Commission.

Respectfully submitted,

December 13, 2013



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CERTIFICATE OF COUNSEL

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

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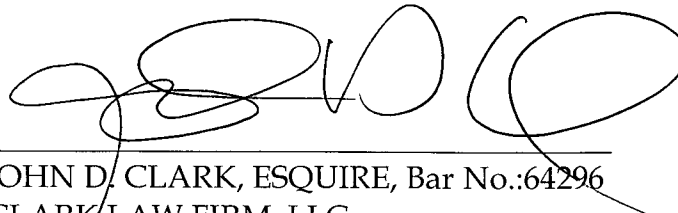
Southlake Transport, Inc., Employer, and Lumberman's Underwriting Alliance, Carrier,
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PROOF OF SERVICE

I certify that I have served the Final Brief of Appellant on Southlake Transport Inc. and Lumberman's Underwriting Alliance by depositing a copy of it in the United States Mail, postage prepaid, on December 17, 2013, addressed to their attorneys of record, Weston Adams, III, Esquire and M. Chad Abramson, Esquire of McAngus Goudelock & Courie, LLC, Meridian 10th Floor, 1320 Main Street, P.O. Box 12519 Columbia, South Carolina 29211-2519 and Helen F. Hister, Esquire of McAngus Goudelock & Courie, LLC 735 Johnnie Dodds Blvd, Suite 200, P.O. Box 650007, Mount Pleasant, South Carolina 29465

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