

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ABBEVILLE COUNTY
Court of Common Pleas

Eugene C. Griffith, Jr., Circuit Court Judge

Appellate Case No.: 2013-001348

South Carolina Second Injury Fund,.....Appellant,

v.

Abbeville County Memorial Hospital, Employer, and
PHTS Risk Management Services, Carrier,..... Respondents,

In re:
Billie New, Employee/Claimant,

v.

Abbeville County Memorial Hospital,.....Employer.

FINAL BRIEF OF APPELLANT

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SC Court of Appeals

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ISSUES ON APPEAL

1. Under S.C. Code Ann. § 42-9-400, should the Commission's decision that Claimant did not have preexisting arthritis be reinstated as supported by substantial evidence in the record?
2. Under S.C. Code Ann. § 42-9-400, should the Commission's decision that the presumption for arthritis was rebutted be reinstated as supported by substantial evidence in the record?
3. Under S.C. Code Ann. § 42-9-400, was the Commission's finding that Claimant's preexisting anxiety and depression were not permanent and serious enough to constitute a hindrance or obstacle to employment supported by substantial evidence in the record?
4. Under S.C. Code Ann. § 42-9-400, was the Commission's decision that Claimant's prior neck and shoulder pain were permanent and serious enough to constitute a hindrance or obstacle to employment supported by substantial evidence in the record?

STATEMENT OF THE CASE

This is a claim for partial reimbursement from the South Carolina Second Injury Fund (the "Fund") by Abbeville County Memorial Hospital, Employer, and PHTS Risk Management Services, Carrier, (collectively "Carrier") pursuant to S.C. Code Ann. § 42-9-400. Carrier alleged that it incurred substantially greater liability for compensation and medical benefits when Billie New's ("Claimant") preexisting arthritis, anxiety and depression were either aggravated by or combined with her July 12, 2005 work related neck and arm injuries. Carrier further alleged that Claimant's preexisting conditions were a hindrance or obstacle to her employment. The Fund denied that Claimant had preexisting arthritis, and if it preexisted, the medical evidence rebutted the presumption that it was permanent and serious enough to constitute a hindrance or obstacle to employment. The Fund also asserted that Claimant's anxiety, depression, and neck and shoulder pain conditions were not permanent and serious enough to constitute a

hindrance or obstacle to employment and did not create substantially greater medical costs and permanent disability; and therefore, Carrier's claim did not meet the requirements for reimbursement pursuant to S.C. Code Ann. § 42-9-400.

The Hearing Commissioner denied Carrier's reimbursement request and the Full Commission affirmed. The Circuit Court reversed and the Fund appealed to this Court.

STANDARD OF REVIEW

The Administrative Procedures Act governs the standard of review in workers' compensation cases. Liberty Mut. Ins. Co. v. S.C. Second Injury Fund, 363 S.C. 612, 619, 611 S.E.2d 297 (Ct. App. 2005). An appellate court may not substitute its judgment for that of the Workers' Compensation Commission as to the weight of the evidence on questions of fact. Stone v. Traylor Bros., 360 S.C. 271, 600 S.E.2d 551 (Ct. App. 2004). Courts can reverse the decision of an administrative agency where it is affected by an error of law or not supported by substantial evidence. Lark v. Bi-Lo, Inc., 276 S.C. 130, 133, 276 S.E.2d 304, 305 (1981); Corbin v. Kohler Co., 351 S.C. 613, 617, 571 S.E.2d 92, 95 (Ct. App. 2002). A reviewing court may reverse an agency decision if the findings or conclusions are clearly erroneous in view of the reliable, probative, and substantial evidence in the record. Bass v. Kenco Grp., 366 S.C. 450, 457, 622 S.E.2d 577, 580 (Ct. App. 2005).

ARGUMENT

- I. THE COMMISSION'S DECISION THAT CLAIMANT DID NOT HAVE PREEXISTING ARTHRITIS WAS SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD AND SHOULD BE REINSTATED.

The statutory reimbursement scheme requires that Carrier first establish that Claimant had a preexisting impairment. S.C. Code Ann. § 42-9-400(a). One way to determine the existence of a preexisting impairment is to review medical records that predate Claimant's work injury. Here, medical records from 1991, 1998, 2002, 2004 and 2005 were part of the record. R.pp. 119-123. In July 1991, Claimant presented for treatment of numbness in her index finger. R.p. 119. There is no diagnosis of arthritis in this medical narrative. R.p. 119. In March 1998, Claimant received medical treatment for shoulder pain and other unrelated medical issues. R.p. 120. The March 1998 medical report does not include a diagnosis of arthritis. R.p. 120. Claimant's 2002 medical narratives indicate that she was experiencing chest pain, anxiety and depression and that she underwent testing for skin lesions. R.p. 121. There is no diagnosis of arthritis in the 2002 medical records. R.p. 121.

Claimant's 2004 medical records reveal abdominal pain. R.p. 122. Claimant received medication for pain and no follow up was indicated. There is no diagnosis of arthritis in the 2004 medical reports. R.p. 122. Claimant's February and April 2005 medical reports also indicate abdominal pain as well as aches in her neck, shoulder and legs and flu-like symptoms. R.p. 123. Claimant was prescribed medication to address these issues. R.p. 123. There is no diagnosis of arthritis in Claimant's 2005 medical reports that predate the work injury. R.p. 123.

Claimant completed a comprehensive health survey outlining whether she had any of the sixty-two (62) listed conditions therein. R.pp. 161-164. Of the sixty-two (62) listed conditions outlined in the comprehensive health survey, Claimant indicated that she had two (2) conditions, bronchitis and a peptic ulcer. R.pp. 161-162. Claimant specifically denied that she had arthritis. R.p. 161. Furthermore, Carrier has not proved that Claimant had arthritis prior to the work injury or that she concealed the existence of arthritis, if she had it prior to her July 2005 work injury.

On August 17, 2005, approximately one (1) month post injury, Claimant underwent surgical intervention to address cervical issues, to include a herniated disc resulting from the work injury. R.pp. 124-125. The operative report indicates the presence of cervical stenosis, which Claimant's treating physician indicates is arthritis. R.pp. 124-125 and 165. However, even if we assume arguendo that cervical stenosis is arthritis, there is no evidence that Carrier was aware of this condition prior to the work injury. Unknown conditions are barred from reimbursement when the work injury occurs on and after June 25, 2003; and as a result, Carrier must either establish knowledge of the preexisting impairment or that Claimant concealed the preexisting condition. See S.C. Code Ann. § 42-9-400, 2003 Amendments. In this case, Carrier has failed to establish either knowledge or concealment.

On June 8, 2006, Claimant's supervisor indicated that Claimant "periodically complained and missed work due to pain in all parts of her body including her neck." R.p. 160. While this statement is sufficient to establish knowledge of Claimant's prior neck pain, it is not tantamount to a diagnosis of arthritis nor is it sufficient to establish knowledge of arthritis.

Carrier asserted that Claimant concealed her condition. However, the record is completely devoid of evidence establishing Claimant's concealment. In City of Greenville v. S.C. Second Injury Fund, this Court held that a carrier did not establish concealment of a preexisting condition because it failed to show that the Claimant intentionally concealed the preexisting condition. 339 S.C. 141, 147, 528 S.E.2d 91, 94 (Ct. App. 2000). Likewise, Carrier has not established that Claimant intentionally concealed the condition. In order to successfully assert concealment, Carrier must first establish that Claimant had a preexisting condition to conceal. On the contrary, the medical records predating the work injury do not reveal a diagnosis of arthritis. Thus, there is no basis for asserting concealment.

II. IF CLAIMANT HAD PREEXISTING ARTHRITIS, SUBSTANTIAL EVIDENCE IN THE RECORD REBUTTED THE PRESUMPTION THAT IT WAS PERMANENT AND SERIOUS ENOUGH TO CONSTITUTE A HINDRANCE OR OBSTACLE TO HER EMPLOYMENT.

The statutory reimbursement scheme requires that Carrier establish several elements in order to implicate reimbursement. One of the requisite elements of reimbursement is that Claimant have a "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." S.C. Code Ann. § 42-9-400(d). Arthritis is entitled to a presumption that it is a hindrance or obstacle to employment. S.C. Code Ann. § 42-9-400(d)(4). However, a presumption is overcome by evidence rebutting it. BLACK'S LAW DICTIONARY 558 (3rd pocket ed. 2006).

While the statutory reimbursement scheme does not define what constitutes a hindrance to employment, resort to other authority is in order. Webster's defines "hinder" and "obstacle" respectively, as that which causes delay or difficulty, or to prevent from doing or happening; and "something that obstructs or hinders progress." WEBSTER'S DESK DICTIONARY 212 and 312 (2004). Recent case law instructs that "permanent" encompasses the fact that a Claimant may require specialized healthcare without the means to earn a living. Crisp v. SouthCo., 401 S.C. 627, 643, 738 S.E.2d 835, 843 (2013). Additionally, Larson's instructs that whether a condition is a hindrance to employment depends upon whether an employer would hire, employ or promote Claimant knowing all of the facts. 5 LARSON, WORKERS' COMPENSATION § 91.02(6). Claimant's arthritis, if it preexisted, did not hinder her ability to perform the duties and responsibilities of her job as a home health aide. Claimant's arthritis, if it preexisted, did not result in any specialized healthcare without the means for her to earn a living. It is unknown whether Claimant's arthritis, if it preexisted, would prevent an employer from hiring or employing her but given the fact that the medical records predating the injury do not indicate the presence of arthritis and there is no indication that Claimant's ability to do her job was hindered in any way, it is unlikely that the presence of arthritis would have prevented her from securing employment. In fact, Claimant's vocational evaluation revealed that she was employable in various capacities. R.p. 157.

Even if we assume arguendo, that Claimant had preexisting arthritis, the medical evidence in the record rebuts the presumption that it was a hindrance to her employment. Claimant's comprehensive health survey indicates that she had never been denied employment for health reasons, did not have any conditions that would require special

work assignments, had not been hospitalized for any serious illnesses and had never been out of work for more than one (1) week at a time. R.pp. 162-163. These facts are probative on the issue of hindrance, they support the Commission's determination that Claimant's arthritis, if it preexisted, was not a hindrance to her employment, and were appropriately considered by the Commission in its denial of Carrier's reimbursement request.

Carrier relies on Carolinas Recycling Grp. v. S.C. Second Injury Fund for the proposition that the Commission's decision was not supported by substantial evidence. 398 S.C. 480, 730 S.E.2d 324 (Ct.App. 2012). In Carolinas Recycling Grp., this Court reversed the decision of the Commission because the Appellate Panel "relied exclusively upon an evaluation by a non-treating physician who only met with the Claimant on one occasion." Id at 485. The only issue in Carolinas Recycling was the medical issue of whether Claimant's preexisting condition combined with the work injury to create substantially greater medical costs and permanent disability. Id. This Court also noted that the record was "replete with expert medical testimony concluding Claimant's preexisting condition combined with or aggravated his subsequent injury to cause 'substantially greater' disability than would have been caused by the June 2004 injury alone." Id. at 485. This case is easily distinguished from Carolinas Recycling. Unlike Carolinas Recycling where only a medical issue was in dispute, this case presents several issues that are in dispute.

The first issue in dispute is whether Claimant had preexisting arthritis. The second issue in dispute is whether the evidence in the record rebuts the presumption that arthritis was permanent and serious enough to constitute a hindrance to employment, if it

preexisted. The third issue in dispute is whether Claimant's anxiety, depression, and pain in the neck and shoulder were permanent and serious enough to constitute a hindrance or obstacle to employment. Here, the record is replete with evidence supporting the Commission's denial of Carrier's request for reimbursement.

Carolinas Recycling is also distinguished from this case because it was decided solely on a medical question, namely whether Claimant's preexisting condition was aggravated by or combined with the work injury to create substantially greater medical costs and permanent disability. Here, the issues of whether Claimant had a preexisting condition, whether it was a hindrance or obstacle to employment, and to a lesser degree whether Carrier had knowledge of the alleged preexisting condition are not medical issues. In fact, these are mainly vocational issues that can be gleaned without resort to medical evidence or expert testimony.

Contrary to Carrier's belief, the Commission is not required to give conclusive effect to a medical questionnaire, or other medical evidence. Here, issues of knowledge and hindrance are not solely medical issues. However, assuming, arguendo, that these issues are solely medical questions, the Commission is not required to give conclusive effect to the opinions of medical experts. In Wynn v. People's Natural Gas, the South Carolina Supreme Court held that findings of fact by the Commission are conclusive. 238 S.C. 1, 12, 118 S.E.2d 812, 818 (1961). See also, Glover v. Columbia Hosp. of Richland Cnty., 236 S.C. 410, 114 S.E.2d 565 (1960). Furthermore, while Carrier presented a questionnaire supporting reimbursement, the Commission is not required to give conclusive effect to a questionnaire to the exclusion of other more compelling

medical evidence in the record. See, Ballenger v. S. Worsted Corp., 209 S.C. 463, 467, 40 S.E.2d 681, 682-83 (1946).

In Anderson et al. v. Campbell Tile Co., the South Carolina Supreme Court held that opinions of medical experts may constitute substantial evidence to support a judgment. 202 S.C. 54, 24 S.E.2d 104 (1943). Anderson does not instruct that opinions of medical experts must constitute substantial evidence nor does it exclude other sufficiently compelling evidence that would support a judgment. Anderson also held that the Commission determines the weight given to the opinion of medical experts. Id. Here, the Commission gave much greater weight to the totality of the evidence on issues of knowledge and hindrance, and not just the medical questionnaire, which was not supported by the medical narratives. Claimant indicated via a comprehensive health survey that she had never been denied employment for health reasons, did not have any conditions that would require special work assignments, had not been hospitalized for any serious illnesses and had never been out of work for more than one (1) week at a time. R.pp. 162-163. Claimant's comprehensive health survey in conjunction with the remaining evidence in the record are clear indicia that her preexisting conditions were neither permanent nor serious enough to constitute a hindrance or obstacle to her employment. The Circuit Court's decision should be reversed and the Commission's decision should be reinstated.

III. SUBSTANTIAL EVIDENCE IN THE RECORD SUPPORTS THE COMMISSION'S FINDING THAT CLAIMANT'S ANXIETY AND DEPRESSION WERE NOT PERMANENT AND SERIOUS ENOUGH TO CONSTITUTE A HINDRANCE OR OBSTACLE TO EMPLOYMENT.

Carrier also asserts that Claimant had preexisting anxiety and depression that were permanent and serious enough to constitute a hindrance or obstacle to employment. While Carrier has a medical questionnaire supporting reimbursement for anxiety and depression, these questionnaires are not supported by the medical evidence in the record. R.pp. 167-168. Claimant had experienced bouts of anxiety and depression prior to her July 2005 work injury. R.p. 121. Claimant's anxiety is initially noted in April 16, 2002, when she presented to her family physician. R.p. 121. Claimant was prescribed medication to address her anxiety and a four (4) week follow up was requested. R.p. 121. Claimant's May 14, 2002 follow up visit revealed that her anxiety and depression were "much better" and no additional complaints regarding anxiety were noted. R.pp. 121-122. Thus, the medical records predating the injury clearly indicate that Claimant's anxiety and depression were successfully treated with medication; and, as such, these conditions were neither permanent nor serious enough to constitute a hindrance or obstacle to employment as contemplated by the statute.

The Fund also asserts that Claimant's preexisting anxiety and depression do not pass muster under the previously cited standards. Claimant's anxiety and depression were being successfully treated with medication and therefore, the anxiety and depression did not hinder her progress. R.p. 121. Moreover, Claimant's preexisting anxiety and depression did not require any specialized healthcare without the means for her to earn a living. Furthermore, Dr. Nicholas Lind, treating psychologist, indicated that Claimant's

“anxiety and depression are more likely than not, with as much medical certainty reasonable in the field of psychology, due to the physical limitations resulting from the fall [of] 12 July 2005.” R.p. 148. Dr. Lind did not indicate that Claimant’s prior bouts of anxiety and depression were contributing factors in her current status. Claimant’s vocational evaluation also revealed that she was employable in a variety of capacities, including customer service representative, front desk clerk and receptionist. R.p. 157. The Commission’s denial of reimbursement was supported by substantial evidence in the record and should be reinstated.

IV. CLAIMANT’S PRIOR NECK AND SHOULDER PAIN WERE NOT PERMANENT AND SERIOUS ENOUGH TO CONSTITUTE A HINDRANCE OR OBSTACLE TO HER EMPLOYMENT.

Claimant’s prior neck and shoulder pain were not permanent and serious enough to constitute a hindrance or obstacle to employment. Carrier’s representative indicated that Claimant periodically complained of pain in her neck and throughout her body. R.p. 160. The Fund denies that Claimant’s periodic complaints of pain rises to the level of being permanent and serious enough to constitute a hindrance to employment as contemplated by the statute. Claimant’s prior neck and shoulder pain did not hinder her from performing the duties of her job and did not result in any specialized treatment without the means for her to earn a living. The totality of the medical evidence reveals that Claimant’s prior neck pain did not result in any significant treatment or lost time from work. Thus, the Commission’s finding that Claimant’s prior shoulder aches and pains were not serious enough to constitute a hindrance or obstacle to employment was supported by substantial evidence in the record and should be reinstated.

CONCLUSION

The Appellant, South Carolina Second Injury Fund, requests that this Honorable Court reverse the decision of the Circuit Court and reinstate the Commission's denial of Carrier's reimbursement request pursuant to S.C. Code Ann. § 42-9-400 as supported by substantial evidence in the record.

Respectfully submitted,

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January 2, 2014
Columbia, South Carolina

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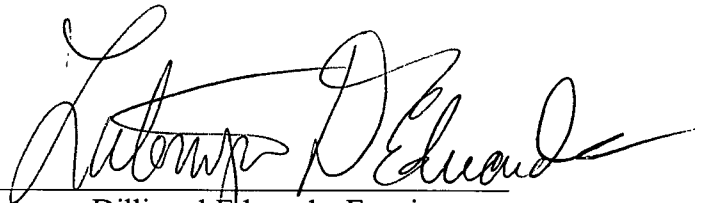
The undersigned employee of Dilligard Edwards, LLC, Attorney for the Appellant, does hereby certify that service of the **Final Brief of the Appellant, Record on Appeal, and Certificate of Counsel** to the South Carolina Court of Appeals in the above-captioned matter was made upon counsel of record for Respondents, Abbeville County Memorial Hospital, Employer and PHTS Risk Management Services, Carrier, and the South Carolina Workers' Compensation Commission, by placing same in the United States Mail, first class postage

prepaid, at the below listed address clearly indicated on said envelope on this 3rd day of January,

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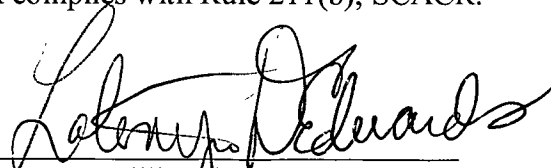
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CERTIFICATE OF COUNSEL

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

January 3, 2014



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