

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Letitia H. Verdin, Circuit Court Judge

Appellate Case No.: 2013-001892

Trial Court Case No.: 2013-CP-23-05822

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

v.

Specialty Risk Services.....Respondent.

BRIEF OF RESPONDENT

RECEIVED
JUL 24 2014
SC COURT OF APPEALS

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STATEMENT OF THE CASE

Specialty Risk Services, Respondent, is the Third-Party Administrator for Hartford Insurance Co. of the Midwest, the workers' compensation insurance carrier for BMW Manufacturing Corporation, LLC, Employer. Respondent filed a Form 54 requesting an adjudicatory hearing before the South Carolina Workers' Compensation Commission for an Order requiring reimbursement from the South Carolina Second Injury Fund, Appellant, for medical and indemnity benefits paid by virtue of injuries deemed compensable arising from a work-related accident which occurred on February 9, 2004. (R. p. 102). Appellant filed a Form 55 denying responsibility for medical and indemnity reimbursement. (R. p. 103).

Appellant alleged that Respondent could not prove it had prior knowledge of the Employee/Claimant's pre-existing medical conditions. Appellant further asserted that the Employee/Claimant's pre-existing medical conditions were not permanent nor were an obstacle and hindrance to employment or re-employment. (R. pp. 18 and 103).

By way of background, Tunde Quarles Szabo, Employee/Claimant, began working at BMW Manufacturing Corporation, LLC, Employer, as a production associate on April 24, 2000. On February 9, 2004, Ms. Szabo suffered admitted work-related injuries to her left and right arms and hands because of repetitive job activities. As a production associate, Ms. Szabo lifted and installed dashboards on a repetitive basis. (R. pp. 104, 112-113 and 133). Ms. Szabo's work activities resulted in the overuse and the overextension of her hands, arms and shoulders.

Ms. Szabo was diagnosed with a torn right rotator cuff. Dr. Stephen Geary, an orthopedic surgeon, performed an arthroscopic debridement of the right rotator cuff. (R. pp. 107 and 270-271). Shortly after undergoing the right rotator cuff surgical repair, Ms. Szabo began complaining of trigger finger problems involving the third and fourth fingers. (R. pp. 123-124). Ms. Szabo later underwent successful right trigger finger releases. (R. pp. 125-126).

Dr. Geary released Ms. Szabo to return-to-work. Ms. Szabo then began to complain of cervical spine pain. (R. pp. 109-110 and 112). Ms. Szabo related her cervical spine pain to the repetitive work activities and her admitted work-related accident of February 9, 2004. (R. p. 107). Ms. Szabo further asserted that her physical injuries aggravated pre-existing depression. (R. pp. 118, 140-142 and 145). BMW and Hartford Insurance Co. of the Midwest denied Ms. Szabo's allegations of a cervical spine injury and resulting depression.

Ms. Szabo filed a Form 50 requesting an adjudicatory hearing to address the compensability of the denied cervical spine injury and depression. By Order dated June 19, 2006, Commissioner Susan S. Barden determined that Ms. Szabo had attained maximum medical improvement to her right and left upper extremities with regard to the right rotator cuff and right trigger fingers. Commissioner Barden further found and concluded that Ms. Szabo had sustained a compensable injury to her cervical spine, but had reached maximum medical improvement on February 3, 2006. (R. p. 5). Commissioner Barden awarded Ms. Szabo twenty (20%) percent disability to the right upper extremity (shoulder); zero (0%) percent disability to left upper extremity; and

ten (10%) percent disability to the cervical spine. (R. p. 5). Commissioner Barden denied Ms. Szabo's claim of depression.

On appeal, the Full Commission Appellate Panel affirmed Commissioner Barden's Decision and Order.

On November 14, 2007, Ms. Szabo filed a second Form 50 claim alleging a change of condition. Ms. Szabo contended that she was permanently and totally disabled due to the worsening condition of her neck and right upper extremity.

By Order dated April 4, 2008, the Commission promulgated an Order finding that Ms. Szabo had undergone a change of condition for the worse. The Order awarded Ms. Szabo temporary total disability compensation benefits and medical treatment beginning on August 4, 2006. (R. p. 9). Ms. Szabo's diagnostic tests showed degenerative disc disease of the cervical spine at C5-6 and C6-7, along with foraminal stenosis and spondylosis. (R. pp. 183, 226-227).

Ms. Szabo had also alleged injuring her lumbar spine before or at the time of the change of condition claim. The lumbar spine injury was denied as being a compensable injury by the Commission. Ms. Szabo had undergone surgery to her lumbar spine prior to the cervical spine injury being adjudicated compensable as a change of condition claim.

On July 15, 2010, Dr. Cavert McCorkle performed an anterior cervical disc removal and interbody bone fusion at C5-C6 and C6-C7. (R. p. 228). On October 21, 2010, Dr. McCorkle opined Ms. Szabo had attained maximum medical improvement. (R.

p. 241). Dr. McCorkle assigned Ms. Szabo a twenty (20%) percent medical impairment to the spine. (R. p. 241).

BMW Manufacturing Corporation, LLC and The Hartford, by and through Specialty Risk Services, Respondent, filed a Form 21 requesting an adjudicatory hearing to determine Ms. Szabo's entitlement to permanent disability benefits and future medical treatment. By Order dated March 20, 2011, Commissioner Avery Wilkerson, Jr., adjudicated Ms. Szabo permanently and totally disabled. Commissioner Wilkerson found that the combination of Ms. Szabo's non work-related injuries of depression, lumbar injury, hyperthyroidism, and Raynaud's Disease combined with the compensable cervical spine and upper extremity injuries to render Ms. Szabo permanently and totally disabled. (R. pp. 3, 9-12). Commissioner Wilkerson legally concluded that Ms. Szabo was permanently and totally disabled by virtue of a combination of the pre-existing conditions and her present health maladies pursuant to the Supreme Court holding in the case of Ellison v. Frigidaire Home Products, 371 S.C. 159, 638 S.E.2d 664 (2006). (R. p. 5).

After the Commission had awarded Ms. Szabo permanent and total disability compensation benefits and lifetime medical treatment, Respondent filed a claim for Second Injury Fund reimbursement. (R. p. 102). By Order dated November 14, 2011, Commissioner Barden denied Respondent's claim for reimbursement from Appellant, South Carolina Second Injury Fund. (R. pp. 15-28). Respondent timely appealed to the South Carolina Workers' Compensation Full Commission Appellate Panel. (R. p. 6).

By Order dated June 5, 2012, the South Carolina Workers' Compensation Commission's Appellate Panel reversed the Single Commissioner's Order in its entirety and ordered Appellant to reimburse Respondent pursuant to *Section 42-9-400* for indemnity compensation benefits and medical costs pertaining to injuries sustained by Ms. Szabo on February 9, 2004. (R. pp. 3-14). The Commission's Order further provided that reimbursement should include benefits awarded and paid emanating from Ms. Szabo's change of condition claim. (R. p. 14).

Appellant filed its Notice of Intent to Appeal to the Circuit Court. Appellant's appeal to the Circuit Court was heard by The Honorable Letitia H. Verdin, Circuit Court Judge for the Greenville County Court of Common Pleas. By Order dated July 29, 2013, the Circuit Court affirmed the Decision of the Workers' Compensation Commission finding that the Commission's Decision and Order was not affected by an error of law and is supported by substantial evidence. (R. pp. 1-2). From this Decision, Appellant has appealed to this Honorable Court.

ARGUMENTS

I. THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION'S FACTUAL FINDINGS AND LEGAL CONCLUSIONS MUST BE AFFIRMED BECAUSE RESPONDENT MET ITS BURDEN OF PROOF IN ESTABLISHING THAT IT IS ENTITLED TO SECOND INJURY FUND REIMBURSEMENT AND THE DECISION IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

The South Carolina Workers' Compensation Full Commission Appellate Panel's Decision and Order must be affirmed according to South Carolina Law. Legal precedence supports affirmation of the Commission's Order, as does the substantial

evidence in the record. The Appellate Panel's Decision was predicated upon medical, lay and vocational evidence. There is no contrary evidence in the file refuting the Commission's Decision ordering Appellant to pay reimbursement of indemnity and medical benefits awarded to Ms. Szabo.

Respondent respectfully submits that because Appellant provided no evidence to refute Respondent's entitlement and claim for reimbursement, the Appellate Panel's Decision cannot be reversed, but rather, must be affirmed as a matter of law. Lark v. Bi-Lo, 276 S.C. 130, 276 S.E.2d 304 (1981).

In the underlying case, Ms. Szabo was awarded permanent and total disability compensation and lifetime medical benefits by reason of the combined effects of her right upper extremity, right finger(s) and cervical spine injuries and her pre-existing impairments or conditions of hyperthyroidism, Raynaud's disease, lumbar spine injury and depression. (R. pp. 5, 10-13 and 102).

The Commission's award of permanent and total disability compensation benefits is completely analogous with the Supreme Court's holding in the case of Ellison v. Frigidaire Home Products, 371 S.C. 159, 638 S.E.2d 664 (2006). In Ellison, the Employee was awarded permanent and total disability compensation benefits as a consequence of a fractured left leg which resulted in a twenty (20%) percent medical impairment rating to the left lower extremity. The Supreme Court found that because Ellison had pre-existing physical conditions of hypertension and sleep apnea, these non-occupational maladies or congenital conditions, in combination with Ellison's work place injury rendered him permanently and totally disabled. Id. In affirming the Commission's

award of permanent and total disability compensation benefits, the Supreme Court cited *Section 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 in compensation and medical liability or either, for a disability that is substantially greater, by reason of the combined effects of the pre-existing impairment and subsequent injury.....**

- (d) **As used in this section, "permanent physical impairment" means any permanent condition, whether congenital or due to injury or disease, of 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 (a) and (d) (2013).

The Commission found Ms. Szabo permanently and totally disabled from the combined effects of her pre-existing conditions of hyperthyroidism, Raynaud's Syndrome and depression, along with her admitted work-related injuries to her right upper extremity, fingers and cervical spine. (R. pp. 5, 9, 45, lines 17-25 and 46, lines 1-2). Ms. Szabo's pre-existing conditions combined with her admitted work-related accidental injuries to render her permanently and totally disabled. The Factual Finding is supported by medical evidence from Drs. David Mitchell and Phillip Esce. (R. pp. 178-180, and 243-245).

There is no dispute that Ms. Szabo suffered with Raynaud's disease, hyperthyroidism and depression prior to her work-related accident of February 9, 2004. Drs. Mitchell and Esce opined that Ms. Szabo's pre-existing conditions caused her to lose more time from work than she would have solely from the work-related injuries she

sustained to her right upper extremity and neck. (R. pp. 179 and 244). The pre-existing conditions also caused Ms. Szabo to suffer from a substantially higher percentage of permanent disability than she would have solely from the work-related injuries according to the unrefuted and uncontradicted medical evidence. (R. pp. 179 and 244).

Drs. Mitchell and Esce further opined that Ms. Szabo's medical costs were substantially increased because of the pre-existing congenital maladies. (R. pp. 180 and 245). To this end, the unrefuted medical evidence in the record supports the Commission's finding that Ms. Szabo's pre-existing conditions of hyperthyroidism, Raynaud's disease and depression constituted a hindrance or obstacle to obtaining employment or re-employment. At the time Ms. Szabo was adjudicated permanently and totally disabled, she was unemployed and receiving long-term and Social Security disability benefits. (R. p. 284). Further, Ms. Szabo was still suffering with pain and discomfort in her hands caused by the hyperthyroidism and Raynaud's disease. (R. pp. 179, 244, 257, 260, 273 and 291). Ms. Szabo was also physically limited and restricted because of a lumbar spine injury and resulting surgery to the lumbar spine. (R. p. 292).

In addition, medical reports from Dr. Juliette Sadd, Ms. Szabo's neurologist, reflect that her hands were cold to the touch and discolored. (R. p. 188). Ms. Szabo was unable to hold or grasp any objects because of the numbness and tingling in her hands caused by Raynaud's disease. (R. pp. 181, 187-188). Because Ms. Szabo was afflicted with paresthesia and swelling of the right hand, Dr. Sadd opined that Ms. Szabo was not able to perform any repetitive work with her upper extremities or hands;

and that Ms. Szabo could not perform any activities that required grip strength. (R. p. 193). The Raynaud's disease certainly impacted and hindered Ms. Szabo from returning to work in a gainful capacity at BMW Manufacturing Corporation, LLC.

Dr. Robert Schwartz, a physiatrist, noted that Ms. Szabo's hands were cold accompanied by atrophic skin changes and vasomotor and sudomotor changes. (R. p. 203). Dr. Schwartz also noted that Ms. Szabo's peripheral pulses were decreased. (R. p. 203).

In short, medical evidence in the record containing the conclusions, diagnoses and opinions of Drs. Mitchell, Esce, Sadd and Schwartz undoubtedly support the Appellate Panel's Ruling that Ms. Szabo's pre-existing health conditions constituted a hindrance or obstacle to obtaining employment or re-employment as required by *Section 42-9-400. Supra.* Therefore, the Commission's Ruling ordering reimbursement from The Second Injury Fund must be affirmed based upon the substantial evidence. Lark v. Bi-Lo, Supra.; Fredrick v. Wellman, Inc., 385 S.C. 8, 15-16, 682 S.E.2d 516, 519 (Ct. App. 2009).

The remaining issues raised on appeal should be dismissed in that such raises only factual questions which were resolved by the Commission, the ultimate fact finder. *See, Hunter v Patrick Constr. Co., 289 S.C. 46, 344 S.E.2d 613 (1986).*

II. THE COMMISSION NOR THE CIRCUIT COURT ERRED IN CONCLUDING THAT A CHANGE OF CONDITION CLAIM IMPLICATED REIMBURSEMENT FROM THE SOUTH CAROLINA SECOND INJURY FUND.

The Second Injury Fund's argument and rationale for denying reimbursement is predicated solely upon Ms. Szabo's condition dating from her injury on February 9, 2004 until she was awarded first permanent disability benefits at the initial hearing before Commissioner Barden on March 21, 2006. This period constitutes the only basis for any potential reimbursement from Appellant's perspective.

Ms. Szabo was initially awarded twenty (20%) percent disability to the right upper extremity and ten (10%) percent disability to the spine, prior to undergoing surgery for a worsening cervical spine condition. Previous to Ms. Szabo's successfully proving that she had suffered a change of condition for the worse, the prerequisite indemnity requirements necessary for reimbursement had not been fully met. It was not until the Commission found and concluded by virtue of an Order dated April 4, 2008, Ms. Szabo had undergone a change of condition for the worse, that the claim became ripe for Second Injury Fund reimbursement consideration.

The reimbursement claim is clearly predicated upon the initial underlying work-related accident. This is clearly stated in Findings of Fact 4 – 7, and 9 of the Appellate Panel's Order. (R. pp. 9-11). Nonetheless, Section 42-9-400 (a) provides for total reimbursement which includes Ms. Szabo's change of condition claim. *Section 42-9-400 (a)* states:

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 pre-existing impairment and the subsequent injury or by reason of the aggravation of the pre-existing impairment... such employer or his insurance carrier shall be reimbursed from the Second Injury Fund...

S.C. Code Ann. §42-9-400 (a) (as amended June 25, 2003) (Emphasis added).

Ms. Szabo's change of condition claim resulted in a cervical spine fusion which in turn caused subsequent and increased disability from the February 9, 2004 accidental injury. (R. pp. 11-12). Accordingly, Respondent is subject to full reimbursement from the South Carolina Second Injury Fund, as opposed to partial reimbursement dating from February 9, 2004 to February 3, 2006 (dates referenced in the initial permanent disability award). *Id.*

Interestingly, Appellant argued that under no circumstances could it be deemed liable for payment of reimbursement benefits for indemnity and medical benefits paid to Ms. Szabo resulting from the change of condition claim. (R. p. 61, lines 6-49). Respondent argued that the change of condition claim proximately and directly emanated from the original February 9, 2004, work-related accident. However, because Ms. Szabo had returned to work and had potentially exacerbated her cervical spine condition, the change of condition claim could have been theoretically characterized as a new accident. In any event, there is no argument that Claimant's cervical spine problems and resulting surgery emanated from the original work-related accident, which had progressively worsened over time. (R. pp. 222-227, and 235-236).

Because of Ms. Szabo's pre-existing conditions of Raynaud's syndrome, hyperthyroidism and depression, and the lumbar spine surgery combined with her increased subsequent disability stemming from the shoulder and neck injuries, the claim qualifies for Second Injury Fund reimbursement.

III. SUBSTANTIAL EVIDENCE SUPPORTS THE COMMISSION'S FACTUAL FINDINGS THAT MS. SZABO'S PRE-EXISTING HYPERTHYROIDISM, RAYNAUD'S SYNDROME AND DEPRESSION WERE PERMANENT AND SERIOUS CONDITIONS AND CONSTITUTED A HINDRANCE OR OBSTACLE TO EMPLOYMENT OR RE-EMPLOYMENT.

The arguments advanced by Appellant in addressing this issue are predicated upon a factual determination. On Page 6 of Appellant's Brief, Larson's treatise on worker's compensation is cited. Appellant's Brief states:

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).

In the underlying worker's compensation claim, Ms. Szabo was deemed permanently and totally disabled from employment activities at BMW Manufacturing Corporation, LLC. The testimony and the vocational medical evidence prove that Ms. Szabo's health maladies posed a hindrance or obstacle to employment and re-employment. (R. pp. 179, 244, 256-299, and 336-352). Ms. Szabo testified she would not be able to engage in repetitive activities involving the movement and use of her arms and hands. (R. pp. 338-350). Ms. Szabo's limitations, impairments and

disabilities are corroborated by vocational evidence and medical evidence in the record. (R. pp. 256-299).

Regardless of a conflict in the evidence as Appellant argues, a Finding of Fact by the Commission is conclusive. Tiller v National Health Care Center of Sumter, 334 S.C. 333, 513 S.E.2d 843 (1999). Whether hyperthyroidism and Raynaud's syndrome constituted an obstacle or a hindrance to employment or re-employment for Ms. Szabo is a factual issue. Sharpe v Case Produce, Inc., 336 S.C. 154, 519 S.E.2d 102 (1999); Wynn v People's Natural Gas Co., 238 S.C. 1, 118 S.E.2d 812 (1961). Because the Commission's and the Court's Decisions on this issue are supported by substantial evidence, it is respectfully submitted that the Order for reimbursement from the Appellant be affirmed.

IV. THE RAYNAUD'S SYNDROME WAS A PERMANENT AND SERIOUS CONDITION AND POSED AN OBSTACLE AND HINDRANCE TO EMPLOYMENT.

As previously argued, Appellant's appeal of this issue constitutes a disagreement with the Commission's factual findings. This argument does not present any legal challenge as a basis for reversing the Commission. Again, the medical reports of Drs. Sadd, Esce, Mitchell, and Schwartz and the vocational reports of Drs. William Stewart and Benson Hecker constitute substantial evidence in support of the Commission's finding that the Raynaud's syndrome was a permanent and serious condition and posed as an obstacle and hindrance to employment and re-employment. (R. pp. 179, 181-183, 187-188, 193, 198, 244 and 267-299).

The Full Commission is the ultimate fact finder. As such, even when there are conflicts in evidence and medical testimony, a Court may not weigh the testimony and upset the Commission's findings when supported by competent evidence. Sturkie v. Ballinger Corp., 268 S.C. 536, 235 S.E.2d 120 (1977); Scott v Havnear Motor Co., 226 S.C. 580, 86 S.E.2d 475 (1955).

The Findings of Fact by the Commission are conclusive and not subject to review by an Appellate Court unless such is not supported by substantial evidence. Layton v. Hammond-Brown-Jennings Co., 190 S.C. 425, 3 S.E.2d 492 (1939). Appellant chose not to place any evidence into the record nor challenge the expert medical and vocational opinions of the experts submitted by Respondent. See, Carolina's Recycling Group v South Carolina Second Injury Fund, 398 S.C. 480, 730 S.E.2d 324, (Ct. App. 2012).

None of the treating physicians ever disputed Ms. Szabo's contention that she was unable to hold objects and that she was experiencing continuous numbness and tingling in her hands. As a matter of fact, Ms. Szabo's complaints of discoloration, paresthesia and swelling were corroborated by the physical examination by Drs. Sadd and Schwartz. (R. pp. 187-190, 202-203).

For the foregoing reasons, it is respectfully submitted that the Commission's and Court's Decision and Order ordering Appellant to reimburse Respondent for medical and indemnity benefits be affirmed.

CONCLUSION

It is respectfully submitted that the Commission's Circuit Court's Decision and Order be affirmed and Appellant's appeal be dismissed for the following reasons:

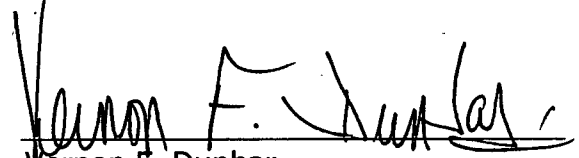
- 1. Appellant presented no evidence to refute the expert medical opinions of Drs. David Mitchell and Phillip Esce opining that Ms. Szabo had suffered with pre-existing conditions or Raynaud's syndrome, hyperthyroidism and depression and that such had combined with her injuries suffered on February 9, 2004 to render her permanently disabled and resulted in increased medical costs.**
- 2. Appellant presented no medical evidence, medical questionnaires or countervailing medical opinions to refute the numerous medical opinions and reports.**
- 3. Appellant presented no medical treatise or literature at the hearing in order to contradict the expert medical opinions of Drs. Mitchell and Esce.**
- 4. Appellant did not depose any of the medical and vocational experts; nor did Appellant depose Ms. Szabo in order to determine the severity of her pre-existing conditions.**

The only evidence in the records confirms and corroborates that Ms. Szabo had pre-existing permanent conditions and physical impairments and that such combined with her cervical spine, right shoulder and right trigger finger injuries to render Ms. Szabo permanently and totally disabled. Hence, the Commission's Decision must be affirmed as a matter of law. Ellison v. Frigidaire Home Products, *Supra.* and Carolinas Recycling Group v South Carolina Second Injury Fund, *Supra.*

(Signature to follow on next page)

Respectfully submitted,

By:

A handwritten signature in black ink, appearing to read "Vernon F. Dunbar". The signature is written over a horizontal line.

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