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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Appellate Case No. 2018-000922

Robert L. Evans, Employee, ... Appellant,

v.

Aqua Seal Manufacturing & Roofing,
and Builders Mutual Insurance Company,..... Respondents.

PETITION FOR REHEARING

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MEMORANDUM OF AUTHORITIES

STATUTES

The Appellant by and through his undersigned counsel and pursuant to Rule 221(a) of the South Carolina Appellate Court Rules hereby request that the Court rehear the above reference matter, as it relates to the Court's affirming the Worker's Compensation Commission's Order denying and dismissing Appellant's claim with prejudice. This request is based upon the following:

It is Appellants position that the Court has improperly substituted it's finding of facts for that of the Worker's Compensation Commission (the Appellate Panel's) in support of the Appellate Panel's ruling and as such overstepped it's authority under §1-23-380 of the South Carolina Administrative Procedure Act.

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 administrate findings, inferences, conclusions or decisions are affected by either 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 Appellate Panel'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).

The Appellate Panel's ruled that under S.C. Code §42-1-160 (Supp. 2011), the Claimant did not met his burden of proving he suffered a compensable injury by accident out of and in the course of his employment. (R. p. 6, para 4). The Commission based it's ruling on the factual finding that when the evidence was reviewed as a whole, the Claimant did not prove by a preponderance of the evidence that he suffered an injury by accident - rhabdomyolysis - on June 3, 2016. (R. p. 6, para 13). The Commission further stated that "while the Claimant clearly suffers from this condition, he has not met his burden as to compensability set forth in the Act. (R. p. 6, para 13).

The Claimant claim of compensability is based not upon the condition, **Rhabdomyolysis**, but upon the **heat exhaustion** he suffered on June 3, 2016. In Smith v. Southern Builders, Inc., 24 S.E. 2d 109, 115 (1943), the court stated ,"a workman who sustains heat prostration as the result of the working conditions under which he labors, has sustained an injury 'arising out of and in the course of his employment; and the fact that other workman may not have been affected or that he may have been rendered more readily susceptible to injury than they were by reason of his physical condition cannot affect the matter."

The Claimant was admitted to hospital on June 5, 2016 where it was determined that Claimant was suffering from **acute rhabdomyolysis**, anterior abdominal wall pain/cramps, generalized muscle cramps, moderate to severe dehydration, and **heat exhaustion**. (R. p 107). The Commission found as a fact that "when the evidence is reviewed as a whole, there is no question that the Claimant had a heat-related incident on June 3, 2016." (R. p. 4, para 4). There is substantial evidence, (Claimant's testimony and medical records), in the record to support the Appellate Panel's "Finding of Fact" that Claimant had a heat-related incident (heat exhaustion) on June 3, 2016.

This Court held that evidence in the record supported the Appellate Panel's finding that Claimant failed to prove an injury by accident. This is in error since the Appellate Panel found that Mr. Evan's had a heat-related incident on June 3, 2016. Such an incident is compensable under the Act.

The Appellate Panel was presented with the question, did Claimant's heat related incident on June 3, 2016 aggravate and accelerate his unknown pre-existing condition "rhabdomyolysis" and as such, is it a compensable injury by accident arising out of and in the course of his employment pursuant to S.C. Code §42-1-160 (Supp. 2011)?

The question rises two separate issues;

1) Is the heat related incident a compensable injury in it's own right? and

2) If so, did it aggravate and accelerate Claimant's unknown pre-existing condition "rhabdomyolysis"?

FIRST ISSUE

This Court in it's first analysis did not review the Appellate Panel's ruling in light of the Appellate Panel's finding that Claimant had a heat related incident. Instead the Court focused on whether Claimant's condition "rhabdomyolysis" was a compensable injury under S.C. Code §42-1-160 (Supp. 2011). To that end, the Court stated that Dr. Floyd testified that he could not determined when Claimant suffered an injury. The Court than stated that "the rule has been established in this state that 'when the testimony of medical experts is relied upon to establish causal connection between an accident and subsequent disability or death, in order to establish such, the opinion of the experts must be at least that the disability or death most probably resulted from the accidental injury". The Court left out the last sentence of the paragraph of the cited testimony of Dr. Floyd's in which he stated, "it is the opinion of this examiner, though, that working on the roof top contributed to his acute illness". (R. p. 91, lines 8-10). Dr. Floyd also testified that "rhabdomyolysis" is an "acute injury". (R. p. 84, line 18). An acute injury is an injury that is severe and with sudden onset.

Based upon the rule articulated above, Dr. Floyd's testimony that Claimant working on the roof contributed to the acute onset of his illness, "rhabdomyolysis", established the causal connection between his injury and his work. The acute onset of Claimant's "rhabdomyolysis" was cause by a heat related incident as found by the Appellate Panel. Therefore, under S.C. Code §42-1-160 (Supp. 2011), the Claimant did meet his burden of proving that he suffered a compensable injury by accident arising out of and in the course of his employment.

The Court also asserted that Claimant claim was not compensable because his prior heat related episodes were not an unlooked for event, and that he could have anticipated it due to his past experiences. This totally disregard the Appellate Panel's finding that "While there is clearly evidence that the Claimant has had previous heat-related episodes, the Claimant does not have a diagnosis of rhabdomyolysis until this event. There is no evidence in the record that the Claimant knew prior to this event that he suffered from rhabdomyolysis. Absent any evidence of an earlier diagnosis, it would require speculation ..... to conclude that he could or should have known. Rhabdomyolysis is a specific diagnosis which is different than heat exhaustion or dehydration. " (R. p. 5, para 7). The Appellate Panel's findings and ruling made no mention of prior "debilitating heat-related episodes" being grounds for a denial of compensability. This court take it upon itself to review the evidence and to find grounds, not found by the Appellate Panel, to support the denial of compensability under S.C. Code §42-1-160 (Supp. 2011).

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. S.C. Code § 1-23-380 (Supp. 2011). The court here, has substituted it's judgment for that of the Appellate Panel. The Appellate Panel's findings are in stark contrast to the analysis of the Court as to "unlooked for or untoward events" in this matter. The Appellate Panel specifically find that "it would require speculation....to conclude that"...Claimant..."could or should have known" that he suffered from rhabdomyolysis. This factual finding was made by the Appellate Panel even after acknowledging the Employer's assertion that Claimant knew or should have known that he had the condition. This court does not have the authority to substitute its judgment for the judgment of the agency. S.C. Code § 1-23-380 (Supp. 2011). The only question before

the Court is whether the record contains substantial evidence supporting the Commission's finding. In this instance there was sufficient evidence in the record to support the Appellant Panel's finding of fact as it related to Claimant's prior heat related episodes.

The Appellant Panel's own factual findings support the conclusion that Claimant suffered a compensable injury by accident arising out of and in the course of his employment. There is no factual finding in the Appellant Panel's ruling that would support their "Conclusions of Law" that under S.C. Code §42-1-160 (Supp. 2011), the Claimant did not meet the burden of proving he suffered a compensable injury by accident arising out of and in the course of his employment. Such a conclusion is an error of law and/or not supported by the reliable, probative and substantial evidence on the whole record. S.C. Code § 1-23-380 (Supp. 2011). Therefore, that part of the Appellant Panel's decision should be reversed.

SECOND ISSUE

The Court has also held that the evidence in the record supported the Appellate Panel's finding that Claimant did not suffer a compensable aggravation of a pre-existing condition pursuant to S.C. Code Ann. §42-9-35 (2015). It is Claimant's position that this finding is also in error.

A work-related accident which aggravates or accelerates a pre-existing condition, infirmity, or disease is compensable. Brown v. R.L. Jordan Oil Co., 291 S.C. 272, 353 S.E.2d 280 (1987); Sturkie v. Ballenger Corp., 268 S.C. 536, 235 S.E.2d 120 (1977); Mullinax v. Winn-Dixie Stores, Inc., 318 S.C. 431, 458 S.E.2d 76 (Ct. App.1995). A condition is compensable unless it is due solely to the natural progression of a pre-existing

condition. Mullinax, 318 S.C. at 437, 458 S.E.2d at 80. It is no defense that the accident, standing alone, would not have caused the claimant's condition, because the employer takes the employee as it finds him or her. Id. "[A]ggravation of a pre-existing condition is compensable where disability is continued for a longer time, even though no disability would normally have resulted from the injury alone, or even if the aggravation would have caused no injury to an employee who was not afflicted with the condition." Id.

A "claimant's right to compensation for aggravation of a pre-existing condition arises when the claimant has a dormant condition that becomes disabling because of the aggravating injury." (Murphy v. Coming, 393 S.C. 77, 86, 710 S.E. 2d 454, 458 (S.C. App. 2011).

Claimant's rhabdomyolysis was a latent pre-existing condition unknown to the Claimant that became acute on June 3, 2016. This condition was aggravated and accelerated by Claimant's "heat exhaustion" on June 3, 2016. Dr. Floyd in a letter dated April 12, 2017 stated that Claimant had a "heat related illness which appeared to have resulted from a cauldron of chronic medical condition(HIV), medications and repeated heat exposure. How each contributed to his heat illness could not be determined." (R. p 139.). But, it was his opinion "that working on the roof top contributed to" Claimant's "acute illness" rhabdomyolysis. Id. It was also Dr. Floyd's opinion that Claimant's condition was permanent and restricted his ability to work. Dr. Floyd stated in his Deposition that Claimant "...can permanently never ever work in that type of environment where heat and extreme activities are involved, yes, it's permanent." (R. p 99, lines 16-18). The Appellate Panel found that "...the Claimant had a heat-related incident on June 3, 2016." (R. p 4, para 4). The Appellate Panel also found that "...Rhabdomyolysis is a specific diagnosis

which is different than heat exhaustion or dehydration." (R. p 5, para 7). The Appellate Panel also find that "While there is clearly evidence that the Claimant has had previous heat-related episodes, the Claimant does not have a diagnosis of rhabdomyolysis until this event. There is no evidence in the record that the Claimant knew prior to this event that he suffered from rhabdomyolysis. Absent any evidence of an earlier diagnosis, it would require speculation..... to conclude that he could or should have known" of his condition. Rhabdomyolysis is a specific diagnosis which is different than heat exhaustion or dehydration. " (R. p. 5, para 7). The Appellate Panel's findings and ruling made no mention of prior "debilitating heat-related episodes" being grounds for a denial of compensability.

Claimant testified that after his arrival to the hospital on June 5, 2016 he was told by his care provider(s) that his CPK level was in the thousands, that his kidneys could shutdown, and something about Rhabdomyolysis. (R. p. 57, lines 17-25). Claimant's emergency room report states that Claimant presented complaining of abdominal cramping and pain which had been ongoing for the last 3 days. (R. p 105). After physical examination it was determined that Claimant was suffering from acute rhabdomyolysis, anterior abdominal wall pain/cramps, generalized muscle cramps, moderate to severe dehydration, and heat exhaustion. (R. p 107). There is ample evidence, (medical and otherwise), in the record that casually connect Claimant's heat incident to the acute onset of his rhabdomyolysis.

The Appellant Penal's own factual findings support the conclusion that Claimant suffered a compensable aggravation of a preexisting condition arising out of and in the course of his employment. There is no factual finding in the Appellant Panel's ruling that

would support their "Conclusions of Law" that under S.C. Code §42-9-35 (2015), the Claimant did not meet that burden. Such a conclusion is an error of law and/or not supported by the reliable, probative and substantial evidence on the whole record. S.C. Code § 1-23-380 (Supp. 2011).

CONCLUSION

Claimant would submit that based upon the medical evidence, testimony and all of the evidence in the record as a whole he has established by a preponderance of the evidence that he sustained an injury arising out of and in the course of employment, heat exhaustion/heat prostration, that aggravated a pre-existing condition, rhabdomyolysis, that was dormant but which became acute and disabling.

Therefore, this Court should reverse the decision of the Appellant Panel based upon the grounds that the Appellant Panel's decision is clearly an error of law and/or erroneous in view of the reliable, probative and substantial evidence on the whole record.

Respectfully submitted,

July 28, 2020

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PROOF OF SERVICE

I certify that I have served a copy of Appellant's **Petition For Rehearing** on the following party, Helen F. Hiser, Esq., Attorney for the Respondents, on July 28, 2020, by depositing said papers in United States Mail, Postage Prepaid, Return Address clearly indicated on the envelope, to the address below:

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July 28, 2020

The Honorable, Jenny Abbott Kitchings
Clerk, South Carolina Court Of Appeals
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RE: Evans v. Aqua Seal Manufacturing and Roofing, et al
App. Case No. 2018-000922
Petition For Rehearing
Our File No.: 16-029-WCC

Dear Ms. Kitchings:

Please find enclosed Appellant's Petition For Rehearing for filing with the Court. I have provided the original and six copies of the Petition along with the filing fee of $50.00. I have also enclosed an extra copy and would ask that you stamped it received and return it in the enclosed self-addressed stamped envelope that I have enclosed.

Your cooperation and assistance is appreciated and if you have any questions please contact.

Sincerely,

Charles E. Johnson, Esq.

CEJ
Enclosure
cc: Helen F. Hiser, Esq.

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The Honorable, Jenny Abbott Kitchings
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