

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

Appellate Case No: 2020-000718

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SC Court of Appeals

Timothy Clayton, Claimant.....Appellant,

v.

South Carolina Department of Transportation, Employer, and South Carolina State Accident
Fund, Carrier,.....Respondents.

INITIAL BRIEF OF RESPONDENTS

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ISSUES ON APPEAL

1. Whether the Full Commission properly found that the Appellant failed to meet his burden of proving his preexisting psychiatric and psychological conditions were aggravated as a result of his March 28, 2017 on the job accident where the only opinion supporting causation was from a doctor that the Commission found to not be convincing?

STATEMENT OF THE CASE

This matter involves an admitted claim in which Appellant suffered an injury to his back on March 28, 2017 while lifting equipment into his work truck. Appellant initially treated with Carolina Occupational Health for this injury before he was transferred to Midlands Orthopaedics for further treatment. Appellant treated first with Dr. O'Leary before his care was transferred to Dr. LaMotta. Dr. LaMotta released Appellant at MMI on September 26, 2017.

On September 20, 2017, Appellant filed a Form 50 requesting a hearing and alleging injury to his back and right hip. Respondents filed a Form 51 on October 17, 2017 admitting only an injury to the low back. Respondents filed a Form 21 that same day seeking to stop the payment of temporary total disability benefits, a determination of permanency and the amount of compensation due, and also a credit of overpayment of TTD to the date of MMI. Appellant filed an amended Form 50 on October 20, 2017 alleging, in addition to injury to his back and right hip, that his right leg and psychological condition were also affected. That same day, Appellant filed a Form 22 admitting that he was at MMI, but further alleging that he was in need of additional medical care and treatment. Respondents filed a second Form 51 on October 27, 2017 admitting only an injury to the low back as a result of the March 28, 2017 work accident.

A hearing was set on Appellant's Forms 50, Respondents' Forms 51, Respondents' Form 21, and Appellant's Form 22 on December 29, 2017. Prior to that hearing, the parties entered into a Consent Order dated December 19, 2017 in which the parties agreed that Respondents would authorize a second opinion for Appellant's low back with Dr. Peelle and that Respondents would send Appellant for a psychological evaluation with Dr. Lowndes-Rosen. Dr. Peelle completed his evaluation of Appellant's low back on January 4, 2018 and Dr. Lowndes-Rosen completed her Independent Psychological Evaluation of Appellant on March 6, 2018.

Thereafter, on March 23, 2018, Respondents filed a Form 21 seeking to stop the payment of temporary total disability benefits, a determination of permanency and the amount of compensation due, and also a credit of overpayment of TTD to the date of MMI. Appellant filed a Form 50 on April 5, 2018, again alleging injury to his back and right hip, and that his right leg and psychological condition were affected. Appellant also sought payment of medical bills for Lexington County EMS, Palmetto Health Baptist-Parkridge, and Pitts Radiology for a date of service of July 20, 2017 following an alleged seizure at Dr. LaMotta's office. Appellant also filed a Form 22 on May 1, 2018 alleging that Appellant was permanently and totally disabled as a result of the injuries sustained in his March 28, 2017 work accident. Respondents filed a Form 51 on May 4, 2018 again admitting only an injury to the low back as a result of the March 28, 2017 work accident.

A hearing was set on Respondents' Form 21, Appellant's Form 22, Appellant's Form 50, and Respondents' Form 51 on September 26, 2018. However, that hearing was postponed to allow the parties to conduct mediation. After mediation was unsuccessful, a hearing was reset on October 25, 2018. Prior to that hearing, the parties entered into a Consent Order providing that additional discovery was needed prior to a hearing. On January 8, 2019, Appellant requested the Commission place the file back on the docket for a hearing.

Pursuant to this request, a hearing was set on Appellant's Form 50 and Respondents' Form 51 on March 6, 2019. At the time of the hearing, the parties agreed that the matters raised in Respondents' Form 21 and Appellant's Form 22 would be considered as well.

At the hearing, Appellant requested payment for an ambulance bill and emergency room treatment on July 20, 2017 related to an apparent seizure Appellant experienced following an injection by Dr. LaMotta. Appellant further alleged that Appellant's psychological condition was

aggravated by his work accident. Appellant asserted that, as a result of the combination of his physical injuries and his psychological condition, he was rendered permanently and totally disabled.

Respondents asserted that Appellant's injury is limited to his low back, and that he is at MMI for that injury. Therefore, Respondents claimed that Appellant's recovery is limited to that afforded under S.C. Code Ann. §42-9-30. Respondents denied that Appellant's July 20, 2017 seizure was causally related to Appellant's work injury, or to the treatment provided for such injury. Respondents further denied that Appellant's psychological condition was aggravated by his work related condition. In the alternative, Respondents argued that, should the Commissioner find that Appellant had sustained an aggravation of his psychological condition, he is not at MMI for that condition, and Respondents should get to direct the care for that condition.

Following the hearing, the Single Commissioner issued an Order and Decision on May 13, 2019 finding Appellant's preexisting psychiatric and psychological conditions were aggravated subsequent to his March 28, 2017 on the job accident, and that Appellant had not reached MMI for this condition. The Single Commissioner further found that a full psychological evaluation of Appellant needs to be done by a certified psychiatrist. Finally, the Single Commissioner found that Appellant's July 20, 2017 seizure episode was causally related to the original March 28, 2017 on the job accident.

Respondents filed a Form 30 appealing the Hearing Commissioner's ruling.¹ Respondents set forth the following issues on appeal:

1. Did the hearing Commissioner err as a matter of law in finding that Claimant's preexisting psychiatric and psychological conditions were aggravated subsequent to the March 28, 2017 on the job accident where the Commissioner relied on the opinion of Dr. Kirkland in rendering that decision, but further found Dr. Kirkland to not be convincing?

¹ Appellant did not appeal any portion of the decision of the Single Commissioner to the Full Commission.

2. Did the hearing Commissioner err as a matter of fact in finding that Claimant's preexisting psychiatric and psychological conditions were aggravated subsequent to the March 28, 2017 on the job accident where the Commissioner relied on the opinion of Dr. Kirkland in rendering that decision, but further found Dr. Kirkland to not be convincing?
3. Did the hearing Commissioner err as a matter of law in ordering Defendants to provide full psychological evaluation of Claimant by a certified psychiatrist?
4. Did the hearing Commissioner err as a matter of fact in ordering Defendants to provide full psychological evaluation of Claimant by a certified psychiatrist?
5. Did the hearing Commissioner err as a matter of fact in finding that Claimant's July 20, 2017 seizure episode was causally related to the original March 28, 2017 on the job accident?
6. Did the hearing Commissioner err as a matter of law in finding that Claimant's July 20, 2017 seizure episode was causally related to the original March 28, 2017 on the job accident?

Following argument on August 10, 2019, the Full Commission issued an Order dated April 20, 2020, in which it affirmed in part and reversed in part the decision of the Single Commissioner. Specifically, the Full Commission set forth that they affirmed "the Single Commissioner's findings that Claimant sustained a causally related medical episode July 20, 2017, subsequent to an authorized injection." As to the finding regarding Appellant's psychiatric and psychological condition, the Appellate panel reversed the Single Commissioner's findings that Claimant sustained a compensable aggravation of his preexisting psychiatric and psychological condition. The Appellate Panel held that such findings by the Single Commissioner:

were based solely on medical evidence that the Single Commissioner found to be unconvincing. The finding that this evidence was unconvincing was not appealed. Therefore, the finding of compensability of Claimant's psychiatric and psychological condition is wholly inconsistent with the finding that the evidence in support of compensability is unconvincing.

Appellant filed the present appeal from that decision.

STATEMENT OF THE FACTS

Prior to Appellant's work accident, he had preexisting psychological conditions dating back to childhood. In April 2011, Appellant described to Dr. James Kirkland being

institutionalized for several months at age 13. (Respondents' APAs p. 1). Appellant further recalled recognizing he had anxiety after experiencing severe panic attacks in 1996 after he bought a new home, the shop where he worked closed, and his wife wrecked the car. (Respondents' APAs p. 1). He described experiencing diaphoresis, hypertension, tremors, rubbery legs, parasthesis, dyspnea, tachycardia, palpitations and impending doom. (Respondents' APAs p. 1). Appellant told Dr. Kirkland he was out of work for two weeks at that time. (Respondents' APAs p. 1). Appellant noted other significant incidences that contributed to his depression, including his son's death and a move from Florida. (Respondents' APAs p. 1). Appellant described being in counseling for years, but was referred to Dr. Kirkland by an Internet website in 2011 after his prior psychologist moved to another state. (Respondents' APAs p. 1). Appellant advised Dr. Kirkland of his history of a number of health problems, including lupus, gastroesophageal reflux disease, hyperlipidemia, sleep apnea, and irritable bowel syndrome. (Respondents' APAs p. 2). He further described a past adverse reaction to Lipitor, which he claims wiped out his memory. (Respondents' APAs p. 2).

Appellant's records from his treatment with Dr. Kirkland from before his work accident demonstrate a history of severe panic attacks, including instances where Appellant had lost consciousness and an instance where it was accompanied by vomiting. (Respondents' APAs p. 4). Appellant also described experiencing panic attacks that caused him to be afraid to drive for two weeks. (Respondents' APAs p. 6). Appellant's records from his treatment with Dr. Kirkland demonstrate that Appellant was regularly treating with Dr. Kirkland ahead of his accident. (Respondents' APA number 1 and Appellant's APA number 1) Appellant generally saw Dr. Kirkland every two to three months, though there are a number of times where Appellant saw Dr. Kirkland ahead of his scheduled appointment due to an increase in psychiatric symptoms.

(Respondents' APA number 1 and Appellant's APA number 1)

Appellant sustained a work related injury on March 28, 2017 while he was lifting equipment into a truck. Appellant did not report this injury to his supervisor until May 30, 2017, more than two months after the date of injury, at which time he reported an injury to his back. (Appellant's APAs p. 263). Appellant did seek treatment with Lexington Family Practice on April 20, 2017. (Appellant's APAs p. 17). At that time, Appellant complained of right mid and lower back pain, which he had been experiencing for two weeks. (Appellant's APAs p. 17). He denied any injury, but noted that he had been performing "a lot of up and down repetitive movements at work." (Appellant's APAs p. 17).

After Appellant did report his injury to his employer, Appellant began treatment for his back injury on June 1, 2017 with Carolina Occupational Healthcare, LLC. (Appellant's APAs p. 53). Appellant treated at Carolina Occupational Healthcare only twice before he was sent for physical therapy and referred to an orthopedic doctor. (Appellant's APAs p. 53-56).

Appellant was seen by Dr. Kirkland on June 8, 2017. Dr. Kirkland noted that Appellant was being "seen prior to scheduled appointment as pt (sic) has the day off." (Appellant's APAs p. 5). Based on Dr. Kirkland's note, it appears that this appointment was moved up out of convenience for Appellant rather than because of a need to be seen sooner. (Appellant's APAs p. 5). Appellant stated that "[h]e injured his back at work shortly after his last appointment" which was almost three months prior.² (Appellant's APAs p. 5). Appellant described "having increased anxiety as he is not sure what type of treatment he will need and if he will be able to continue

² It is unclear how much sooner Appellant saw Dr. Kirkland than was scheduled as his medical records reflect that he saw Dr. Kirkland every two to three months, and his June 8, 2017 was almost three months after his last appointment with Dr. Kirkland.

working his current job,” but denied having any panic attacks.³ (Appellant’s APAs p. 5)

Appellant began physical therapy on June 15, 2017, then first saw Dr. James O’Leary with Midlands Orthopaedics on June 20, 2017. (Appellant’s APAs p. 57, 73). Dr. O’Leary noted that Appellant complained only of low back pain. (Appellant’s APAs p. 73-74). At the conclusion of his medical note, Dr. O’Leary noted that Appellant’s “wife was displeased with my evaluation, medical opinion and plan of care and I will therefore release him from my office.” (Appellant’s APAs p. 75). Dr. O’Leary referred Appellant to a spine specialist or another orthopedic surgeon for further evaluation or treatment. (Appellant’s APAs p. 75).

Appellant’s treatment was transferred to Dr. Ivan LaMotta, who first began treating Appellant on July 20, 2017. (Appellant’s APAs p. 78). At that time, Appellant again complained of low back pain. (Appellant’s APAs p. 78-79) As had Dr. O’Leary, Dr. LaMotta recommended that the Appellant would benefit from nonoperative treatment. (Appellant’s APAs p. 80). He recommended a continued course of physical therapy for the lumbar spine in addition to Celebrex. (Appellant’s APAs p. 80). He noted that surgery was not indicated for Appellant. (Appellant’s APAs p. 80). Dr. LaMotta administered a PSIS injection, which he noted Appellant tolerated well with no complications. (Appellant’s APAs p. 80).

Following the administration of the injection, while Appellant was still in Dr. LaMotta’s office, he experienced what he alleges was a seizure. Appellant’s wife described the incident to the EMTs who responded to Dr. LaMotta’s office and stated that, approximately ten minutes after he received the injection, Appellant “began to feel weak and asked to sit down.” (Appellant’s APAs p. 107). Appellant’s wife further stated that, after Appellant sat down he “began having a

³ Appellant’s medical records from his treatment with Dr. Kirkland before his work accident indicate that Dr. Kirkland would start and stop medications and increase or decrease dosages depending on Appellant’s current complaints and condition. (Respondents’ APA number 1 and Appellant’s APA number 1)

full body seizure” for approximately thirty seconds. (Appellant’s APAs p. 107). The EMS record further reflects that Appellant “never had a postictal period after seizure.” (Appellant’s APAs p. 107). Appellant reported to the EMTs that he experienced a seizure six years prior. (Appellant’s APAs p. 107).

Appellant was transported to Parkridge Hospital emergency room for treatment. (Appellant’s APAs p. 107, 109). At the hospital, Appellant’s wife described to the doctor “a generalized tonic-clonic episode with following postictal state.” (Appellant’s APAs p. 109). Appellant noted “that he felt it ‘coming on,’ prior to onset of symptoms.” (Appellant’s APAs p. 109). He further advised the doctor that he “does have a history of similar symptoms, in the past.” (Appellant’s APAs p. 109). While Dr. Baird’s clinical impression was new onset seizure, in his summary, Dr. Baird described Appellant as “a 46-year-old who is presenting with possible seizure.” (Appellant’s APAs p. 110). Dr. Baird noted that the CT of Appellant’s head “was grossly unimpressive with no focal intracranial abnormality” and that his EKG was “unimpressive.” (Appellant’s APAs p. 110). Dr. Baird described Appellant’s workup as “otherwise unimpressive.” (Appellant’s APAs p. 110). Dr. Baird noted that Appellant rested comfortably throughout his stay, and had a history of one other seizure. (Appellant’s APAs p. 110). Appellant was discharged home “with appropriate seizure precautions.” (Appellant’s APAs p. 110).

During Appellant’s physical therapy session on July 24, 2017, Appellant noted that he “[h]ad cortisone injection this past Thursday which has helped his pain.” (Appellant’s APAs p. 64). He further noted that he “[h]ad seizure per pt (sic) and BP elevated.” (Appellant’s APAs p. 64). Appellant advised the physical therapist that he was “better now” and that the injection “did help his pain.” (Appellant’s APAs p. 64).

Appellant next sought treatment with Dr. Nishanth Kodumuri with the USC Neurology

Clinic on August 2, 2017. (Appellant's APAs p. 115). Appellant described his apparent seizure on July 20, 2017. (Appellant's APAs p. 115). He further told Dr. Kodumuri that "he had one episode of passing out but did not have any shaking movements at the time, he regained consciousness immediately and was back to baseline." (Appellant's APAs p. 115). He denied ever having a seizure-like episode in the past. (Appellant's APAs p. 115). Appellant noted to Dr. Kodumuri that he was "concerned that steroid shot may have caused his seizure and wants to know about it." Dr. Kodumuri diagnosed Appellant with a "new onset non provoked seizure." (Appellant's APAs p. 116). Dr. Kodumuri recommended an increase in Appellant's dosage of Lamictal, and advised Appellant not to drive for six months per South Carolina law. (Appellant's APAs p. 116). Dr. Yedatore Venkatesh reviewed Dr. Kodumuri's assessment and plan, but noted that Appellant was going to talk to his Psychiatrist about an increase of his Lamictal and then decide how to proceed. (Appellant's APAs p. 114).

Appellant went to see Dr. Kirkland on August 7, 2017 for the first time since his June 8, 2017 appointment. (Appellant's APAs p. 5). Appellant's wife assisted in providing the doctor with an updated history. (Appellant's APAs p. 5). Appellant advised Dr. Kirkland that he had increased anxiety and that his panic attacks had returned after the injection. (Appellant's APAs p. 5). He told Dr. Kirkland that he "rarely leaves the house except for doctor's appointments due to panic attacks." (Appellant's APAs p. 5). Dr. Kirkland increased Appellant's Xanax prescription, but kept the rest of his medications the same. (Appellant's APAs p. 5). The medical note does not indicate that Appellant discussed with Dr. Kirkland the increase in Lamictal recommended by Dr. Kodumuri and Dr. Venkatesh. (Appellant's APAs p. 5).

Appellant returned to Dr. Kirkland on August 17, 2017 and noted that the Xanax wore off too quickly to help with his panic attacks. (Appellant's APAs p. 6) Dr. Kirkland changed

Appellant's prescription from Xanax to Valium and advised Appellant to see a counselor, which Appellant had "been opposed to for some time as he was in counseling for years during his teens." (Appellant's APAs p. 6) Dr. Kirkland stressed to Appellant that he had new issues that needed to be addressed by a counselor, and Appellant's wife advised Dr. Kirkland she would facilitate this. (Appellant's APAs p. 6) Dr. Kirkland also noted that Appellant's employer did not have a job available to him that is less physically demanding than his prior job, and Appellant advised Dr. Kirkland that he had been advised to seek long term disability. (Appellant's APAs p. 6) That same day, Appellant advised his physical therapist that it was difficult for him to give subjective comments because he was "heavily medicated." (Appellant's APAs p. 65).

Dr. LaMotta next saw Appellant on August 24, 2017, at which time Appellant noted that the prior injection provided mild, temporary relief. (Appellant's APAs p. 85). Appellant further claimed that he had "developed anxiety and agoraphobia since his adverse reaction to the injection and that he was told he had a seizure, so he is unable to drive according to the neurologist." (Appellant's APAs p. 85). Dr. LaMotta recommended that Appellant undergo a functional capacity evaluation. (Appellant's APAs p. 86).

During Appellant's appointment with Dr. Kirkland on September 5, 2017, Appellant's wife advised Dr. Kirkland that Appellant had "only done limited driving the past 2 months and none in the past 2 weeks."⁴ (Appellant's APAs p. 6) Appellant's wife further told Dr. Kirkland that Appellant had not taken Celexa since late the prior year even though Appellant had told Dr. Kirkland that he needed the medications back. (Appellant's APAs p. 6). With regard to Appellant's application for disability, Dr. Kirkland noted that he discussed with Appellant and his wife "to emphasize back problems in disability claims as panic attacks are likely to decrease

⁴ Dr. Kodumuri advised Appellant that, per South Carolina law, he was not to drive for six months after his apparent seizure. (Appellant's APAs p. 116).

significantly or resolve in 3 to 6 months.” (Appellant’s APAs p. 6).

Following the FCE completed on September 14, 2017, Appellant returned to see Dr. LaMotta on September 21, 2017. (Appellant’s APAs p. 97-98). Dr. LaMotta noted his agreement with the results of the FCE, which revealed that Appellant was capable of working at a heavy physical demand. (Appellant’s APAs p. 98). Dr. LaMotta further opined that Appellant had reached MMI and had not sustained any loss of function to the lumbar spine. (Appellant’s APAs p. 99). Therefore, he opined that Appellant sustained no permanent impairment to the lumbar spine, and did not need any additional medical treatment. (Appellant’s APAs p. 99). Dr. LaMotta released Appellant back to work with the restrictions as set forth by the FCE completed by CORA. (Appellant’s APAs p. 99).

On October 4, 2017, Appellant returned to Dr. Kirkland and noted that he was “a little down as he has worked since the age of 16 and is now not able to work.” (Appellant’s APAs p. 8).⁵ However, Dr. Kirkland noted that Appellant was “not depressed.” (Appellant’s APAs p. 8). During his next appointment with Dr. Kirkland on October 31, 2017, Appellant described feeling more alert with the change of his medication from Valium to Xanax, and also described a decrease in his anxiety since he started citalopram. (Appellant’s APAs p. 8).⁶ Appellant described increased anxiety during his initial appointment with his psychologist. (Appellant’s APAs p. 8). Appellant noted that he was so anxious that the psychologist ended the session prematurely and would try again in two weeks once Appellant stabilized more on citalopram. (Appellant’s APAs p. 8).

On February 27, 2018, Respondent saw Dr. Dyana Lowndes-Rosen for an Independent

⁵ There is no evidence that Appellant attempted to find work within his restrictions of heavy physical demand as set forth by Dr. LaMotta at Appellant’s September 14 visit.

⁶ Citalopram is the generic form of Celexa, the medication which Appellant’s wife told Dr. Kirkland Appellant had not been taking since the prior year. The medical note from March 21, 2017, the last note prior to Appellant’s work accident, indicates Dr. Kirkland was prescribing Celexa to Appellant at that time. (Appellant’s APAs p. 5).

Psychiatric Evaluation. Dr. Lowndes-Rosen noted that, upon seeing Appellant and his wife in the waiting room, she handed Appellant a questionnaire to complete, which his wife immediately took away and began writing. (Respondents' APAs p. 15). Dr. Lowndes-Rosen noted that Appellant had persistent depressive disorder as well as a panic disorder, which she noted was preexisting and not related to his workers' compensation injury. (Appellant's APAs p. 16). She further noted her opinion that Appellant's cognitive dysfunction could be caused by an "overuse of tranquilizer medication in combination with his other medications."⁷ (Appellant's APAs p. 16).

On March 19 and 22, 2018, at the recommendation of Dr. Kirkland, Appellant was seen by Dr. William Haxton for a Neuropsychological Re-evaluation. (Appellant's APAs p. 144). At that time, Appellant noted Dr. Lowndes-Rosen's opinion that Appellant's cognitive issues could be due to overuse of antianxiety medication, such as Xanax⁸, and advised Dr. Haxton that he was not taking any medication for pain. (Appellant's APAs p. 145). Dr. Haxton noted that Appellant "moves and thinks at a notably slow rate of speed, giving the impression of sedation from one or more of his medications." (Appellant's APAs p. 149). He further noted the possibility, based on Appellant's wife's claim that Appellant was taking less than the prescribed amount of his medications, these issues may "stem from the severity of his mood and anxiety disorders." (Appellant's APAs p. 149). He recommended that Appellant "continue to work with his psychiatrist to treat his mood and anxiety disorders" and to "consult with his psychiatrist regarding the possibility that his medication regimen might be contributing to his current condition."

⁷ During his March 8, 2018 visit with Dr. Kirkland, Appellant noted to Dr. Kirkland that Dr. Lowndes-Rosen noted some cognitive changes, but the medical note does not indicate that Appellant advised Dr. Kirkland that one possible cause for these changes could be Appellant's medications. (Appellant's APAs p. 13).

⁸ Appellant's wife advised Dr. Haxton that she had not refilled Appellant's Xanax medication since November 2017 and that he still has several pills in the bottle, meaning that he took it less than prescribed. (Appellant's APAs p. 145). However, Dr. Haxton noted that, during testing, Appellant "appeared somewhat sedated and his psychomotor speed was rather slow." (Appellant's APAs p. 146). Appellant advised Dr. Haxton that he had taken "¼ of a Xanax and ½ of a 'diamond shaped pill' prior to his appointment." (Appellant's APAs p. 146).

(Appellant's APAs p. 149). The last medical note in the record from Appellant's treatment with Dr. Kirkland is from April 5, 2018. This was after Appellant's evaluation with Dr. Haxton, but before he generated his report. (Appellant's APAs p. 14). Appellant notes that he had the evaluation, but does not discuss with Dr. Kirkland potential concerns with his medication regimen and Appellant's prescriptions remained the same. (Appellant's APAs p. 14).

Dr. Kirkland completed two separate questionnaires at the request of Appellant's counsel. In response to the first on December 5, 2017, Dr. Kirkland noted that Appellant's "increased anxiety, panic attacks, and depression were most probably... aggravated by the low back/right leg/right hip pain; and July 20, 2017 seizure originating when Mr. Clayton lifted hydraulic pumps to saddles on March 28, 2017, while at work." (Appellant's APAs p. 9). As far as treatment, Dr. Kirkland recommended a referral to a psychologist, the restart of citalopram, and an increased dosage of Xanax.⁹ (Appellant's APAs p. 9). In response to the second questionnaire on May 15, 2018, Dr. Kirkland again noted that Appellant's "increased anxiety, panic attacks, and depression were most probably... aggravated by the low back/right leg/right hip pain; and July 20, 2017 seizure originating when Mr. Clayton lifted hydraulic pumps to saddles on March 28, 2017, while at work." (Appellant's APAs p. 16). He further stated that Appellant's panic attacks and extreme anxiety would prevent him from maintaining a forty hour work week.¹⁰ (Appellant's APAs p. 16).

⁹ Notably, Dr. Kirkland referred Appellant for counseling prior to his work accident, but Appellant advised Dr. Kirkland he was not open to that at all. (Appellant's APAs p. 2). Further, Appellant was prescribed citalopram/Celexa prior to the accident, including the visit immediately prior to his work accident. (Appellant's APAs p. 5). Finally, while Dr. Kirkland recommended an increase in Appellant's dosage of Xanax to address his apparent increase in anxiety, per Appellant and his wife, Appellant was not taking it as prescribed. (Appellant's APAs p. 145).

¹⁰ Notably, Dr. Kirkland did not opine that Appellant's medications would prevent him from being able to work a 40 hour work week.

STANDARD OF REVIEW

“In workers' compensation cases, the Full Commission is the ultimate fact finder.” DeBruhl v. Kershaw County Sheriff's Dep't, 303 S.C. 20, 24, 397 S.E.2d 782, 785 (Ct. App.1990). “While a finding of fact of the commission will normally be upheld, such a finding may not be based upon surmise, conjecture, or speculation, but must be founded on evidence of sufficient substance to afford a reasonable basis for it.” Edwards v. Pettit Constr. Co., 273 S.C. 576, 579, 257 S.E.2d 754, 755 (1979). The final decision regarding witness credibility and the weight to be afforded evidence resides with the Full Commission. Ford v. Allied Chem. Co., 252 S.C. 561, 167 S.E.2d 564 (1969). It is not the job of the appellate courts to weigh the evidence as determined by the Full Commission. Ellis v. Spartan Mills, 276 S.C. 216, 277 S.E.2d 590 (1981). “Under the scope of review established in the APA, this Court may not substitute its judgment for that of the Appellate Panel as to the weight of the evidence on questions of fact, but may reverse where the decision is affected by an error of law.” Bass v. Isochem, 365 S.C. 454, 467, 617 S.E.2d 369, 376 (Ct. App. 2005).

The South Carolina Administrative Procedures Act establishes the “substantial evidence” standard of review for decisions by the South Carolina Workers’ Compensation Commission and other state agencies. Lark v. Bi-Lo, Inc., 276 S.C. 130, 133-134, 276 S.E. 2d 304, 307 (1981). Under this standard, the Court of Appeals’ review “is limited to deciding whether the appellate panel’s decision is unsupported by substantial evidence or is controlled by some error of law.” Gadson v. Mikasa Corp., 368 S.C. 214, 221, 628 S.E. 2d 262, 266 (Ct. App. 2006) (citing S.C. Code Ann. §1-23-380). “The commission’s decision **must** be affirmed if the factual findings are supported by substantial evidence in the record.” Jennings v. Chambers Dev. Co., 335 S.C. 249, 259, 516 S.E.2d 453, 458 (Ct. App. 1999) (quoting Minor v. Philips Prods., 329 S.C. 321, 493 S.E.2d 819 (1997))(emphasis added).

ARGUMENT

1. **The Full Commission properly found that the Appellant failed to meet his burden of proving his preexisting psychiatric and psychological conditions were aggravated as a result of his March 28, 2017 on the job accident where the only opinion supporting causation was from a doctor that the Commission found to not be convincing**

The Full Commission properly found that Appellant failed to meet his burden of proving his preexisting psychiatric and psychological conditions were aggravated as a result of his March 28, 2017 on the job accident where the only opinion supporting causation was from a doctor the Commission found to not be convincing. As such, this decision should be affirmed.

Where an injured worker is alleging an aggravation of a preexisting condition as a result of a work related accident, S.C. Code Ann. §42-9-35(A) provides:

The employee shall establish by a preponderance of the evidence, including medical evidence, that

- (1) the subsequent injury aggravated the preexisting condition or permanent physical impairment; or
- (2) the preexisting condition or the permanent physical impairment aggravates the subsequent injury.

However, where an injured worker is alleging an aggravation of a preexisting psychological condition as a result of a work accident, the South Carolina Workers' Compensation Act requires either an admission of the aggravation or a specific medical finding by a physician. S.C. Code Ann. §42-1-160(D) provides that:

Stress, mental injuries, and mental illness alleged to have been aggravated by a work-related physical injury **may not be found compensable** unless the aggravation is:

- (1) admitted by the employer/carrier;
- (2) noted in a medical record of an authorized physician that, in the physician's opinion, the condition is at least in part causally related or connected to the injury or accident, whether or not the physician refers the employee for treatment of the condition;
- (3) found to be causally related or connected to the accident or injury after evaluation by an authorized psychologist or psychiatrist; or
- 4) noted in a medical record or report of the employee's physician as causally related or connected to the injury or accident. (emphasis added)

With regard to the evidence presented to meet this standard, "the Commission is the sole

fact-finder in workers' compensation cases, and ... any questions of credibility must be resolved by the Commission.” Smith v. S.C. Dep't of Mental Health, 329 S.C. 485, 501, 494 S.E.2d 630, 638 (Ct. App.1997). “Expert medical testimony is designed to aid the Commission in coming to the correct conclusion; therefore, the Commission determines the weight and credit to be given to the expert testimony.” Tiller v. Nat'l Health Care Ctr. of Sumter, 334 S.C. 333, 340, 513 S.E.2d 843, 846 (1999).

In the present claim, Appellant clearly had a very extensive preexisting psychiatric and psychological condition. Respondents never admitted any aggravation of Appellant’s preexisting psychiatric and psychological condition. No authorized treating physician ever opined that Appellant’s psychiatric and psychological condition had been aggravated by his work accident or referred Appellant for psychiatric or psychological treatment relating to his work accident. Dr. Dyana Lowndes-Rosen, the authorized IPE provider, found that Appellant’s condition pre-existed his work accident, and did not indicate that this condition had been aggravated or exacerbated by his work accident.

As none of the first three requirements of S.C. Code Ann. §42-1-160(D) were met in this present case, Appellant was required to establish with clear, credible evidence the requirements of S.C. Code Ann. §42-1-160(D)(4). While Appellant claims he met this requirement based on the opinions of Dr. Kirkland in his responses to Appellant’s attorney’s questionnaires, the Single Commissioner’s specific finding that Dr. Kirkland is not convincing invalidates those opinions. This finding was not appealed by Appellant to the Full Commission, and is now the law of the case. Only those issues raised to the Commission within the Form 30 are preserved for review by the Full Commission. Hilton v. Flakeboard Am. Ltd., 418 S.C. 245, 791 S.E.2d 719 (2016). All other findings become the law of the case. Ham v. Mullins Lumber Co., 193 S.C. 66, 7 S.E.2d

712 (1940) (holding that all findings of fact and law by the Hearing Commissioner that are not within the scope of an appellant's appeal to the Full Commission become and are the law of the case); Brunson v. American Koyo Bearings, 367 S.C. 161, 165, 623 S.E.2d 870, 872 (Ct. App. 2005) (holding that the findings of fact and law by the single commissioner become and are the law of the case unless excepted to by appellant) *abrogated in part on other grounds* by Bone v. U.S. Food Service, 404 S.C. 67, 744 S.E.2d 552 (2013); Green v. City of Columbia, 311 S.C. 78, 80, 427 S.E.2d 685 (Ct. App. 1993) (holding the findings of fact and law by the single commissioner become the law of the case, unless within the scope of the appellant's exception to the single commissioner's order) *abrogated in part on other grounds* by Bone v. U.S. Food Service, 404 S.C. 67, 744 S.E.2d 552 (2013).

Further, Dr. Kirkland's treatment records for Claimant do not appear to support the opinions expressed in his questionnaire responses. Appellant did not see Dr. Kirkland for almost three months after his work accident, and it appears that Appellant moved up that appointment as a matter of convenience for Appellant rather than due to increased symptoms. (Appellant's APAs p. 5). Appellant demonstrated similar, if not the same, symptoms both before and after the accident. Appellant had significant, often debilitating panic attacks prior to his work accident to the point where it occasionally caused Appellant to lose consciousness or to vomit. (Respondents' APAs p. 4). At times prior to Appellant's work accident these panic attacks were so severe that Appellant was afraid to drive for two weeks. (Appellant's APAs p. 6). Appellant advised Dr. Kirkland on October 25, 2012, that he "would not be able to leave the house due to panic attacks if he was not on medication." (Appellant's APAs p. 8). Appellant was recommended for counseling after his work accident, but that is a referral that was made a number of times prior to Appellant's work accident. Appellant expressed reticence about pursuing this both before and

after his work accident. As for changes to Appellant's medications after his accident, the only major change appears to be the dosage of Appellant's Xanax and Citalopram, and a temporary change from Xanax to Valium. Further, there is a serious question presented by the records as to whether Appellant was properly taking his medications both before and after his accident. When Appellant is taking his medications, it appears that his condition improves significantly.

Appellant further faults the Full Commission because it is not clear that they "weighed all evidence to determine Dr. Kirkland unconvincing." In so arguing, Appellant is in essence arguing that the Full Commission erred in not considering an issue that he never raised to them, the Full Commission was not tasked with determining whether Dr. Kirkland was convincing or credible. That decision had been made by the Single Commissioner, and was not appealed to the Full Commission. Therefore, this issue was not before them for review.

While the Full Commission conducts a de novo review of the Single Commissioner's decision, it will only consider those issues properly before it. An issue not raised in the application for review is not preserved for the full commission's consideration. Creech v. Ducane Co., 320 S.C. 559, 564, 467 S.E.2d 114, 117 (Ct.App.1995). Appellant failed to appeal the finding by the Single Commissioner that Dr. Kirkland was not convincing. Therefore, this finding is the law of the case and could not be disturbed by the Full Commission on appeal, nor can this Court now review this finding. Atlantic Coast Builders v. Lewis, 398 S.C. 323, 329, 730 S.E.2d 282, (2012)(citing Buckner v. Preferred Mut. Ins. Co., 255 S.C. 159, 177 S.E.2d 544 (1970) for the proposition that "an unappealed ruling, right or wrong, is the law of the case.") The Full Commission was faced with two entirely inconsistent findings by the Single Commissioner. As only one finding was challenged on appeal to the Full Commission, they properly reversed that finding.

Further, to the extent that Appellant contends that the Full Commission improperly ignored his “strong, candid testimony” in holding that he did not meet his burden, such testimony would not be sufficient to meet the requirements of S.C. Code Ann. §42-1-160(D). Appellant could only make such a showing through valid medical evidence, not his own testimony, no matter how credible.¹¹ In the present case, the only evidence Appellant submitted to satisfy his burden under S.C. Code Ann. §42-1-160(D) was the opinion of a doctor that was found by the Commission to not be convincing. As such, the Full Commission considered the issue properly raised before it in light of this finding and correctly held that the Appellant failed to meet his burden of establishing that his psychiatric and psychological condition has been aggravated by his work accident.

For the reasons set forth above, the Full Commission properly found that Appellant failed to meet his burden of establishing that his preexisting psychiatric and psychological conditions were aggravated as a result of his the March 28, 2017 on the job accident as the only evidence he presented to meet the requirements of S.C. Code Ann. §42-1-160(D) was an opinion from a physician who was determined to be not convincing. This decision was not appealed to the Full Commission, and is therefore the law of the case. As such, the Full Commission’s decision should be upheld.

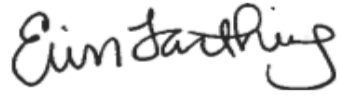
CONCLUSION

The Workers’ Compensation Commission’s decision that Appellant failed to meet his burden of establishing that his psychiatric and psychological condition has been aggravated by his work accident is fully supported by substantial evidence and the other findings of the Commission,

¹¹ Appellant also references Dr. LaMotta’s August 24, 2017 note as further evidence that his psychological condition has been aggravated by his work accident. However, in his note, Dr. LaMotta merely references Appellant’s claim to him that he has experienced psychological symptoms since his injection. Dr. LaMotta does not offer any medical opinion regarding whether or not his psychological condition has been aggravated by his work accident. Just as Appellant’s testimony does not satisfy the requirements of S.C. Code Ann. §42-1-160(D), his statements to a doctor regarding his understanding regarding his condition do not satisfy the requirements.

which are now the law of the case. As such, the Respondents respectfully request that the Court of Appeals affirm the Decision and Order of the South Carolina Workers' Compensation Commission.

Respectfully Submitted,



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Attorney for Respondents

Columbia, South Carolina
December 1, 2020

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

Appellate Case No: 2020-000718

RECEIVED

Dec 01 2020

SC Court of Appeals


Timothy Clayton, Claimant,.....Appellant,

v.

South Carolina Department of Transportation, Employer, and South Carolina State Accident
Fund, Carrier.....Respondents.

CERTIFICATE OF MAILING

I hereby certify that I have served the foregoing Initial Brief of Respondents and
Designation of Matter to be Included in the Record on Appeal on this 1st day of December, 2020
via e-mail, to the following e-mail address: Liz@mcwhirterlaw.com.



Erin Farthing
State Accident Fund
P.O. Box 102100
Columbia, SC 29221-5000

Erin Farthing

From: Erin Farthing
Sent: Tuesday, December 1, 2020 2:18 PM
To: Elizabeth McMahon Pentz
Subject: Clayton v. DOT, appellate case number 2020-718
Attachments: IBOR Clayton v. DOT.pdf

Liz,
Attached for service upon you is a the Initial Brief of Respondents and Designation of Matter with the Court of Appeals in the above claim. These documents are being filed with the Court via e-file today. Thank you.
Erin

During the Covid-19 pandemic, we are committed to ensuring our insureds and their injured workers have uninterrupted, high-quality service while our employees remain in the safest environment possible. Many of our employees will remain in our offices to serve the needs of our agency, but our offices will be closed to non-employees. We are fortunate to have the technology to allow some of our staff to work remotely. During that time, these employees will remain fully functional and available to service all needs of our insureds and their injured workers. Additionally, we are working to ensure that all benefit checks and bill payments are sent out in a timely manner.



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Dec 01 2020
SC Court of Appeals

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South Carolina State Accident Fund

Henry D. McMaster
Governor

Amy V. Cofield, Esq.
Director

December 1, 2020

VIA E-File

The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
1015 Sumter Street
Columbia, SC 29201

RECEIVED

Dec 01 2020

SC Court of Appeals

RE: Timothy Clayton v. SCDOT
Workers' Compensation File No. 1708722
Appellate Case No.: 2020-718

Dear Ms. Kitchings:

Attached for filing is the Initial Brief of Respondents, Designation of Matter to be Included in the Record on Appeal, and Proof of Service.

By copy of this letter, I am serving Appellant with a copy of the same via e-mail.

Sincerely,

A handwritten signature in black ink that reads "Erin Farthing".

Erin Farthing
Deputy Chief Counsel, State Accident Fund
S.C. Bar Number 76151

cc: Elizabeth McMahan Pentz, Esquire (via e-mail)