

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Unpublished Opinion No. 2020-UP-266 (Ct. App. – filed September 9, 2020)
Appellate Case No. 2018-001516

Johnnie Bias, Employee, Petitioner,

v.

SCANA Corporation, Self-Insured Employer, Respondent.

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Pursuant to Rule 242(d)(1), SCACR, Counsel for Petitioner certifies that a Petition for Rehearing was made to the Court of Appeals on September 24, 2020, and denied by the Court of Appeals on November 25, 2020, pursuant to the attached opinion.

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in their application of the “substantial evidence” standard of review in affirming the Commission’s denial of benefits based on a natural progression of a pre-existing condition, when there is no evidence in the record that indicates Petitioner’s injuries were the natural progression of his pre-existing condition.
2. Whether the Court of Appeals exceeded their role as an appellate court by substituting their view of the evidence instead of deferring to the Commission as the appropriate fact finders in the case.

STATEMENT OF THE CASE

This matter arises from a work-related injury sustained by Petitioner/Claimant, Johnnie Bias, (“Bias”) on October 14, 2014. The Respondent/Defendant, SCANA Corporation, (“SCANA”) denied the claim.

Bias filed a Form 50, Request for a Hearing, on January 24, 2017, seeking benefits for an injury by accident and/or aggravation of a pre-existing condition to his left hip, left leg, left ankle, left hand, left wrist, left arm, buttocks, back, right hip, right leg, right ankle, right foot, nervous system, bladder, urological system, penis and psychological overlay. (Appendix p. 50). On February 23, 2017, SCANA filed a Form 51, denying Bias sustained an injury by accident arising out of and in the course of his employment. (Appendix p. 55).

A hearing was held on September 19, 2017, in front of Commissioner Avery B. Wilkerson, Jr. (“Single Commissioner”). At the hearing, Bias contended that (1) he suffered a work-related injury to his back, left leg, right leg, bladder, urological system, penis and resultant psychological, as affirmatively found by Dr. Poletti, Dr. Rames, Dr. Gunter, Dr. Lind, and Dr. Hutcheson; (2) he was entitled to past, present and future medical treatment and care due to his work-related injuries.

as affirmatively found by Dr. Poletti, Dr. Rames, Dr. Gunter, Dr. Lind, and Dr. Hutcheson; (3) he was entitled to additional medical treatment, as he had not reached maximum medical improvement for all work-related injuries; (4) he was entitled to back TTD since he did not return to work following his October 14, 2014 work-related injury because he was written out of work by Dr. Poletti, and was subsequently terminated; and (5) if deemed to be at maximum medical improvement, Bias contended he was permanently and totally disabled under S.C. Code §42-9-10, as a combination of his work-related injuries resulted in the complete destruction of his earning capacity and alternatively under S.C. Code §42-9-30, as he was permanently and totally disabled after suffering greater than fifty-percent (50%) loss of use to his back. (Appendix p. 82).

On January 18, 2018, the Single Commissioner issued his Order finding that Bias did not sustain a compensable injury by accident on October 14, 2014. (Appendix p. 41). Furthermore, while the Single Commissioner found that not all of Bias's issues pre-existed the date of his injury, the Single Commissioner concluded that Bias did not sustain a compensable aggravation of a pre-existing condition on October 14, 2014. (Appendix p. 39). Thereby finding that Bias was not entitled to any benefits under the South Carolina Workers' Compensation Act. (Appendix p. 41)

On January 29, 2018, Bias filed a Form 30, Request for Commission Review. (Appendix pp. 58-61). Oral arguments were held before the South Carolina Workers' Compensation Commission ("Commission") on April 16, 2018. (Appendix p. 417). On July 19, 2018, the Commission affirmed the Order of the Single Commissioner, without making any additional Findings of Fact or Conclusions of Law. (Appendix pp. 44-47). Bias timely filed a Notice of Appeal with the South Carolina Court of Appeals on August 13, 2018. (Appendix p. 718).

The Court of Appeals, without oral arguments, filed an unpublished opinion, Bias v. SCANA Corporation, affirming the Commission's Order. Unpublished Opinion No. 2020-UP-266 (Ct. App. – filed September 9, 2020) (Appendix pp. 769-771).

ARGUMENT

I.

The Court of Appeals erred in their application of the “substantial evidence” standard of review, as no medical evidence in the record, including expert testimony, supports its conclusion that Bias’s symptomology is the natural progression of his preexisting condition.

Section 42-9-35 of the South Carolina Code 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...(B) The commission may award compensation benefits to an employee who has a permanent physical impairment or preexisting condition and who incurs a subsequent disability from an injury arising out of and in the course of his employment for the resulting disability of the permanent physical impairment or preexisting condition and the subsequent injury.

S.C. Code Ann § 42-9-35 (Supp. 2012). “Medical evidence” is defined as “expert opinion or testimony stated to a reasonable degree of medical certainty, documents, records, or other material that is offered by a licensed health care provider.” *Id.*

When a pre-existing condition or disease is accelerated or aggravated by injury or accident arising out of and in the course of the employment, the resulting disability is a compensable injury. *Brown v. R.L. Jordan Oil Co.*, 291 S.C. 272, 353 S.E.2d 280 (1987). A condition is compensable unless it is due **solely** to the natural progression of a pre-existing condition. *Mullinax v. Winn-Dixie Stores, Inc.*, 318 S.C. 431, 458 S.E.2d 76 (Ct. App. 1995) (Emphasis Added).

Additionally, an award from the Commission cannot be based upon mere possibilities, probabilities, surmise or conjectures. *Broughton v. South Carolina Game & Fish Dept.*, 219 S.C. 50, 64 S.E.2d 152 (1951). If the findings of the Commission are based on surmise, speculation or conjecture, then the issue becomes one of law for the court and not of fact for the Commission. *Herndon v. Morgan Mills, Inc.*, 246 S.C. 201, 143 S.E.2d 376 (1965).

The “substantial evidence” rule of the APA governs the standard of appellate review in a workers’ compensation case. Frame v. Resort Servs., Inc., 357 S.C. 520, 527, 593 S.E.2d 491, 494 (Ct. App. 2004). Substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the administrative agency reached in order to justify its action. Etheredge v. Monsanto Co., 349 S.C. 451, 455-56, 562 S.E.2d 679, 681 (Ct. App. 2002).

On October 14, 2014, Bias was walking down a flight of concrete steps at SCANA in order to check a problem at a pond, when he slipped on some rocks, fell and landed on his backside. (Appendix p. 125, lines 2-17). Bias immediately notified his supervisor of his accident, and Bias informed his supervisor that he was having pain in his buttocks, both hands and left ankle. (Appendix p. 125, lines 2-17; p. 132, lines 9-12; p. 403). An email was sent to Mr. Terry Seagle, the Safety and Training Coordinator at SCANA, documenting Bias’s accident and injuries. (Appendix p. 403; p. 494, line 25 – p. 495, line 9). This email documenting Bias’s work accident was not disclosed, despite subpoena, until during Mr. Seagle’s deposition, over two years after Bias’s work accident. (Appendix p. 495, line 3 – p. 496, line 11; p. 399). Prior to the discovery of this email, Respondents asserted that the injury had not been documented at the time of the accident. (Appendix p. 462, lines 10-17).

While Bias admittedly had a pre-existing low back condition prior to his work injury, that condition had not prevented him from returning to, and performing, his job. (Appendix p. 130, lines 19-25; p. 149, line 23 – p. 150, line 9; p. 335; pp. 339-341; p. 467, lines 6-11). Bias worked for SCANA for seventeen years prior to this work injury despite intermittently treating for his pre-existing low back condition. (Appendix p. 123, lines 1-9). In fact, Dr. Poletti, the doctor who had previously performed surgery on Bias’s pre-existing low back condition, confirmed that Bias had

significant improvement in his condition prior to his fall at work. (Appendix p. 466, line 24 – p. 467, line 5). Since his fall at work, Bias was unable to return to his employment with SCANA, due to the worsening of his symptoms. (Appendix p. 346; p 467, lines 15-25).

Prior to his fall at work, Bias's lower back and radicular symptoms were primarily left-sided and were improving. (Appendix p. 352). Shortly after his fall at work, additional symptoms began manifesting, which doctors opined was consistent with Bias's injury. (Appendix p. 461, lines 12-21; p. 476, line 11 – p. 477, line 3; p. 477, line 17 – p. 478, line 10; p. 680, lines 7-19). Bias noted increased weakness, difficulty ambulating, numbness and a cold sensation in his left leg. (Appendix pp. 344-345). Bias also reported that after the fall he was experiencing new, radiating pain down his right leg. *Id.* Dr. Poletti and Dr. Gunter, **Respondent's own expert**, not only noted the increasing lower back and left sided symptomology, **but new symptomology on the right side following the injury**. (Appendix p. 352; pp. 369-372) (Emphasis Added). Bias's subjective complaints of pain following his fall at work were also supported by the doctors' objective findings. Bias was noted to have antalgic gait, positive straight leg raise, diminished reflexes, difficulty with heel and toe raise and diminished range of motion of his lumbar spine. *Id.* Furthermore, **an MRI performed on October 29, 2014, fifteen days after the injury, revealed a recurrent disc herniation**. (Appendix p. 346) (Emphasis Added).

Of the six providers that evaluated Bias following his work injury, **five**, including, but not limited to, Dr. Poletti, Bias's treating physician for nearly 15 years, and Dr. Gunter, Respondent's own expert, affirmatively indicated new or worsening symptoms due to his work injury. (Appendix p. 352; p. 481, line 23 – p. 482, line 3; pp. 264-265; p. 543, lines 14-20; p. 577, lines 18-20; p. 581, line 22 – p. 582, line 5; pp. 369-372; pp. 271-275; p. 619, line 21 – p. 620, line 5; p. 622, lines 8-15; p. 629, lines 14-16; p. 631, lines 2-7; p. 636, lines 8-15; p. 637, lines 5-9; p. 640, lines 7-11; p.

643, lines 13-16; pp. 257-260) (Emphasis Added). Only Dr. LaMotta was unable to affirmatively state that Bias's current symptomology was a result of his fall at work. (Appendix p. 715, line 22 – p. 716, line 7). However, Dr. LaMotta did confirm a worsening of Bias's symptoms following his fall at work. (Appendix p. 715, lines 16-21). While not able to opine to a reasonable degree of medical certainty that Bias's worsening symptoms stemmed from his fall at work, it is more important to note that Dr. LaMotta also could not opine to a reasonable degree of medical certainty that Bias's current condition was the natural progression of his pre-existing condition. In fact, **there is no expert testimony that affirmatively indicates Bias's current condition is a natural progression of his pre-existing condition.** (Emphasis Added). Instead, the overwhelming expert testimony only leads to the conclusion that Bias's current condition is the result of his work injury.

In addition to the increasing low back and left leg symptomology and the new right leg symptomology, Bias also began experiencing urological issues following his fall at work. Interestingly, the Court of Appeals noted in its decision that “**Bias received treatment for urological...issues prior to this accident.**” (Appendix p. 770) (Emphasis Added). However, this is inconsistent with the medical evidence, as Bias never complained of or treated for his absent bulbocavernosus reflex, urinary incontinence, urge incontinence, or nocturnal enuresis prior to his work accident. (Appendix p. 46, 260, 263). Bias's issues with urinary incontinence appeared after his fall at work, with his first recorded complaints of urinary incontinence to Dr. Poletti's office on January 7, 2015. (Appendix p. 352) Dr. Gunter, Respondent's own expert, confirmed that Bias's “**urinary symptoms are new since the fall.**” (Appendix p. 370) (Emphasis Added). There is no medical evidence in the record that supports the conclusion that Bias's urological issues naturally progressed from his pre-existing condition. Furthermore, there is no expert testimony that affirmatively states Bias's current urological symptomology is the natural progression of his pre-

existing condition. Rather, the medical evidence in the record only supports that his urological symptoms are a direct result of his fall at work on October 14, 2014.

When viewing the record as a whole, the conclusion that Bias's current symptomology is the natural progression of his pre-existing condition is not supported by the medical evidence. Instead, the overwhelming evidence in the record, including expert testimony, supports the conclusion that Bias sustained an aggravation of a pre-existing condition due to his fall at work.

II.

The Court of Appeals erred in their application of the "substantial evidence" standard by adding their view of the evidence instead of deferring to the Commission as the appropriate fact finders in the case, thereby exceeding their role as an appellate court.

A court "may not substitute its judgment for that of any agency as to the weight of the evidence on questions of fact unless the agency's findings are clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." Tiller v. National Health Care Ctr. of Sumter, 334 S.C. 333, 339, 513 S.E.2d 843, 845 (1999). As noted above, substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the administrative agency reached in order to justify its action. Etheredge v. Monsanto Co., 349 S.C. 451, 455-56, 562 S.E.2d 679, 681 (Ct. App. 2002).

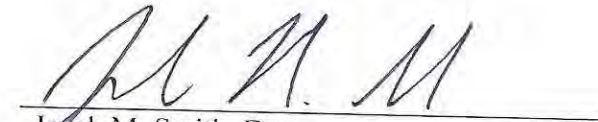
The Court of Appeals, in deciding without oral arguments, ruled that Bias had been receiving treatment for urological issues prior to this accident. (Appendix p. 770). The medical record is clear in that the urological issues Bias suffered from started **after** his fall at work on October 14, 2014. (Appendix pp. 46, 260, 263, 352, 370) (Emphasis Added). Furthermore, the medical evidence in the record only supports the conclusion that Bias's urological issues stem from

the work accident; no doctor opined that Bias's urological issues were the natural progression of a pre-existing condition. (Appendix p. 260, 370). The Commission actually found as fact that Bias's **"urological issues also naturally progressed from his pre-existing symptoms, despite having never complained of urological issues prior to the alleged work incident."** (Appendix p. 40) (Emphasis Added). Despite the overwhelming medical evidence to the contrary and the finding by the Commission that Bias never complained of urological issues prior to his fall at work, the Court of Appeals concluded **"Bias received treatment for urological...issues prior to this accident."** (Appendix p. 770) (Emphasis Added). Neither the Commission's nor the Court of Appeal's conclusion is supported by medical evidence in the record, as the medical evidence in the record clearly indicates that Bias's urological issues were the direct result of his October 14, 2014 fall at work.

It is clear that the Court of Appeals exceeded its appellate authority in finding that Bias received treatment for urological issues prior to the accident, as the medical evidence in the record leads only to one conclusion: that Bias's urological symptoms not only started after, but were also a direct result of his October 14, 2014 fall at work.

CONCLUSION

For the reasons set forth above, Petitioner respectfully requests that this Court grant the Petition for Writ of Certiorari, review all of the prior Orders of the Commission, review all of the medical evidence, permit oral arguments and issue a decision finding that Bias sustained a compensable work accident and remand the case back to the Commission for further findings consistent with that finding.



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