

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Unpublished Opinion No. 2020-UP-266 (Ct.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. 2020-001668

Johnnie Bias, Employee, Petitioner,

v.

SCANA Corporation, Self-Insured Employer, Respondent.

PETITIONER'S REPLY TO RETURN TO PETITION

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ARGUMENTS

I.

RESPONDENT ERRONEOUSLY CONTENDS THAT SUBSTANTIAL EVIDENCE SUPPORTS THAT PETITIONER'S SYMPTOMOLOGY IS THE NATURAL PROGRESSION OF HIS PREEXISTING CONDITION.

A.

Respondent misstates the record in support of the ruling by the Court of Appeals that substantial evidence supports the Commission's decision.

Respondent asserts that Petitioner misstated the record in asserting that no medical evidence, including expert testimony, supports the Court of Appeal's decision that Bias's symptomology was the natural progression of his preexisting condition. (Return to Petition for Writ of Cert., p. 3-4). In support of its argument, Respondent turns to Dr. LaMotta's testimony and incorrectly states that Dr. LaMotta opined Bias's symptoms "**were more likely than not just the continued deterioration and worsening of his lumbar spine based upon the natural history of his pathology, and not necessarily the alleged fall.**" *Id.* at p. 4. (Emphasis Added) This description of Dr. LaMotta's testimony is inaccurate. In fact, during Respondent counsel's final line of questioning of Dr. LaMotta regarding causation after Dr. LaMotta reviewed all the evidence, Dr. LaMotta testified as follows:

Q. One question, Doctor. There is no doubt and I think you testified that he – [Bias's] symptoms increased based upon that October 22, 2014, note. His – his symptoms were worse. Fair enough?

A. Yes.

Q. **But your testimony here today to a reasonable degree of medical certainty is that you can't say whether that was the natural progression of his preexisting condition, whether that was caused by a fall at work, whether that was caused by coughing...Is that a fair summarization of your testimony?**

A. **That's correct.**

Appendix, p. 715, line 22 –716, line 7. (Emphasis Added). It is clear from Dr. LaMotta’s testimony that he **did not** opine that Bias’s symptoms were the natural progression of his preexisting condition. (Emphasis Added).

Dr. LaMotta’s testimony does not support the finding that Bias’s condition was likely the natural progression of his preexisting condition. In fact, 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 any medical evidence. Instead, the evidence in the record, including expert testimony, only supports the conclusion that Bias sustained an aggravation of a preexisting condition due to his fall at work.

Respondent also continues to assert that the independent medical providers’ opinions were discredited following an incomplete review of the evidence. Respondent identifies an IME synopsis letter that did not include the summary of one appointment following Bias’s fall at work. Respondent goes even further by asserting that each provider “**was presented with this report for the very first time, by the Respondent, during their respective depositions.**” (Return to Petition for Writ of Cert., p. 5) (Emphasis Added). However, **every doctor who was able to review the records that were attached to the synopsis letter confirmed that the record in question was included by Bias’s counsel prior to their evaluation of Bias.** (Appendix, p. 522, lines 3-7; p. 635, lines 18-22) (Emphasis Added). For Respondent to now assert that the deposition was the first time these providers were presented with the report is clearly a misstatement of the record. Respondent takes a position that the missing appointment summary in a synopsis letter was somehow “an attempt to veil material evidence which supports the Respondent’s position that there was no compensable injury.” However, Dr. LaMotta and Dr. Poletti, the physician that treated Bias’s preexisting back condition for nearly 12 years, addressed the record and both noted

that it was not strange or unusual to have a delay in reporting symptoms. (Appendix, p. 461, lines 12-21; p. 476, line 12 – p. 477, line 3; p. 477, line 17 – p. 478, line 10; p. 680, lines 7-19).

The Commission is afforded the opportunity to weigh the credibility of the witness testimony. However, awards cannot be based on surmise, conjecture or speculation. Broughton v. South Carolina Game & Fish Dept., 219 S.C. 50, 64 S.E.2d 152 (1951). In this case, there is no evidence that supports the conclusion that Bias's symptomology was solely due to the natural progression of his preexisting condition. 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 preexisting condition). No physician affirmatively testified or opined that Bias's new symptomology naturally progressed solely from his preexisting condition. Instead, every physician that gave an opinion as to whether Bias's condition stemmed from his fall at work or solely from the natural progression of his preexisting condition, opined that the worsening of his condition was caused by the fall at work. (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). However, the Commission wrongly discounted **ALL** of the medical evidence in entering its own, unsupported opinion that Bias's condition was due to the natural progression of a preexisting condition. (Appendix, p. 46) (Emphasis Added).

B.

Respondent erroneously contends that substantial evidence supports the Commission's conclusion that Petitioner failed to meet his burden of proof.

Under Section 42-9-35, Petitioner has the burden of proving, by way of medical evidence that his alleged "subsequent injury aggravated a pre-existing condition..." S. C. Code Ann. § 42-9-35 (Supp. 2012). Respondent asserts that "[e]ven if the Petitioner's condition has worsened since mid-October 2014, substantial evidence supports the Commission's conclusion that the worsening was not necessarily caused by the Petitioner's alleged fall and that the Petitioner failed to meet his burden of proof." (Return to Petition for Writ of Cert., p. 5-6).

Bias argues that he has met his burden of proving a compensable aggravation of a preexisting condition. Every doctor that gave an opinion as to whether or not Bias's condition worsened due to his fall at work or due to the natural progression of his preexisting condition opined that the worsening of his condition was caused by the fall at work. (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). Even Dr. Gunter, Respondent's IME expert and the last physician to evaluate Bias's condition before the hearing, affirmatively indicated new and worsening symptoms related to his fall at work. (Appendix, p. 352; pp. 369-372). **No doctor testified or opined that Bias's symptomology was solely caused by the natural progression of his preexisting condition.** (Emphasis Added).

Respondent argues that Bias's preexisting condition was not dormant, and thereby, cannot be compensable as an aggravation of a preexisting condition. Bias disagrees and would argue that

the new and worsening symptomology was dormant prior to the accident, as affirmatively found by the Commission. (Appendix, p. 45; pp. 344-345; p. 352; pp.369-372; 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). Immediately prior to his fall at work, Bias’s low back and left leg symptoms were improving. (Appendix, p. 352). Bias’s last complaint of right leg symptomology was four years before his fall at work. (Appendix, p. 306). Further, even though the Court of Appeals found to the contrary, Bias was not having urological symptoms until after his fall at work. (Appendix, p. 260, 352, 370). The Commission even addressed Bias’s preexisting condition noting that “not all of the Claimant’s issues pre-existed the date of injury.” (Appendix, p. 45). Specifically, regarding the urological condition the Commission noted that Based on the evidence and the Commission’s finding, it is clear that Bias’s current condition was not active prior to his fall at work.

Even if Bias’s current condition was not dormant, Bias would contend that his underlying condition produced no disability prior to his fall at work. Workers’ compensation benefits are awarded not for a physical injury as such, but for “disability” produced by such injury, as measured by the employee’s capacity or incapacity to earn the wages which he was receiving at the time of his injury. Corbett v. City of Columbia, 290 S.C. 71, 348 S.E.2d 191 (S.C. App. 1986), rev’d 294 S.C. 327, 364 S.E.2d 459 (1988). Following all of the treatment Bias received pre-dating his fall at work, Bias always returned to his employment, including working for seventeen (17) years with Respondent. (Appendix, p. 123, lines 4-8; p. 130, lines 19-25; p. 149, line 23 – p. 150, line 9; p. 335; pp. 339-341; p. 467, lines 6-11). In fact, following his surgery in early 2014, Bias returned to work and was doing well until his fall at work. (Appendix, p. 466, line 24 – p. 467, line 5). Since his fall at work, Bias has been unable to return to work. (Appendix, p. 346; p 467, lines 15-25). Therefore, Bias’s preexisting condition was not disabling until following his fall at work.

II.

RESPONDENT ERRONEOUSLY CONTENDS THAT PETITIONER'S ASSERTION THAT THE COURT OF APPEALS FAILED TO DEFER TO THE COMMISSION AS THE FINDERS OF FACTS IS IMPROPER UNDER RULE 242 OF THE APPELLATE COURT RULES.

Rule 242(d)(2) states that “only those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for writ of certiorari as a question presented to the Supreme Court.” Appellate Ct. Rule 242(d)(2). The question presented in Question 2 of the Petition for Writ is part of the core argument that Bias raised in the Petition for Rehearing. (Appendix, p. 775). Specifically, Bias argued that the Court of Appeals erred in its application of the “substantial evidence” standard of review. *Id.* Bias contended and contends that the ruling by the Court of Appeals that **“Bias received treatment for urological...issues prior to the accident”** was inconsistent with the record, as Bias never complained of or treated for those issues prior to his fall at work. *Id.* The ruling by the Court of Appeals is directly in conflict with Commission’s finding 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. 46).

Respondent would have this Court ignore the “finding” by the Court of Appeals as “erroneous,” but this argument highlights the unanswered question with this case: how can substantial evidence exist where no evidence exists? (Return to Petition for Writ of Cert., p. 12). No medical opinion or testimony exists that supports the conclusion that Bias’s urological condition derived anywhere but from his documented fall at work. The Court of Appeals, in deciding without oral argument, made their own finding of fact that Bias’s urological condition

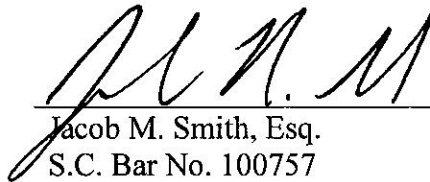
pre-dated the fall at work. This is directly in conflict with the Commission's finding and the evidence of the case.

CONCLUSION

Based on the foregoing, Bias 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.

Respectfully Submitted,

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