

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION
COMMISSION, APPELLATE PANEL

Derrick L. Williams, Commissioner
Susan S. Barden, Commissioner
Avery B. Wilkerson, Jr., Commissioner

WCC File No. 0822094

Thomas Karabees, Jr.,.....Respondent,
v.
State Board for Tech. & Comp. Education,.....Appellant.

BRIEF OF APPELLANTS

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TABLE OF CONTENTS

Table of Authorities.....ii

Statement of the Issues on Appeal.....1

Statement of the Case.....1

Statement of Facts.....2

Arguments

I. THE COMMISSION ERRED IN FINDING THAT THE RESPONDENT WAS PERMANENTLY AND TOTALLY DISABLED AS A RESULT OF HIS WORK INJURIES AS RESPONDENT IS UNABLE TO WORK DUE TO HIS PRE EXISTING MULTIPLE SCLEROSIS.....4

II. THE COMMISSION ERRED IN FINDING OF FACT #4 AS IT IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE AND RESPONDENT’S MULTIPLE SCLEROSIS CLEARLY AFFECTED RESPONDENT’S ABILITY TO WORK.....7

III. THE COMMISSION ERRED IN RELYING ON THE OPINION OF DR. NOLAN AND ON THE VOCATIONAL REPORT AS IT IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.....8

Conclusion.....10

TABLE OF AUTHORITIES

CASES

DeBruhl v. Kershaw County Sheriff's Dept., 397 S.E.2d 782 (Ct. App. 1990).....4

Green v. Raybestos-Manhattan, Inc., 156 S.E.2d 318 (1967).....4

Jane Doe v. Department of Disabilities and Special Needs, 364 S.C. 411, 613 SE 2nd 785, (Ct. App. 2005).....3-4

Lowe v. Am-Can Transport Services, 324 S.E.2d 87 (Ct. App. 1984).....4

Rogers v. Kunja Knitting Mills, 440 S.E.2d 401 (Ct. App. 1994).....4

Sharpe v. Case Produce, Inc., 336 S.C. 154, 519 S.E.2d 102 (1999).....4

STATUTES

South Carolina Code Ann. § 42-9-30.....5, 10

STATEMENT OF ISSUES ON APPEAL

I. THE COMMISSION ERRED IN FINDING THAT THE RESPONDENT WAS PERMANENTLY AND TOTALLY DISABLED AS A RESULT OF HIS WORK INJURIES AS RESPONDENT IS UNABLE TO WORK DUE TO HIS PRE EXISTING MULTIPLE SCLEROSIS.

II. THE COMMISSION ERRED IN FINDING OF FACT #4 AS IT IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE AND RESPONDENT'S MULTIPLE SCLEROSIS CLEARLY AFFECTED RESPONDENT'S ABILITY TO WORK

III. THE COMMISSION ERRED IN RELYING ON THE OPINION OF DR. NOLAN AND ON THE VOCATIONAL REPORT AS IT IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

STATEMENT OF THE CASE

This case arises out of a worker's compensation claim. On October 7, 2009, Respondent filed a Form 50 alleging that he injured his left shoulder, left arm, neck, mid back, low back, left leg and right leg on October 31, 2008 when he fell down a stairwell while in the course and scope of his employment. A Form 51 was filed on November 6, 2009, admitting injury to his left shoulder and low back. Appellants ultimately admitted that Respondent injured his left shoulder, neck and low back. A hearing was held on January 5, 2011, after Respondent filed a Form 50 requesting temporary total benefits. As a result of that hearing, Respondent was awarded temporary total benefits from November 3, 2009 ongoing to the present. Appellants appealed this order to the Full Commission and the Full Commission affirmed on October 26, 2011.

Respondent filed another Form 50 on August 22, 2011. Respondent alleged that he was permanently and totally disabled. Appellants denied that the

Respondent is permanently and totally disabled and contend that the Respondent's inability to work was a result of his multiple sclerosis and that any award should be made pursuant to § 42-9-30. The parties stipulated that the Respondent had a maximum medical improvement date of March 8, 2011 per Dr. Nolan. A hearing was held on January 4, 2012. As a result of that hearing, Respondent was found to be permanently and totally disabled. Appellants appealed to the Full Commission. Appellants' Form 30 raised the following issues:

Whether the Single Commissioner erred in finding that the Respondent is permanently and totally disabled as it is not supported by substantial evidence; Whether the Single Commissioner erred in failing to find that the Respondent's Multiple Sclerosis affects his ability to work; Whether the Single Commissioner erred in Finding of Facts #4, 5, 11 & 12, as these findings are not supported by the substantial evidence; Whether the Single Commissioner erred in Rulings of Law #3 & 4, as they are not supported by substantial evidence. Whether the Single Commissioner erred in not finding that Respondent cannot work due to his Multiple Sclerosis. (R.p.51)

The Full Commission affirmed the prior order on September 10, 2012 and this appeal timely followed.¹(R.pp.1-6).

STATEMENT OF FACTS

Respondent was an instructor at Trident Technical College and has a Master's Degree. Respondent fell down a stairwell on October 31, 2008. As a

¹Both parties agree that there is a scrivener's error in the order of Full Commission dated September 10, 2012 as it erroneously references the grounds of appeal from the Form 30 dated March 30, 2011 as oppose to the Form 30 dated March 14, 2012.(R.pp.7-8).

result of that fall, Respondent injured his shoulder, neck and back. Respondent was treated by Dr. Kupferman for his left shoulder. Dr. Kupferman did surgery on Respondent's left shoulder. Respondent hasn't seen Dr. Kupferman since May of 2009. On the 14-B completed by Dr. Kupferman, there are no restrictions listed.

(R.p.106). Respondent was treated by Dr. Wilson for his neck and back.

Respondent received conservative treatment, including physical therapy and injections. Respondent never had back or neck surgery, nor was any surgery recommended. Respondent's care was then transferred to Dr. Nolan for pain management and Respondent has continued to received injections.

Respondent was diagnosed with multiple sclerosis in 2001 and has treated with Dr. Lucas since then. (R.pp.284-285). Respondent retired from Trident Tech in April of 2009 and has since been approved for social security disability due to his multiple sclerosis.(R.p.39).

STANDARD OF REVIEW

In a workers' compensation appeal, no court can substitute its judgment from that of the Commission. The court may reverse or modify the decision of the Commission only if the Respondent's substantial rights have been prejudiced because the decision is affected by an error of law or is clearly erroneous in view of the reliable, probative and substantial evidence. Substantial evidence is not a mere scintilla of evidence nor evidence viewed from one side, but such evidence, when the whole record is considered; as would allow reasonable minds to reach the conclusion reached by the Full Commission. Jane Doe v. Department of Disabilities

and Special Needs, 364 S.C. 411, 613 SE 2nd 785, (Ct. App. 2005).

In a workers' compensation case, the Full Commission is the ultimate fact finder. DeBruhl v. Kershaw County Sheriff's Dept., 397 S.E.2d 782 (Ct. App. 1990); Rogers v. Kunja Knitting Mills, 440 S.E.2d 401 (Ct. App. 1994). The Full Commission, sitting as a finder of fact, can consider all of the evidence and reach its own findings of fact and conclusions of law. The scope of review of the Full Commission is not limited. Lowe v. Am-Can Transport Services, 324 S.E.2d 87 (Ct. App. 1984); Green v. Raybestos-Manhattan, Inc., 156 S.E.2d 318 (1967). "The Commission's decision must be affirmed if the factual findings are supported by substantial evidence in the record. Substantial evidence is that evidence which, in considering the record as a whole, would allow reasonable minds to reach the conclusion the Commission reached. The possibility of drawing two inconsistent conclusions from the evidence does not prevent the Commission's finding from being supported by substantial evidence. Where there is a conflict in the evidence, the Commission's findings of fact are conclusive. The final determination of witness credibility and the weight to be accorded evidence is reserved to the Commission and it is not the task of the court to weigh the evidence as found by the Commission." Sharpe v. Case Produce, Inc., 336 S.C. 154, 519 S.E.2d 102 (1999).

ARGUMENTS

I. THE COMMISSION ERRED IN FINDING THAT THE RESPONDENT WAS PERMANENTLY AND TOTALLY DISABLED AS A RESULT OF HIS WORK INJURIES AS RESPONDENT IS UNABLE TO WORK DUE TO HIS PRE EXISTING MULTIPLE SCLEROSIS.

The Commission erred in ruling that the Respondent is permanently and totally disabled from the October 31, 2008 accident when the evidence is clear that the Respondent is disabled from his multiple sclerosis. Respondent's worker's compensation award should have been limited to an award under § 42-9-30.

Respondent has a long history of multiple sclerosis. Dr. Lucas is a board-certified neurologist who treats the Respondent for his multiple sclerosis. Dr. Lucas started treating the Respondent in 2001 for his multiple sclerosis. (R.pp.66-67). On October, 4, 2001, Dr. Lucas noted that the Respondent had pain in his right leg, difficulty with memory and foggiess of his thoughts. (R.p.103). Dr. Lucas saw the Respondent on September 20, 2007, when he noted at the time that he would support the Respondent in a disability application. Specifically, Dr. Lucas noted that the Respondent had been having increased symptoms and that Dr. Lucas was actually surprised that the Respondent was still able to work with the amount of physical problems that he was having. (R.p.68). At the March 20, 2008 visit, Dr. Lucas noted he wasn't sure how much longer the Respondent would be able to work. (R.p.69). Specifically, Dr. Lucas noted that the Respondent had been having a series of small falls and losing his balance and he was having more difficulty walking. Dr. Lucas testified he didn't think the Respondent would be able to continue to work for much longer and felt that six months to a year was the longest he imagined the Respondent would be able to work. (R.p.70). Dr. Lucas became aware of the Respondent's on-the-job injury on March 19, 2009. Dr. Lucas was of the opinion that the fall of October 31, 2008

did not in any way affect the Respondent's multiple sclerosis. (R.p71). On September 17, 2009, Dr. Lucas noted that the Respondent was having more of a gradual decline as a result of his multiple sclerosis, including difficulty balancing, and some cognitive difficulty. (R.p.73). Furthermore, Dr. Lucas testified that to a reasonable degree of medical certainty, that the Respondent was disabled and unable to work as a result of multiple sclerosis. (R.p.74).

There is no case law in South Carolina addressing this particular situation. The statute on pre existing condition addresses situations when the worker's comp injury aggravates the pre existing condition or the pre existing condition is aggravated by the worker's comp injury. In this case, there was no aggravation of either the worker's comp injury or the pre existing condition. Dr. Lucas testified that the Respondent's multiple sclerosis was not aggravated by the fall and there is no evidence that the fall was aggravated by the multiple sclerosis. It is clear from the medical testimony that Respondent would have been unable to work due to the multiple sclerosis regardless of the fall ever happening. Arguably, if the Respondent did not have multiple sclerosis, he would still be working. Respondent was granted social security disability as a result of his multiple sclerosis . Although the commission found that social security ruling was not dispositive, it still should carry some weight. Furthermore, the Respondent voluntarily retired and elected a regular retiree status as opposed to a disability retiree status. Respondent also admitted he received Social Security Disability as a result of his multiple sclerosis. Therefore, from the overwhelming amount of evidence, it appears that the Respondent is not disabled from the fall of October

31, 2008, but as a result of his multiple sclerosis and therefore is not permanently and totally disabled. Therefore, the opinion of the Single Commissioner should be reversed.

Respondent's contention that since he was not taken out of work due to his multiple sclerosis that it means that the multiple sclerosis did not prevent him from working is incorrect. The record is full of evidence that Dr. Lucas was concerned about the Respondent's ability to work and ultimately testified that the Respondent could not work because of his multiple sclerosis. Dr. Lucas also testified that the Respondent's fall on October 31, 2008 did not aggravate his multiple sclerosis. Based on Dr. Lucas' opinion, it is clear that the Respondent would have become disabled as a result of his multiple sclerosis regardless of the October 31, 2008 accident. If an injured worker is unable to work due to a non work related condition, it penalizes the carrier to find the worker to be permanently and totally disabled. Therefore, since the Respondent is unable to work due to his multiple sclerosis, it was an error of law to find him permanently and totally disabled from his work injuries and the Commission's ruling should be reversed.

II. THE COMMISSION ERRED IN FINDING OF FACT #4 AS IT IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE AND RESPONDENT'S MULTIPLE SCLEROSIS CLEARLY AFFECTED RESPONDENT'S ABILITY TO WORK.

The Commission erred in Finding of Fact # 4. Finding of Fact #4 finds that "Respondent suffered from multiple sclerosis since 2001 but he worked full-time until he went of work due to his injuries and at no time was he taken out of work

by a doctor due to his multiple sclerosis and missed no time from his job prior to his injury because of his multiple sclerosis.”(R.p.4). Respondent worked following this accident until April of 2009 when he retired. As previously argued, there is medical evidence showing that Respondent was unable to work because of his multiple sclerosis. Furthermore, Finding of Fact #4 is inconsistent with Finding of Fact #5 which notes that Respondent is on Social Security disability due to his multiple sclerosis. It is inconsistent to have a finding that the Respondent’s multiple sclerosis had no effect on his ability to work but then acknowledge that multiple sclerosis is the reason why he was deemed unable to work by the Social Security Administration.

III. THE COMMISSION ERRED IN RELYING ON THE OPINION OF DR. NOLAN AND ON THE VOCATIONAL REPORT AS IT IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

Finding of Fact #11 states that “Dr. Nolan, the authorized treating physician, indicated Respondent could not work due to his work injuries and this finding is supported by the vocational expert’s report of September 16, 2011. Respondent is permanently and totally disabled.”(R.p.5). The Commission’s reliance on Dr. Nolan’s opinion is misplaced. Dr. Nolan did not start seeing the Respondent until approximately a year after the date of the injury. Dr. Nolan was unaware of the extent of the Respondent’s multiple sclerosis or the opinion of the treating neurologist with regards to the Respondent’s ability to work which related to his multiple sclerosis. Dr. Lucas, who has seen the Respondent both post and pre-accident, is of the opinion that the multiple sclerosis is what rendered the Respondent unable to work.

Dr. Nolan first saw the Respondent in November of 2009, approximately a year after the on-the-job injury. Dr. Nolan is the Respondent's pain management doctor. Dr. Nolan testified in his deposition that he did not feel that the Respondent was able to work when he first saw him in November of 2009. (R.p.195). Dr. Nolan testified that he did not treat the Respondent for multiple sclerosis and that Dr. Lucas was the Respondent's doctor for his multiple sclerosis. When asked whether Dr. Nolan factored in the multiple sclerosis in his ability to engage in activities, Dr. Nolan responded that he had not considered it or factored it in. (R.p.200). Dr. Nolan was not aware that Dr. Lucas has rendered an opinion that the Respondent was unable to work due to his multiple sclerosis. Dr. Nolan was never given the opportunity to review Dr. Lucas' records or deposition. (R.p.201). Dr. Nolan was under the impression that the Respondent's multiple sclerosis was not that severe. (R.p.201). Dr. Nolan was shown Dr. Lucas' opinion that the Respondent could not work due to his multiple sclerosis and Dr. Nolan testified that it was interesting and that the Respondent had several reasons why he was disabled and couldn't work. (R.p.202).

When Respondent went for his vocational evaluation with Dr. Price, he was feeling poorly as the result of the injections and treatment he had received for his multiple sclerosis in the days prior to the evaluation. Respondent testified that he "couldn't even focus" at the time of the evaluation. (R.p.634). Therefore, by Respondent's own admission, the vocational evaluation was effected by the Respondent's multiple sclerosis. Furthermore, the vocational report found that the Respondent is also medically disabled from working due to his multiple

sclerosis. This clearly demonstrates that the Respondent's multiple sclerosis is what effects his ability to work. Respondent continued to work until April 11, 2009. (R.p.616). Furthermore, the Respondent voluntarily retired from his job at Trident Tech and elected a regular retiree status as opposed to a disability retiree status. Respondent admitted he had retired from Trident Tech. (R.p.616). A prior order of the Commissioner found that the Respondent is on social security disability as a result of his multiple sclerosis.

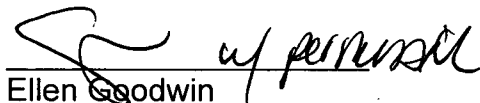
CONCLUSION

For all of the foregoing reasons the decision and order of the Full Commission should be reversed and the case should be remanded for a determination under § 42-9-30.

Respectfully submitted,



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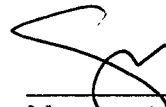
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State Board for Tech. & Comp. Education, Employer, and State Accident
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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Appellants' Final Brief
complies with Rule 211(b).

April 15, 2013



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SC Court of Appeals

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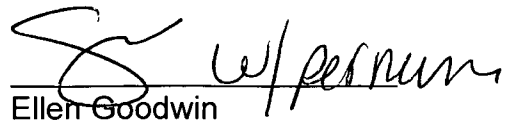
I certify that I have served the Appellants' Final Brief and Certificate of Counsel Rule 210(g) compliance and Certificate of Counsel Rule 211(b) compliance on Thomas Karabees, Jr. by depositing a copy of it in the United States Mail, postage prepaid, on April 15, 2013, addressed to his attorney of records, Thomas M. White, Post Office Box 1028, Goose Creek, SC 29445.

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