

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court Of Common Pleas

The Honorable Roger L. Couch, Circuit Court Judge

Case No: 2012-CP-42-2329

Daljit Roopra,Respondent,

v.

Spartanburg Automotive, Inc., and
Liberty Mutual Insurance Company, Appellants.

INITIAL BRIEF OF APPELLANTS

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STATEMENT OF ISSUE ON APPEAL

- I. Did The Circuit Court Err in Affirming The Award Of A 39% Disability Rating To Roopra's Left Shoulder And A 4% Disability Rating To His Neck When Those Ratings Are Excessive And Fail To Account For A 20% Disability Award For Roopra's 1996 Shoulder Injury?

STANDARD OF REVIEW

South Carolina Code Ann. § 1-23-380 establishes the “substantial evidence” rule as the standard of review for decisions of the Workers’ Compensation Commission. *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 276 S.E.2d 304 (1981) Pursuant to that rule, the circuit court reviewing an award or denial of benefits may only reverse or modify the agency’s decision if the findings, rulings, and conclusions of the administrative agency are “clearly erroneous in view of the reliable and substantive evidence of the whole record.” *Id.*, 276 S.C. at 135, 276 S.E.2d at 306. Substantial evidence is defined as:

Such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. It must be enough to justify, if the trial went to a jury, refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury. This is something less than the weight of the evidence and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency’s finding from being supported by substantial evidence.

Id., 276 S.C. at 135-136, 276 S.E.2d at 307.

Appellate courts are not at liberty to substitute their view of the evidence for that rendered by the Commission. Rather, “[t]he Circuit Court’s role is appellate only, and is limited to deciding whether the Commission’s decision is not supported by substantial evidence or is controlled by some error of law.” *Rogers v. Kunja Knitting Mills Co.*, 312 S.C. 377, 440 S.E.2d 401 (Ct. App. 1994). When reviewing an appeal from the Workers’ Compensation Commission, the appellate court may not weigh the evidence or substitute its judgment for that of the Full Commission as to the weight of the evidence and questions of fact. *Farrell v. Jerry’s, Inc.*, 370 S.C. 22, 26, 633 S.E.2d 893, 894-895 (2006).

Moreover, “the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency’s finding from being supported by substantial evidence.” *Palmetto Alliance, Inc. v. S.C. Pub. Serv. Comm’n*, 282 S.C. 430, 432, 319 S.E.2d 695, 696 (1984). In workers’ compensation cases, the Appellate Panel is the ultimate finder of fact. *Shealy v. Aiken County*, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000). When the evidence is conflicting over a factual issue, the findings of the Appellate Panel are conclusive. *Hargrove v. Titan Textile Co.*, 360 S.C. 276, 290, 599 S.E.2d 604, 611 (Ct. App. 2004). The final determination of witness credibility and the weight to be accorded evidence is reserved for the Appellate Panel. *Bass v. Kenco Group*, 366 S.C. 450, 458, 622 S.E.2d 577, 581 (Ct. App. 2005).

STATEMENT OF THE CASE

Respondent Daljit Roopra (“Roopra”) initiated these proceedings with the filing of his Form 50, Request for Hearing, dated July 5, 2011, in which he alleged work-related injury to his left arm, left shoulder, left upper extremity and neck that occurred November 14, 2003¹. In their Form 51, Employer’s Answer, Appellants Spartanburg Automotive, Inc. (“Employer”) and Specialty Risk Services, Inc.² (“Carrier”) admitted Roopra sustained injury to the left shoulder but denied the remainder of Roopra’s alleged injuries by accident. The parties stipulated as to maximum medical improvement, and the only issues for hearing before the single commissioner were permanency and future medical treatment for pain management. (October 5, 2011 Hr’g Trans., p. 5, line 22 - p. 6, line 8) Following a hearing on October 5, 2011, the single commissioner issued a Decision and Order filed November 7, 2011, in which he concluded Roopra sustained a 39% permanent partial disability to the left shoulder and a 4% permanent partial disability to the neck. (November 7, 2011 Decision & Order, p. 11)

Appellant filed a timely Form 30, Request for Commission Review, on November 21, 2011. (Form 30) Following oral argument on March 19, 2012, the Appellate Panel issued its Decision and Order filed May 2, 2012, in which it unanimously

¹ Specifically, Roopra alleged he injured his left shoulder “when he slipped on grease that was on the floor. While slipping, he grabbed a die with his left arm and caught himself. [Roopra] also alleges he sustained an injury to his neck as a direct and proximate result of the left shoulder injury.” (November 7, 2011 Decision and Order, p. 3)

² The carrier is mis-identified as Liberty Mutual Insurance Company via scrivener’s error in the Order entered by Judge Roger L. Couch on January 16, 2013. Specialty Risk Services, Inc., is the actual carrier.

affirmed the findings of fact and conclusions of law reached by the single commissioner. (May 2, 2012 Decision and Order) Appellants thereafter filed a notice of appeal in the Court of Common Pleas for Spartanburg County on the basis that the Appellate Panel's Decision and Order was not supported by substantial record evidence in the case.

Following oral argument on September 12, 2012, the circuit court issued its Order dated January 16, 2013, in which the court fully affirmed the Appellate Panel Decision and Order. (January 16, 2013 Order) Specifically, the court affirmed based upon evidence of work restrictions placed upon Roopra after his 2003 injury; however, the court did not address any impairment to Roopra's ability to earn income. (*Id.*, pp. 3-4; September 12, 2012 Hr'g. Trans.) This appeal followed.

STATEMENT OF THE FACTS

Roopra sustained a prior injury to his left shoulder in 1996, at which time he also was employed with Spartanburg Automotive. (October 5, 2011 Hr'g Trans., p. 6, lines 13-16) He underwent two surgical procedures for that injury and ultimately settled a workers' compensation claim for a 20% permanent partial disability. (*Id.*, p. 6, lines 17-25) Roopra went back to work as a die setter and remained in that position until roughly a month or two prior to the events giving rise to this claim. (*Id.*, p. 7, lines 1-11) Dr. Kana performed an arthroscopic surgery to Roopra's left shoulder in June 2005, and he last treated Roopra on November 14, 2007. (*Id.*, p. 19, line 22 - p. 20, line 4) Roopra also treated with Dr. Esce until February 2008. (*Id.*, p. 20, lines 5-10) He also treated with a pain management physician, Dr. Mourtada, but was released from Dr. Mourtada's practice on January 29, 2009, due to a failed drug test. (*Id.*, p. 20, lines 11-22)

Roopra missed thirty-four weeks of work as a result of his November 2003 injury; however, he has worked continuously since returning to work. (October 5, 2011 Hr'g Trans., p. 21, lines 19-25) He speaks several languages fluently, works approximately 55 to 60 hours per week, and has had no further issues with his shoulder or any disciplinary infractions. (*Id.*, p. 22, line 14 - p. 23, line 1; p. 25, lines 2-6) While he sustained injury to his left shoulder, Roopra is right hand dominant and remains able to travel. (*Id.*, p. 24, lines 3-7, 14-23) Roopra now works in a supervisory capacity and manages 14 people and three machines. (*Id.*, p. 23, lines 15-17) Roopra testified that Spartanburg Steele has been "very good" to him and that earns more income today than he did prior to the November 2003 incident giving rise to this claim. (*Id.*, p. 12, lines 17-22)

ARGUMENT

I. The Full Commission Erred In Awarding A 39% Disability Rating To Roopra's Left Shoulder And A 4% Disability Rating To His Neck When Those Ratings Are Excessive And Fail To Account For A 20% Disability Award For Roopra's 1996 Shoulder Injury.

South Carolina Code Ann. § 42-1-120 defines disability as “incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment.” *See also Watson v. Xtra Mile Driver Training, Inc.*, 399 S.C. 455, 463, 732 S.E.2d 190, 194 (Ct. App. 2012) (“The extent of disability is a question of fact to be proved as any other fact is proved Disability in compensation cases is to be measured by loss of earning capacity.”) (*quoting Wynn v. Peoples Natural Gas Co. of S.C.*, 238 S.C. 1, 11-12, 118 S.E.2d 812, 817-18 (1961)).

The impairment award “must be based upon evidence which fairly proves the extent or percentage of disability.” *Dickey v. Springs Cotton Mills*, 209 S.C. 204, 210, 39 S.E.2d 501 (1946); *Linen v. Ruscon Construction Co.*, 286 S.C. 67, 68, 332 S.E.2d 211, 212 (1985) (“the award may not rest on surmise, conjecture, or speculation; it must be founded on evidence of substance to afford it a reasonable basis.”) (citation omitted)

When an injury results in something that is less than a complete loss of a scheduled body part, two issues must be addressed: (1) to what extent the claimant has suffered an impairment to that particular body part and (2) what disability the claimant has suffered. Grady LN. Beard *et al.*, *The Law of Workers' Compensation Insurance in South Carolina* 353 (2008). The first issue is usually addressed by a medical professional, while the second issue is left to the discretion of the Commission.

Here, the lower tribunals committed error in two respects. First, they disregard substantial record evidence that militates against a finding that Roopra is entitled to substantial disability ratings to his left shoulder and neck and failed to account for a significant rating awarded for a prior injury. Second, the substantial record evidence demonstrates that Roopra has not sustained impairment to his ability to earn income and is actually earning more income than prior to the November 2003 injury giving rise to this matter. Thus, the award is not consistent with the substantial evidence in this case and should be reversed.

- A. The disability ratings of 39% and 4% do not comport with the Act's definition of disability, as they are too high considering Roopra's current, admitted capabilities.**

The Commission and the circuit court erred in affirming the order of the single commissioner, which incorrectly determined Roopra sustained a 39% permanent partial disability to his left shoulder and a 4% permanent partial disability to his neck as a result of the November 2003 incident. Appellants submit that the preponderance of the evidence does not lend itself to such excessively high disability ratings. Therefore, Appellants request that these findings be reversed to reflect more accurately the substantial record evidence in this case.

The single commissioner abused his discretion in determining the extent of Roopra's disability because he gave little or no regard to the impairment ratings assigned by Roopra's own treating physicians. For example, on March 8, 2006, Dr. Kana assigned Roopra an impairment rating of 21% to the left upper extremity. (APA #1, p. 18) On August 14, 2006, Dr. Kana assigned Roopra an 18% impairment rating to his left upper

extremity, which had not changed by August 18, 2007, when Dr. Kana gave him the same rating. (APA #1, pp. 22, 29) Dr. Kana noted Roopra had permanent restrictions of no lifting, pulling, or pushing greater than two pounds with the left arm. (APA #1, p. 22)

On August 21, 2011, Dr. Esce completed a Form 14B, wherein he noted a 2% medical impairment to the whole person. (APA #4, p. 42) Dr. Esce further noted Roopra was restricted from performing overhead work and from lifting greater than thirty pounds. (APA #4, p. 42) Finally, on July 25, 2011, Dr. Mourtada completed a Form 14B noting that Roopra had a 21% impairment to his left shoulder/neck. (APA #11, p. 108) Dr. Mourtada opined Roopra could return to work per Dr. Kana's restrictions. (APA #11, p. 108) The only additional treatment noted on the Form 14B that is necessary to lessen the period of Roopra's period of disability is pain management. (APA #14, p. 108; November 7, 2011 Decision & Order, p. 13) The fact that Dr. Esce and Dr. Mourtada recommended pain management, standing alone with no other recommended treatment, hardly supports the high disability ratings awarded by the single commissioner. (November 7, 2011 Decision & Order, p. 6)

Roopra has continued to work for Spartanburg Automotive since his November 14, 2003 injury. In fact, he currently works in a position where he supervises fourteen people and is earning higher wages than he was at the time of the initial hearing. (October 5, 2011 Hr'g. Trans., p. 12, lines 19-21) Roopra's testimony indicates he is gainfully employed without any restrictions on his ability to perform his new job, as well as the satisfactory work that he has been doing for Spartanburg Automotive (*Id.*, p. 12, lines 5-

6, 19-21) In his new position, Roopra has not been written up for poor performance. (*Id.*, p. 22, line 7)

Roopra works about 55 to 60 hours per week and has not missed any work relative to his injury since his time off after the 2005 surgery. (October 5, 2011 Hr'g. Trans., p. 22, lines 1, 7; November 7, 2011 Decision & Order, p. 7) Furthermore, Roopra is right-hand dominant, and his new position does not require him to do any lifting, pushing, or pulling unless he voluntarily aids other employees occasionally. (October 5, 2011 Hr'g. Trans., p. 22, lines 10-11; p. 24, lines 6-7) Roopra's injury was to his left shoulder - a shoulder previously injured and for which Roopra received an impairment rating. It is apparent he has not had any difficulties performing his new job duties since his work accident. Nonetheless, even if Roopra discovers he cannot continue his employment with Spartanburg Automotive because of his injuries, he is certainly employable, as he is fluent in three languages and passable in another. (November 7, 2011 Decision & Order, p. 7) Dr. Kana even indicated that if Roopra could not perform his former work duties that he believed that "he is capable of doing other jobs" that involve lighter duty or are computer-oriented (APA #1, pp. 26, 28) His functional capacity test results also indicated Roopra's ability to perform a "medium level job." (APA #6, p. 46)

Aside from his employment status, Roopra's lifestyle choices and activities further support Appellants' contention that the single commissioner's award does not accurately reflect his degree of disability. Roopra's live testimony demonstrates his active lifestyle. According to Roopra's testimony, following his November 14, 2003

work injury, he traveled to India for six weeks in 2007 and to California and Phoenix, Arizona in February 2011, where he visited the Grand Canyon. (October 5, 2011 Hr'g. Trans., p. 24, lines 16-23) While he was in Arizona, he clearly was able to enjoy his vacation without worrying too much about his pain as he enjoyed his friends' company and smoked marijuana with them. (*Id.*, p. 9, lines 9-15) Roopra testified during his August 18, 2011 deposition that he has difficulty sitting for more than 15 or 20 minutes; however, he sat in the car all the way to the Grand Canyon while his brother drove. (*Id.*, p. 24, line 22; Depo. Trans., p. 31, line 10)

While he states it is fairly difficult to drive, Roopra still drives a pickup truck and a sedan. (Depo. Trans., p. 34, lines 19-25) Furthermore, Roopra can stand for up to 30 to 45 minutes without experiencing pain, and he has no difficulty walking. (Depo. Trans., p. 30, lines 23-24; p. 31, lines 3-5) Although Dr. Kana noted restrictions of no lifting more than two pounds, Roopra is still capable of carrying his two-year-old son. (October 5, 2011 Hr'g. Trans., p. 25, line 15) During his deposition, Roopra also shared that he still plays around with his children as much as he can. (Depo. Trans., p. 33, lines 4-5)

It is quite apparent that Roopra's activities have not been drastically limited by his work injury, seeing as he is still able to take several vacations, socialize, and play with his children. Considering the aforementioned factors pertaining to Roopra's current employment and earnings, his good job performance, and his fairly active lifestyle, the heightened disability ratings are far too high and fly in the face of the Act's definition of disability as noted supra. *See* S.C. Code Ann. § 42-1-120 (1976). Because such ratings are against the better weight of the evidence, and because Roopra's ability to earn income

has not been impaired, Appellants respectfully submit they are entitled to an order reversing the decision of the single commissioner, as well as those of the Full Commission and the circuit court affirming it, and instructing the Commission to impose lower disability ratings consistent with the evidence in this case.

B. Failure to consider Roopra's prior award of 20% permanent partial disability when determining the 39% rating to the left shoulder constitutes an abuse of discretion.

Roopra was previously awarded 20% permanent partial disability for a work injury to his left shoulder in 1996. (November 7, 2011 Decision & Order, p. 7) An additional 39% disability award to that same body part, given that Roopra is capable of working 55 to 60 hours a week plus overtime and has not missed work relative to his accident since 2005, is unjustly high and, therefore, not supported by substantial evidence. The Commissioner's 39% rating in addition to the prior 20% award would presumably rate Roopra as 59% disabled relative to his left shoulder. Such rating simply does not comport with the medical records, Roopra's own testimony, or the impairment ratings assigned by Roopra's treating physicians.

Turning to Roopra's medical history, it becomes clear that the impairment rating to his shoulder is unjustifiably high. Roopra had two left shoulder arthroscopic surgeries in 1997 and 2000. (APA #1, p. 1) The 2000 surgery successfully relieved Roopra's pain. (APA #1, p. 1) Following the surgeries, Roopra had full range of motion but still experienced pain when raising his arm above shoulder level. (APA #1, p. 1) Roopra testified that following his 1996 injury and surgeries, his left shoulder was "decently functionable," and he returned to work. (Depo. Trans., p. 19, lines 6-7) As a result,

Roopra received the 20% permanent and partial disability award relative to the 1996 accident.

After Roopra's 2003 accident, Dr. Kana performed a third left shoulder arthroscopy on June 1, 2005, to repair the anterior labral tear (APA #1, p. 8) Dr. Kana's progress notes indicated that Roopra "seems to be doing very well" and making good progress. (APA #1, pp. 10, 14) On March 8, 2006, Dr. Kana released him and gave him a 21% impairment rating to the left upper extremity. (APA #1, p. 18) On August 14, 2006, Dr. Kana later lowered the impairment rating to his upper extremity to 18% and in 2007 indicated that he would not recommend any further surgeries. (APA #1, pp. 22, 27)

Roopra's minimal treatment following his surgery in 2005, further supports Appellants' contention that his degree of disability with respect to his shoulder does not rise to the level of 39%. The only recommended treatment immediately following Roopra's 2005 shoulder surgery was deep tissue massage and a work hardening program. (APA #1, pp. 14, 21) Roopra later attended physical therapy in October 2005, and his physical therapist, Toni Parham, indicated on every progress report that Roopra "responded well to treatment." (APA #12, pp. 110-116) More recently in July 2011, the only recommended treatment per the Form 14B was pain management. (APA #14, p. 108)

Moreover, it is telling that Roopra complained of severe pain yet waited until July 5, 2011, to request a hearing, and he continues to work with no significant difficulties or limitations in his current position. Roopra's working schedule of 55 to 60 hours per week and the significant amount of overtime he has worked recently despite his prior injury to

the same shoulder, further support the Appellants' contention that his left shoulder cannot possibly be deemed a combined 59% permanently and partially disabled. (October 5, 2011 Hr'g. Trans., p. 22, line 1; November 7, 2011 Decision & Order, p. 7)

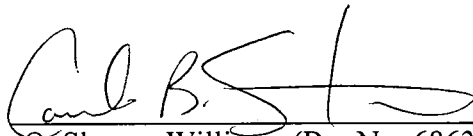
In light of the substantial evidence in this case, Appellants respectfully request that the Court reverse the single commissioner's determination, affirmed by the Full Commission and the circuit court, regarding Roopra's 39% disability rating relative to his left shoulder and remand for assignment of an impairment rating that more accurately reflects Roopra's actual condition, including his ability to earn income.

CONCLUSION

Based on the foregoing, Appellants respectfully submit that the orders of the circuit court and the Full Commission affirming the single commissioner's assignment of Roopra's disability ratings are not supported by substantial evidence and should, therefore, be reversed.

April 29, 2013

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