THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Appeal from the South Carolina Workers' Compensation Commission

Derrick L. Williams, Commissioner
T. Scott Beck, Commissioner
Andrea C. Roche, Commissioner

W.C.C. File No. 0626795

Jesus Lugo, ... Respondent,

v.

Kohler Company, Employer, Self-Insured, ... Appellant.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

I. DID THE COMMISSION ERR IN AFFIRMING THE $10,000 PENALTY ISSUED BY THE SINGLE COMMISSIONER WHEN THE ISSUING OF THE PENALTY WAS AN ABUSE OF DISCRETION?

STATEMENT OF THE CASE

This case came before Commissioner Huffstetler on claimant's Motion for Sanctions filed on August 9, 2011. In the motion, claimant Jesus Lugo alleged that Kohler Company had failed to comply with consent orders signed by the parties on February 2, 2011 and June 17, 2011. (Motion.) As part of these consent orders, Kohler agreed, among other things, to reimburse Lugo for out-of-pocket expenses, provide transportation and an interpreter for all future medical appointments, authorize prescriptions and treatment including a spinal cord stimulator, and continue to pay temporary total disability payment until further agreement of the parties or order of the Commission. A hearing on Lugo's motion was held on August 23, 2011. The single Commissioner found that Kohler had not complied with the terms of the consent orders and levied a $10,000 penalty against Kohler. (Order, Sept. 19, 2011.)

On October 5, 2011, Kohler appealed the Commissioner's Order to the full Commission. (Form 30, Oct. 5, 2011). On January 18, 2012, an appellate panel of the Commission decided the matter without oral argument and affirmed the single Commissioner's Order. (Order, Feb. 23, 2012). Kohler thereafter appealed (Notice of Appeal.)

STATEMENT OF FACTS

On October 3, 2006, Jesus Lugo suffered a back injury while employed as a caster for Kohler Company. Kohler initially denied the injury and the matter was scheduled for a hearing on liability in July 2008. Prior to the hearing, the parties reached a consent order in which Kohler accepted liability for the injury. (Consent Order, Aug. 4, 2008.) This order stipulated that Lugo had not reached maximum medical improvement (MMI), Kohler would authorize treatment for Lugo with Dr. Mourtada and Dr. Nowatka, and Kohler would reimburse Lugo for medical expenses incurred during the period of Kohler's denial of the claim.

The matter was then re-scheduled for a hearing on December 16, 2010. The parties again reached a consent order prior to hearing date. (Consent Order, Feb. 2, 2011). The February 2011 consent order stipulated: 1) Lugo had not reached MMI; 2) that medical treatment by Dr. Nowatka and Dr. Mourtada was authorized to included prescriptions, referrals and causally-related medicals; 3) Kohler would provide transportation and an interpreter for Lugo's medical visits; 4) Kohler would reimburse Lugo for any unpaid mileage; 5) Kohler would reimburse Lugo for unpaid medical expenses in accordance with the August 4, 2008 consent order; 6) a

hearing on the permanency of Lugo's injuries would be held in abeyance; and 7) Lugo would continue to receive temporary total benefits until agreement by the parties or order of the Commission.

On May 25, 2011, Lugo moved to compel compliance with the February 2011 consent order. Before that motion could be heard, however, the parties once again came to an agreement. (Consent Order, June 17, 2011). The resulting June 2011 consent order provided that Kohler agreed to comply with the prior consent orders including the specific items listed in the February 2011 consent order. On August 9, 2011, Lugo moved for sanctions pursuant to S.C. Code Ann. § 42-3-175, claiming that Kohler had failed to comply with the February 2011 and June 2011 consent orders.

On August 23, 2011, Commissioner Huffstetler conducted a hearing on the motion. Counsel for Lugo acknowledged that his client was not entitled to relief under S.C. Code Ann. § 42-3-175, as the injury occurred prior to the statute's revision. (*Id.* at 5:13-16). Kohler admitted that prior to the filing of the motion for sanctions it had failed to fully comply with the consent orders. (*Id.* at 6:9-18, 7:7-25, 81-21). Kohler also informed the Commissioner, however, that since the filing of the motion for sanctions all but one item agreed to in the consent orders had been completed. (*Id.* at 6:22-23, 7:7-23; 8:12, 21). Kohler attempted to explain the reasons for the

delay in compliance, however the Commissioner would not entertain Kohler's explanations. (*Id.* at 6:9-20). On September 19, 2011, Commissioner Huffstetler found that Kohler had not complied with the consent orders and imposed a $10,000 penalty under S.C. Code Ann. § 42-1-640.

SUMMARY OF THE ARGUMENT

The single Commissioner abused his discretion when issuing the $10,000 penalty against Kohler. The amount of the penalty was not supported by substantial evidence in the record, including any evidence of loss suffered by Lugo due to Kohler's failure to fully comply with the consent orders.

ARGUMENT

I. THE COMMISSIONER ABUSED HIS DISCRETION BY ISSUING OF THE $10,000 PENALTY AGAINST KOHLER COMPANY.

A. APPLICABLE LAW

The Administrative Procedures Act establishes the standard for judicial review of worker's compensation decisions. *Lark v. Bi-lo, Inc.*, 276 S.C. 130, 276 S.E.2d 304 (1981). This Court may reverse or modify an agency's decision if the findings and conclusions of the agency are: "(1) affected by an error of law, (2) clearly erroneous in view of the reliable and substantial evidence on the whole record, or (3) arbitrary or capricious or

characterized by abuse of discretion or a clearly unwarranted exercise of discretion." *James v. Anne's Inc.*, 390 S.C. 188, 193, 701 S.E.2d 730, 732 (2010); S.C. Code Ann. § 1-23-580 An abuse of discretion occurs if the Commission's findings are wholly unsupported by the evidence or the conclusions are controlled by an error of law. *Thompson v. South Carolina Steel Erectors*, 369 S.C. 606, 612, 632 S.E.2d 874, 878 (Ct. App. 2007).

In civil contempt proceedings, judicial sanctions may be levied for either or both of two purposes: to coerce the defendant into compliance with the court's order and to compensate the complainant for losses sustained. *Cheap-O's Truck Stop, Inc. v. Cloyd*, 350 S.C. 596, 607, 567 S.E.2d 514, 519 (Ct. App. 2002). "Where compensation is extended, a fine is imposed, payable to the complainant. *Such a fine must of course be based upon evidence of complainant's actual loss.*" *Id.* (emphasis added). The burden of showing what amount, if any, the complainant is entitled to recover by way of compensation rests on the complainant. *Id.* "Any component of a sanction must directly relate to the contemptuous conduct and the loss incurred by the offended party." *Id.* at 609, 567 S.E.2d at 520.

B. THE COMMISSIONER'S DECISION TO ISSUE A $10,000 PENALTY AGAINST KOHLER WAS ARBITRARY, CAPRICIOUS AND AN UNWARRANTED EXERCISE OF DISCRETION.

The appellate panel erred by affirming the single Commissioner's issuance of a $10,000 penalty against Kohler, as the amount of the penalty was an abuse of discretion. The single Commissioner issued a $10,000 penalty against Kohler for its failure to fully comply with the consent orders agreed to by the parties. The amount of the penalty is both arbitrary and capricious, as the record does not contain substantial evidence to support the amount of the penalty.

During the hearing before the single Commissioner, counsel for Kohler admitted that, prior to the filing of the claimant's motion for sanctions, Kohler had not fully complied with the June 2011 consent order. (Hearing Tr., Aug. 23, 2011). Counsel for Kohler, however, also informed the Commissioner that since the filing of the motion, all but one requirement of the consent order had been complied with and Kohler's compliance was ongoing. The penalty therefore was not necessary to compel Kohler's compliance with the terms of the consent order.

Nor was the penalty compensatory, the other permissible purpose for a contempt sanction. Lugo did not to provide any information as to the amount necessary to compensate him for Kohler's noncompliance. Indeed

by the time of the hearing Kohler had paid all outstanding amounts owed to Lugo. Lugo failed to meet his burden of proof as to the effect or loss he sustained due to Kohler's actions. Without such evidence, the issuing of a $10,000 penalty payable to Lugo cannot be deemed appropriate.

The Commissioner's issuance of the $10,000 penalty without any basis or reasoning was an unwarranted exercise of discretion. Other than finding that prior to the filing of the Lugo's motion for sanctions Kohler had not fully complied with the consent orders, the Commissioner failed to relate the penalty to the record. The Commissioner also failed to relate the amount of the penalty to any specific findings in the record or any actual losses incurred by Lugo. Rather than being coercive or compensatory, the award was wholly punitive and therefore was an abuse of discretion. *See Cheapo's*, 350 S.C. at 607, 567, S.E.2d at 519 (recognizing that a contempt award should serve either a coercive or compensatory purpose).

CONCLUSION

For the reasons set forth above, Kohler Company respectfully asks this Court to reverse the $10,000 penalty.

Respectfully submitted,

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PROOF OF SERVICE

I certify that I have served the foregoing Initial Brief of Appellant on Jesus Lugo by depositing a copy of same in the United States Mail, postage prepaid, on April 23, 2012, addressed to his attorney of record, Alton L. Martin, Jr., P.O. Box 8220, Greenville, South Carolina 29604.

April 23, 2012

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the Initial Brief of Appellant complies with South Carolina Supreme Court's August 13, 2007, Order.

April 23, 2012

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