

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

Civil Action No.: 2012-CP-42-2329
Appellate Case No.: 2013-000312
WCC File No.: 0326068

Daljit Roopra,.....Respondent,

v.

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

INITIAL BRIEF OF RESPONDENT

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FACTUAL BACKGROUND

Respondent worked as a die setter for Spartanburg Steel Products, Inc., from 1992 until this accident on November 14, 2003. R.pp.____ (Roopra Depo., p. 11; Tr., p. 9). Respondent regularly had to lift and move dies and other parts weighing forty-five to fifty pounds. R.pp.____ (Tr., p. 9). On November 14, 2003, Respondent slipped on grease that was on the floor. R.pp.____ (Roopra Depo., p. 25; Decision and Order of the Single Commissioner, Statement of the Case). While falling, Respondent grabbed a die with his left arm and caught himself, injuring his left arm/shoulder and neck in the process. R.pp.____ (Roopra Depo., p. 25; Decision and Order of the Single Commissioner, Statement of the Case). Following his June 1, 2005, left shoulder surgery, Respondent was out of work for approximately 34 weeks, after which time he returned, but under permanent work restrictions. R.pp.____ (APA pp. 43-44; Tr., p. 21). Respondent now works as an automation technician, which is a job with very little lifting, pushing or pulling. R.pp.____ (Tr., pp. 11-12).

STANDARD OF REVIEW

The substantial evidence rule of the APA governs the standard of review in a workers' compensation decision. See Frame v. Resort Servs., Inc., 357 S.C. 520, 593 S.E.2d 491 (Ct.App.2004); Corbin v. Kohler Co., 351 S.C. 613, 571 S.E.2d 92 (Ct.App.2002). The Commission is the ultimate fact finder in workers' compensation cases. See Gibson v. Spartanburg Sch. Dist. No. 3, 338 S.C. 510, 517, 526 S.E.2d 725, 729 (Ct.App.2000); Muir v. C.R. Bard, Inc., 336 S.C. 266, 519 S.E.2d 583 (Ct.App.1999). The findings of an administrative agency are presumed correct and will be set aside only if unsupported by substantial evidence. See Anderson v. Baptist Med. Ctr., 343 S.C. 487, 541 S.E.2d 526 (2001); Hicks v. Piedmont Cold Storage, Inc., 335 S.C. 46, 515 S.E.2d 532 (1999); Frame, 357 S.C. at 528.

ARGUMENT

Appellants assert the South Carolina Workers' Compensation Commission ("the Commission") and the Circuit Court erred as follows: 1) they disregarded substantial evidence that militates against substantial disability ratings to Respondent's shoulder and neck, 2) they failed to account for a rating to Respondent's left upper extremity awarded for a prior injury, and 3) they failed to recognize Respondent has not sustained impairment to his ability to earn income. These assertions amount to nothing more than an invitation to this Court to second-guess the Commission's findings on factual matters, and demonstrate a misunderstanding of the Workers' Compensation Act relative to the legal issues raised. The circumstances involved in this matter are fairly routine in the workers' compensation context, and this decision should be affirmed.

I. THE FINDING OF 39% PERMANENT PARTIAL DISABILITY TO RESPONDENT'S LEFT SHOULDER AND 4% PERMANENT PARTIAL DISABILITY TO HIS NECK IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

As stated above, this Court is limited to determining whether the Commission's factual findings are supported by substantial evidence. Appellants' contend there is other evidence that "militates" against the factual findings reached by the Commission. However, "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).

The Commission determines the percentage of loss of use or "disability" based on any competent evidence, whether it be medical, professional or lay testimony. See Roper v. Kimbrell's of Greenville, Inc., 231 S.C. 453, 99 S.E.2d 52 (1957); see also Tiller v. National Health Care Ctr., 334 S.C. 333, 343, 513 S.E.2d 843, 847-848 (1999)(the Supreme Court found

the medical and lay testimony constituted substantial evidence in support of the award). While expert testimony can be considered, the Commission may find a degree of disability greater than the impairment rating of the treating physicians. See Lyles v. Quantum Chemical Co., 434 S.E.2d 292, 315 S.C. 440 (Ct.App.1993). In this case, the medical evidence and Respondent's testimony provide substantial support for the Commission's findings.

A. Medical Evidence

Respondent began treating with Dr. Stephen Kana, orthopedic surgeon, for his left arm/shoulder injuries on September 9, 2004. R.pp.____ (APA, pp. 1-2). Dr. Kana performed a left shoulder arthroscopy to repair Respondent's anterior labrum. R.pp.____ (APA, pp. 43-44). On March 8, 2006, Dr. Kana assigned 21% to Respondent's left upper extremity. R.pp.____ (APA p. 18). On August 14, 2006, Dr. Kana lowered the impairment rating to 18% to the upper left extremity. R.pp.____ (APA pp. 22). Dr. Kana also placed severe limitations on Respondent's left arm, including permanent restrictions against "any repetitive work with the left arm" as well as "no lifting, pulling or pushing greater than two pounds with [left] arm." R.pp.____ (APA, pp. 23, 118, 121). Dr. Kana later noted: "From a work standpoint, I do not ever see him getting back to doing what he was doing before." R.pp.____ (APA, p. 27).

Respondent treated with Dr. Phillip Esce, neurosurgeon, from December 2004 to February 2008 regarding his neck. On August 21, 2011, Dr. Esce assigned 2% impairment to Respondent's whole person, and permanently restricted Respondent from overhead work and lifting over thirty pounds. R.pp.____ (APA, p. 42). Additionally, Dr. Esce specified that Respondent would need pain management in the future. R.pp.____ (APA, p. 42).

Dr. Husam Mourtada, physiatrist, treated Respondent for two-and-a-half years. Dr. Mourtada assigned 21% impairment to Respondent's left shoulder and neck. R.pp.____ (APA, p.

108). Further, as did Dr. Kana, Dr. Mourtada permanently restricted Respondent to no lifting, pulling or pushing greater than two pounds with his left arm. R.pp.____ (APA, p. 108). Dr. Mourtada also agreed Respondent requires pain management in the future. R.pp.____ (APA, p. 108).

B. Respondent's Testimony

Respondent sustained a prior left shoulder injury in 1996, but testified his left shoulder was "decently functionable" from the time he returned to work following his 1996 injury until his November 14, 2003, injury. R.pp.____ (Tr., p. 18). Respondent testified his left shoulder is now in pain all the time, and has very limited motion, restricting his forward reach and his ability to raise his left arm high. R.pp.____ (Tr., p. 10-11). According to Respondent, he can pick up his two-and-a-half year old son for only five to seven minutes. R.pp.____ (Tr., p. 14). He is limited to using a riding lawn mower, can no longer use a weed eater, and is now unable to perform maintenance on his own automobile. R.pp.____ (Tr., p. 14). He has trouble washing his back, washing his hair, and dressing himself. R.pp.____ (Tr., p. 15). Respondent is no longer able to run, and he explained that sleeping is very difficult, as his arm gets numb and tingles when he tries to rest. R.pp.____ (Tr., p. 15-16). Respondent believes he has lost at least two-thirds use of his left arm. R.pp.____ (Tr., pp. 17).

Respondent further testified that he has pain in his neck twenty-four hours a day, seven days a week. R.pp.____ (Tr., p. 16). His pain radiates down his left arm into his elbow and fingers, and he has lost grip strength in his left hand. R.pp.____ (Tr., p. 16-17). Respondent now takes Naproxen, prescribed by Dr. Stephen Yost, his family doctor, for his pain. R.pp.____ (Tr., p. 18). Together, the medical and lay evidence provide substantial support for the Commission's finding of permanent partial disability to Respondent's left shoulder and neck.

II. THE COMMISSION'S FINDING REGARDING THE PERMANENT PARTIAL DISABILITY TO RESPONDENT'S LEFT SHOULDER IS UNAFFECTED BY THE PREVIOUS PERMANENT PARTIAL DISABILITY AWARD TO HIS LEFT UPPER EXTREMITY.

Appellants argue the Commission failed to account for Respondent's previous 20% permanent partial disability award to his left upper extremity in awarding 39% permanent partial disability to his left shoulder in this instance. Appellants offer no law in support of their argument on this issue. This is because, contrary to Appellants' assertion, S.C. Code Ann. § 42-9-170(B) provides:

If an employee receives a permanent injury as specified in Section 42-9-30 . . . after having sustained another permanent injury in the same employment, **he is entitled to compensation for both injuries**, but the total compensation must be paid by extending the period and not by increasing the amount of weekly compensation, and in no case exceeding five hundred weeks.

(emphasis added). In short, any injury Respondent may have suffered previously is immaterial to the assignment of permanent partial disability in this case, so long as the combined value of the two injuries does not exceed 500 weeks of benefits (which it does not).¹ As such, Appellants' argument on this issue is moot.

III. LOSS OF EARNING CAPACITY IS PRESUMED FOR SCHEDULED INJURIES.

The economic model of workers' compensation "defines disability and incapacity in terms of the claimant's loss of earning capacity as a result of the injury." Wigfall v. Tideland Utils., 354 S.C. 100, 104, 580 S.E.2d 100, 102 (2003). The medical model of workers' compensation "provides awards for disability based upon degrees of medical impairment to specified body parts." Id. As explained by our Supreme Court:

¹ The previous award of 20% permanent partial impairment to Respondent's left upper extremity totals 39 weeks of benefits. The current award of 39% to Respondent's left shoulder totals 70.2 weeks of benefits. Even considering the 4% permanent partial disability award to Respondent's spine, which totals 12 weeks of benefits, Respondent is far short of the 500 week maximum.

South Carolina provides three methods to obtain disability compensation: 1) total disability under S.C. Code Ann. § 42-9-10; 2) partial disability under S.C. Code Ann. § 42-9-20; and 3) scheduled disability under S.C. Code Ann. § 42-9-30. The first two methods are premised on the economic model, in most instances, while the third method conclusively relies upon the medical model with its presumption of lost earning capacity.

Id., at 105. In other words, “[a] claimant may obtain disability for a scheduled physical injury included in S.C. Code Ann. § 42-9-30” and “is not required to show lost earning capacity because the compensation is based on the character of the injury and lost earning capacity is conclusively presumed.” Id., at 107 (citing Fields v. Owens Corning Fiberglass, 301 S.C. 554, 393 S.E.2d 172 (1990); Larson's Workers' Compensation Law, § 86.02 at 86-5 (1999)). Here, Respondent was assigned permanent partial disability ratings pursuant to S.C. Code Ann. § 42-9-30. R.pp. ____ (Full Commission Decision and Order, Conclusions of Law, ¶ 3). Therefore, Appellants’ argument that the Commission failed to consider Respondent’s earning capacity is also moot.

CONCLUSION

The appeal in this matter is merely a pronouncement of Appellants' dissatisfaction with the results. There is substantial evidence to support the factual findings reached by the Commission, and there is no legal basis for Appellants' arguments relative to Respondent's prior injury or subsequent earning capacity. As such, the decision in this matter should be affirmed.



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