THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Casey Manning, Circuit Court Judge

Case No. 2008-CP-400-2813

Linda Burris, Employee .....Appellant,

v.

Lexington/Richland School District 5, Employer,
And South Carolina School Board Insurance Trust, Carrier.....Respondents

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INITIAL BRIEF OF APPELLANT

April 24, 2013

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QUESTIONS PRESENTED

1. **Did the circuit court err in denying the Claimant benefits under the act, and thereby affirming and adopting the Order of the Appellate Panel, the error being the decision is not supported by the evidence and is an error of law?**
2. **Did the circuit court err in finding the Claimant did not suffer a repetitive injury to her back, the error being the evidence submitted shows Claimant's injuries were the result of the repetitive duties of her job?**
3. **Did the circuit court err in not finding that the Claimant's repetitive duties of employment aggravated or exacerbated the Claimant's back condition, such error being one of law?**

STATEMENT OF THE CASE

Linda Burriss(Claimant) was employed by the Richland-Lexington School District # 5 (Defendant) for 28 years. Her last thirteen years she was a teacher's aide at H.E. Corley Elementary school. She retired first in June of 2001 but returned to work in August of 2001 so she could work another five years on the TERI plan.

In the early fall of 2001 she began to experience pain in her lower back and both legs. She filed a report of injury with her employer and went to see Dr. Beaver in October of 2001. Dr. Beaver suspected that she had a hip problem. She continued to work in discomfort. She later went to **Dr. Benjamin Levinson, a board certified internist**. He placed her for conservative management with **Dr. Rick Sanford, a chiropractor** who worked with Dr. Levinson at South Carolina Internal Medicine and Rehabilitation.

Dr. Levinson sent her for an MRI in February of 2002. Her pain lessened between January and June of 2002 with continued treatment by Dr. Sanford. In August of 2002 during the first week of school, Mrs. Burriss had a very hard week where she testified: " . . I started back to school in August and I hadn't been there two days, probably just one

day, because like I say, we had to do a lot of **stooping** and the **bending** and the **twisting** and the **cutting** and the laminating and all of that. I was on my feet nonstop except for a lunch break until like about 7:00 O'clock at night those first few days of school. And so the pain started shooting down the other leg, so I went back to Dr. Sanford and they started me on treatment again. And I was there close to a year with therapy." (TR Single Commissionerp.14, L18-25; p.15, L. 1-3).

Dr. Levinson referred her for an opinion to Dr. William Rambo, Jr. of Carolina Neurosurgical Associates. Dr. Rambo examined her in September 2002 and gave this impression: "Lumbar instability at L5-S1, with both mechanical back pain, and L5 radicular symptoms. It sounds as though this condition has been slowly progressing over the last year, although currently her symptoms are improved with conservative management. I think she may end up needing surgery, however." He recommended that she continue with therapy and chiropractic treatment, he said she could work but lift no more than ten pounds. . ." (Cl. APA, pp.2-3). Mrs. Burriss chose not to opt for surgery but to continue with conservative care. (TR. Single Commissionerp.16, L 23-25; p.17, L 1-10).

Mrs. Burriss returned to therapy with Dr. Sanford which allowed her to work, but still in pain and discomfort for the remainder of the 2002-2003 school year. She was forced to retire in June of 2003 because of her pain and the nature of her job duties. (TR Single Commissioner p.15, L. 6-11).

The Claimant, Linda Burris, filed her SCWCC Form 50 Request for a hearing asserting an injury to her lower back, hips and legs due to the "cumulative repetitive trauma over the course of her employment." At least two previous hearings had been

scheduled but failed to convene for proper reasons. A hearing was held before Commissioner Huffstetler on September 4, 2007 with all parties present and represented. The hearing was held pursuant to Forms 50 and 51.

The Claimant was claiming permanent injury to her hips, legs and low back due to repetitive trauma occurring on her job as a teacher's aide. She claims temporary total disability from May 30, 2003, her last day of work, to the present, payment of all related medicals, and compensation for permanent disability, partial disability, and all relief under the Act. Defendant denies an injury by accident arising out of / in the course of her employment, or alternatively, that she may have suffered a temporary exacerbation of a preexisting condition.

The Decision and Order was issued on October 5, 2007. The single commissioner found *inter alia* that "In accordance with 42-1-160, the Claimant failed to carry the burden of proof of an injury by accident, repeated trauma, or occupational disease." The Single Commissioner also found "the Claimant fails to describe a **specific event** which caused her alleged back injury." On March 20, 2008, The Full Commission Appeal Panel further found "facts do not support an injury by repetitive trauma or occupational disease." After Petition for judicial review filed to the circuit court, Judge Casey L. Manning upheld the decision of the South Carolina Workers compensation Commission Appellate Panel. The Claimant appealed to this court.

ARGUMENTS

I. The circuit court erred in denying the Claimant benefits under the act, and thereby affirming and adopting the Order of the Single Commissioner, the error being the decision is not supported by substantial evidence and is an error of law.

The Full Commission Appeal Panel and the circuit court erred in denying Claimant benefits under the act. Examining the medical evidence in its entirety, it is clear that the Claimant's primary treating physician was **Dr. Benjamin Levinson, M.D., a board-certified internist** who practiced in an office with **Dr. Rick Sanford, a chiropractor** of long experience, in the office of "South Carolina Internal Medicine and Rehabilitation LLC." Dr. Levinson was the medical doctor, and Rick Sanford was the Director of Rehabilitation. (Cl. APA, p. 6). The claimant submitted approximately 134 pages of records from this practice. (Cl. APA, pp. 4-138). In addition to this, claimant submitted a two-page report of Dr. William Rambo of Columbia Neurosurgical. (Cl. APA, pp. 2-3); two MRI reports (Cl. APA, p. 1, p. 141), X-ray report, (Cl. APA p. 131), and a two-page report from Dr. Eva Rawl, M.D.(Cl. APA. p. 141).

Dr. Levinson was the primary treating physician from the beginning of this case. He is a ***medical doctor*** (board certified internist) who treats back pain conservatively with therapy and prescriptions, if required. A review of the transcript of record will show that the Mrs. Burriss could not tolerate the pain and anti-inflammatory medications Dr. Levinson prescribed and therefore she ended up having to rely on over-the-counter Ibuprofen, Dr. Sanford's treatments, and home exercise therapy to decrease the pain. (TR. Single Commissioner p. 17, 18) She did not opt for surgery but instead chose to rely on conservative therapy as prescribed by Drs. Levinson and Sanford.

Dr. Levinson provided a permanent impairment rating of **"9% to the whole person based on injury from spondylolisthesis. She will need chronic treatment for life unless she opts for surgery."** (Cl APA, p. 129).

On November 20, 2002, Dr. Levinson provided a detailed description of Mrs. Burriss' condition. (Cl. APA, p. 83). It is instructive to read this page in its entirety as Dr. Levinson describes her back condition in detail, then summarizes the history and progress of her condition. He emphasizes the fact that it is:

"aggravated by her job duties <u>every day</u> which do include standing for long periods of time, bending and twisting and just all parts of her <u>everyday</u> job activities." (underline added).

". . . the patient is going to experience extended problems throughout her lifetime as a result of the condition that she has and also the job duties that require her to stand for long periods, bend and twist, etcetera will aggravate her condition. I have spoken to her about the need to possibly quit her job. The reason for this being I do not think that she is going to show any improvement."

"I do feel like the patient will show some improvement if she does not have to perform the job duties that she is performing <u>every day.</u>"

". . . we do not feel that she will ever return to 100%, however we do feel she would be better off without working the job that does aggravate her back."

"I do feel that the patient did re-injure her back on August 8, 2002 due to her job duties which did require her to bend and twist and stand for extended periods of time."

"As you can see as a result of the findings of her MRI scan dated February 15, 2002, that she has an extreme amount of problems in her lower back relating into the instability with associated disk bulging with the compression at the exiting L5 nerve root."

Dr. Levinson responded to a questionnaire dated June 4, 2007 and is found on page 138 of the Claimant's APA. None of the APA documents were objected to by either party; therefore they are part of the record that was before the Single Commissioner, the Commission Appellate Panel and the circuit court and **are uncontradicted**. The Defendant did not depose Dr. Levinson to challenge his opinions, credentials, or evidence presented. Nor did the defense present any 'expert' witness or evidence to dispute Dr. Levinson's conclusions. Here, it is plain to see the treating physician has unequivocally documented his opinion ***"to a reasonable degree of medical certainty"*** **that the** ***claimant's chronic back, leg and hip pain from the conditions listed in his 11/20/02 office note were "aggravated and accelerated by many of the activities of her job as a teacher's aide."*** The activities which aggravated and accelerated claimant's back, leg and hip conditions are specifically listed and affirmed by Dr. Levinson.

The Orders of the South Carolina Workers Compensation Commission as well as the circuit court completely ignore or do not consider **Internist Dr. Levinson's** opinions as described above. This was an error of law because it is an error of law to base one's decision on a mere partial review of the evidence. (seeHendricks v. Pickens County et. al., 335 SC 405, 517 SE2d 698 (Ct. App. 1999), wherein it is was held that once the evidence is properly before the Commission, it can only be excluded if it is "irrelevant, immaterial or unduly repetitious" [S.C. Code Ann. s. 1-23-330 (1)]. The evidence of the treating physician's opinions on extent of disability and causation can hardly be considered irrelevant, immaterial or unduly repetitious, especially here where, as in Hendricks, the issues of causation and extent of disability are disputed.

Even if it were true, arguendo, that Chiropractors are incompetent to render opinions on "an injury to the back" and are insufficient to support a finding of causation, the Claimant here does not rely solely on a chiropractor's opinion. The records of South Carolina Internal Medicine and Rehabilitation were submitted which contain the progress reports on Mrs. Burriss' treatment by both Drs. Levinson and Sanford, but the opinions as to causation and disability rating are those of Dr. Levinson. Furthermore, the Circuit Courts of this state have long recognized that **Chiropractors are competent to testify as to matters within their field of specialty.**Daniels v. Bernard, 270 SC 51, 240 SE2d 518 (S.C. 1978).

The Claimant also provided compelling evidence which attributed the Claimant's injuries to her work in a letter dated September 19, 2002 from William M. Rambo, Jr., MD. Dr. Rambo opines that her current condition has been slowly progressing over the last year and that she may need surgery. Dr. Levinson, the treating physician, referred the Claimant to Dr. Rambo for an evaluation and management of her low back pain and lumbar spondylolisthesis. Upon submission of this medical record into evidence, the Defendants did not refute the medical testimony of Dr. Rambo. Thus, the Commission's as well as the circuit court's rulings are an error of law as the medical evidence clearly supports a finding of causation.

II. The Circuit Court erred in finding the Claimant did not suffer a repetitive injury to her back, the error being the evidence submitted shows Claimant's injuries were the result of the repetitive duties of her job.

A review of South Carolina case law indicates our courts have interpreted and defined 'repetitive trauma' as an injury by accident. A review of the case law does not require that the claimant prove or show how a "**specific event**" or a "**particular trauma**" caused the injury in question. In fact, quite the opposite is true. In Pee v. AVM, Inc., 352 S.C. 167, 573 S.E.2d. 785 (S.C. 2002), South Carolina chose the definition of "injury by accident" that did not include the requirement of "some unusual or unlooked-for mishap resulting in injury to constitute an accident; . ." but rather chose to focus on the unforeseen result, the injury itself, rather than some specific event. (seeStokes v. First National Bank, 306 SC 46, 410 SE2d 248 (S.C. 1991).*The unexpected result or industrial injury is itself considered the compensable accident."* And Sigmon v. Dayco Corp., 316 SC 260, 449 SE2d 497(Ct.App. 1994) ; *Proof of a "causative event" is not required to establish "injury by accident."*

Mrs. Burriss' injury to her back was caused by repeated work activities which are thoroughly described elsewhere in this Order and in the Transcript of record as previously cited. These activities produced a disabling and chronic back condition which eventually resulted in Mrs. Burriss being forced to retire from her job before she otherwise would have thus causing a work related disability as defined in Section 42-1-120. The Commission disregards these facts by stating: "The Claimant describes a variety of activities which essentially constitute working. She does not describe a particular trauma . . ." (Finding of Fact #4, p.6, single commission order; order of Judge Manning p.). This is further elaborating in Finding of Fact # 6 stating: "Working in itself, is not a

hazard and is not harmful. Some physical activity is good for one's health. However, if a person has a degenerative back, then physical activity of any kind can cause it to be more symptomatic." (p. 7, Order of Single Commission; p. 5 Order of Judge Manning) This statement is untrue. In Finding of Fact # 9, the Commission finds: "The activities at the Claimant's work caused her condition to be symptomatic, but did not result in an injury. Under the case law in South Carolina, the industrial injury (asymptomatic condition becoming symptomatic) is the industrial injury. (Supra) There is a difference between pain and an injury and compensation is not available for the former." (p. 7, Order of Single Commissioner, p.5 order of Judge Manning).

These statements are in conflict with the workers' compensation law and tradition as it has evolved in this state. The fact that our Act has always been considered "social legislation" with the courts and the Commission's stated policyof liberally construing the Act in favor of coverage is axiomatic and needs no citation of authority.

No one event or single trauma produced the disabling pain, but rather was the result of a gradual process involving numerous "mini-accidents" at work. *See* Schurlknight v. City of North Charleston, 352 S.C. 175, 174, 574 S.E.2d 194 (S.C. 2003*), repetitive trauma injuries...have a gradual onset caused by the cumulative effect of repetitive traumatic events or "mini accident."* The fact that Mrs. Burriss may have had pre-existing, asymptomaticspondylolisthesis which was made symptomatic by her work in no way can be considered a bar to her entitlement to benefits under the Act. In White v. Medical University of South Carolina, 355 S.C. 560, 586 S.E.2d 157 (S.C. App. 2003), White complained of back pain for years before filing a claim. The court found he suffered a repetitive trauma and was awarded benefits. The facts in the present case

reveal Ms. Burriss suffered from an asymptomatic condition of the back which became symptomatic due to the demand of her job which required her to repetitively bend, stoop, squat, stand, twist, lift and pull. The only distinction between White and the present case made by the Single Commissioner is the tasks undertaken in White were more strenuous than the tasks in the present case. Those kinds of distinctions are irrelevant and worse yet, unfair when considering the merits of an individual worker's claims of injury. Whether one pushes around a large bed or lifts boxes of Xerox paper should not matter in the final analysis as long as the activity produces injury. We do not know, for example, if White's injuries had anything whatsoever to do with pushing the big bed around, or even with lifting patients. The case does not tell us. We do know however, that "to a reasonable degree of medical certainty, Linda Burriss suffered from chronic back, leg and hip pain from conditions listed in [Dr. Levinson's] office note of 11/20/02 and that **these conditions were aggravated and accelerated by many of the activities of her job as a teacher's aide."** Those activities which aggravated and accelerated Mrs. Burriss' back, leg and hip conditions are clearly indicated by Dr. Levinson in both his own writing and on a check-list. (Cl. APA, p. 138).

"No specific exposure or repeated activity exists in this case" as stated in conclusion of law of no. 1, flies in the face of the facts in the record. Mrs. Burriss worked doing the tasks she describes in detail, for thirteen years. (TR. Single Commisisoner pp. 6-12) The tasks were done repeatedly, usually on a daily basis, several times a day. They involved: (1) lifting 25 lb. boxes of Xerox paper; (2) lifting a 20 to 30 pound box of laminating film; (3) having to load the film into a laminating machine which required her (a small woman 59 years of age at the time the pain began), to wrestle

with a 36-inch roll of film weighing 10 to 15 lbs and insert it in an "awkward" manner which put pressure on her back making it hurt more (TR Single Commissioner p. 9-10); (4) standing on pavement for 40 to 50 minutes at least three times a week on 'car-rider' or school bus duty in addition to all of her other duties; (5) lifting 25 to 50 lb. boxes of teacher's mail and sort it and place in mailboxes; (6) using a paper cutter that sat on a 'regular' table, not a higher work counter, and cut several hundred sheets of construction paper every day which required her to bend in order to place sufficient force down on the cutter to cut five sheets at a time (TR Single Commissioner p. 6 & 11); (7) loading the Xerox machine frequently requiring awkward stooping and bending (TR Single Commissioner p.7); (8) sitting on child-size chairs and on the floor frequently when she went to the classrooms to assist the teachers; and (8) standing on chairs decorating bulletin boards and walls for teachers. (TR. Single Commissionerp. 6). Her pain did worsen with the work and eventually forced her to quit. Mrs. Burriss did not want to have surgery, even though she could have opted for it. She got along the best she could with therapy, both at home and with Dr. Sanford until as she stated: : *"Because 2003 I just - - - I could not take it any longer. I'd tried to get up and- - - - I went to school but I did not feel like going. But I still went to finish out the year. And because I had intended to work the five years on TERI but I just - - I could not make it."* (TR Single Commissioner p. 15, L. 6-11). (See also Mrs. Stump's testimony on this issue, at TR Single Commissioner p. 42.)

Although Mrs. Burriss would temporarily improve after extensive and constant therapy, her long-term prognosis was "extremely guarded" and she "is going to experience extended problems throughout her lifetime as a result of the condition that she

has and also the job duties that require her to stand for long periods, bend and twist, etcetera will aggravate her condition. . . she will show some improvement if she does not have to perform the job duties that she is performing every day. . . she has an extreme amount of problems in her low rack relating into the instability with associated disk bulging with the compression at the exiting L5 nerve root." (Cl. APA, p. 83.) Dr. Levinson stated that she could work but with these restrictions: no prolonged standing, sitting, no heavy pushing, lift only 5-10 lbs pt. Is not to do stooping, bending. (Cl. APA, p. 138).

The facts on record prove a compensable injury. Therefore the Commission's and the circuit court's conclusions to the contrary, having no support in the record, constitute an error of law.

III. The circuit court erred in not finding that the Claimant's repetitive duties of employment aggravated or exacerbated the Claimant's back condition, such error being one of law.

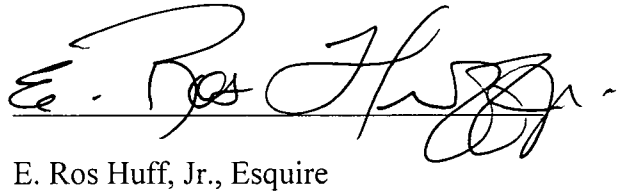
The Commission's finding of fact # 9 that Mrs. Burriss' "work caused her condition to be symptomatic, but did not result in an injury," fails to recognize the long-standing principle in our law that *"A work-related accident which aggravates or accelerates a pre-existing condition, infirmity, or disease is compensable."* Hargrove v. Titan Textile Co., 599 S.E.2d 604, 360 S.C. 276 (Ct. App. 2004).If Mrs. Burriss had a pre-existing condition (in this case spondylolisthesis) that was asymptomatic and in no way disabling, and due to work-related activities, becomes symptomatic and disabling, how is that not an injury? The Commission Appellate Panel found **that the work caused her condition to be symptomatic**. This is not appealed and therefore the law of the

case.Theuncontradicted evidence on the whole record, including both medical and lay opinions, is that Mrs. Burriss "symptoms" of chronic pain in her low back and radicular pain in both legs caused her to have to quit work. (see Cl. APA, pp.2-3, Dr. Rambo's report, citing MRI results; p. 83 and 138, Dr. Levinson; TR. Single Commissioner p. 15, Mrs. Burriss testimony; and TR p. 42, Mrs. Stump's testimony). Dr. Levinson recommended that she quit her job and Dr. Rambo placed her on a ten pound lifting limitation in the fall of 2001. Clearly, the 'symptoms' resulting from her work, had consequences.

To further support Ms. Burris' argument, the Court found in Ellison v. Frigidaire Home Products, 371 S.C. 159, 638 S.E.2d 664 at 666 that the language of § 42-9-400 (a) and (d) indicates that the Legislature clearly envisioned that a claimant may recover for greater disability than that incurred from a single injury to a particular body party if the combination with any pre-existing condition hinders reemployment. There is no requirement that the pre-existing condition aggravated the injury, or that the injury aggravated the pre-existing condition, so long as there is a greater disability simply from the "combined effects" of the injury and the pre-existing condition.

CONCLUSION

Therefore, the claimant requests that this court reverse this matter upon the grounds that the Claimant provided sufficient evidence to show that she suffered from a compensable work related injury, thereby entitling her to medical benefits and temporary total disability benefits. The claimant further requests that this case be remanded to the South Carolina Workers Compensation Commission for findings as to what injuries the Claimant sustained and what Workers Compensation benefits the claimant is entitled to, including disability and medical. This determination regarding benefits shall be decided upon the record that was before the South Carolina Workers' Compensation Commission in drafting its order of March 20, 2008.



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