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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Appellate Case No. 2021-000303
WCC File No. 1704918

Raqual Cunningham, Employee.....Appellant,

v.

BMW Manufacturing Corp., Employer and
Hartford Accident & Indemnity Company, Carrier Respondents,

FINAL BRIEF OF RESPONDENTS

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STATEMENT OF ISSUES ON APPEAL

1. Did the South Carolina Workers' Compensation Commission commit legal error in affirming the Hearing Commissioner's finding and legal conclusion that Appellant had attained maximum medical improvement and is entitled to an award of 25% disability to the left leg?
2. Appellant has raised arguments outside of the record which are not preserved for Appellate review. Thus, should Appellant's appeal be dismissed?

INTRODUCTION

The Record on Appeal is in two parts. The first version of the Record only contains an order of the Commission dated June 13, 2019, and the Hearing Transcript or Transcript of Record. Because the first version of the Record is not numbered properly, Respondents cited the Transcript of Record (TR.) with respect to information contained under the "STATEMENT OF FACTS" heading.

The second version of the Record or Supplemental Record on Appeal is correctly numbered. To this end, Respondents cite to the Record (R.) in the remaining portions of its brief.

STATEMENT OF THE CASE

Raqucal D. Cunningham, Employee/Claimant [hereinafter "Appellant"], is a 48 year old female, who began working as a Production Associate for BMW Manufacturing Corporation, LLC, the Employer [hereinafter "Respondent"], on September 21, 2015. [R. p. 11].

On May 2, 2017, Appellant injured her left ankle while climbing a flight of stairs during a bathroom break. Appellant was immediately treated at BMW's Industrial Health Services (IHS) [R. pp. 11 & 49-52]. The medical providers at IHS referred Appellant to Greer Memorial Emergency Room for further evaluation and x-ray studies. Physicians at Greer Memorial

Emergency Room diagnosed Appellant with a lateral ankle sprain. Appellant was fitted with an air cast. [R. p. 11].

Appellant returned to IHS for further medical treatment. Thereupon, Appellant was prescribed physical therapy and medications to address her complaints of ankle pain and swelling. [R. p. 12].

Because conservative medical modalities proved to be ineffective, Appellant began treating with Dr. Michael Tollison, an orthopedic surgeon. [R. pp. 85-96]. Dr. Tollison performed a left ankle reconstruction surgery, which involved surgical procedures on the peroneal tendon and lateral left ankle ligaments. [R. pp. 91-92].

On August 6, 2018, Dr. Tollison released Appellant to return to work without restrictions. Dr. Tollison assigned Claimant a five (5%) percent medical impairment rating to the left lower extremity. [R. p. 85].

Thereupon, Respondent BMW filed a Form 21 to address the issues of whether Appellant had attained maximum medical improvement and extent of permanent partial disability to the left leg. The Honorable Aisha Taylor, Commissioner, held an adjudicatory hearing on March 28, 2019. [R. pp. 1-7].

Commissioner Taylor found Appellant had not attained maximum medical improvement based upon a report by Dr. Stephan Pill, an orthopedic surgeon with Steadman Hawkins Clinic. [R. p. 7]. Dr. Pill had opined Appellant would benefit from repeat arthroscopic surgery in order to remove scar tissue, which in turn would potentially lessen her pain and discomfort and improve her ability to walk, stand and lift. [R. p. 66].

Commissioner Taylor ordered the additional treatment as recommended by Dr. Pill. BMW and the insurance carrier, Hartford, (“Respondent” or “Respondents”) promptly authorized and scheduled the recommended medical treatment.

On August 9, 2019, Dr. Pill performed surgery on Appellant’s left ankle, despite Appellant’s effort to postpone the surgery to a later date. [R. pp. 120-125]. After undergoing physical therapy, Dr. Pill opined in a Form 14B dated November 5, 2019, Appellant had attained maximum medical improvement as of October 24, 2019. Dr. Pill assigned Appellant a ten (10%) percent medical impairment rating to the left leg. [R. p.156].

Subsequently, Respondents filed a Form 21 hearing request to terminate payment of temporary total disability benefits and pay permanent partial disability benefits. Respondents further requested credit for the overpayment of temporary total disability benefits paid subsequent to the date of maximum medical improvement. [R. pp. 8-9].

The Honorable R. Michael Campbell, II, Commissioner, scheduled a Form 21 or Stop Payment Hearing, which was held on March 5, 2020. Commissioner Campbell promulgated an order on April 23, 2020, finding Appellant had attained maximum medical improvement as of October 24, 2019. [R. pp. 8-22]. Commissioner Campbell only awarded Respondents credit for the overpayment of temporary total disability compensation benefits beginning from January 10, 2020 or the date the Form 21 was filed. Additionally, Commissioner Campbell awarded Claimant 25% disability to the left leg or 48.75 weeks of compensation benefits. [R. pp. 21-22].

Pursuant to Commissioner Campbell’s order, Respondents tendered to Appellant the disability award check less attorney’s fees and costs, the latter of which were paid directly to Appellant’s former counsel, Charles P. Edwards. Appellant endorsed the disability award check but refused to execute the Form 19 reflecting receipt of the disability award. [R. pp. 43 & 158].

Appellant filed a Form 30 appealing Commissioner Campbell's Decision and Order on or about April 27, 2020. [R. p. 38]. Appellant also appealed Commissioner Campbell's award of attorney's fees and costs to Appellant's former attorney Charles P. Edwards, who represented Appellant through the date of the adjudicatory hearing. Appellant did not the Commission schedule the appeal for an oral argument. (R. p. 38).

Appellant's appeal was reviewed by the South Carolina Workers' Compensation Commission's Appellant Panel by virtue of the submitted briefs. By Order dated March 10, 2021, the Appellant Panel affirmed the Hearing Commissioner's decision awarding Appellant twenty-five percent (25%) disability to the left leg. [R. pp. 23-37].

Furthermore, the Appellant Panel found and concluded Appellant's injury involved only one body part. Thus, Appellant was not entitled to an award of wage loss or permanent and total disability compensation benefits. [R. pp. 30 & 35 (Finding of Fact #23)].

Last, the Appellate Panel found Appellant failed to prove she had permanent disability greater than twenty-five percent (25%) disability to the left leg. [R. p. 34 (Finding of Fact #18); R. p. 35 (Finding of Fact #23)]. From this decision, Appellant appealed to this Honorable Tribunal.

STATEMENT OF THE FACTS

Raquacal Denise Cunningham, Appellant, is presently a 48-year-old female. Appellant has a GED and attended school for occupations as a nail technician, barber and cosmetologist. Appellant testified she has worked as a housekeeper, but had worked primarily in the cosmetology field as a licensed barber and cosmetologist. Prior to Appellant's employment at BMW, she had worked for Adidas and Siemens Industries.

Appellant testified she injured her left leg on May 2, 2017, while climbing stairs. Appellant testified that after undergoing the first surgery with Dr. Michael Tollison, she returned to work at BMW. Appellant testified that once she returned to work, her ankle would swell and become more painful. Appellant further explained the pain was exacerbated by her ankle “popping out” (TR. p. 17, ll. 16-25 and TR. p. 18, ll. 13-14).

According to Appellant, when she returned to work after undergoing work conditioning and work hardening in August 2018, she had tremendous difficulty walking from the parking lot into the building. Appellant testified by the time she entered into the building from the parking lot, her ankle pain “was horrible.” (TR. p. 23, ll. 18-22) Appellant testified when she began work, her ankle was painful and swollen from having had walked from the parking lot to BMW’s manufacturing facility. (TR. pp. 20-25).

Appellant testified wearing certain shoes causes ankle swelling and pain. Appellant further testified she has difficulty walking up stairs or an incline. (TR. pp. 33-34) Appellant also admitted squatting poses a challenge with regard to left ankle stability and pain. According to Appellant, walking from the parking lot into a Walmart store causes immense pain. (TR. p. 35, ll. 2-7)

Appellant further asserted she has balance problems. However, Appellant testified the purported balance problems have not resulted in any falls.

Appellant testified she still experiences ankle pain and swelling if she is active, stands or walks for a short period of time or approximately five minutes. As a result, Appellant takes 800mg of ibuprofen to alleviate the pain only when needed. (TR. pp. 37-38)

Appellant admitted the photographs she submitted into evidence were taken prior to the most recent surgery performed by Dr. Pill on August 9, 2019. (TR. p. 43). Appellant further

admitted the most accurate depiction of her ankle was the condition of her ankle that was exhibited and observed during the hearing.

Appellant denied having any idea or an appreciation how long she could stand or walk without experiencing increased pain and swelling. (TR. pp. 44-48). Specifically, Appellant testified she could stand for five minutes without experiencing pain and swelling, but was uncertain as to whether she could stand for ten minutes or more without experiencing an increase in symptoms. Similarly, Appellant indicated that she was unable to state how long or how far she could walk without her symptoms becoming exacerbated, despite a history of running and walking for long distances. (TR. pp. 46-47).

Appellant admitted BMW Production Associates have to stand and walk to perform the essential job tasks. Additionally, Appellant reported that when she returned to work after the first surgery, her ankle constantly popped out or dislocated, which in turn, caused intense and disabling pain. (TR. p. 51, ll. 11-15). Appellant described the pain and swelling associated with the popping of the ankle as “super bad”. (TR. p. 52, ll. 10-14) As a result of the constant popping, Appellant sought a second medical opinion with Dr. Pill. Appellant eventually underwent a second surgery, which was performed by Dr. Pill.

Appellant admitted there was instability in her ankle that persisted after the first surgery was performed by Dr. Tollison in 2018. (TR. p. 52, ll. 20-23)

Appellant acknowledged that after undergoing the second surgery in 2019, her symptoms drastically improved. Appellant admitted she had apprised her physical therapist in a report dated October 7, 2019, that she had felt good enough to square dance after the second surgery. (TR. pp. 58-59)

Appellant testified she was not seeking employment at the time of the hearing, despite not being employed at BMW. At the time of the hearing, Appellant was contemplating returning to school and perhaps working. (TR. p. 69)

Donell Smith testified on behalf of the Defendants. Mr. Smith is employed as a Disability Management Analyst for BMW Manufacturing Corporation. Mr. Smith explained BMW has a light duty policy in which a Production Associate's medical limitations and restrictions are accommodated for 90 days. If after 90 days, the Production Associate is not able to return to work, that individual is placed out of work until the Production Associate is able to return to full duty employment.(TR. p. 78)

Mr. Smith further testified in a ten hour shift, there would be as much as eight hours of standing and considerable walking involved in order for a Production Associate to perform the required and essential job duties. Mr. Smith further testified most of the jobs requires a Production Associate to lift various weights, squat, and stoop. (TR. pp. 79-80).

Appellant appealed Commissioner Campbell's Decision and Order finding that she has attained maximum medical improvement and she has a 25% disability to the left leg.

Appellant presented her argument for greater disability to the South Carolina Workers' Compensation Commission's Appellate Panel by virtue of her brief. Appellant did not request oral argument. (R. p. 38). Therefore, an appellate hearing was not scheduled because of Appellant chose not to have oral argument.

By Order dated March 10, 2021, the Appellate Panel found and concluded Claimant's disability was 25% disability to the left leg and that there was no other evidence to support increasing the disability award or awarding additional compensation benefits. From this decision, Appellant has appealed to this Court.

STANDARD OF REVIEW

Judicial review of a Workers' Compensation Commission decision is governed by South Carolina Code Annotated §1-23-380 of the Administrative Procedures Act (hereinafter "the APA"); *Lark v. Bi-Lo*, 276 S.C. 130, 276 S.E.2d 304 (1981). Under the APA, a decision of the South Carolina Workers' Compensation Commission should be reversed, modified or remanded if unsupported by substantial evidence, or if substantial rights of the appellant have been affected by an error of law, or if the decision is arbitrary or capricious or characterized by an abuse or unwarranted exercise of discretion. *S.C. Code Ann. §1-23-380(A)(5)* (2022).

Review of the Commission's factual findings is governed by the substantial evidence standard. "A reviewing court may reverse or modify a decision of an agency if the findings, inferences, conclusions, or decisions of that agency are 'clearly erroneous in view of the reliable, probative and substantial evidence on the whole record.'" *Bass v. Isochem*, 365 S.C. 454, 467, 617 S.E.2d 369, 376 (Ct. App. 2005), quoting from *Burse v. South Carolina Dep't of Health & Env'tl. Control*, 360 S.C. 135, 600 S.E.2d 80 (Ct. App. 2004); See also *Tiller v. Nat'l Health Care Ctr.*, 334 S.C. 333, 513 S.E.2d 843 (1999); See also *S.C. Code Ann. §1-23-380(A)(5)(e)*. "Substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the administrative agency reached in order to justify its action." *Frame v. Resort Services Inc.*, 357 S.C. 520, 527–28, 593 S.E.2d 491, 495 (Ct. App. 2004); *Bass v. Isochem*, 365 S.C. at 468, 617 S.E.2d at 376. In particular, workers' compensation awards "must not be based on surmise, conjecture or speculation." *Tiller*, 334 S.C. at 339, 513 S.E.2d at 845.

In addition, a reviewing court should reverse, remand or modify a decision of the

Workers' Compensation Commission if it is affected by an error of law. *Etheredge v. Monsanto Co.*, 349 S.C. 451, 562 S.E.2d 679 (Ct. App. 2002). Case law unequivocally establishes that statutory interpretation is a question of law, and the appellate court "is free to decide matters of law with no particular deference to the fact finder." *King v. Int'l Knife & Saw – Florence*, 395 S.C. 437, 442, 718 S.E.2d 227, 229 (Ct. App. 2011); *S.C. Uninsured Employers' Fund v. House*, 360 S.C. 468, 602 S.E.2d 81 (Ct. App. 2004). Likewise, the determination of legislative intent in a statute is a matter of law. *Wehle v. S.C. Retirement Syst.*, 363 S.E. 394, 611 S.E.2d 240 (2005); *Liberty Mutual Insur. Co. v. S.C. Second Injury Fund*, 363 S.C. 612, 611 S.E.2d 297 (2005).

In summary, an appellate court must review the Commission's interpretation of a statute as a question of law and must review the Commission's application of the facts to the statute as a question of fact under the substantial evidence standard of review. *See King*, 395 S.C. at 442, 718 S.E.2d at 229.

LEGAL ARGUMENTS

I. THE 25% DISABILITY AWARD TO THE LEFT LEG IS MORE THAN SUFFICIENT DISABILITY COMPENSATION BASED UPON 5% AND 10% MEDICAL IMPAIRMENT RATINGS TO THE LEG.

Appellant argues the 25% disability award is not enough to compensate her for her left leg injury. On the contrary, Appellant asserts she should have been awarded compensation benefits due to wage loss.

First, Appellant did not raise or argue wage loss in the initial hearing before the Hearing Commissioner. Thus, Appellant's failure to argue her entitlement to a wage loss or permanent disability award precludes its consideration on appeal. *Murphy v. Hagon*, 275 S.C. 334, 271 S.E.2d 311 (1980).

The Hearing Commissioner did not err in awarding Appellant permanent partial disability benefits to the left leg pursuant to section 42-9-30. *S.C. Code Ann. §42-9-30 (16) (2022)*. The Hearing Commissioner awarded Appellant 25% disability to the left leg. The compensation award was correctly and properly based upon functional loss of the left leg rather than loss of earnings. *Dykes v. Daniel Const. Co., 262 S.C. 98, 202 S.E.2d 646 (1974)*.

Claimant also argued her termination was unlawful because she was deprived of the opportunity to return to work despite being able to work. Appellant's testimony and evidence do not support this argument.

Because Appellant's injury is confined to the left leg, a scheduled member, and no other body part is impaired or affected by the admitted left ankle injury, Appellant's recovery and damages are limited to the scheduled compensation per section 42-9-30. *Colonna v. Marlboro Park Hosp., 404 S.C. 537, 745 S.E.2d 128 (Ct. App. 2013)*

Thus, Appellant's argument that she should be awarded wage loss is without merit and should be dismissed as a matter of law. *S.C. Code Ann. § 42-9-20 (2022)*.

II. ARGUMENTS IN APPELLANT'S BRIEF WERE NOT TIMELY RAISED, PRESERVED OR PROPERLY BRIEFED AND CANNOT BE CONSIDERED AS ISSUES FOR APPELLATE REVIEW AND MUST BE DISMISSED.

It has been long established that all findings of fact and conclusions of law made by the Hearing Commissioner become the law of the case, except only those within the scope of the appeal. See *Ham v. Mullins Lumber Co., 193 S.C. 66, 7 S.E.2d 712 (1940)*.

In reviewing Appellant's brief, she admits only her left ankle was injured. Appellant further admits that despite two surgeries, the leg injury slowed her but did not prevent her from engaging in recreational and vocational activities; or wearing shoes.

Appellant's primary argument is she was wrongfully terminated and retaliated against for filing a workers' compensation claim. This argument is outside of the record and was not designated as an exception in the Form 30 Appeal. Therefore, Appellant's arguments pertaining to an alleged wrongful termination cannot be considered in this appeal as a matter of law. *S.C. Code Ann. §§ 42-17-50 & 60 (2022)*.

The exhibits attached to Appellant's brief reflect that Appellant was subject to termination in accordance with BMW's eighteen month maximum allowable time of inactive status on April 1, 2019. Yet, in an effort to accommodate Appellant's potential return to work, the date of termination was extended to August 2, 2019. Because Appellant did not return to work on or before August 2, 2019, Appellant was terminated on August 3, 2019.

Undoubtedly, Appellant was granted an extension of leave beyond eighteen months, but still did not return to work. Therefore, Appellant's argument is without merit and cannot be considered by the Court.

CONCLUSION

Based upon the foregoing arguments, Respondents request the Decision and Order of the South Carolina Workers' Compensation Commission is affirmed.

Respectfully submitted,

A handwritten signature in black ink that reads "Vernon F. Dunbar". The signature is written in a cursive style with a prominent initial "V".

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