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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE WORKERS' COMPENSATION COMMISSION

Opinion No. 5891 (S.C. Ct. App. filed January 19, 2022)

Dale Brooks, Employee, Respondent,

v.

Benore Logistics System, Inc., Employer, and Great American Alliance Insurance Company, Carrier, Petitioners.

REPLY BRIEF OF PETITIONERS

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II. WHETHER THE COURT OF APPEALS' INTERPRETATION OF S.C. CODE ANN. § 42-1-172 (2007) RELIEVED THE CLAIMANT OF HIS BURDEN OF PROOF FOR ESTABLISHING A COMPENSABLE REPETITIVE TRAUMA INJURY UNDER SOUTH CAROLINA LAW WHEN IT DETERMINED THAT THE FULL COMMISSION NEED NOT "MAKE A SEPARATE FACTUAL FINDING THAT THE EMPLOYEE'S JOB DUTIES WERE REPETITIVE"?

ARGUMENT

I. Whether Respondent met his burden of proving a compensable repetitive trauma injury is a question of fact subject to the substantial evidence standard of review.

A. Whether Respondent established causation is a question of fact subject to the substantial evidence standard of review

Despite Respondent's arguments to the contrary, this appeal presents questions of fact subject to the substantial evidence standard of review. Specifically, it is black letter law in this state that whether a claimant's alleged injury is causally related to his employment is a question of fact reserved for the Full Commission. *Sharpe v. Case Produce, Inc.*, 336 S.C. 154, 159, 519 S.E.2d 102, 105 (1999) ("Whether there is any causal connection between employment and an injury is a question of fact for the Commission."); *Pee v. AVM, Inc.*, 352 S.C. 167, 172 n. 4, 573 S.E.2d 785, 788 n. 4 (2002) (same); *Hill v. Eagle Motor Lines*, 373 S.C. 422, 436, 645 S.E.2d 424, 431 (2007) (same); *Crisp v. SouthCo., Inc.*, 401 S.C. 627, 641, 738 S.E.2d 835, 842 (2013) (same); *Jennings v. Chambers Dev. Co.*, 335 S.C. 249, 258-59, 516 S.E.2d 453, 458 (Ct. App. 1999) (same); *S.C. Second Injury Fund v. Liberty Mut. Ins. Co.*, 353 S.C. 117, 126, 576 S.E.2d 199, 204 (Ct. App. 2003) (same); *Rhodes v. Guignard Brick Works*, 245 S.C. 304, 307, 140 S.E.2d 487, 488 (1965) ("[T]he basic *factual* issue before the Commission was whether there was any causal connection between the employment and the heart attack, that is, whether the heart attack constituted an accident arising out of the employment." (emphasis added))); *Shuler v. Gregory Elec.*, 366 S.C. 435, 440, 622 S.E.2d 569, 571 (Ct. App. 2005) ("Because causation is a question of fact, the [F]ull [C]ommission's decision on the issue must be affirmed if it is supported by substantial evidence in the record.").

Herein lies an error in the Court of Appeals' decision in this case—"[i]t is *only* where the evidence gives rise to but one reasonable inference that the question becomes one of law for the

courts to decide." *Arnold v. Benjamin Booth Co.*, 257 S.C. 337, 341, 185 S.E.2d 830, 832 (1971) (citing *Polk v. E. I. duPont de Nemours Co.*, 250 S.C. 468, 472, 158 S.E.2d 765, 766 (1968) (emphasis added))). This Court has also stated that "[w]here there are no disputed facts, the question of whether an accident is compensable is a question of law." *Whigham v. Jackson Dawson Commc'ns*, 410 S.C. 131, 135, 763 S.E.2d 420, 422 (2014) (alteration in original); *see also Williams v. City of Columbia*, 218 S.C. 287, 290, 62 S.E.2d 469, 469 (1950) ("Generally speaking, the question whether an injury arose out of or in the course of the employment is one of law where the facts are admitted, and one of fact where the evidence is conflicting.") (citations omitted)). Here, the facts were not "undisputed" nor was the evidence before the Full Commission capable of only one reasonable inference. Therefore, the issue was not one for the Court of Appeals to decide as a matter of law.

Hartzell v. Palmetto Collison, LLC is instructive as to this issue. 419 S.C. 87, 796 S.E.2d 145 (Ct. App. 2016). In *Hartzell*, the claimant auto-mechanic alleged that he injured his back while moving tires, rims, and heavy frame equipment for his employer. *Id.* at 89-90, 796 S.E.2d at 146. The employer denied the claim. *Id.* at 90, 796 S.E.2d at 147. The Court of Appeals noted the question of whether the claimant's alleged back injury was compensable under section 42-1-160 of the South Carolina Code (2007) was a question of fact for the Full Commission. *Id.* at 93, 796 S.E.2d at 148. In so doing, the Court noted that "the facts surrounding [the claimant]'s back injury were clearly disputed by the parties . . . [and therefore] whether [the claimant]'s alleged injury is compensable was a question of fact." *Id.*

The situation presented in *Hartzell* is similar to the one before the Court in the present case. The "facts surrounding [Respondent]'s back injury" were clearly disputed by the parties in this case because Petitioners denied the claim. (App. p. 4). In support of our denial, Petitioners noted

several factual discrepancies between Respondent's alleged date, cause, and onset of his symptoms. Specifically, Respondent first reported feeling flu-like symptoms to his supervisor—not a repetitive trauma injury to his back—around the time of this alleged injury. (App. p. 106). There are also factual discrepancies between Respondent's purported date of onset, mechanism of injury, and cause of symptoms in the initial medical records and in the description of accident. (App. pp. 55-60). There were even disputed facts concerning Respondent's job duties as a "Switcher." While Petitioners asserted Glen Adams observed Respondent's actual job duties as a "Switcher," Respondent denied Adams even observed the same job, claiming that the "Switcher" truck Adams observed was a "luxury model." (App. pp. 81, 93). All these *factual* discrepancies had to be resolved by the Full Commission as the ultimate factfinder. Although the Full Commission could have resolved those discrepancies in Respondent's favor and found the claim compensable, they chose not to do so for several fact-specific reasons.

As further support for Petitioner's position that this case presents questions of fact, let us examine cases that have determined the question of compensability was an issue of law. In *Whigham v. Jackson Dawson Communications*, this Court found the issue of whether the claimant suffered a compensable injury by accident was a question of law, noting that the "undisputed facts" indicate his injury arose out of and in the course and scope of his employment. 410 S.C. at 138, 763 S.E.2d at 423. There the facts were undisputed that the claimant shattered his tibia and fibula while playing in an employer-organized kickball game. *Id.* at 134, 763 S.E.2d at 421. The sole determination for this Court was whether the injury arose out of and in the course and scope of the claimant's employment, which is an entirely different animal than the current case.

Nicholson v. South Carolina Department of Social Services is another case where this Court found "[b]ecause the facts surrounding her fall [we]re undisputed," the question of causation

was one of law. 411 S.C. 381, 390, 769 S.E.2d 1, 5-6 (2015). There it was undisputed the claimant fell at work while walking to a meeting, and the issue was whether the injury arose out of her employment. *Id.* at 384, 769 S.E.2d at 2. This Court held that her injuries "arose out of her employment as a matter of law and she [wa]s entitled to workers' compensation." *Id.* at 390, 769 S.E.2d at 5-6.

Unlike *Whigham* and *Nicholson*, the facts surrounding Respondent's alleged injury were disputed. Petitioners did not admit: (1) that Respondent's job was repetitive in nature; (2) Respondent was injured at work as alleged; or (3) that the injury arose out of his job duties as a Switcher. Stated otherwise, the *sole* issue in this case is *not* whether Respondent's job duties as a Switcher were sufficiently repetitive to constitute a compensable repetitive trauma injury under section 42-1-172 of the South Carolina Code (2007). Although that undoubtedly is an issue in the case, another issue is whether Respondent met his burden of proving he suffered a compensable repetitive trauma injury to his low back and right leg arising out of his employment as a Switcher on or about January 17, 2017 as alleged. (App. p. 33). This is an important distinction because while the former issue *might* be a question of law reserved solely for the Court's determination, the latter is a question of fact subject to the substantial evidence standard of review.

Therefore, contrary to Respondent's argument, the issue of whether Respondent met his burden of proving a compensable repetitive trauma injury was not a question of law subject to *de novo* review by the Court of Appeals. Rather, it was a question of fact subject to the substantial evidence standard of review. *Crisp*, 401 S.C. at 641, 738 S.E.2d at 842 ("Whether there is any causal connection between employment and an injury is a question of fact for the Commission. The claimant has the burden of proving facts that will bring the injury within the workers' compensation law . . . ." (internal citations omitted))).

B. The Full Commission's application of the facts of the case to section 42-1-172 is a question of fact subject to the substantial evidence standard of review

It is well known that questions of statutory interpretation are questions of law. *CFRE, LLC v. Greenville Cnty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011). However, "whether the facts of a case were correctly applied to a statute is a question of fact, subject to the substantial evidence standard." *Murphy v. Owens Corning*, 393 S.C. 77, 82, 710 S.E.2d 454, 456 (Ct. App. 2011) (*quoting Hopper v. Terry Hunt Constr.*, 373 S.C. 475, 479-80, 646 S.E.2d 162, 165 (Ct. App. 2007))); *Bessinger v. R-N-M Builders & Assocs., LLC*, 421 S.C. 349, 356, 806 S.E.2d 731, 734 (Ct. App. 2017).[1] For example, in *King v. International Knife*, the Court of Appeals applied the substantial evidence standard of review to the Full Commission's findings related to whether the claimant complied with section 42-15-20 of the South Carolina Code (2007) related to notice for a repetitive trauma injury. 395 S.C. 437, 443, 718 S.E.2d 227, 230 (Ct. App. 2011). Likewise, in *Hopper v. Terry Hunt Construction*, the Court of Appeals held that whether an employer met the requirements to transfer liability under section 42-1-415 to the South Carolina Uninsured Employer's Fund was a question of fact. 373 S.C. at 479-80, 646 S.E.2d at 165.

Consequently, whether the Full Commission correctly *applied* the facts of this case to section 42-1-172 was a question of fact subject to the substantial evidence standard of review. The Full Commission did just that. They reviewed the facts of the case, applied them to section 42-1-172, and found that Respondent did not prove a compensable repetitive trauma injury. There is

[1] Although certainly not binding precedent, a helpful case regarding the proper standard of review to be applied in this case is the Court of Appeals' decision in *Wheeler v. Spartanburg Sch. Dist. Six*, Op. No. 2012-UP-570, 2012 WL 10862834 (per curiam) (unpublished) (S.C. Ct. App. filed Oct. 24, 2012). Similar to our case, the claimant in *Wheeler* alleged a repetitive trauma injury under section 42-1-172. The Full Commission found the claim non-compensable, and the Court of Appeals affirmed in an unpublished opinion pursuant to Rule 220(b), SCACR, finding substantial evidence supported that decision. *Id.*

substantial evidence to support the Full Commission's application, and the Court of Appeals erred in reversing that decision.

This appeal also concerns the *interpretation* of section 42-1-172, which Petitioners concede is an issue subject to the *de novo* standard of review. However, that argument is a double-edged sword for Respondent as this Court is free to decide questions of statutory interpretation without any deference to the Court of Appeals. Furthermore, the Full Commission is charged with administering section 42-1-172; therefore, its interpretation—which supports Petitioner's interpretation—should not be overruled absent compelling reasons. *Hartzell*, 419 S.C. at 92, 796 S.E.2d at 148; *Barton v. Higgs*, 381 S.C. 367, 371, 674 S.E.2d 145, 147 (2009). Petitioner's interpretation of section 42-1-172, discussed in detail in our initial brief at pages 23 through 30, is based on the plain language of the statute and is consistent with the interpretation made by the Full Commission. Respondent does not argue compelling reasons exist to overrule the Full Commission's interpretation nor do any exist. Therefore, the Court of Appeals erred in both its application and interpretation of section 42-1-172.

II. The legislative history of Section 42-1-172 does not support the Court of Appeals' reversal of the Full Commission's decision.

In Respondent's brief, he dissects the legislative history of section 42-1-172 in an attempt to justify the Court of Appeals' decision. While this analysis is informative, it does not support reversal of the Full Commission's decision in this case.

Section 42-1-172 was adopted effective July 1, 2007 in response to this Court's decision in *Pee v. AVM, Incorporated*, 352 S.C. 167, 573 S.E.2d 785 (2002). In *Pee*, this Court found the claimant's alleged carpal tunnel syndrome was compensable under section 42-1-160 as an injury by accident finding, at least in that case, it met the statutory definition of an injury by accident and was otherwise compensable. *Id.* at 169, 573 S.E.2d at 786. In response, the Legislature amended

section 42-1-160 to specifically exclude "repetitive trauma injuries." Act No. 111, 2007 S.C. Acts 111 (effective July 1, 2007); S.C. Code Ann. § 42-1-160(F). Additionally, the Legislature enacted section 42-1-172 and declared that any such alleged repetitive trauma injuries were only compensable under same, presumably to avoid another situation like *Pee*.

Respondent notes that a prior unadopted version of subsection 42-1-172(D) provided the following:

> A repetitive trauma injury shall be considered to arise out of employment only if it is **reasonably apparent upon consideration of all the circumstances** that there is a direct causal relationship between the condition under which the work is performed and the injury.

However, the version ultimately adopted by the Legislature stated the following:

> A repetitive trauma injury shall be considered to arise out of employment only if it is **established by medical evidence** that there is a direct causal relationship between the condition under which the work is performed and the injury.

Act No. 111, § 7.

According to Respondent, this revision indicates the Legislature intended "for compensability [under section 42-1-172] to turn on medical evidence stated to a reasonable degree of medical certainty." Additionally, he argues that had the Legislature "intended a separate finding of repetitiveness by a commissioner, it would have left the prior version of [subsection] 42-1-172(D) intact." However, Respondent's argument is misplaced for two reasons. First, this revision to subsection 42-1-172(D) addresses the causation requirement for a repetitive trauma injury, which is referred to as the "arising out of" prong for purposes of an injury by accident. *See e.g., Owings v. Anderson Cnty. Sheriff's Dep't*, 315 S.C. 297, 299, 433 S.E.2d 869, 871 (1993) (noting the phrase "arising out of" requires proof of a "causal relationship between the conditions under which the work is to be performed and the resulting injury"). However, this revision to subsection

42-1-172(D) did not address subsection 42-1-172(A), which defines a "[r]epetitive trauma injury" as "an injury which is gradual in onset and caused by the cumulative effects of repetitive traumatic events." As we have argued *ad nauseum* in this case, there must actually be "an injury which is . . . caused by repetitive traumatic events" for there to be a "repetitive trauma injury." That must be established first before even addressing causation under subsections 42-1-172(B) or (D).

This same logic applies to other theories of compensability under the Act. An occupational disease and injury by accident both require proof of other elements besides causation. *See e.g.*, *Osteen v. Greenville Cnty. Sch. Dist.*, 333 S.C. 43, 49, 508 S.E.2d 21, 24 (1998) (noting the terms "arising out of" and "in the course of employment" for recovery for an "injury by accident" are not synonymous and "[b]oth parts must exist simultaneously before any court will allow recovery"); *Muir v. C.R. Bard, Inc.*, 336 S.C. 266, 283, 519 S.E.2d 583, 591-92 (Ct. App. 1999) (discussing the six elements for recovery for an occupational disease). It is undisputed that a claimant pursuing a claim for an injury by accident or occupational disease could have a causation statement from a doctor, but the claim not be ruled compensable due to the absence of another element. For example, in a claim brough under section 42-1-160, the claimant's injury might both arise out of and occur in the course and scope of employment and still not be compensable because the injury was not the result of an "accident." *Landry v. Carolinas Healthcare Systems*, 396 S.C. 149, 719 S.E.2d 288 (Ct. App. 2011). Likewise, an occupational disease claimant might have a causation statement from a doctor but be denied compensation because the disease was not peculiar to the occupation. *See Fox v. Newberry Cnty. Memorial Hosp.*, 319 S.C. 278, 281, 461 S.E.2d 392, 394 (1995) (recognizing "[t]he disease must be peculiar to the occupation in which the claimant was engaged"). Why would repetitive trauma claims be any different?

Both Respondent and the Court of Appeals diluted this case down to simply a case of medical causation; however, in doing so, they ignored other key provisions of section 42-1-172. It is clear from the Full Commission's Order that they found Respondent did not prove his job was repetitive, which Petitioners submit was fatal to his repetitive trauma claim in light of subsection 42-1-172(A).

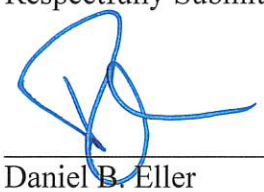
There is another reason Respondent's reliance on the legislative history to section 42-1-172 is misplaced. Specifically, it is clear that by making this revision the Legislature intended to make it more—not less—difficult to prove a "compensable repetitive trauma injury" than an injury by accident. Notably, had the Legislature kept the language allowing proof of causation to be "reasonably apparent upon consideration of all the circumstances" that would have enabled claimants to establish causation without medical evidence. It seems logical to infer that by amending subsection 42-1-172(D) to require a claimant to establish causation by medical evidence that the Legislature intended to make it more difficult for a claimant to recover for a repetitive trauma injury. Likewise, had the Legislature intended for recovery of a repetitive trauma injury to require the same proof as an injury by accident they presumably would not have enacted section 42-1-172. *See CFRE, LLC*, 395 S.C. at 74, 716 S.E.2d at 881 (stating courts must interpret statutes so "that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous" because "[t]he General Assembly obviously intended [the statute] to have some efficacy, or the legislature would not have enacted it into law"). As discussed above, prior to enacting section 42-1-172, the law in South Carolina was that a repetitive trauma injury could be compensable as an injury by accident. *See Murphy v. Owens Corning*, 393 S.C. 77, 83, 710 S.E.2d 454, 457 (Ct. App. 2011) ("[R]epetitive trauma injuries were compensable under section 42-1-160 prior to July 1, 2007."). Petitioners assert that by specifically excluding "repetitive trauma injuries" from the

definition of an "injury by accident," the Legislature intended "repetitive trauma injuries" to require proof of something more than an injury by accident. Therefore, Petitioners assert that the legislative history of section 42-1-172 does not support the Court of Appeals' reversal in this case.

CONCLUSION

Petitioners respectfully assert that the Court of Appeals disregarded its standard of review by substituting its opinion for the Full Commission on questions of fact. The Court of Appeals also misconstrued section 42-1-172 by relieving the claimant of the burden of proving all elements of his claim for a repetitive trauma injury. For the foregoing reasons, we respectfully request that this Court reverse the decision of the Court of Appeals and reinstate the decision of the Full Commission.

Respectfully Submitted,



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