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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.: 2019-000597

Nicholas B. Thompson, Employee, Appellant,

v.

Bluffton Township Fire District, Employer, and State Accident Fund, Carrier, Respondents.

PETITION FOR REHEARING

D. Alan Westerlund, Jr.
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Attorney for Respondents

Bluffton Township Fire District and State Accident Fund (hereinafter "Respondents") respectfully submit this Petition for Rehearing, with a suggestion for rehearing *en banc*, pursuant to S.C.A.C.R. Rules 219, 221, and 240. The Court of Appeals issued its decision on December 7, 2022 (Unpublished Opinion No. 2022-UP-437) and this Petition is timely filed pursuant to Rule 221(a). The Court held that the South Carolina Workers' Compensation Commission erroneously narrowly interpreted the word "repetitive" in S.C. Code § 42-1-172; improperly disregarded Dr. James Lindley's expert medical opinion; and erred in ruling Appellant is time-barred under S.C. Code § 42-15-20(C) from recovering compensation for his repetitive trauma injury. Respondents respectfully assert that the Court of Appeals overlooked, disregarded, and misapprehended the Decision and Order of the South Carolina Workers' Compensation Commission in arriving at this holding.

ARGUMENTS

The Administrative Procedures Act ("APA") establishes the standard for judicial review of decisions of the Workers' Compensation Commission. Hargrove v. Titan Textile Co., 360 S.C. 276, 599 S.E.2d 604 (Ct. App. 2004). Upon review, appellate courts have the power to reverse or modify a decision if the findings and conclusions of the administrative agency are affected by an error of law, clearly erroneous in view of the reliable and substantial evidence on the whole record, arbitrary or capricious, characterized by an abuse of discretion, or a clearly unwarranted exercise of discretion. Gray v. Club Group, Ltd., 339 S.C. 173, 528 S.E.2d 435 (Ct. App. 2000). Under the APA, an appellate court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact, but it may reverse for errors of law. Bentley v. Spartanburg County, 730 S.E.2d 296, 398 S.C. 418 (S.C. 2012) (citing S.C. Code Ann. § 1-23-380(5)). Specifically, "[i]n workers' compensation cases, the Appellate Panel is the ultimate fact finder."

Shealy v. Aiken County, 341 S.C. 448, 535 S.E.2d 438 (S.C. 2000) (citing Hunter v. Patrick Constr. Co., 289 S.C. 46, 344 S.E.2d 613 (1986)). "The final determination of witness credibility and the weight to be accorded evidence is reserved to the Full Commission." Id. (citing Ford v. Allied Chem. Co., 252 S.C. 561, 167 S.E.2d 564 (1969)). It is not the task of the appellate court to weigh the evidence as found by the Full Commission. Id. (citing Ellis v. Spartan Mills, 276 S.C. 216, 277 S.E.2d 590 (1981)).

The substantial evidence rule of the APA governs the standard of review in a workers' compensation decision. Frame v. Resort Servs., Inc., 357 S.C. 520, 593 S.E.2d 491 (Ct. App. 2004). This Court must affirm the findings of fact made by the Full Commission if they are supported by substantial evidence. Jordan v. Kelly Co., 381 S.C. 483, 486, 674 S.E.2d 166, 168 (2009). Substantial evidence is neither a mere scintilla of evidence, nor 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. Pratt v. Morris Roofing, Inc., 357 S.C. 619, 594 S.E.2d 272 (2004). Thus, substantial evidence is a lesser standard than by a preponderance of the evidence. Id.

In this case, the Court opined that "the commission equated activities that are 'repetitive' with activities that must be performed on a near constant basis to find that, because Thompson did not lift the same heavy object in the same way throughout each shift, he was unable to prove the admittedly 'routine' and 'frequent' lifting of heavy objects during his shifts as a firefighter were 'repetitive' as required by section 42-1-172." The Court further stated that "[n]othing in section 42-1-172 demands such a narrow construction of the word 'repetitive,' and we find this narrow construction goes against the policy of the Worker's (sic) Compensation Act, the plain meaning of the word 'repetitive,' and South Carolina precedent." In support, the Court cited Stone v.

Roadway Express, which states that "[i]n construing a workers' compensation statute, 'the words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation.'" 367 S.C. 575, 585, 627 S.E.2d 695, 700 (2006) Respondents respectfully contend that the Court itself expanded the definition of "repetitive," as opposed to the plain and ordinary meaning of that word, in its December 7, 2022 decision.

Meriam-Webster Dictionary defines "repetitive" as "repetitious" and "containing repetition." "Repetition" is defined as "the act or an instance of repeating or being repeated" and "a motion or exercise (such as a push-up) that is repeated and usually counted." The Britannica Dictionary defines "repetitive" as "happening again and again; repeated many times." Collins Dictionary states "repetitive movements or sounds are repeated many times." Macmillan Dictionary defines "repetitive" as "involving repeating the same action over long periods of time." Vocabulary.com states "[s]omething that is repetitive involves doing the same thing over and over again."

The Court found the record "replete with evidence that Thompson's duties as a firefighter included lifting heavy objects on a regular basis." (emphasis added) It further noted routine duties that Appellant performed. (emphasis added) The Court then went on to describe lifting heavy objects in the course of the regular duties of Appellant's employment.

S.C. Code § 42-1-172(B) requires a causal connection between the "repetitive activities" and the injury. Following the plain meaning rule, which the Court cited in Stone v. Roadway Express, the plain meaning and definition of "repetitive" must be used. In drafting S.C. Code § 42-1-172, the legislature used the word "repetitive," not "regular" or "routine," for a reason.

Prior to July 1, 2007, the compensability of repetitive trauma injuries in workers' compensation claims was determined under the case of Pee v. AVM, Inc., 352 S.C. 167, 573 S.E.2d

785 (2002). In that case, the South Carolina Supreme Court determined that a repetitive trauma injury was an injury by accident and thus compensable under the South Carolina Workers' Compensation Act. The Court focused on the unexpected nature of the injury, rather than requiring that the event causing the injury be unexpected. The passage of S.C. Code § 42–1–172 by the South Carolina legislature in 2007 was a direct response to the significant expansion of compensable injuries by the Pee v. AVM, Inc. decision of the Supreme Court. In fact, S.C. Code § 42-1-172(A) specifically states that compensability must be determined under the provisions of that statute and that such injuries are no longer compensable under the general injury by accident statute as determined by the South Carolina Supreme Court. With the passage of S.C. Code § 42-1-172, the legislature defined repetitive injuries: "repetitive trauma injury" means an injury which is gradual in onset and caused by the cumulative effects of repetitive traumatic events.

The Court of Appeals, in its December 7, 2022 decision defining repetitive trauma as performing routine duties or lifting on a regular basis has not given plain and ordinary meaning to the word repetitive, but instead stretched it to include activities that were clearly not contemplated by the legislature. Workers' compensation in South Carolina is a statutory remedy that is defined by the legislature. The words used by the legislature in the statute have meaning. It is not the purview of the Court to rewrite the statute to assign meaning to such words that the legislature clearly never intended.

It is also important to remember that workers' compensation is not a full and complete remedy. It is a statutory scheme that covers only certain injuries and provides limited benefits in exchange for workers not having to prove negligence or being subject to common law defenses. Workers' compensation does not cover everything that occurs at work. It only covers certain injuries and certain accidents as specifically defined by the legislature. For example, heart attacks

that occur at work are not compensable unless caused by unusual and extraordinary conditions of employment; mental injuries that occur at work are not compensable unless caused by unusual and extraordinary conditions of employment; common contagious diseases to which the general public is exposed are not compensable. There are countless other examples. In this matter, if the legislature wanted to make compensable an injury stemming from every physically demanding job, it could have easily done so. However, that is not what the legislature did in S.C. Code § 42-1-172. It specifically limited recovery to the injuries caused by repetitive activities, not regular or routine work activities. The expansion of the injuries that are compensable under S.C. Code § 42-1-172 by the Court in this decision is improper because it redefines and greatly expands the word repetitive, thereby rewriting and rewording the South Carolina Workers' Compensation Act. The Court has usurped the purview of the legislature by rewriting the central word to this statute defining repetitive trauma under the S.C. Workers' Compensation Act.

The S.C. Workers' Compensation Commission Appellate Panel accurately found that Appellant's job description includes reference to performing a variety of physical activities, none of which are performed on a constant or repetitive basis. (R. pp. 544-546) Respondents contend there is no evidence in the record which supports Appellant's argument, or the Court's finding, that his job as a firefighter involves repetitive activities. Respondents further contend that to find that regular or routine job duties satisfy the requirement of repetitive job duties will open the floodgates to compensability for any and all physically-demanding jobs. If that is what the legislature intended, it would have stated so in the S.C. Workers' Compensation Act. It did not, and the legislative intent for designating compensability for only "repetitive" activities cannot be disregarded in this matter.

Second, the Court found that Appellant presented competent medical evidence that there is a direct causal relationship between the condition under which the work is performed and the injury. It relied on the July 11, 2017 letter and January 18, 2018 deposition testimony from Dr. James Lindley. The Court found that Dr. Lindley's opinion was not "'speculative' merely because Dr. Lindley did not distinguish among the repeated activities performed at Thompson's job, the physical nature of his job, and the three incidents of significant pain detailed in Thompson's Form 50 as the cause of Thompson's injury."

Dr. Lindley's deposition transcript includes the following exchange:

> Q: Okay. Would you agree that it's -- based on the evidence that you've seen and also the lack of evidence that you've seen, that it's speculative to state, to a reasonable degree of medical certainty, that Mr. Thompson's back injury is due to the repetitive nature of his job?
>
> A: I would say that it's speculative based on that there are multiple factors, so we don't know exactly which factor was the primary reason for the problem or was it multiple factors where there was wear and tear over time.
>
> Q. Okay. And there's also other factors which may just be a degenerative spine condition that's unrelated to work?
>
> A: Absolutely, yeah.

(R. p. 567, l. 16 to p. 568, l. 6) Upon further questioning, Dr. Lindley could not state to a reasonable degree of medical certainty that Appellant's back condition is causally-related to his employment. (R. p. 568, lines 13-20; p. 568, lines 23-25; p. 580, lines 21-24) Dr. Lindley could also not say whether an exacerbation of Appellant's back condition is related to repetitive trauma versus the three alleged work accidents versus the general physical nature of his job. (R. p. 586, lines 21-22; p.587, line 8)

The S.C. Workers' Compensation Commission Appellate Panel quoted Dr. Lindley's deposition testimony in Finding of Fact No. 20 of its Decision and Order. It also referenced Dr. Lindley's deposition testimony in Findings of Fact Nos. 19 and 21 of its Decision and Order. Respondents contend that the S.C. Workers' Compensation Commission Appellate Panel, as the

fact finder, appropriately weighed the evidence, including the deposition testimony of Dr. Lindley, and its findings of fact should have been affirmed, as they were supported by substantial evidence. Respondents respectfully contend that the Court misapprehended Dr. Lindley's deposition testimony. Respondents also assert that the Court of Appeals substituted its own judgment for that of the Appellate Panel as to the weight of the evidence. The Court found that Dr. Lindley's testimony was not speculative, when Dr. Lindley himself testified that it was speculative. "The final determination of witness credibility and the weight to be accorded evidence is reserved to the Full Commission." Id. (citing Ford v. Allied Chem. Co., 252 S.C. 561, 167 S.E.2d 564 (1969)). It is not the task of the appellate court to weigh the evidence as found by the Full Commission. Id. (citing Ellis v. Spartan Mills, 276 S.C. 216, 277 S.E.2d 590 (1981)). This Court must affirm the findings of fact made by the Full Commission if they are supported by substantial evidence. Jordan v. Kelly Co., 381 S.C. 483, 486, 674 S.E.2d 166, 168 (2009). Respondents contend that the Full Commission's findings of fact related to Dr. Lindley's testimony are supported by substantial evidence and should have been affirmed.

In its December 7, 2022 decision, the Court overlooked Respondents' argument that Appellant cannot prove entitlement to benefits for a repetitive trauma injury due to an aggravation of a pre-existing condition under S.C. Code § 42-1-172. Appellant's Initial Brief asks, "Is a firefighter with a back condition aggravated by cumulative effects of repetitive trauma on the job entitled to workers' compensation benefits …? (emphasis added) As Respondents argued during oral arguments, the answer to that question is no. S.C. Code § 42-1-172(A) states that "repetitive trauma injury" means an injury which is gradual in onset and caused by the cumulative effects of repetitive traumatic events. Compensability of a repetitive trauma injury must be determined only under the provisions of this statute. The plain language of S.C. Code § 42-1-172 requires that the

injury must be caused by, not aggravated or exacerbated by. The Court failed to analyze whether Appellant proved that his back injury was caused by his alleged repetitive work activities. Dr. Lindley could not state to a reasonable degree of medical certainty that the Claimant's alleged repetitive work activities caused his back injury. He could only state that the alleged repetitive work activities may have exacerbated the pre-existing back condition, though he had several qualifications to that opinion. Respondents contend that, had the Court addressed this argument, it would have found that Appellant did not meet his burden for proving compensability for a repetitive trauma injury, as an aggravation of a pre-existing condition is not possible under S.C. Code § 42-1-172.

Finally, the Court found that "Thompson, although experiencing and receiving treatment for back pain from 2014 until 2016, could not have reasonably known it was a compensable repetitive trauma injury until February 2017 . . .. Accordingly, the substantial evidence in the record does not support the commission's finding that Thompson did not timely report his injury, and the ruling that Thompson is time-barred under section 42-15-20(C) from recovering compensation for his repetitive trauma injury is reversed."

The Court of Appeals misapprehended the evidence regarding notice. Appellant admits that he did not provide notice of an alleged repetitive trauma injury in February 2017. At that time, he provided notice to the employer of an alleged lifting incident which occurred in June 2016. Thus, the substantial evidence cannot support the Court's finding that Appellant reported a repetitive trauma injury in February 2017. Appellant did not provide notice of his allegation of repetitive trauma injury to the employer until, at the earliest, April 19, 2017, when he filed a Form 50 Request for Hearing. (R. p. 41) That Form 50 alleged both an injury by accident and repetitive trauma, but described only that Appellant was injured while lifting a very heavy individual. It did

not mention any alleged repetitive work activities. Appellant's Amended Form 50 dated May 30, 2017 withdrew the claim for a repetitive trauma injury and alleged only an injury by accident on or about June 1, 2016, when Appellant was lifting a very heavy individual. (R. p. 42) A second Amended Form 50 was filed on June 30, 2017, alleging a repetitive trauma injury and adding details about two additional alleged accidents. (Supp. R. p. 2) The second Amended Form 50 did not provide any details about the alleged repetitive trauma. Appellant did not formally provide notice of what he felt was the repetitive trauma until his July 10, 2017 deposition. In the December 7, 2022 decision, the Court conflates notice of an injury by accident with notice generally.

S.C. Code § 42-15-20(C) requires that notice must be given by the employee within ninety days of the date the employee discovered, or could have discovered by exercising reasonable diligence, that his condition is compensable, unless reasonable excuse is made to the satisfaction of the Commission for not giving timely notice, and the Commission is satisfied that the employer has not been unduly prejudiced thereby. It is the role of the S.C. Workers' Compensation Commission, as finder of fact, to make a factual determination as to whether the Appellant fulfilled the notice requirement and, as long as it is supported by substantial evidence in the record, its ruling should not be overturned. The Appellant bears the burden of proving compliance with the notice requirement. Lizee v. S.C. Dept. of Mental Health, 367 S.C. 122, 127, 623 S.E. 2d 860, 863 (Ct. App. 2005) The findings of the Appellate Panel concerning notice should be upheld if substantial evidence supports them. King v. International Knife, 395 S.C. at 443, 718 S.E. 2d at 230.

Respondents respectfully contend that the Court misapprehended the facts surrounding Appellant's past back injury and treatment. The Court's December 7, 2022 decision states that "[b]ack pain is not the same as a back injury when evaluating the date a Claimant reasonably

should have known he or she has experienced a repetitive trauma injury." Appellant was diagnosed with a back injury, not simply back pain, in 2015 which he knew was work-related, as he told his doctor it was work-related.

On November 16, 2015, Appellant saw Dr. David Dorsner with a report of lower back pain with radiculopathy on the right side which had been present for five months and which was due to his work. (R. pp. 226-227) (emphasis added) A physical examination found right leg radiculopathy with a positive right straight leg raise. (R. p. 227) Dr. Dorsner diagnosed Appellant with sciatica, back pain, and radiculopathy. (R. p. 227) Thus, Appellant had a diagnosed back injury as of November 16, 2015 which he knew was work-related. Dr. Dorsner ordered a lumbar spine brace, which would have impacted Appellant's ability to perform his job duties as a firefighter. Appellant saw Dr. John Batson on December 2, 2015 for complaints of lower back pain radiating down the right leg, rated 5/10 average and 10/10 maximum. (R. p. 236) He reported that "the pain interrupts activity/exercise, sleep, work." (R. p. 236) He further reported balance/walking difficulty, weakness, numbness, and tingling in the right leg. (R. p. 236) His pain was aggravated by bending forward, bending backward, sitting, standing, walking, exercise/physical activity. (R. p. 236) These were all activities that he performed as a firefighter. Dr. Batson diagnosed Appellant with low back pain, sprain of ligaments of lumbar spine, and radiculopathy of the lumbosacral region. (R. p. 238) He recommended use of a lumbar corset, which again, would have impacted Appellant's ability to perform his job duties as a firefighter.

In misapprehending the facts surrounding Appellant's past diagnosed back injury, the Court came to the incorrect conclusion that Appellant "could not have reasonably known it was a compensable repetitive trauma injury until February 2017." Respondents contend that the S.C. Workers' Compensation Commission Appellate Panel, as the finder of fact, correctly and

appropriately found that Appellant failed to provide the employer with proper notice of a repetitive trauma injury within 90 days as required by S.C. Code § 42-15-20. There is no evidence in the record to show that Appellant provided a reasonable excuse for his failure to provide notice within 90 days.

For the foregoing reasons, Respondents respectfully request an opportunity for this case to be reheard by this honorable Court.

Respectfully submitted,

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Attorney for Respondents

Date: December 20, 2022

THE STATE OF SOUTH CAROLINA
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Workers' Compensation Commission

Appellate Case No.: 2019-000597

Nicholas B. Thompson, Employee, Appellant,

v.

Bluffton Township Fire District, Employer, and State Accident Fund, Carrier, Respondents.

CERTIFICATE OF SERVICE

I, D. Alan Westerlund, Jr., do hereby certify that I am the Attorney for the Respondents with **WILLSON JONES CARTER & BAXLEY, P.A.** in North Charleston, South Carolina, and that on **December 20, 2022**, I electronically served the foregoing **PETITION FOR REHEARING** to the following via e-mail pursuant to the Order of the South Carolina Supreme Court dated August 25, 2021:

Via E-Mail Only
David H. Berry, Esquire, Attorney for Appellant
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Via E-Mail Only
The Honorable Jenny Abbott Kitchings, Clerk
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December 20, 2022

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December 20, 2022

Via E-mail Only – ctappfilings@sccourts.org
The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

Re: Nicholas Thompson v. Bluffton Township Fire District
Appellate Case No. 2019-000597

Dear Honorable Clerk Kitchings:

Enclosed please find the following documents for filing regarding the above-referenced matter:

1. Petition For Rehearing
2. Certificate of Service

By copy of this letter, we are serving a copy of the same on David H. Berry, Esq., Attorney for Appellant. As this Petition for Rehearing is being filed by a State of South Carolina agency, no filing fee is being included pursuant to S.C.A.C.R. 240(d).

With kindest regards,

WILLSON JONES CARTER & BAXLEY, P.A.

D. Alan Westerlund, Jr.

DAW/daw
Enclosures
cc: David H. Berry, Esq., Counsel for Appellant (with enclosures; via e-mail)
Ms. Sandy Harrington (with enclosures, via e-mail)