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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. 2019-001254
WCC File No. 1506114

Frankie Padgett, Claimant Respondent,

v.

Cast & Crew Entertainment Services, Inc., Employer and
American Zurich Insurance Company, Carrier Appellants.

PETITION FOR REHEARING

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Pursuant to Rule 221(a) and 240, SCACR, Petitioners/Appellants Cast & Crew Entertainment Services and American Zurich Insurance Company petition this Court to rehear its opinion in the above-captioned case, Opinion No. 5948 (Ct. App. Filed October 26, 2022). Petitioners received this Court's Opinion No. 5948 on October 26, 2022.

I. THE COURT OVERLOOKED FACTS AND EVIDENCE THAT PADGETT BREACHED THE OCTOBER 22, 2012, CONTRACT OR SETTLEMENT AGREEMENT BY SEEKING AND OBTAINING EMPLOYMENT WITH CAST AND CREW, WHICH IN TURN VIOLATED A DECREE, ACT, ORDER AND JUDGMENT OF THE COMMISSION.

This Court overlooked and/or misconstrued the facts of this case as is set forth in its Opinion. While the Court does properly state that the accident of August 27, 2009, was resolved by virtue of a Settlement Agreement and Release, the Court's opinion did not address the fact Padgett breached the parties' mutual agreement or bilateral contract. The Settlement Agreement and Release entered into by the parties and approved by the Commission provides as follows:

[W]hen approved by a Commission [sic] shall be construed as an Act, Judgment or Decree of South Carolina. This agreement shall be construed as a contract between the parties, and when approved by the South Carolina Workers' Compensation Commission, it shall also be an official act, decree and judgment entitled to full faith and credit in all the states of the United States. The parties agree that this Agreement and Order of the South Carolina Workers' Compensation Commission shall be construed under the laws of South Carolina ...

The Agreement shall have a dual nature and shall also survive as a contract. Even though this agreement, when approved by the South Carolina Workers' compensation Commission shall be treated as an order of the same, it is also to be construed as a contract, with the provisions of the same enforceable in a court of competent jurisdiction.

(Record pp. 33-34; paragraphs G and H).

The Commission found as a fact that Padgett's employment with Cast and Crew in 2015 was in "clear violation of the terms of the settlement agreement and release or clincher..."

(Record p. 7, Finding of Fact 5).

Nevertheless, the Court did not address Padgett's breach and misapprehended his actions in which he willfully and knowingly applied for and accepted employment with Cast & Crew, despite the prohibition in the Settlement Agreement against his re-employment with Cast & Crew.

In this instance, the Commission found that "once Claimant reviewed the hiring or initial paperwork and discovered that Cast & Crew was to pay his wages and did in fact pay his salary, he had ample opportunity to decline the assignment, rather than continue to breach the agreement. Claimant expressly and knowingly accepted the work assignment with Cast & Crew, despite his violation of the terms of the contract and the Settlement Agreement and Release." (R. p. 7, Finding of Fact No. 5).

Additionally, the Court did not address Padgett's breach in terms of violating a court order, decree and judgment; and whether the Commission could exercise subject matter jurisdiction in view of Padgett's willful breach of the agreement not to seek future employment with Cast and Crew.

The Commission's lack of subject matter jurisdiction is embodied in the Settlement Agreement, dated October 22, 2012, which states:

...it is stipulated and agreed between the parties that upon approval, this Agreement shall not be subject to review, modification or amendments by the Commission or the Courts of this State ...

(Record p. 36, paragraph VIV).

Hence, the Court's decision that the Settlement Agreement's provision prohibiting future employment does not void the employment relationship for purposes of the Workers' Compensation Act is contrary to the agreement of the parties, which is not subject to review. As

such, in permitting Padgett to breach the agreement, the Court opinion constitutes a modification or amendment of the mutually agreed upon agreement.

The Court is bound by the plain and ordinary terms of the Settlement Agreement and contract, and is prohibited from obviating the terms of the parties' agreement. Although Padgett's breach may not void the employment relationship for workers' compensation purposes, the employment relationship is certainly voidable under the facts of this case.

II. THE COURT RELIED UPON ASSUMPTIONS AND EVIDENCE THAT ARE OUTSIDE THE RECORD IN AFFIRMING THE DECISION OF THE COMMISSION.

The Court recognized Respondent's full, formal and legal name is Perry Frank Padgett, Jr. The Court stated Respondent had always used the nickname "Frankie" but provided Perry Padgett as his legal name when documents require his full formal name. This is inaccurate.

The South Carolina Workers' Compensation Commission found as a fact that "Claimant's use of two versions of his name, pre-injury and post-injury, while compelling, is not persuasive. ... (R. p. 7, Finding of Fact 6). In the 2009 case, Padgett utilized his formal, legal name on all documents associated with his workers' compensation claim. However, in the 2015 case, he used his nickname exclusively to secure employment and workers' compensation benefits. (Record pp. 230-235).

A. Padgett's Completion Of A Form I-9 Employment Eligibility Verification Did Not Inform Cast & Crew That Frankie Padgett And Perry F. Padgett, Jr. Were The Same Person.

The Court reasons without explanation that Padgett's completion of a Form I-9 adequately apprised Cast & Crew that Frankie Padgett was the same individual as Perry F. Padgett, Jr..

A review of the Form I-9 completed by Padgett reflects that he stated that his first name

or given name is “Frankie” as opposed to “Perry.” Padgett did not indicate a middle initial and he did not complete the section of the form which requested Padgett identify “Other Names Used (if any)”. (R. p. 57).

In short, the Form I-9, Employment Eligibility Verification, as completed inaccurately by Padgett did not inform Cast & Crew that Franke Padgett was the same individual as Perry F. Padgett, Jr.

B. There Is No Evidence That Padgett Provided Copies Of His Social Security Card And South Carolina Driver’s License to Cast And Crew.

The Court concluded that copies of Respondent’s social security card and driver’s license were provided to Cast and Crew. The Court states that this assumption was sufficient to put Cast and Crew on notice that Frankie Padgett was, indeed, Perry Frank Padgett, Jr. However, this conclusion assumes facts which are not included in the record.

Contrary to the Court’s reasoning and findings, Landol Dula Fletcher, President of the Teamsters Union for South Carolina, testified on behalf of Respondent and stated that the production company or Cast & Crew would notify the Teamsters for a drivers list and in turn Cast & Crew would hire drivers from that list. (R. pp. 115-116, ll. 1-11).

Mr. Fletcher never discussed sending social security cards or South Carolina driver’s license to Cast & Crew prior to hiring, but only a list of drivers. The application and notice for membership in the local Teamsters Union and the I-9 Form do not reflect Respondent ever provided copies of his social security card or driver’s license.

There is no evidence that Cast & Crew was provided information proof of Respondent’s identification when it entered the information into its payroll system. (R. pp. 57-59).

As a matter of fact, payroll records from Cast & Crew reflect Respondent’s name as Frankie Padgett as opposed to Respondent’s legal name. Thus, the Court’s conclusion that

substantial evidence in the record supports the appellate findings is not supported by the evidence. (R. p. 54).

Furthermore, in a letter dated October 30, 2017, Cast & Crew in response to a subpoena by Padgett's attorney noted that it did not directly employ or control the day-to-day responsibilities of their payroll clients or their production employees. (Record p. 248) Thus, Cast & Crew did not maintain any employment files for any employees.

Cast & Crew are a provider of payroll services to the entertainment industry and do not directly employ or control the day-to-day responsibilities of payroll clients and their production employees. (Record p. 248). This is further evidence, Cast and Crew did not receive identification records from Padgett as suggested in the Court's Opinion.

Padgett was assigned by the Teamsters Union to work for Cast & Crew. On the contrary, if assumptions are to be made, it is more logical to assume that if Padgett had provided Cast and Crew with a copy of his social security card and driver's license, his paychecks would have reflected his formal name of Perry F. Padgett rather than his nickname "Frankie". The payroll records from May 7, 2015 through July 28, 2017, reflect only the name of Frankie Padgett rather than Perry F. Padgett, Jr. (Record p.54.)

III. THE COURT MISAPPREHENDED THE FACTS IN RULING THAT SECTION 42-9-170 IS NOT APPLICABLE IN THIS CASE.

The Court reasoned that section 42-9-170 is inapplicable because it applies only to permanent injuries under section 42-9-30 or section 42-9-10(B) after an employee has sustained another permanent injury in the same employment. The Court concluded there were no findings by the Commission as to whether Claimant sustained a permanent injury in 2009. The Court seemingly implies that if there was a permanent injury, the settlement was for a "disputed

permanent injury”.

Based upon the record and undisputed factual evidence, there is no dispute Padgett suffered a permanent injury and disability to his left leg.

First, the Form 19, which is an accounting of workers’ compensation benefits paid, reflects a date of accident of August 27, 2009 and payment of 155 weeks or approximately three years of temporary total disability or indemnity benefits. (Record p. 37) .

Second, the Form 19 reflects \$91,851.55 was paid in medical charges with respect to Padgett’s six surgeries to the left leg. (R. p. 37).

Third, Dr. W. Bret Smith, a physician with Moore Orthopedic Clinic, completed a physician’s statement (Form 14B) in which he reports treating Padgett from March 10, 2011 to January 5, 2012. (Record p. 43). Dr. Smith assigned Padgett 10% medical impairment to the left ankle and 7% medical impairment to the left leg, or a total of 17% medical impairment to the left lower extremity. Moreover, Dr. Smith relegated Padgett to sedentary duty with no heavy lifting, pushing or pulling. (Record p. 43).

As a result, the record is replete with evidence of Padgett sustaining a permanent injury in 2009. Hence, Section 42-9-170 is applicable due to the presence of a permanent injury suffered by virtue of an accident in 2009.

A. The Settlement Agreement Provides For Payment Of Permanent Disability.

The Court inappropriately focused on the word “disputed” in determining that Padgett had not suffered a permanent injury or disability from a factual and legal basis.

By way of background, Dr. Brett Smith with Moore Othopaedic Clinic, opined Padgett had attained maximum medical improvement on January 5, 2012. (R. p. 43). Dr. Smith assigned Claimant a 10% medical impairment rating to the left ankle and a 7% medical impairment rating

to the left leg. Additionally, Dr. Smith opined Claimant was only able to engage in sedentary duties with no heavy lifting, pushing or pulling.

It is axiomatic that with the assignment of a medical impairment rating, an injured worker has suffered disability or loss of use of a body part. In the case of *Smith v. S.C. Dept. of Mental Health*, 335 S.C. 396, 517 S.E.2d 694 (1999), the court held that upon a finding of maximum medical improvement, an injured worker is no longer entitled to payment of temporary total disability compensation benefits, but rather permanent disability benefits.

Obviously, the record contains evidence Respondent had suffered significant permanent disability after undergoing six surgeries to the left leg and was relegated to sedentary duty and future medical treatment to lessen disability. Hence, there is no evidence in support of the Court's opinion that Respondent did not suffer a permanent disability by virtue of the medical impairment rating assigned by Dr. Smith as a result of the August 27, 2009 accident.

By previous filings, Padgett had contended that he was permanently and totally disabled not only because of an injury to his left leg, but also because of alleged injuries to his back, hips, right leg and skin.

Thus, use of the word "disputed" can only be viewed in context of the parties' dispute about the amount of permanent disability benefits owed to Padgett. There was no factual dispute about Padgett's entitlement to permanent disability benefits, but rather the factual dispute was about the amount of disability benefits.

To this end, Padgett and his attorney sought the allocation of the settlement proceeds with \$98,533.09 being allocated for permanent disability for 1,704.56 weeks. The fact the allocation specifically states the disability payments are to be allocated over Padgett's lifetime, is indisputable evidence the monies were paid for permanent injury or permanent disability and not

for any other reason.

B. The Law Provides that Padgett Was Paid Permanent Disability Benefits In The Settlement Agreement.

In the case of *James v. Anne's, Inc.*, 390 S.C. 188, 701 S.E.2d 730 (2010), the court unequivocally held that workers' compensation awards for permanent impairment or injuries can be prorated over a claimant's lifetime in order to offset reductions in social security disability benefits. The court found "[a] permanent impairment, by definition, lasts for a lifetime" *James v. Anne's, Inc.*, 390 S.C. 188, 199, 701 S.E.2d 730, 735.

Padgett specifically requested the Commission approve the allocation of permanent disability benefits over his lifetime. Because the Social Security Administration only reduces or offsets the amount of Social Security disability from workers' compensation disability benefits, there is no legal argument to suggest the monies were paid other than for Padgett's permanent injuries and disability. The Settlement Agreement reflects no monies were being paid for past or future medical treatment. (R. pp. 32-33).

In short, the parties agreed the Settlement Agreement is to be treated as an order or award of the Commission. Padgett allocated his settlement proceeds after payment of attorney fees and costs to payment of permanent disability benefits; and not for any other reason.

In short, the only dispute was whether Respondent was permanently and totally disabled. There was no dispute amongst the parties that because of the numerous surgeries and the assigned medical impairment ratings, Padgett had very significant loss of use of the left leg. Thus, the amount paid as reflected in the Settlement Agreement and Release was most certainly for permanent disability benefits.

The parties' agreed and stipulated that the

...Agreement shall not be subject to review, modification or amendments by the Commission or the courts of this state. Each party prays the approval of this Agreement by the Commission as being to his or their best interests.

(R. p. 36)

Based upon the above arguments, the Court has modified and amended the agreement by virtue of its decision. (Record p. 32, ¶3 and p. 36, ¶XIV).

CONCLUSION

For all the reasons stated herein, or based on any other ground appearing in the record pursuant to Rule 220(c), *SCACR*, this Court should re-hear Opinion No. 5948 and reverse the Commission in its entirety by virtue of the terms of the Settlement Agreement, Order, Decree, and Judgment of the Commission and for lack of subject matter jurisdiction. In the alternative, the Court must amend its decision to reflect that section 42-9-170 is applicable in the instance case.

Respectfully submitted,



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