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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM GREENVILLE COUNTY  
Court Of Common Pleas

G. EDWARD WELMAKER, Circuit Court Judge

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Unpublished Opinion No. 2013-UP-071 (Ct. App. Filed 2/13/2013)

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Maria E. McGaha, .....Respondent,

v.

Honeywell International, Inc., Employer  
and Zurich North America, Carrier .....Petitioners.

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PETITIONERS' REPLY TO PETITION FOR WRIT OF CERTIORARI

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## ARGUMENTS

**I. THE COMMISSION'S AWARD OF TEMPORARY TOTAL DISABILITY COMPENSATION BENEFITS FROM MARCH 4, 2005 TO THE PRESENT IS NOT SUPPORTED BY ANY EVIDENCE, MUCH LESS SUBSTANTIAL EVIDENCE, THEREFORE, SPECIAL AND IMPORTANT REASONS EXIST TO WARRANT REVIEW BY THIS COURT BECAUSE THE COMMISSION'S AWARD MUST BE SUPPORTED BY SUBSTANTIAL EVIDENCE.**

Respondent's argument that the Commission's Decision to award temporary total disability compensation benefits from March 4, 2005 represents a compromise award is irrelevant and immaterial under the law. Hill v. Eagle Motor Lines, 373 S.C. 422, 436, 645 S.E.2d 424, 431 (2007).

Initially, Respondent's allegations of her inability to work stemmed from what was erroneously believed to have been left carpal tunnel syndrome. Approximately twenty (20) days after Respondent allegedly became disabled because of problems emanating from what was believed to have been left carpal tunnel syndrome, nerve conduction studies ordered by Dr. Kent Kistler ruled out the inaccurate diagnosis of left carpal tunnel syndrome. (App. pp. 79-80). Therefore, even if the initial injury as alleged by Respondent had been deemed compensable and warranted payment of temporary total disability compensation benefits, such benefits would have only been paid from August 1 through August 21, 2003. Further, there is no evidence that payment for her inability to work resulting from the carpal tunnel syndrome would have been extended beyond

October 28, 2003 under the most generous review of the evidence in question. (App. p. 187).

It is axiomatic that Commission's award of monetary benefits for eight (8) years and counting must be supported by substantial evidence. Hucks v. Green's Fuel of South Carolina, 247 S.C. 457, 148 S.E.2d 149 (1966). If the Court of Appeals is now empowered to affirm the Commission under a new legal theory of "the spirit of compromise" as opposed to actual evidence, such a ruling would constitute a novel issue of law and a departure from the Court's Decisions governing Administrative Hearings and the legal requirement that all Findings of Fact are supported by substantial evidence. Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981).

Respondent's argument that had the Commission determined that Respondent was entitled to payment from temporary total disability compensation benefits from August 1, 2003, would have obligated Petitioner to continue paying temporary total disability benefits is simply disingenuous and misleading.

The employment duties assigned by Honeywell often resulted in its employees developing carpal tunnel syndrome. This malady was generally accepted as a compensable injury by Petitioner without argument; and worker's compensation benefits were provided.

In the instant case, Respondent was initially incorrectly diagnosed with carpal tunnel syndrome. Subsequently, Respondent was diagnosed with a

degenerative condition of the cervical spine and a torn rotator cuff. These maladies certainly were controverted and denied. As such, it is incumbent upon Respondent to prove the compensability of any injuries to the cervical spine and shoulder and to prove her entitlement to temporary total disability compensation and medical benefits. Clade v. Champion Laboratories, 330 S.C. 8, 496 S.E.2d 856 (1998). Because Respondent failed to prove she was temporarily and totally disabled from her left shoulder injury as of March 4, 2005, she is not entitled to temporary total disability compensation benefits beginning on that date. See Shealy v. Algernon Blair, Inc., 250 S.C. 106, 156 S.E.2d 646 (1967).

Moreover, the argument of Petitioner's counsel to the Circuit Court regarding the payment of temporary total disability compensation confirms that such could not have been continuously awarded from August 1, 2003. To wit:

**The Court: So if the Commissioner had found that temporary total should have started in 2003, you really wouldn't have had a complaint?** (R. p. 268, lines 16-18).

**Mr. Dunbar: I don't think I would have had much of a leg to stand on, to be quite candid. Because then there are medical documents in the record to support temporary total beginning on that date. Now, the only problem is how do you order temporary total six years down the road? Because there is some evidence indicating that she was able to return to work some time in 2004/2005. So we would take the position that the record would support that [temporary total disability benefits] shouldn't have been continuing. But the beginning date, clearly, I would not have much to argue... because the Commission ignored all of those records and arbitrarily chose... one report that just shows she had a test conducted on that date, and no doctor writes her out from work.** (R. p. 268, lines 16-25; and p. 269, lines 1-7).

**Mr. Dunbar: The only documents... the record to support temporary total would be from 2004 back. The reason why the**

**Commission did not order payment of temporary total is because the evidence didn't support such. [Claimant] had carpal tunnel syndrome that was eventually ruled out, which my client had admitted could have resulted from work. [Appellants] denied the shoulder, denied the neck. So the Commission was in a quandary in terms of ordering temporary total from 2003 because what we had admitted was ruled out and the cervical spine wasn't a problem. It was arthritic.** (R. p. 281, lines 20-25, p. 282, lines 1-6).

The arguments of Petitioners' counsel only evidences an admission that if claimant had indeed suffered with carpal tunnel syndrome as originally diagnosed and temporary total disability compensation benefits had been ordered, the Commission's decision to award temporary total disability compensation benefits beginning on August 1, 2003 through August 21, 2003 would theoretically have been supported by substantial evidence. (App. pp. 68-70, 73, 75-81, 85, 90, 97).

However, because medical treatment for the carpal tunnel syndrome have ended as early as August 21, 2003 or as late as October 28, 2003, any award beyond the aforesaid dates would not have been supported by substantial evidence.

**II. PETITIONERS PRESERVED ITS ARGUMENT THAT RESPONDENT DID NOT SUFFER A COMPENSABLE NECK INJURY.**

Petitioner preserved its argument that McGaha did not sustain a compensable injury to her neck. On Page 5 of the Petition, Petitioners argued that McGaha no longer suffers with neck pain, which was never designated as a disabling malady by any of the treating physicians. Accordingly, the

compensability of the neck claim is intertwined with Petitioner's argument that Respondent is not entitled to temporary total disability compensation benefits beginning on March 4, 2005 to the present. There is simply no medical evidence aside from that of the qualified opinion of Dr. Michael Bucci, a neurosurgeon, which suggests claimant had suffered a work related accident and is entitled to temporary total disability compensation benefits. As a matter of fact, the Commission never ruled that the alleged neck claim is compensable.

With respect to the left shoulder, Respondent had never been authorized to remain out-of-work due to her left shoulder malady. The Commission's decision to award temporary total disability compensation benefits beginning on March 4, 2005 is not supported by any medical evidence or credible, non-self-serving lay testimony.

Accordingly, if this Court grants Petitioners' Petition for Writ of Certiorari, the Decision of the Commission must be reviewed with regard to the compensability of the alleged neck claim and whether such justifies the award of temporary total disability compensation payments.

Respectfully submitted,

By: 

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July 1, 2013

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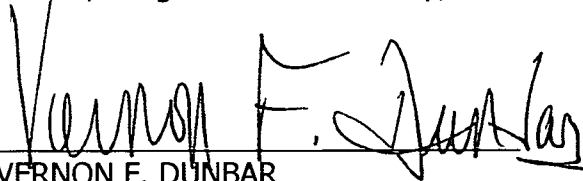
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**CERTIFICATE OF SERVICE**

I certify that I have served the ***Petitioners' Reply to Petition for a Writ of Certiorari and Certificate of Service*** on Maria E. McGaha, Respondent, by depositing a copy of it in the United States Mail, postage prepaid, on July 1, 2013, addressed to the attorneys of record, Kathryn L. Williams, Esquire, and Donald E. Kamb, Jr., Esquire, Post Office Box 10693, Greenville, SC 29603; and The Honorable Jenny Abbott Kitchings, Clerk of Court – South Carolina Court of Appeals, 1015 Sumter Street, Columbia, SC 29201.

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