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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

Appellate Case No.: 2017-001535

Doretta Butler-Long, Employee, Claimant.....Appellant,

v.

ITW Labels, Employer and American Zurich Insurance Company/Zurich North America c/o Broadspire, Carrier .....Respondents.

PETITION FOR REHEARING

Pursuant to Rules 221 and 240, SCACR, Respondents ITW Labels and American Zurich Insurance Company/Zurich North America c/o Broadspire petition this Court to rehear its Opinion in the above-captioned case, Opinion No. 2023-UP-291(Ct. App. filed August 9, 2023). Respondents received this Court's Opinion on August 9, 2023.

This Court overlooked and/or misapprehended the proper standard of review to apply to the appeal. Further, the Court overlooked and/or misapprehended that Appellant had failed to meet her burden under section 42-1-160 of the South Carolina Code. Accordingly, the Appellate Panel's decision should have been affirmed in its entirety.

A. This Court overlooked and/or misapprehended the proper standard of review.

This Court correctly noted that the Administrative Procedures Act (APA) establishes the Court's standard of review for the Appellate Panel's decisions. *See Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981). Respectfully, however, this Court misapplied the proper

standard of review by engaging in independent fact-finding, ignoring and discounting the substantial evidence supporting the Appellate Panel's decision, and substituting its own judgment for that of the Appellate Panel.

This Court must affirm the decision of the Appellate Panel's determination unless it was based on an error of law or was clearly erroneous in view of the substantial evidence of the whole record. *See Lark*, 276 S.C. at 136, 276 S.E.2d at 307. Substantial evidence is evidence which, considering the record as a whole, would allow reasonable minds to reach the same conclusion the Appellate Panel reached in order to justify its action. *See Pierre v. Seaside Farms, Inc.*, 386 S.C. 534, 540, 689 S.E.2d 615, 618 (2010). "The possibility of drawing two inconsistent conclusions from the evidence does not prevent the Commission's finding from being supported by substantial evidence." *Sharpe v. Case Prod., Inc.*, 336 S.C. 154, 160, 519 S.E.2d 102, 105 (1999).

Moreover, the Appellate Panel is the ultimate fact finder in workers' compensation cases. *See Shealy v. Aiken Cnty.*, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000). "The final determination of witness credibility and the weight to be accorded evidence is reserved to the Full Commission." *Brunson v. American Koyo Bearings*, 395 S.C. 450, 455, 718 S.E.2d 755, 758 (Ct. App. 2011). Where there is a conflict in the evidence, either by different witnesses or the testimony of the same witness, the factual findings of the Appellate Panel are conclusive. *See Anderson v. Baptist Med. Ctr.*, 343 S.C. 487, 492-93, 541 S.E.2d 526, 528 (2001). Furthermore, it is the Appellate Panel's prerogative to believe or disbelieve expert testimony. *See Tiller v. National Health Care Center of Sumter*, 334 S.C. 333, 340, 513 S.E.2d 843, 846 (1999) (internal citations omitted) ("while medical testimony is entitled to great respect, the fact

finder may disregard it if there is other competent evidence in the record. Indeed, 'medical testimony should not be held conclusive irrespective of other evidence'").

Here, this Court substituted its judgment and its credibility determinations in place of the Appellate Panel. This Court erroneously determined that Dr. Mazoue's opinion and Dr. Tanksley's single amended medical note were the only credible evidence on the question of whether Appellant suffered a compensable injury at work. The Court expressly discounted the medical records of several other medical providers, the contrary opinions of both Dr. Tanksley and Dr. Mazoue, and Appellant's own statements to medical personnel that her injury was not work related.

There is no dispute that the April 13, 2012 emergency room records, Appellant's first medical treatment sought days after the alleged injury, do not reflect any indication that Appellant reported she had suffered a work related injury. (R. pp. 57-66). Records for visits to the Palmetto Health Richland emergency room on April 17, 2012 and April 24, 2012, indicate that Appellant did not know what was causing her pain and there was no indication that her pain was associated with work. (R. pp. 72-76 & 77-80).

On April 27, 2012, Appellant sought treatment from Palmetto Health's Family Medical Center and Dr. Tanksley, whose the notes indicate she recalled "no injury." (R. pp. 93, 89-90). On May 2, 2012, she returned and the notes reflect that her injury was "not in association with work" and there were suspicions she was "malingering." (R. pp. 94-96). Appellant saw Dr. Tanksley on May 11, 2012 and May 15, 2012 and, in both instances, it was noted that her pain was "not in association with work." (R. pp. 99-104).

On May 11, 2012, Appellant signed a Short Term Disability form in which she indicated her injury was not work related. (R. pp. 303-308).

On May 31, 2012, Appellant saw Dr. Sweet, who reviewed an MRI of her spine and gave no indication that her injury or pain was work related. (R. pp. 122-126).

On June 11, 2012, Appellant saw Dr. McGown at the University Specialty Clinics Department of Orthopedic Surgery, whose notes reflect Appellate "had no specific injury" and gave no indication that Appellant's injury or pain was work related. However, he did diagnose Appellant with an injury to her right rotator cuff. (R. pp. 128-129). Despite receiving this diagnosis of a rotator cuff injury on June 11, 2012, the diagnosis that Appellant claims kept her from associating her injury with work, when she saw Dr. Tanksley on June 15, 2012 and Dr. McGown on July 13, 2012, medical records from neither visit indicated she claimed she was injured at work or noted any suspicion of a work related injury. (R. pp. 110-112 & 128-130).

It was not until July 30, 2012, over three months from the onset of pain and over one month from the diagnosis that her pain was caused by a shoulder injury that any medical professional gave any indication that her injury or pain was associated with work. Moreover, even in that case, Dr. Tanksley's note on July 30, 2012 offers no explanation as to why or even if he intentionally changed or corrected his diagnosis of a work related injury. (R. pp. 114-116). Thus, the Single Commissioner, the Appellate Panel and this Court are left to speculate as to what caused any change from his previous medical records denying a work related injury and weight the credibility of such an alleged change in light of the entire record.

On August 27, 2012, Appellant returned to Dr. Tanksley's medical practice and Dr. Riggsbee, who had access to all Dr. Tanksley's notes, indicated that her complaint had an "unsure etiology." (R. pp. 118-121).

Appellant begin seeing Dr. Mazoue on September 14, 2012. She had visits with him in September 2012, November 2012, February 2013, July 2013, February 2014, May 2014, August

2014, October 2014, November 2014 and December 2014. The notes from all of those visits fail to connect her shoulder injury or pain to work. In fact, the notes from the February 28, 2014 visit note there was "no known [Mechanism of Injury]." (R. pp. 131-149 & 153-171).

On January 20, 2015, after Appellant's last visit with Dr. Mazoue, and after Dr. Mazoue met with Appellant's counsel, he filled out a questionnaire and for the first time indicated that her shoulder injury and pain was associated with her work. (R. p. 172). During cross-examination, Dr. Mazoue testified that "a significant portion of" his opinion was based on information provided by Appellant's counsel in their meeting. (R. p. 361:17-23). Further, he acknowledged that the cause of Appellant's injury "could be any number of different things." (R. p. 370:166 – 371:4).

Thus, within a month of Appellant first seeking treatment, Dr. Tanksley had determined on multiple occasions that Appellant's pain and injury was "not in association with work" and Appellant signed a document expressly stating her pain and injury were not work related. Even after she was diagnosed by Dr. McGown with a shoulder injury, which for some inexplicable reason Appellant insists prevented her from associating her pain with a work injury, the notes from her next two medical visits failed to connect her injury or pain with her work. Moreover, Dr. Mazoue's medical records, consisting of eleven visits over a 26 month time period, failed to connect her injury or pain to her work. It was not until he met with Appellant's counsel that the connection was made.

Put simply, there is substantial evidence from numerous medical records—including those of Dr. Tanksley and Dr. Mazoue, and Plaintiff herself—upon which the Appellate Panel based its Decision and reasonable minds could easily reach the same conclusion the Appellate Panel reached. *Pierre*, 386 S.C. at 540, 689 S.E.2d at 618. Thus, this Court's decision to weigh

what it considered contrary evidence more heavily contradicts the proper standard of review and leads to the inescapable conclusion that this Court erroneously substituted its judgement for the judgement of the Appellate Panel.

Accordingly, this Court should grant rehearing, reverse its decision and affirm the decision of the Appellate Panel.

B. This Court overlooked and/or misapprehended S.C. Code Ann. § 42-1-160 and *McGuffin v. Schlumberger-Sangamo*, 307 S.C. 184, 414 S.E.2d 162 (1992) by reversing the Appellate Panel's determination.

This Court discounts Appellant's repeated failure to associate her pain or injury to work as reflected in numerous medical records and her express rejection that her pain and injury were work related, relying on *McGuffin v. Schlumberger-Sangamo*, 307 S.C. 184, 414 S.E.2d 162 (1992). However, this Court misapplied *McGuffin* to the facts of this case.

In *McGuffin*, the claimant, who had a history of a congenital deformity of her right kidney, felt a "bad stinging" in her back when she lifted a tray of parts at work. Believing her pain was due to a pre-existing kidney condition, the claimant sought emergency treatment and was examined by a urologist who, after tests were run, concluded the claimant did not have a kidney stone. Instead, the urologist treated her with muscle relaxants and rest, concluding that her pain was musculoskeletal. Five weeks later, she saw an orthopedic surgeon, who diagnosed her with a lumbosacral sprain, which the surgeon opined had been caused by "lifting or lifting and twisting." The Commission, which denied benefits to the claimant, relied heavily on the claimant's initial (but erroneous) self-diagnosis and the fact that she did not immediately attribute her pain to lifting the trays. "This reasonable, however erroneous, self-diagnosis does not alter the fact that all treating physicians determined her pain was not related to her kidneys but was in fact musculoskeletal. Considering the record as a whole, the [claimant's] own

misdiagnosis does not constitute substantial evidence from which the Commission could infer that the respondent's muscle strain did not result from an accident at work." 307 S.C. at 187-188, 414 S.E.2d at 164.

Here, unlike the claimant in *McGuffin* who had a congenital deformity of her kidney, which could have caused her pain, Appellant had no such pre-existing condition. Thus, in *McGuffin*, the claimant thought her symptoms were related to a purely personal, pre-existing condition, whereas here, the alleged confusion is centered on what body part Appellant injured but not whether it was a purely personal pre-existing condition versus something work-related. Regardless of whether Appellant potentially injured her arm or neck (with accompanying radiculopathy) or her shoulder, the fact is that she did not relate her pain to her job until months after her alleged injury. There is no basis in the record to suggest that an arm or neck injury could not have been work related but a shoulder injury could.

Furthermore, the Appellate Panel in this case did not place the same emphasis on an erroneous self-diagnosis as did the Commission in *McGuffin*. Here, the Appellate Panel relied on numerous medical records that not only failed to associate her pain or injury to her work, but rather rejected the idea the pain or injury was "in association with work," and the fact that Claimant did not tell a single medical provider for months that she had hurt her arm at work or even that her pain began while she was at work. She was not required to make a correct self-diagnosis; however, she was required to accurately report her symptoms, their onset, and any relevant information to her medical providers. Tellingly, the initial medical notes are silent about any connection between her pain and her job, even *after* she was diagnosed with a shoulder injury.

Thus, as the Appellate Panel relied on numerous medical records in addition to Appellant's failure to connect her pain or injury to work, *McGuffin* is distinguishable and not determinative in this case. This Court should grant rehearing and rule that Plaintiff failed to meet her burden of proving a compensable injury under S.C. Code Ann. § 42-9-160.

C. Respondents agree with the Court's decision that no repetitive injury occurred.

Respondents agree with this Court's determination the record does not support Appellant's theory of a repetitive injury and do not seek rehearing of that part of the Opinion.

CONCLUSION

For the reasons set forth herein, Respondents respectfully request that this Court rehear its decision in this case, and affirm the determinations by the Appellate Panel that Appellant did not suffer a compensable injury at work.

Respectfully submitted,

August 24, 2023

s/Helen F. Hiser

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

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Doretta Butler-Long, Employee, Claimant.....Appellant,

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ITW Labels, Employer, and
American Zurich Insurance Company/Zurich
North America c/o Broadspire, Carrier,.....Respondents.

PROOF OF SERVICE

I certify that on the 24th day of August 2023, I served the Respondents' **Petition for Rehearing** on Doretta Butler-Long by emailing a copy of it to her attorney of record as follows:

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Aug 24 2023
SC Court of Appeals

August 24, 2023

Via SC Courts E-Filing & U.S. Mail
The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RE: Doretta Butler v. Illinois Tool Works and American Zurich Insurance Company/Zurich North America c/o Broadspire
Date of Accident: April 13, 2012
WCC File No.: 1221499
Our File No.: 20149.14118
Claim No.: 186548843
Appeal No.: 2017-001535

Dear Ms. Kitchings:

Enclosed for filing in the above-referenced matter is Respondents ITW Labels and American Zurich Insurance Company/Zurich North American c/o Broadspire's Petition for Rehearing, along with the Proof of Service.

We are serving counsel of record via email only. We will send our firm's check in the amount of $50 for filing the Petition via U.S. Mail with a copy of this filing.

Please do not hesitate to contact the undersigned if the Court requires additional copies and/or if you have any questions.

Yours truly,

McAngus Goudelock & Courie, LLC

Helen F. Hiser

Enclosures
cc: Stephen B. Samuels, Esquire