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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.: 2022-000282

Michael K. Crowley, Employee, ...Appellant,

vs.

Darlington County, Employer, and
South Carolina Association of Counties SIF, Carrier.....Respondents.

RESPONDENTS' RETURN TO PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC

Respondents, Darlington County and South Carolina Association of Counties SIF, by their undersigned attorney, respectfully submit this Return to Petition for Rehearing With Suggestion for Rehearing En Banc. Appellant cites three grounds as a basis for a Rehearing En Banc; Respondents submit that two of those grounds do not form a legitimate basis for a rehearing or rehearing *en banc*. The issue in "Law/Analysis C. Admissibility of Evidence" concerning an interpretation of section 42-15-95 is deserving of reconsideration or rehearing, and may qualify for a rehearing *en banc*.

SCACR 219 states that a rehearing *en banc* is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance.

ARGUMENTS

1. Consideration by the full court is not necessary to secure or maintain uniformity of its decisions in relation to this case.

Appellant argues that its decision in the instant case is in direct conflict with the case of Dent v. East Richland County Pb. Svc. Dist., 423 S.C. 193, 813 S.E.2d 886 (Ct. App. 2018), regarding the application of the substantial evidence standard to the definition of total disability based upon wage loss. Contrary to the arguments implied by Appellant, there is no conflict between the holding in Dent and the decision in this matter regarding total disability. In Dent, the Court of Appeals discussed at length the Singleton standard (where an injury is confined to a scheduled member and there is no impairment of any other part of the body because of such injury, the employee is limited to scheduled compensation under 42-9-30), the definition of total disability under 42-9-10, and a detailed discussion and analysis as to whether the evidence relied upon by the appellate panel of the Commission constituted substantial evidence. Specifically, the Court of Appeals noted that the appellate panel found that Claimant was not totally disabled because he could physically perform medium level work without considering that Claimant did not qualify by experience or education for medium duty work and an analysis of 12,000 job titles in the United States economy revealed that there were no job titles for which he qualified by experience or education within his current physical abilities.

In its decision in the instant case, the Court of Appeals specifically analyzed and properly quoted the case law surrounding 42-9-10. The decision under Law/Analysis (B) specifically refers to 42-9-10 loss of earning capacity and correctly cites the standard that a Claimant is entitled to total and permanent disability benefits when the incapacity for work resulting from an injury is total and that a claimant may establish total disability by showing that an injury has

caused sufficient loss of earning capacity to render him totally disabled. This is the exact same standard and case law set forth in Dent. The court goes on to find that there is substantial evidence in the record to support the Commission's decision to not award Appellant total and permanent disability under section 42-9-10.

As addressed at oral arguments and in Respondents' Briefs, there is no conflict or lack of uniformity in the decisions from the Court of Appeals regarding the law or legal definitions. Appellant argues that because the Court of Appeals found that substantial evidence did not exist in Dent but that substantial evidence did exist in Crowley that the decisions are therefore not uniform. This argument is without merit. The Court of Appeals has uniformly quoted the law on total disability and uniformly defined total disability; in fact, these concepts are black letter law in South Carolina. The application of facts to that legal standard will necessarily be different in every case since the facts of an individual claim are always going to be different. When one set of facts is applied to the legal standard and results in a finding that an injured employee is totally disabled, and another set of facts is applied to the legal standard and results in a finding that an injured employee is not totally disabled, this does not mean that the decisions are not uniform. This is simply the result of the different facts in Crowley, who was actively working at the time of the hearing, and the facts in Dent, who was unable to work in any capacity, which support different conclusions when using the exact same legal standard. Different results from application of different facts to a uniform legal standard does not equal dereliction of uniformity in decisions.

Respondents assert that this issue does not necessitate a rehearing at all, and would certainly not rise to the level of requiring a rehearing *en banc*.

2. The Court of Appeals' interpretation of Section 42-15-95 should be reconsidered or reheard, and this issue may present a question of exceptional importance.

Both parties have asked for a reconsideration/rehearing on "Law/Analysis C. Admissibility of Evidence" concerning an interpretation of section 42-15-95. Respondents assert that the Court of Appeals should reconsider or rehear those issues in accordance with the filings that have been previously made.

The bigger question is whether judicial interpretation of the statute is a question of exceptional importance. Generally speaking, questions of exceptional importance are landmark legal issues where decisions will significantly affect persons and entities other than the litigants. The interpretation of section 42-15-95 is of importance to the parties on this particular claim, and will be a decision which affects other litigants in workers' compensation claims. Further, the interpretation of 42-15-95 is a significant question of law that has not been, but should be, settled by the appellate court. For these reasons, a significant argument can be made that this is a question of exceptional importance which may qualify for a rehearing *en banc*.

Respondents assert that the Court of Appeals should, at the very least, reconsider or rehear their decision as to the interpretation of 42-15-95 as stated in the decision in "Law/Analysis C. Admissibility of Evidence." There exists some facts which would qualify this reconsideration as a question of exceptional importance, and the Respondents leave the decision as to whether to hear this particular issue *en banc* with the good judgment of the Court of Appeals.

3. Rehearing by the full court is not necessary to analyze whether substantial evidence exists in the record to support the Commission's award under 42-9-30.

Appellant argues that the decision in Paulino v. Diversified Coatings, Inc., Op. No. 28212 (S.C. filed 6/26/24) presents a question of exceptional importance, and that the Court of Appeals failed to understand the difference between medical impairment and loss of use. These arguments are without merit.

In Paulino, the Supreme Court found that the Court of Appeals had misapplied the substantial evidence standard in reviewing a decision of the Commission. The Supreme Court stated that factual decisions from the Commission should be affirmed if they are supported by substantial evidence when considering the record as a whole, and that there is nothing in the standard of review that requires a claimant to establish his claim by "medical evidence." The Supreme Court stated, "when considering the record as a whole--both medical evidence and non-medical evidence--if substantial evidence supports the commission's findings, the court must affirm." In that case, the Commission found that Claimant was totally and permanently disabled as a result of having more than 50% disability to the spine, but the Court of Appeals reversed on the basis that there was no medical evidence to support such a finding because there was no medical rating that established more than 50% impairment. The Supreme Court indicated that a claim for benefits under section 42-9-30 must be proved by considering the evidence in the record as a whole as opposed to the medical evidence being conclusive.

In the instant case, the Court of Appeals properly analyzed all of the evidence in the record when determining whether there is substantial evidence in the record to support the commission's finding of less than 50% loss of use to the back. While the Court of Appeals certainly refers to the various medical opinions from a variety of medical experts, the decision specifically states that they considered the record as a whole. There was a healthy discussion of

non-medical evidence during oral arguments. This non-medical evidence considered by the Court of Appeals includes the fact that Appellant was actively working providing judicial security at a courtroom, the fact that at least two doctors indicated that he could continue to work that job or that he had no work restrictions, the fact that a vocational expert indicated that he could work a number of different jobs (12 jobs were available at that time within a 50 mile radius for which appellant qualified), and the nature of his ongoing complaints. While this non-medical evidence was not specifically cited in the decision, it was clearly relied upon by the Court of Appeals, cited extensively in the Briefs, and was discussed at length during oral arguments.

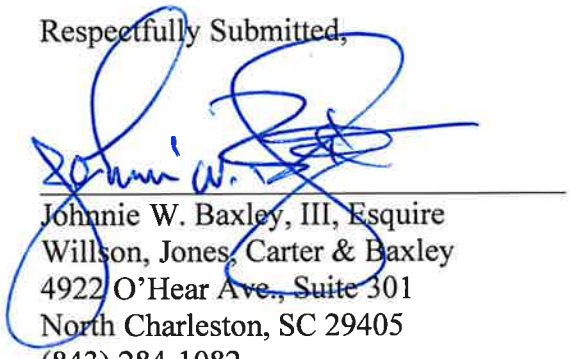
It is worth noting that throughout the course of both of his claims, Appellant continued working for Respondents, who accommodated his work restrictions, until his resignation on January 5, 2021. At the hearing, Appellant testified that his resignation was voluntary and was, in part, due to issues he was having with the Sheriff's Department. The Court of Appeals correctly noted per Clemmons that this evidence of Claimant working is not conclusive on the issue of total disability, but it is certainly part of the evidence as a whole that was considered in determining whether substantial evidence supported the Commission's findings.

Respondents assert that this issue does not necessitate a rehearing at all, and would certainly not rise to the level of requiring a rehearing *en banc*.

CONCLUSION

For the foregoing reasons stated above, Respondents request reconsideration and rehearing of "Law/Analysis C. Admissibility of Evidence" in its prior order, and Respondents leave to the good judgment of the Court of Appeals whether this should be reheard *en banc*. Respondents assert that neither of the other two issues raised by Appellant qualify for rehearing or rehearing *en banc*.

Respectfully Submitted,



Johnnie W. Baxley, III, Esquire
Willson, Jones, Carter & Baxley
4922 O'Hear Ave., Suite 301
North Charleston, SC 29405
(843) 284-1082
jwbaxley@wjcblaw.com

ATTORNEY FOR RESPONDENTS

August 5, 2024

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PROOF OF SERVICE

I certify that I have served **Respondents' Return to Petition for Rehearing With Suggestion for Rehearing En Banc** by electronic service on August 5,2024, on the Honorable Jenny Abbott Kitchings, Clerk of Court of the South Carolina Court of Appeals at:

ctappfilings@sccourts.org

In addition, I certify that I have served the same on the all counsel of record for Appellant in the above-captioned claim on August 5, 2024, by email at the following addresses:

Preston F. McDaniel, Esquire
kim@pfmcdlaw.com; kathryn@pfmcdlaw.com; rose@pfmcdlaw.com

Gerald Malloy, Esquire
gmalloy@bellsouth.net; gelliotte@bellsouth.net

Johnnie W. Baxley, III, Esquire
Willson, Jones, Carter & Baxley, P.A.
4922 O'Hear Avenue, Suite 301
North Charleston, SC 29205
(843) 284-1082
jwbaxley@wjcblaw.com
Attorney for Respondents

August 5, 2024
North Charleston, South Carolina

willson jones carter & baxley

attorneys at law
greenville | charleston | columbia
charlotte | myrtle beach | raleigh | atlanta

Johnie W. Baxley, III
Direct (843) 284-1082
Fax (843) 284-1081
jwbaxley@wjcblaw.com

4922 O'Hear Ave.
Suite 301
North Charleston, SC 29405
www.wjcblaw.com

August 5, 2024

VIA E-FILING ONLY - ctappfilings@sccourts.org
The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: Michael Crowley vs. Darlington County
Appellate Case No. 2022-000282
Carrier: South Carolina Association of Counties SIF - Claim No.: 2018-SCAC-070654
WJCB File No.: 0560.00961

Dear Ms. Kitchings:

Per the Court of Appeals' request dated July 31, 2024, I am fling the attached Respondents' Return to Petition for Rehearing With Suggestion for Rehearing En Banc. I have also attached the Proof of Service.

With kindest regards,

WILLSON JONES CARTER & BAXLEY, P.A.

Johnnie W. Baxley, III

JWB

cc: Mr. Gerald Malloy (via e-mail)
Mr. Preston F. McDaniel (via e-mail)