

THE STATE OF SOUTH CAROLINA

In The Supreme Court

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S.C. SUPREME COURT

Appeal from the South Carolina
Workers' Compensation Commission

Unpublished Opinion No. 2024-UP-110
Heard February 6, 2024-Filed March 27, 2024
Withdrawn, Substituted, and Refiled July 3, 2024

Rachel J. Turner, Employee,Petitioner,

v.

Medustrial Healthcare Staffing Service and Condustrial
Inc; Guarantee Insurance Company; Countrywide
Staffing Solutions Group, Inc.; South Carolina
Department of Corrections; State Accident Fund; and
South Carolina Uninsured Employer's Fund, Respondents-Petitioners
of which Condustrial, Inc. f/k/a Medustrial Healthcare
Staffing Service, Employer, is the..... Respondent

**RETURN TO
PETITION FOR WRIT OF CERTIORARI**

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Question Presented

- I. Did the Court of Appeals properly conclude that Turner was not entitled to temporary total disability benefits after September 30, 2015, based on the substantial evidence in the record?
- II. Whether the Court of Appeals properly concluded that the Commission properly denied Turner's Motion to Admit Newly Discovered Evidence?

Statement of the Case

Petitioner, Rachel Turner ("Turner"), is a licensed practical nurse ("LPN") who, on February 7, 2013, entered into a relationship with Medustrial Healthcare, Inc., a division or service of Conustrial, Inc., under which Medustrial/Conustrial placed Turner as a nurse with various companies with which Medustrial/Conustrial contracted. (R. p. 2980) Turner chose which assignments and shifts she would accept, and where she would work. (R. pp. 632-633, 734-736) The wages Turner earned through Conustrial were reported on a 1099 rather than a W-2. (R. pp. 3079-3099; 3539- 3547) When Turner filed her 2014 and 2015 tax returns, she filed a Schedule C in which she claimed a number of business-related deductions, including vehicle expenses, insurance, office expenses, utilities, internet/cable, laptop computer, office supplies, and other claimed business- related expenses. (R. pp. 3079-3099; 3539-3547) Turner's alleged business expenses for 2014 totaled \$39,577.00 and as a result her total business "profit" for that year was \$16,603.00. (R. pp. 3082) For 2015, Turner's alleged business expenses totaled \$30,296.00, and her total business "profit" for that year was \$12,706.00. (R. p. 3541) As a result of Turner's claimed business expenses, along with other deductions, Turner did not pay any income taxes in 2014 or 2015. (R. pp. 3079-3099; 3539-3547)

On or around September 5, 2015, Turner was working at Kirkland Correctional Institution ("Kirkland") of the South Carolina Department of Corrections ("SCDC") pursuant to a contract

between Medustrial Healthcare and SCDC. (R. pp. 2972-2978). On or around September 5, 2015, two inmates held Turner and another nurse, who was an employee of SCDC, hostage for a number of hours. (R. pp. 593-599) Following her release by the inmates, Turner's brother took her to the hospital, where she received treatment. (R. pp. 599-600, 2702-2714) She was diagnosed with facial pain, bruising, and anxiety post assault, and was discharged home in stable condition. (R. pp. 2702-2714).

After a number of status conferences, numerous requests and motions by all parties, and protracted discovery, this claim was set to be tried on July 24, 2017, and July 31, 2017. The hearing on the merits of this claim commenced on July 24, 2017. Prior to reconvening the second day of the hearing on July 31, 2017, counsel for Countrywide Staffing Solutions Group and Guarantee Insurance Company advised the Commission of a potential conflict between his two clients and requested to be relieved as counsel for these parties. On July 31, 2017, this request was considered by the Hearing Commissioner and granted, and the continuation of the hearing was postponed permitting these parties to obtain new counsel. Following a number of additional status conferences and telephone conferences, the hearing reconvened on October 12 and 13, 2017. After the matter did not conclude following two additional full days of hearing, the matter was scheduled to reconvene on November 2, 2017, to continue through the weekend if needed to conclude the hearing. In all, the hearing took seven days of testimony and presentation of evidence: July 24, October 12, October 13, November 2, November 3, November 4, and November 6, 2017.

The Hearing Commissioner issued her Order and Decision on July 31, 2020. The Hearing Commissioner's Order held that, on the date of her injury, Turner was a direct employee of Conustrial and a statutory employee of SCDC; that she sustained an injury by accident arising out of and in the course and scope of that employment on September 5, 2015; that Conustrial

failed to maintain workers' compensation insurance covering Turner at the time of her work accident; and that liability for the injuries sustained by Turner as a result of her September 5, 2015, work accident transferred to SCDC, as the statutory employer, and SAF, as SCDC's carrier, under S.C. Code Ann. §§42-1-400 through 42-1-450. The Hearing Commissioner further held that Turner's average weekly wage was \$1,130.86, with a corresponding compensation rate of \$753.94. The Hearing Commissioner further held that Turner was not entitled to temporary total disability after September 30, 2015. Furthermore, the Hearing Commissioner denied Turner's Motion to Admit Newly Discovered Evidence.

Following the issuance of the Order, SCDC and SAF filed a timely Form 30 appealing portions of the Hearing Commissioner's Order, as did Turner, Condustrail, and Guarantee Insurance Company/SC Property & Casualty Insurance Guaranty Association.

Following argument on November 10, 2020, the Commission issued an Order dated April 6, 2021, in which it affirmed in part and reversed in part the decision of the Hearing Commissioner. Specifically, the Commission reversed the Hearing Commissioner's Findings of Fact and Conclusion of Law regarding the average weekly wage/compensation rate. The Commission held that the correct average weekly wage was \$762.21, and the compensation rate was \$508.17. The Commission further held that Turner was not entitled to temporary total disability after September 30, 2015. Furthermore, the Commission properly denied Turner's Motion for After Discovered Evidence.

Following the decision of the Commission, Condustrail filed a Motion to Reconsider on April 12, 2021. On May 4, 2021, Turner filed a Motion to Submit Additional and Newly Discovered Evidence. On May 17, 2021, the Commission denied Condustrail's Motion to Reconsider. On June 15, 2021, Turner filed a Notice of Appeal from the April 6, 2021, and May

17, 2021, Orders of the Commission, and Condustrial filed its own Notice of Appeal from those same Orders on June 16, 2021.

With regard to Turner's Motion to Submit Additional and Newly Discovered Evidence, the Commission issued an Order on June 21, 2021, denying the Motion as it lacked jurisdiction. Turner requested, and was granted, a partial remand from the Court of Appeals for the Commission to consider the merits of the Motion. On September 20, 2021, the Commission issued an Order denying the Motion.

On March 27, 2024, the Court of Appeals issued an opinion reinstating the Hearing Commissioner's finding for the average weekly wage and compensation rate and also affirming the Commission's finding that Turner was not entitled to temporary total compensation after September 30, 2015. The Court also affirmed the Commission's denial of Turner's Motion to Admit Newly Discovered Evidence. Turner, Condustrial and SCDC/State Accident Fund filed Petitions for Rehearing, and these petitions were denied on July 3, 2024. On July 3, 2024, the Court of Appeals withdrew, substituted and refiled its opinion.

Arguments

I. **Substantial evidence supports the Commission's finding that Turner was not entitled to temporary disability compensation after September 30, 2015**

Turner contends that the Court of Appeals erred in affirming the Commission's denial of temporary total disability ("TTD") benefits after September 30, 2015. Turner contends she is entitled to TTD benefits from the date of her work injury and continuing to this date on a running award. However, such claim is entirely unsupported by the law and the evidence in the record and would be based entirely on speculation. Substantial evidence in the record supports the Court of

Appeal's affirmation of the Commission's ruling that Turner is not entitled to TTD benefits after September 30, 2015.

Turner contends that she is entitled to TTD benefits from the date of her work injury to present. The basis for this argument is Turner's claim that she has "never recovered sufficiently from her PTSD to the point where she could return to work." However, Turner's argument is not based on any properly submitted medical evidence. Turner further argues that she is not barred from receipt of TTD benefits for refusing suitable employment since she claims the offer was not genuine and made in good faith and was made at a time Turner was written out of work. Again, the evidence in the record does not support these contentions.

Turner had the burden of proving through competent evidence that she was entitled to TTD benefits, and for what period. Lee v. Bondex, Inc., 406 S.C. 97, 749 S.E.2d 155 (Ct. App. 2013 (noting that "[t]he claimant bears the burden of proving entitlement to temporary disability compensation.")). Further, the Courts have held that an award in favor of a claimant "may not rest on surmise, conjecture or speculation and must be founded on evidence of sufficient substance to afford a reasonable basis for it." Coleman v. Quality Concrete Products, Inc., 245 S.C 625, 142 S.E.2d 43 (1965). In order to establish entitlement to TTD benefits, a claimant must establish "that work restrictions prevent him from performing the job he had before the injury, and that his current employer has not offered him light-duty employment." Lee v. Bondex, Inc., 406 S.C. at 102, 749 S.E.2d at 157 (Ct. App. 2013). Additionally, S.C. Code Ann. §42-9-190 provides that where "an injured employee refuses employment procured for him suitable to his capacity and approved by the commission he shall not be entitled to any compensation at any time during the continuance of such refusal." The only medical evidence submitted that the claimant was unable to work was a note taking Turner out of work from September 5, 2015-September 30, 2015. Turner failed to prove

that she had work restrictions preventing her from working after September 30, 2015. Furthermore, the record shows that there was a clear offer of light-duty employment.

In support of her argument that she has not been able to return to work in any capacity since her assault, Turner refers to her testimony before the Hearing Commissioner as well as references in the medical records to her complaints and condition. Critically, Turner fails to point to any actual opinion from a medical provider or from a vocational expert that Turner has been and remains unable to return to work in any capacity outside of a single document writing her out of work from September 16, 2015, until September 30, 2015. (R. p. 3027) While Turner's medical records reflect requests for out-of-work statements following September 30, 2015, Turner failed to produce any such statements. Also, while Turner testified that she previously received out-of-work statements, but they were lost during her eviction from a prior residence, she presented no evidence that she attempted to obtain replacement copies of these statements from her providers prior to the Hearing Commissioner's decision that she was not entitled to TTD benefits after September 30, 2015.

Ultimately, the "evidence" that Turner is urging this Court to consider outside of actual medical opinions is her own self-serving statements, both in her testimony and to her providers. Turner is also requesting that this Court interpret her medical records to read into them some sort of implied statement that Turner is totally disabled. However, to do so would be ask the Court to do exactly what the Commission held it cannot do under Burnette v. City of Greenville, 401 S.C. 417, 737 S.E.2d 200 (Ct. App. 2013): issue an opinion that would be the equivalent of a medical opinion.

With regard to the offer of employment made to Turner by Condustrial in September 2015, Turner contends that it was made one time, and that she could not have accepted the offer since

she was written entirely out of work at the time it was made. She further claims that since the offer was made and rejected, the offer was "null and void unless renewed or a counteroffer [was] made." However, there is no evidence that she advised Condustrial that, at the time they extended the offer of employment, she remained written out of work for another six days, to put Condustrial on notice that it needed to extend or renew its offer. Additionally, while she faults Condustrial for not renewing its offer after September 30, 2015, there is no evidence that Turner ever contacted Condustrial after that date to see if the offer was still available to her. In fact, the evidence in the record is that she refused to take calls from Tony Durham and Tom Sears, cutting off communication with those who could make or confirm such an offer.

In addition to Turner's rejection of the job offer by Condustrial, there is also no evidence in the record that Turner ever attempted to search for or secure any type of employment outside of Condustrial after September 30, 2015. See Coleman v. Quality Concrete Products, Inc., 245 S.C 625, 142 S.E.2d 43 (1965) (*quoting Larson's Workmen's Compensation Law*, Vol. II, Section 57-66 that "Whenever claimant depends in part on a showing that he has been unable to get work because of his physical condition it naturally follows that claimant must prove that he has made reasonable efforts to secure employment.") Instead, Turner is asking this Court to award her almost nine years of compensation, and continuing, based on a single record placing her out of work for two weeks in 2015 and her own claims that she is unable to return to work in any capacity.

In addition to arguing that she could not have accepted Condustrial's offer of employment, Turner also contends that the offer of employment from Condustrial was not made in good faith and was not genuine. This request is based entirely on speculation regarding the alleged motives behind the drafting of the letter and conduct and behavior over the past five years that has significantly soured the relationship between Turner and Condustrial. She has not presented any

actual evidence that the offer was not genuine and would not have been honored by Condustrial. In fact, the only evidence in the record is the testimony from the Owner/President of Condustrial and its general counsel that such offer was genuine and made in a genuine effort to assist Turner. Turner acknowledges that she declined the offer, and that all contacts between Turner and Condustrial after the offer were hostile, contributing to the further disintegration of their relationship.

Finally, Turner contends that the Commission erred in declining to award TTD back to the date of injury because Turner is not at MMI, so the liable party would not have been able to stop TTD under the Act once it was started back in September 2015. However, TTD has never been started, and this matter is not before the Commission on Respondents' Form 21. Rather, the matter was before the Commission on the Appellant's Form 50 to determine whether Turner was an employee and therefore covered by the Act, whether she sustained a compensable injury, and whether she was owed TTD and for what time period. As this was on Turner's Form 50, it was her burden to prove all of the above. The Act is clear that a covered injured worker is entitled to TTD only for the time period "[w]hen the incapacity for work resulting from an injury is total." S.C. Code Ann. §42-9-10(A) The Hearing Commissioner reviewed the evidence for the time prior to the hearing before her and found that it supports a finding that Turner was disabled for a definite period of time, and she awarded back TTD for that period of time.

What Turner is asking is to award her almost nine years of back TTD based on a single document, completed by someone other than the doctor who actually evaluated her, that placed her out of work for two weeks. Of note, the Commission did not address entitlement to benefits beyond the date of the hearing since "the Commission would not have knowledge of whether the Claimant has or has not been issued work restrictions applicable to periods after the date of the

hearing." The Commission, and this Court, do not have any records from Turner's present treatment, and the opinions of her present doctors regarding her work restrictions, if any. Further, Turner is asking for an award of temporary benefits despite a clear offer of employment within the record. Such a finding would be entirely inconsistent with the intent of the Workers' Compensation Act and would necessarily be entirely founded on conjecture and speculation.

The Court of Appeals was correct in affirming that the Commission's finding that Turner is not owed TTD past September 30, 2015. Substantial evidence in the record clearly supports this finding. Therefore, the Petition for Writ of Certiorari should be denied as the Court of Appeals has not committed any legal error.

II. The Court of Appeals was correct in affirming the Commission's denial of Turner's Motion to Admit Newly Discovered Evidence

Turner alleges that the Court of Appeals erred in affirming the Commission's denial of her Motion to Admit Newly Discovered Evidence. The Court of Appeals found that the Commission had discretion to review additional evidence and determined that the Commission did not err by denying Turner's Motion to Admit Newly Discovered Evidence.

Regulation 67-707 provides that "[w]hen additional evidence is necessary for the completion of the record in a case on review the Commission *may, in its discretion*, order such evidence taken before a Commissioner." (emphasis added). Where a party makes such a request, they must establish that "[t]he evidence sought to be introduced is not evidence of a cumulative or impeaching character but would likely have produced a different result had the evidence been procurable at the first hearing." The party must further show that "[t]he evidence was not known to the moving party at the time of the first hearing, by reasonable diligence the new evidence could

not have been secured, and the discovery of the new evidence is being brought to the attention of the Commission immediately upon its discovery." Regulation 67-707(C)(2). "If the Commission grants the motion, the review hearing is stayed. The case will be remanded to the original Hearing Commissioner who may, unless otherwise provided, reconvene the hearing or admit the deposition of a witness into the record." Id. The original Hearing Commissioner would then "issue his or her findings and recommendations in the form of an order to the Commission and the parties." Id.

In the present claim, Turner filed a Motion requesting to add a record that Turner claims reflects a physician's opinion that she was unable to work from October 21, 2015, through November 20, 2015. Turner contends that this record alone establishes that she is entitled to back TTD, and to remain on a running TTD award. Turner's counsel contends he did not have this record until April 19, 2021. However, it is clear that Turner was aware of this record at the time of the hearing, and even testified to its existence during the first day of the hearing, more than three months before the hearing concluded. There is no indication Turner, or her counsel attempted to secure this record until it became evident she would get an adverse ruling from the Hearing Commissioner due to the absence of sufficient evidence to support her claim for TTD benefits. Further, there was no attempt to introduce this document until after the Full Commission issued its ruling affirming that adverse ruling.

Furthermore, it is clear that this record could have been secured through reasonable diligence prior to the hearing before the Hearing Commissioner, or certainly before she issued her ruling. This claim involved protracted discovery, and it was abundantly clear to Turner that she was not in possession of her complete records well prior to the hearing. She testified that a number of her records were lost when she was evicted from a prior residence. Specifically, it became

evident that specific documents were missing when Turner was questioned about the only document in the record writing her entirely out of work and testified that there were other such records. Despite this knowledge, there does not appear to be any indication that there was any effort on her part to ensure she secured all the necessary records from her providers and from SOVA prior to a ruling by the Hearing Commissioner, or by the review by or ruling from the Full Commission.

Even assuming *arguendo* that the record sought to be introduced by Turner had been admitted, the record below would continue to fail completely to show entitlement to the relief Turner seeks; almost nine years of back TTD, and to remain on a running award. At best, Turner purports that this document establishes that she was written out of work by a physician from October 21, 2015, through November 20, 2015. It does not establish that she was disabled and unable to return to work in any capacity from her date of injury to present. Further, in only supplying this record after the decision of not only the Single Commissioner, but the Full Commission, Turner has entirely deprived any of the other parties from conducting further discovery into this document or the alleged opinions expressed therein.

The Court of Appeals was correct in affirming the Commission's denial of Turner's Motion to Admit Newly Discovered Evidence. Therefore, Turner's Petition for Writ of Certiorari should be denied as the Court of Appeals did not commit any legal error.

Conclusion

Based on the arguments set forth herein above, the Respondents-Petitioners, the South Carolina Department of Corrections and the South Carolina State Accident Fund, respectfully request that the South Carolina Supreme Court deny the Petitioner's Writ of Certiorari to review

the July 3, 2024, Opinion of the Court of Appeals as the Petition raises no special or important reasons for review.

Respectfully submitted,



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