RECEIVED

JAN 0 6 2014

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

T. Scott Beck, Commissioner

Appellate Case No. 2013-00261

Opinion No. 5176 (S.C. Ct. App. filed October 9, 2013)

Richard A. Hartzell, Employee,.....Petitioner,

v.

Palmetto Collision, LLC, Employer,.....Respondent,

and

the S.C. Worker's Compensation Uninsured Employers Fund,.....Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

Kirsten Leslie Barr
S.C. Bar # 15525
Trask & Howell, L.L.C.
P.O. Box 2167
Mt. Pleasant, SC 29465
(843) 881-4228
Attorneys for Palmetto Collision

Other Counsel of Record:

Kerry W. Koon, Esq.
147 Wappoo Creek Drive, Suite 203
Charleston, SC 29412
Attorney for Petitioner

Lisa Glover, Esq.
S.C. Uninsured Employers Fund
P.O. Box 210039
Columbia, SC 29921-0039
Attorney for Respondent, SCUEF

Index

Counter-Statement of the Questions Presented for Review

I. Did the Court of Appeals properly exercise appellate jurisdiction, considering the Workers' Compensation Commission's March 26, 2012 Decision and Order is immediately appealable pursuant to S.C. Code Ann. § 1-23-380?

II. Did the Court of Appeals properly apply the substantial evidence standard of review and the applicable law in reversing the Worker's Compensation Commission's vague finding and implicit legal conclusion regarding the notice requirement of S.C. Code Ann. § 42-15-20?

III. Did the Workers' Compensation Commission err in vaguely finding Hartzell sustained "an injury by accident to his back" without any legal conclusion as to the requirements of S.C. Code Ann. § 42-1-160 and without the support of substantial evidence in the record?

IV. Did the Workers' Compensation Commission err as a matter of law by awarding Hartzell medical benefits when there is no competent evidence to support such a claim and by wholly excusing the burden of proof by "expert medical evidence stated to a reasonable degree of medical certainty" required by S.C. Code Ann. § 42-15-60?

Counter-Statement of the Case

The Petitioner, Richard Hartzell, alleges that one day (he is "not sure exactly what day it was") he "started to clean up" the Palmetto Collision body shop and sometime later "started having pain." (A. p.54, lines 22-25; pp.43-44). Hartzell speculated that this was "approximately at the end of February" 2009 (A. p.55, lines 3-4). Hartzell admits that he did not have a sudden onset of pain at work. (A. p.55, lines 20-22). However, Hartzell claims that the "next day" he told Palmetto Collision's owner, Mike Stallings, that he

"was pretty sore" and "must have hurt himself." (A. p.45). Hartzell did not seek medical treatment, but continued working until March 20, 2009, when he applied for unemployment benefits because "there was no work in the shop and the storage lot was empty." (A. p.48, p. 220).

In the months that followed, Hartzell admits never asked Stallings for medical treatment or even complained of back pain. (A. p.58—59). The only "medical" evidence in the record those of a chiropractor, Austin Murray, to whom Hartzell reported in April 2009 "a recurrence of complaints related to a previously resolved spine, ribs, pelvic region condition which ... was not caused by a work or automobile accident." (A. p.175) (emphasis added). Chiropractor Murray did not relate Hartzell's symptoms or alleged need for chiropractic treatment to any work-related accident or injury, did not even mention any work-related accident, did not state that Hartzell required any medical treatment to lessen his alleged period of disability, and did not give any opinion to a "reasonable degree of medical certainty." (A. pp. 174—184). Hartzell admits that he did not ask Stallings to pay for his treatment with Chiropractor Murray. (A. p.66).

Hartzell later found work at Altman Suzuki as a painter in August 2009. Hartzell testified that his job at Altman Suzuki, especially "bending over and squatting down" had "caused his back to become sore and painful." (A. p.50, lines 8—10). Hartzell also worked during this period at the Ladson Fairground, where he would "set up tables and sell merchandise, household stuff and things." (A. p.51, lines 18—19).

On May 10, 2010, Hartzell for the first time filed a workers' compensation claim alleging an injury to his back on "2-25-09 (approx.)" while "moving auto frame machine" at Palmetto Collision. (A. p.19). Stallings testified that this was the first notice he had

that Hartzell was alleging a work-related injury some fifteen (15) months earlier. (A. pp.113-114). Despite speaking to Hartzell several times after he left Palmetto Collision, Stallings testified that Hartzell never gave him any reason to belief he had injured his back or that he needed medical treatment. (A. pp. 108—109).

Palmetto Collision formally denied Hartzell's claim by Form 51 dated June 8, 2010, at which time Palmetto Collision specifically denied it was subject to the Workers' Compensation Act and also raised Hartzell's failure to give notice within 90 days as a defense, citing S.C. Code Ann. § 42-15-20. A hearing was held before Commissioner Andrea C. Roche in North Charleston on July 12, 2011. Thereafter, Commissioner Roche issued a Decision and Order dated September 8, 2011, which included vague findings that Hartzell "sustained an injury by accident to his back" and "timely reported the injury," but failed to make any legal conclusion or even address the requirements of S.C. Code Ann. §§ 42-1-160 or 42-15-20. Commissioner Roche also awarded Hartzell medical benefits, despite the fact that he presented no evidence that he required medical treatment, based upon Commissioner Roche's erroneous conclusion that Hartzell did not bear any burden of proof and that S.C. Code Ann. § 42-15-60 otherwise did not apply to Hartzell.[1]

Palmetto Collision filed a Form 30 seeking review by the Workers' Compensation Commission's Appellate Panel. (A. pp.24—27). By Order dated March 26, 2012, the Appellate Panel affirmed the prior order of Commissioner Roche by a vote of two to one.

[1] S.C. Code Ann. § 42-15-60 requires "expert medical evidence stated to a reasonable degree of medical certainty" that additional medical treatment would "tend to lessen the period of disability." However, Commissioner Roche nullified this statutory requirement and concluded that "the employer is not entitled to the benefit of any defense based upon the lack of an expert medical opinion." (A. p.17, #3).

(A. pp.9-18). The Appellate Panel adopted Commissioner Roche's vague findings regarding the accident and notice requirements, but failed to address S.C. Code Ann. §§ 42-1-160 or 42-15-20 or make any legal conclusions regarding contested legal issues.

Thereafter, Palmetto Collision appealed to the South Carolina Court of Appeals. After receiving briefs and hearing oral arguments, the Court of Appeals issued Opinion Number 5176 on October 9, 2013, concluding that the record does not contain substantial evidence that Hartzell provided "adequate notice he had suffered a work-related injury," as required by S.C. Code Ann. § 42-15-20. The Court of Appeals did not address the remaining issues on appeal[2], as the notice requirement was dispositive.

Palmetto Collision respectfully contends that the Court of Appeals properly applied the substantial evidence standard of review and the applicable law in reversing the Worker's Compensation Commission's vague finding and implicit conclusion regarding the notice requirement of S.C. Code Ann. § 42-15-20. Furthermore, because the decision of the Court of Appeals does not raise any novel question of law, contains no dissent, does not conflict with any prior decision of the Supreme Court, involves no substantial constitutional issue, and includes no federal question, Palmetto Collision respectfully requests that the Petition for Writ of Certiorari be denied pursuant to Rule 242(b), S.C.A.C.R.. Should the Supreme Court grant the Writ of Certiorari on this issue, Palmetto Collision respectfully requests that the Court consider the additional arguments

---

[2] The remaining issues on appeal where "*Did the Workers' Compensation Commission err in finding that the Claimant sustained an injury to his back by accident "on or about February 24, 2009" and in falling to make any conclusion of law with respect to S.C. Code Ann. § 42-1-160?*" and "*Did the Workers' Compensation Commission err as a matter of law in awarding the Claimant 'medical, surgical, hospital or other authorized treatment' in direct contravention of S.C. Code Ann. § 42-15-60?*"

raised by Palmetto Collision regarding the propriety of the Workers' Compensation Commission's Decision and Order and the award of medical benefits.

Hartzell also raises a new argument that the Court of Appeals was without appellate jurisdiction to reverse the Workers' Compensation Commission. Palmetto Collision respectfully contends that, not only is this argument without merit, but because this argument was not raised in the Court of Appeals, it is not properly presented in the Petition for Writ of Certiorari. Rule 242 (d)(2), S.C.A.C.R., Norton v. Opening Break of Aiken, Inc., 319 S.C. 469, 462 S.E.2d 861 (Ct. App. 1995). Therefore, Palmetto Collision respectfully requests that the Petition for Writ of Certiorari be denied as to this issue.

Arguments

I. The Court of Appeals properly exercised appellate jurisdiction in this case because the Workers' Compensation Commission's March 26, 2012 Decision and Order is immediately appealable pursuant to S.C. Code Ann. § 1-23-380.

Not only is Hartzell's argument that the Court of Appeals lacked appellate jurisdiction not properly presented, his argument is without merit. According to Hartzell, the case of Bone v. U.S. Food Service, 404 S.C. 67, 744 S.E.2d 552(2013), prohibits the Court of Appeals from immediately reviewing the Workers' Compensation Commission's final Decision and Order in this case. At issue in Bone was whether a Circuit Court order remanding a case to the Workers' Compensation Commission constituted a "final judgment" of the Circuit Court, as required by S.C. Code Ann. § 1-

23-390.[3] In Bone, the Circuit Court awarded no benefits to the claimant, instead the Court's remand instructions required the Commission to take further action and determine whether and to what extent the claimant was entitled to medical and compensation benefits. As a result, the Circuit Court's order in Bone was not an enforceable judgment.

However, the case *sub judice* is clearly distinguishable. Not only does the present appeal not involve an appeal from the Circuit Court, but the Commission's Decision and Order is not an intermediate remand order. Instead, the Commission's Decision and Order awards Hartzell medical benefits, making it final and enforceable. Therefore, Bone and the statutory language construed therein (S.C. Code Ann. § 1-23-390), are neither applicable, nor even relevant, to whether the Court of Appeals properly exercised appellate jurisdiction in the present appeal.

Instead, the statute relevant to the appellate jurisdiction of the Court of Appeals in this case is S.C. Code Ann. § 1-23-380, which, unlike § 1-23-390, does not limit the Court's appellate jurisdiction to review of "final judgments." In fact, S.C. Code Ann. § 1-23-380 does not even employ the critical term "final judgments." Moreover, S.C. Code Ann. § 1-23-380 plainly states that a "preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy."

[3] According to the Bone opinion, "At issue here is the meaning of a 'final judgment' under section 1-23-390."

Palmetto Collision respectfully contends that the Commission's March 26, 2012 Order is a "final decision" as contemplated by § 1-23-380, because it fully and finally addresses the only claim advanced by Hartzell, *i.e.*, a claim for medical benefits, by making a blanket award of such medical benefits.[4] (A. p, 17, Conclusion of Law #3; p.36, lines 6-15). There are no further claims or issues pending before the Commission and it would be entirely speculative to suggest that there will be any new claim filed in the future. If the Commission's March 26, 2012 Order is not a "final decision" simply because Hartzell may or may not file a claim for additional benefits in the future, then the Court's appellate jurisdiction and Palmetto Collision's right to due process hinges entirely on the speculative future actions of an adverse party. What if the present appeal is dismissed, but Hartzell files no future claim and there is no further, more "final" order to appeal? Would Palmetto Collision never have any right to review the March 27, 2012 Order? Plainly, such a result would be absurd. Palmetto Collision respectfully contends that the concept of finality under S.C. Code Ann. § 1-23-380 should be considered definite, not speculative, and relative only to the issues presently in dispute, not those which may or may not come before the Commission in the future. As such, the March 27, 2012 Order should be considered final for purposes of determining the appellate jurisdiction of the Court of Appeals pursuant to S.C. Code Ann. § 1-23-380.

Even assuming, *arguendo*, that the Commission's March 26, 2012 is merely a "preliminary" or "intermediate" agency action, Palmetto Collision respectfully contends

[4] Palmetto Collision respectfully contends that the Commission erred as a matter of law in making this award of medical benefits; however, because the notice issue under S.C. Code Ann. § 42-15-20 was dispositive, the Court of Appeals did not reach this issue.

that it is immediately reviewable pursuant to S.C. Code Ann. § 1-23-380. Under the terms of the March 26, 2012 Order, Palmetto Collision must contract with third-party medical providers to render "medical, surgical, hospital and authorized treatment" for Hartzell. No appeal of some future Commission order (which may or may not ever even come into existence) could alleviate or "remedy" Palmetto Collision's contractual obligations to authorized medical providers, which are required by the March 26, 2012 Order. Therefore, to force Palmetto Collision to contract with third-party medical providers without some immediate right of review would eliminate any semblance of an "adequate remedy" and would be otherwise violative of Palmetto Collision's right to due process. Palmetto Collision respectfully requests that the Court interpret S.C. Code Ann. § 1-23-380 so as to preserve its constitutional and statutory right to meaningful review.

In fact, the South Carolina Supreme Court has recently addressed a similar issue in Shatto v. McLeod Regional Medical Center, (Opinion NO. 27341, Dec. 18, 2013), 2013 WL 6654374. In Shatto, the claimant was awarded medical and compensation benefits by the Workers' Compensation Commission, but there was no determination of her entitlement, if any, to benefits for permanent disability or lifetime medical benefits. Shatto's employer appealed to the Court of Appeals, arguing that there was no employer-employee relationship. The Supreme Court addressed the matter of appellate jurisdiction in light of the Bone decision and ultimately concluded that Bone "has no application." Similarly, insofar as Hartzell, like Shatto, may be able to file claims for additional benefits in the future, this fact has no bearing on the appellate jurisdiction of the Court of Appeals to review the Commission's March 26, 2012 Decision and Order pursuant to S.C. Code Ann. § 1-23-380.

Therefore, even if Hartzell is permitted to Petition for a Writ of Certiorari based on an argument that was not presented to or decided by the Court of Appeals, Palmetto Collision respectfully contends that the Court of Appeals committed no error in exercising appellate jurisdiction in this case. Furthermore, Hartzell's appellate jurisdiction argument involves no novel question of law, no conflict with any prior decision of the Supreme Court, no substantial constitutional question, and no federal question. Therefore, Palmetto Collision respectfully requests that the Supreme Court deny the Petition for Writ of Certiorari pursuant to Rule 242(b), S.C.A.C.R.

II. The Court of Appeals properly applied the substantial evidence standard of review and the applicable law in reversing the Worker's Compensation Commission's vague finding and implicit conclusion regarding the notice requirement of S.C. Code Ann. § 42-15-20.

After reviewing, considering, and discussing the paltry evidence regarding whether Hartzell gave Palmetto Collision "notice of the [alleged] accident," the Court of Appeals properly concluded that "in view of the entire record" the Commission's vague finding that Hartzell "timely reported the injury" is not supported by substantial evidence or the applicable law, which required Hartzell to supply "facts connecting the injury... with the employment." (*citing* Etheridge v. Monsanto Co., 349 S.C. 451, 562 S.E.2d 679 (Ct. App. 2002). Hartzell did not give Stallings or anyone else at Palmetto Collision any facts connecting his alleged back injury to his employment and admittedly never even requested any medical treatment until he filed a Form 50 some fifteen (15) months later. (A. p.66, pp.108—109).

Stallings, the sole owner of Palmetto Collision, testified that his first notice of the alleged accident was the Form 50 dated May 10, 2010. (R. p.114, ll.11-15). However, S.C. Code Ann. § 42-15-20 required Hartzell give Stallings notice of a job-related *accident* within ninety days after its occurrence. Hanks v. Blair Mills, Inc., 286 S.C. 378, 335 S.E.2d 91 (Ct. App. 1985); *see also* McCraw v. Mary Black Hosp., 350 S.C. 229, 237, 565 S.E.2d 286, 290 (2002). The burden was upon Hartzell to show compliance with S.C. Code Ann. § 42-15-20. *See* Lowe v. Am-Can Transport Servs., Inc., 283 S.C. 534, 324 S.E.2d 87 (Ct. App. 1984). While Hartzell testified that that he told Stallings, the owner of Palmetto Collision, the "next day" that he "was pretty sore" and "must have hurt himself" (A. p.45, l.1), this alone is insufficient evidence upon which a conclusion in his favor could have been made under S.C. Code Ann.§ 42-15-20, because

> "the employer's knowledge of the fact that an employee becomes ill while at work does not necessarily, of itself, serve the employer with notice that such illness constituted or resulted in a compensable injury." Sanders v. Richardson, 251 S.C. 325, 162 S.E.2d 257 (1968).

There is no evidence that Hartzell ever reported any accident involving a "heavy frame machine" as the Commission's order implies, nor did he claim to give Stallings any other information that would suggest that his alleged back problem was work-related. (A. pp.58—59). Instead, Hartzell admits he continued to work for Stallings for another month and never even requested any medical treatment. (A. p.220; p.66). Hartzell further admits in his Petition that his "testimony was not as specific as it might have been," but that "it is inconceivable that [Stallings] would not have known Petitioner's injury was work related." Basically, Hartzell is suggesting that he should prevail upon

unfounded speculation because he certainly presented no evidence that he ever told Stallings that he injured his back moving a frame machine "on or about February 25, 2009."[5]

Palmetto Collision respectfully contends that the Court of Appeals properly applied that substantial evidence standard of review to the actual evidence in the record as a whole and properly applied S.C. Code Ann. § 42-15-20 so as to require Hartzell to prove, by a preponderance of the evidence, that his alleged back problem was caused by a work-related accident. The Court of Appeals properly concluded that it was legally insufficient for Hartzell to simply complain of back pain while at work. This conclusion does not present a novel question of law, does not involve a dissenting opinion, does not conflict with a prior decision of the Supreme Court, does not involve a substantial constitutional issue, and does not include any federal question. Therefore, Palmetto Collision respectfully requests that the Supreme Court deny the Petition for Writ of Certiorari pursuant to Rule 242(b), S.C.A.C.R..

However, in the event that the Court grants the Writ as to the notice issue, Palmetto Collision respectfully requests that the Court either address the remaining issues presented to the Court of Appeals as set forth below, or remand these issues for determination by the Court of Appeals.

---

[5] The Commission made no conclusion of law with respect to S.C. Code Ann. § 42-15-20; however, the Commission's finding seems to suggest that Hartzell reported that he injured his back "while moving a heavy frame machine." (A. p.17). There is simply no evidence in the record that such a conversation ever occurred; instead, Hartzell suggests that conjecture supports this finding. See Coleman v. Quality Concrete Products, Inc., 245 S.C. 625, 630-631, 142 S.E.2d 43, 45 (1965) (holding that and award "may not rest on surmise, conjecture or speculation and must be founded on evidence of sufficient substance to afford a reasonable basis for it.")

III. The Workers' Compensation Commission erred in vaguely finding Hartzell sustained "an injury by accident to his back" without any legal conclusion as to the requirements of S.C. Code Ann. § 42-1-160 and without the support of substantial evidence in the record.

According to the Workers' Compensation Commission, "the medical records and testimony" support a finding that Hartzell injured his back "on or about February 25, 2009, while moving a heavy frame machine." The Commission failed to make any conclusion of law regarding these issues and the March 26, 2012 Decision and Order does not even mention the legal requirements of S.C. Code Ann. § 42-1-1-60. Palmetto Collision respectfully contends that the Commission's impermissibly vague finding in this regard and utter failure to properly apply the law to the facts constitutes plain, reversible legal error. *See* S.C. Code Ann. § 1-23-350.[6] Essentially, there can be no "meaningful review" of the Commission's rulings on these important legal issues because the Commission failed to make any such rulings.

Furthermore, the Commission's impermissibly vague finding of fact that Hartzell did sustain "an injury by accident to his back" [sic] is not supported by substantial evidence and should be reversed. While the Commission purportedly relied on the "medical records" to find that Hartzell sustained an injury to his back "on or about February 25, 2009," the only "medical records" in evidence are the reports of a chiropractor, Austin

[6] S.C. Code Ann. § 1-23-350 requires that "[a] final decision or order adverse to a party in a contested case shall be in writing or stated in the record. A final decision shall include findings of fact and conclusions of law, separately stated. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings."

Murray. Hartzell did not see Dr. Murray until April 2009. According to Dr. Murray's April 2, 2009 narrative report, Hartzell complained of "a recurrence of complaints related to a previously resolved" condition that "was not caused by a work or automobile accident." (A. p.175) (emphasis added). Hartzell signed a statement for Dr. Murray on April 1, 2009 indicating that his condition began on February 30, 2009 and that the cause of his condition was "unknown." (A. p.174). There are no other records—medical, chiropractic, or otherwise -- concerning the cause of Hartzell's alleged back problem and there are no records whatsoever that mention Hartzell moving a heavy frame machine. Therefore, Palmetto Collision respectfully contends that the "medical records" simply do not support a finding that Hartzell injured "his back on or about February 25, 2009, while moving a heavy frame machine" and the Commission's finding in this regard should be reversed in accordance with the Administrative Procedures Act.

While Hartzell may have testified that he now believes he injured his back lifting a frame machine on February 25, 2009, he was forced to admit on cross-examination that he was "not sure exactly what day it was." (A. p.54, l.25). Hartzell also admitted that he did not have a sudden onset of pain moving anything at work. (A. p.55, ll.20-22). In addition, Hartzell admits that he continued working at Palmetto Collision after the alleged accident and that the reason he quit working for Palmetto Collision in March 2009 was not due to an alleged back injury, but was because work was slow. (A. p.56). Hartzell also admits that he applied for unemployment benefits after he left his job at Palmetto Collision (A. pp.216--229) and eventually found work as a painter at Altman Suzuki. Even during the course of his protracted unemployment claim, Hartzell admits that he never asked Stalling for medical treatment, never asked him to pay any medical

bills, and never even told him that his back was hurting. (A. pp.58-59, p.64, p.66). Palmetto Collision respectfully contends Hartzell's testimony, viewed as a whole, is not substantial evidence in support of a finding that Hartzell injured his back on or about February 25, 2009 lifting a heavy frame machine. Therefore, the Commission's finding in this regard should also be reversed in accordance with the Administrative Procedures Act.

Furthermore, Stallings testified that Hartzell never gave him any reason to believe that he had injured his back while working for Palmetto Collision and Hartzell never requested any medical treatment. (A. pp. 108-109, p.111--114). Even in his discussions with Hartzell in the year after he quit working for Palmetto Collision, Hartzell never gave Stallings any reason to believe that he had injured his back or was in need of medical treatment. Stallings further testified that nothing about Hartzell's job even required him to move a heavy frame machine and that Stallings would have never asked Hartzell to move a frame machine because Hartzell was known to have weak, arthritic shoulders. (A. p.110). The Commission failed to discuss or otherwise discount this testimony in making its conclusory finding and simply made no ruling of law on this issue; therefore, Palmetto Collision respectfully contends that, should the Supreme Court grant the Petition for Writ of Certiorari, the Commission's finding that Hartzell injured his back on or about February 25, 2009 and its implicit ruling of law on this issue should be reversed.

IV. The Workers' Compensation Commission erred as a matter of law in awarding Hartzell "medical surgical, hospital and other authorized treatment" in direct contravention of S.C. Code Ann. § 42-15-60.

The Commission found that Hartzell is entitled to medical treatment; however, no evidence is cited in support of this vague and conclusory finding. Palmetto Collision respectfully contends that there is no competent evidence upon which such a finding could be properly based and that only impermissible surmise, conjecture, and speculation support the claim for medical benefits. Perhaps more importantly, the Commission erred as a matter of law by completely relieving Hartzell of his burden of proof under S.C. Code Ann. § 42-15-60. (R. pp.17-18, #3). As such, Palmetto Collision requests that, should the Petition for Writ of Certiorari be granted, that the Commission's finding and conclusion regarding Hartzell's entitlement to medical benefits be reversed.

According to the Commission, S.C. Code Ann. § 42-15-60 "is not intended to disadvantage or burden" Hartzell with a burden of proof by actual evidence. This conclusion is plainly contrary to the applicable law, including the unequivocal terms of S.C. Code Ann. § 42-15-60. It was heretofore well-settled that a claimant bears the burden of proving his entitlement to benefits under the Workers' Compensation Act and that an award in his favor may not rest on mere surmise, conjecture, or speculation. Coleman v. Quality Concrete Products, Inc., 245 S.C. 625, 630-631, 142 S.E.2d 43, 45 (1965) (holding that and award "may not rest on surmise, conjecture or speculation and must be founded on evidence of sufficient substance to afford a reasonable basis for it."); Jennings v. Chambers Development, 516 S.E.2d 453 (Ct. App. 1999). In addition, S.C. Code Ann. § 42-15-60 specifically requires a heightened burden of proof for medical

claims beyond ten weeks from the date of the alleged injury. According to the plain an unequivocal terms of S.C. Code Ann. § 42-15-60, the Commission may only award medical benefits beyond ten weeks from the date of an injury when such treatment

> "will tend to lessen the period of disability as evidence by expert medical evidence stated to a reasonable degree of medical certainty."

The record contains no medical evidence that Hartzell requires any medical treatment, much less medical evidence that Hartzell requires medical treatment to "lessen the period of disability" related to an alleged low back strain in February 2009. The record certainly contains no opinion whatsoever "stated to a reasonable degree of medical certainty." Because Hartzell did not and cannot meet his burden of proof by "expert medical evidence stated to a reasonable degree of medical certainty," the Commission chose to eviscerate S.C. Code Ann. §42-15-60 and relieve Hartzell of his burden of proof entirely, ostensibly because favorable evidence "would be expensive and difficult to obtain." Palmetto Collision respectfully contends that the Commission erred as a matter of law in shifting the burden of proof to its small, struggling, family business, simply because Hartzell has filed a claim for medical benefits more than ten weeks after he alleges to have been injured. *See* Herndon v. Morgan Mills, 246 S.C. 201, 209, 143 S.E.2d 376, 380-381(1965) (stating that the "difficulty in proving a fact in a compensation case does not relieve the party on whom the burden rests of proving it, and does not shift the burden to the other party.") (internal citations omitted).

The Legislature, within its sole discretion, has chosen to place the burden of proof squarely upon Hartzell, despite any alleged expense or difficulty, based on the clear terms of S.C. Code Ann. § 42-15-60. "Once the legislature has made [a] choice, there is no

room for the courts to impose a different judgment based upon their own notions of public policy." South Carolina Farm Bureau Mut. Ins. Co. v. Mumford, 299 S.C. 14, 19, 382 S.E.2d 11, 14 (Ct. App. 1989). Therefore, Palmetto Collision, respectfully contends that the Commission erred as a matter of law in ignoring the plain and unambiguous requirements of S.C. Code Ann. § 42-15-60 and in entering an impermissibly vague finding in Hartzell's favor that is based on speculation, not substantial evidence. Palmetto Collision respectfully requests that the award of medical benefits be reversed in accordance with S.C. Code Ann. § 42-15-60, as it is supported by neither substantial evidence in the record, nor the applicable law.

Conclusion

Based upon these arguments and the Rule 242(b), S.C.A.C.R., Palmetto Collision respectfully requests that the Petition for Writ of Certiorari be denied. In the alternative, should the Court grant the Petition for Writ of Certiorari, Palmetto Collision respectfully requests that their remaining arguments, which were not addressed by the Court of Appeals due to the dispositive nature of the notice issue, be considered by either the Supreme Court or the Court of Appeals.

Respectfully submitted,

TRASK & HOWELL, L.L.C.
P. O. Box 2167
Mt. Pleasant, SC 29465

By Kirsten Leslie Barr
Kirsten Leslie Barr
S.C. Bar No. 15525
Attorneys for the Respondent

December 31, 2013
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

JAN 06 2014

S.C. SUPREME COURT

APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

T. Scott Beck, Commissioner

Appellate Case No. 2013-00261
Opinion No. 5176 (S.C. Ct. App. filed October 9, 2013)

Richard A. Hartzell, Employee,.....Petitioner,

v.

Palmetto Collision, LLC, Employer,.....Respondent,

and

the S.C. Worker's Compensation Uninsured Employers Fund,.....Respondent.

PROOF OF SERVICE

The undersigned hereby certifies that the Richard A. Hartzell and the S.C. Workers's Compensation Uninsured Employer's Fund were each served with a copy of the enclosed Return to Petition for Writ of Certiorari filed on behalf of Palmetto Collision this 2nd day of January 2014, by depositing a copy of the same in the United States Mail, first class postage prepaid, addressed to the parties of record, as follows:

Kerry W. Koon, Esq.
147 Wappoo Creek Drive, Suite 203
Charleston, SC 29412

Lisa Glover, Esq.
S.C. Uninsured Employers Fund
P.O. Box 210039
Columbia, SC 29921-0039

Kirsten L. Barr
Trask & Howell, LLC
Attorneys for Palmetto Collision