THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE SOUTH CAROLINA WORKER'S COMPENSATION COMMISSION

Appellate Panel

Appellate Case No. 2012-211870
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. Uninsured Employers Fund.....Respondent

PETITIONER'S REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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INDEX

ARGUMENT

I. Was the Decision and Order of the South Carolina Worker's Compensation Appellate Panel dated March 26, 2012, an appealable final order under South Carolina Code Ann. Section 1-23-380 (A) as interpreted in Bone v. U.S. Food Service, 404 S.C. 67, 744 S.E. 2nd 552 (2013).

The difficulty posed in answering this question results from the statutory amendment eliminating the Circuit Court as the first appeal from the Worker's Compensation Commission Appellate Panel.

Petitioner submits that, under current law, the decision of the Appellate Panel to award medical benefits is the procedural and factual equivalent of the Circuit Court order in Bone v.

U.S. Food Service, 404 S.C. 67, 744 S.E. 2nd 552 (2013). The reason is that, like the Circuit Court remand order in Bone, the Appellate Panel order not only contemplated, but ordered further proceedings to determine whether Petitioner is at MMI, whether he is need of additional medical treatment, and whether he is entitled to any benefits under the Act which would necessarily result from the evaluation and determination.

The Appellate Panel order is clear that the Worker's Compensation Commission has not made its final award.

Since the Circuit Court step is no longer applicable, the determination of this question must lie in the construction of S.C. Code Ann. Section 1-23-380 (A).

Respondent argues, against the Bone precedent, that the Appellate Panel order should be reviewable under Section 1-23-380 (A) because the employer should not be forced to contract with third party medical providers without some immediate right of review. It argues that it has no adequate remedy and is therefore deprived of due process. Petitioner respectfully submits that this issue has been decided in Bone where the Court determined that an order awarding medical benefits alone was not an interlocutory order of a type entitled to immediate review under Section 1-23-380 (A), and that the employer is no more disadvantaged by application of the rule than the claimant would be if the opposite result obtained. Id. at 404 S.C. 82-83, 744 S.E. 2nd 560. The Court noted in Bone, that "...there has been no definitive enforceable award entered in this case. That is the point made here." Id. at 404 S.C. 83, 744, S.E. 2nd 560. Thus the final "award" is the "final judgment" in a Worker's Compensation Commission case, triggering the right of appeal.

The Respondent cites Shatto v. McLeod Regional Medical Center (Opinion NO. 27341, December 18, 2013); 2013 WL 6654374, relying on a footnote in that case wherein this Court

stated that Bone "has no application". As far as can be gleaned from the footnote, the question of the applicability of Bone was raised relative to the appropriateness of the Supreme Court review of the Court of Appeals decision. The Court of Appeals review of the Appellate Panel's order is a completely distinct issue. Also, in Shatto, the Court of Appeals had reversed the Commission which had the effect of denying benefits. A denial of benefits is always a final, appealable decision.

II. Does the record contain substantial evidence that the Petitioner reported a work related accidental injury to the owner of the Employer within ninety (90) days?

Petitioner will not take the opportunity of this Reply to repeat the testimony upon which he relies to demonstrate that the record provided substantial evidence that Hartzell reported a work related injury to his employer.

Petitioner must point out, however, that Respondent's reliance upon Sanders v. Richardson 251 S.C. 325, 162 S.E. 2nd 257 (1968) is misplaced. In that case, the employee told his employer that he felt like he was "kind of hurting, I have got a kind of hurting in my side and back...I got a knot on my side." He was specifically asked if he told his employer how he got hurt and he responded negatively. He further testified that he told his employer "I believe I have hemorrhoids." Id. at 251 S.C. 327-328, 162 S.E. 2nd at 258. Here, Petitioner told his supervisor "...I was pretty sore, I must have hurt myself." (R. p. 44, line 23 – p. 45, line 1). One having "hurt himself" as opposed to just "kind of hurting" indicates some incident causing injury.

Other corroborative testimony distinguishes this case, including the following from Petitioner's cross-examination:

> "Q: And you said you had some discussion, you said you mentioned that your back was sore from working one day; is that what you told him?

A: Yes, that was the next day after I had realized I had somehow injured my back. (R. p. 64, lines 17-21).

The factual issue in Sanders is sufficiently different so that Sanders does not control.

III. The Worker's Compensation Commission did not err by finding Hartzell sustained "an injury by accident to his back", and its findings and conclusions were sufficiently stated in the Appellate Panel Order.

This issue was not ruled upon by the Court of Appeals.

An administrative agency decision is in compliance with the APA if sufficiently detailed to enable a reviewing Court to determine if fact findings and conclusions are supported by the evidence and whether the law has been correctly applied. Cloyd v. Mabry 295 S.C. 86, 89-90 367 S.E. 2nd 171, 173 (S.C. App. 1988) The Appellate Panel Order outlined the questions presented for review and the standard of review. It also summarized the evidence in the case including the testimony upon which it relied in determining that the Claimant's testimony was more credible on the fact of, and reporting of the injury (R. pp. 12-14). It further summarized its legal conclusions in detail with citations of authority as to the questions of law presented in the appeal (R. pp. 14-16). Though its enumerated findings of fact and conclusions of law were relatively brief, neither the parties nor the reviewing Court were presented with any difficulty in determining the factual or legal issues in the case. Cloyd makes it clear that form does not supersede function. No prejudice to any party has resulted from the format of the order.

IV. The Worker's Compensation Commission did not err as a matter of law in awarding Hartzell "medical, surgical, hospital and other authorized treatment" and did not contravene S.C. Code Ann. Section 42-15-60.

This also is an issue upon which the Court of Appeals did not rule. The Appellate Panel's ruling on this matter was explained in detail with citations of legal authority (R. pp. 14-16).

The question is whether Section 42-15-60 (A) requires an on employee to provide an expert medical opinion as a precondition of treatment where the employer has not first provided initial treatment as mandated. That section provides

> "The employer shall provide medical, surgical, hospital, and other treatment including medical and surgical supplies as reasonably may be required, for a period not exceeding ten (10) weeks from the date of an injury, to effect a cure or give relief and for an additional time as in the judgment of the Commission will tend to lessen the period of disability as evidenced by expert medical evidence stated to a reasonable degree of medical certainty...."

To reach its conclusion that, under the circumstances of this case, the employee was not required to present such an opinion, the Appellate Panel first looked at the general purposes of the Worker's Compensation Law. The panel cited Yeomans v. Anheuser Busch, Inc. 198 S.C. 65, 15 S.E. 2nd 833 (1941):

> "The basic purpose of the Compensation Act is inclusion of employers and employees and not their exclusion." Id. at 15 S.E. 2nd 835,

and Caughman v. Columbia YMCA 212 S.C. 337, 47 S.E. 2nd 788 (1948):

> "To great extent the whole scheme of workman's compensation is to place the economic burden of industrial accidents upon industry rather than upon the workers and their dependents, and as to the latter thereby rendered indigent, upon the state." Id. at 15 S.E. 2nd 789-790.

The panel also cited Elliot v. South Carolina Department of Transportation 362 S.C. 234, 607 S.E. 2nd 90 (Ct. App. 2004), wherein the Court of Appeals observed:

> "The Workman's Compensation Act is remedial legislation enacted to protect the worker and therefore the law is given a broad construction in order to accomplish that end." Id. at 607 S.E. 2nd 92.

The Appellate Panel correctly recognized that the legal principles above cited prohibit placing undue burdens upon the employee. The panel therefore concluded that the requirement of expert medical evidence is not triggered until the employer has complied with the Act by providing medical treatment for the initial ten (10) week period after the date of injury (R. p. 15). The panel reasoned that to do otherwise would shift the burden of providing initial treatment "to effect a cure or give relief" to the employee which is inconsistent with the statute and the purposes of the Act.

The Appellate Panel further relied upon settled rules of statutory construction.

"Words used in a statute must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand its operation" (Citation omitted). "The language must also be read in a sense which harmonizes with its subject matter and accords with its general purpose." Smith v. South Carolina Insurance Company 350 S.C. 82, 564 S.E. 2nd 358, 361 (Ct. App. 2002).

It considered State v. Woody 345 S.C. 34, 545 S.E. 2nd 521 (Ct. App. 2001) wherein the Court of Appeals held:

> "...the Court should not consider a particular clause in isolation but should read it in conjunction with the purpose of the whole statute and the policy of the law." Id. at 545 S.E. 2nd 521, 522,

and Heape v. Heape 335 S.C. 420, 517 S.E. 2nd 1 (Ct. App. 1999) where it was stated:

> "A statute must, as a whole be interpreted practically, fairly, and reasonably such that the interpretation harmonizes with the purpose, design, and policy of the lawmakers." Id. at 335 S.C.424, 517 S.E. 2nd 2.

The Appellate Panel concluded that under these rules of construction and in order to be consistent with the Act's statutory purpose to place the economic burden of workers' accidents upon industry and favor inclusion rather than exclusion, Section 42-15-60 (A) should not be interpreted to deny an employee the right to employer provided medical treatment where the employer has failed to provide such treatment during the initial ten (10) week period. Otherwise,

the panel reasoned, the phrase "....and for additional time as in the judgment of the Commission will tend to lessen the period of disability..." would be made meaningless by eliminating the distinction between employer responsibility to provide initial treatment and the Claimant's responsibility to demonstrate by expert opinion the need for additional treatment. See Barnhill v. Bank of America, N.A. 318 F. Supp., 2nd 696 (DSC 2005) wherein United States District Judge Herlong observed:

> "It is a cardinal principal of statutory construction that statutes, ought, upon the whole to be construed that, if it can be prevented, no clause, sentence or words shall be superfluous, void or insignificant." Id. at 700.

In the routine case, the expert medical opinion required by 42-15-60 (A) is rendered by the physician chosen by the employer to provide mandatory initial treatment. The interpretation urged by the Appellant would require that, before receiving treatment, the employee identify a doctor willing to accept a workers compensation case without the usual prior employer approval, and procure and pay for an expert opinion. Such a burden on the employee would be unreasonable and inconsistent with our Appellate Courts' interpretation of the purposes of the Act.

This issue was resolved by the Appellate Panel as primarily one of law and its legal conclusions were well stated and more than sufficient under Cloyd. Supra.

CONCLUSION

The writ of certiorari should be granted and this appeal should be dismissed or in the alternative the Court of Appeals should be reversed as there is substantial evidence in the record that the Petitioner gave adequate notice of injury to his employer.

Respectfully submitted,

January 10, 2014

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PROOF OF SERVICE

I certify that I have served Petitioner's Reply to Return to Petition for Writ of Certiorari by depositing a copy of same in the United States mail, postage prepaid, on January 10, 2014, addressed to their attorney of record, Kirsten Barr, Esq. and to the attorney for the S.C. Uninsured Employers Fund, Lisa Glover, Esq., as follows:

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