

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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APPEAL FROM CHARLESTON COUNTY

COURT OF COMMON PLEAS

G. THOMAS COOPER, JR., CIRCUIT COURT JUDGE

APPELLATE CASE NUMBER: 2013-001382

Latonya Footman,Claimant/Appellant,

vs.

Johnson Food Services, LLC, Employer, and The Hartford, Carrier,Defendants/Respondents.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Did the Circuit Court err in affirming the South Carolina Workers' Compensation Commission's May 30, 2012 permanent disability award when: (a) this determination is materially based upon a factual finding that Appellant, Latonya Footman, "has been released with no restrictions, and has returned to work (full duty) with both of her employers"; (b) the evidence of record firmly establishes that neither her authorized treating physician nor the second opinion specialist granted the purported "full duty" release; (c) a review of the relevant evidence, as referenced in the Commission's Order, unquestionably confirms she is working within restrictions imposed by the second opinion specialist, while receiving accommodations in connection with her limitations; and (d) this absence of evidentiary support rendered the Commission's disability assessment legally erroneous per S.C. Code Ann. Section 1-23-380 (A) (5) (Supp. 2012)?

2. Did the Circuit Court err in failing to conclude the Commission has engaged in a legally insufficient fact finding process relative to its determination to afford a remote (February 1, 2008) reference to grip strength consistency "great weight" in connection with the 2012 assessment of her permanent disability when: (a) the purported basis for this finding ("these are notes of Claimant's own expert") provides no insight as to the relationship between this isolated statement and Ms. Footman's degree of residual permanent disability; (b) our Appellate Courts have consistently required an administrative agency to enter factual findings which sufficiently explain the underlying rationale for its rulings; (c) this Court has similarly rejected the notion that the Commission's "medical opinion" constitutes either evidence or an appropriate basis for affirming a ruling of this nature; and (d) entry of this conclusory finding, which offers no

legally tenable explanation as to the reasoning behind attributing “great weight” to this comment, constituted an error of law?

STATEMENT OF THE CASE

This is an appeal from the May 30, 2012 Order of the South Carolina Workers' Compensation Commission (Commission), which was subsequently affirmed by Order of the Honorable G. Thomas Cooper, Jr. dated April 1, 2013. Appellant, Latonya Footman, similarly appeals Judge Cooper's denial of her April 15, 2013 S.C.R.C.P. Rule 59 (e) Motion to Alter/Amend Judgment.

In 2006, Ms. Footman developed bilateral arm symptoms, which were subsequently diagnosed to be reflective of carpal tunnel syndrome. When Respondents, Johnson Food Services, LLC and The Hartford, denied the compensability of her injuries per the South Carolina Workers' Compensation Act, she sought evaluation from Dr. Joseph P. Jackson, Jr. of Camden Orthopaedic Associates, who confirmed: (a) her bilateral carpal tunnel syndrome "most probably result[ed] . . . from her performance of repetitive activities incidental to her job" with this employer; and (b) right carpal tunnel surgery was warranted. (See, Record on Appeal, pp. 242 - 243).

Shortly thereafter, Respondents admitted liability for Ms. Footman's injuries and directed her to Dr. Michael S. Green for further evaluation. Although Dr. Green acknowledged the presence of "bilateral moderate carpal tunnel syndromes", he essentially limited treatment to the right arm (performing a carpal tunnel release on March 1, 2007) and initially discharged her from care on April 9, 2007. (See, Record on Appeal, pp. 261-265).

When her bilateral arm problems persisted, Ms. Footman was reevaluated by Dr. Jackson (August 13, 2007), who: (a) felt she was also exhibiting evidence of cubital tunnel syndrome; and (b) suggested obtaining updated electrodiagnostic testing. This

development prompted Respondents to redirect Ms. Footman to Dr. Green (August 24, 2007), who concurred with Dr. Jackson's recommendation of "EMG/NCS of both upper extremities to evaluate her ulnar nerve function." (See, Record on Appeal, pp. 244 – 245; 266).

While this testing confirmed the presence of both left carpal tunnel syndrome and right cubital tunnel syndrome, Dr. Green, who mistakenly assumed Ms. Footman had "underwent a procedure for both of these conditions, one on the right upper extremity and one on the left", offered no additional treatment and again discharged her from active care (February 15, 2008). (See, Record on Appeal, pp. 267 - 270). At that time, he assigned permanent physical impairment ratings of 2% to each upper extremity. (See, Record on Appeal, p. 270).

Conversely, Dr. Jackson (February 1, 2008) felt the results of these electrodiagnostic studies were reflective of a bilateral cubital tunnel syndrome, for which he recommended several nonsurgical treatment options. (See, Record on Appeal, pp. 246 - 247). During this visit, he also sensed Ms. Footman's right-sided grip strength effort was lacking, to the extent he "pointed out the consistency of effort in grip strength as a basic element of building a doctor/patient relationship". (See, Record on Appeal, p. 247).

Additionally, after further examining Ms. Footman on May 15, 2008, Dr. Jackson verified: (a) she had actually only undergone one surgical procedure for her bilateral arm injuries as of that date; (b) her bilateral cubital tunnel syndrome resulted from the consequences of her compensable accident; and (c) these injuries had not only produced medical impairment, but also necessitated the imposition of work restrictions (no

repetitive use of her arms, no lifting or exertion of force in excess of 20 lbs.). (See, Record on Appeal, pp. 248 – 252).

Consistent with the parties' previous pattern of action, Respondents then redirected Ms. Footman to Dr. Green (June 27, 2008), who not only agreed with Dr. Jackson's diagnoses, but also implemented one of his treatment recommendation (splinting for the right cubital tunnel syndrome). As he felt she was "not ready for any surgical procedure", Dr. Green again released Ms. Footman from treatment (August 11, 2008). (See, Record on Appeal, p. 272).

Shortly thereafter, Dr. Green offered a variety of opinions relative to the nature of Ms. Footman's causally related pathology, her previous course of treatment and the functional impact of her injuries in the context of an October 3, 2008 deposition. Inspection of this deposition also reveals he agreed: (a) Dr. Jackson's ratings fell within the range that could reasonably be assigned for Ms. Footman's particular pathology; and (b) this range (2% – 5%) would be applicable to each of Ms. Footman's distinct injury components (carpal and cubital tunnel syndromes). (See, Record on Appeal, pp. 26 – 27; 34).

When Ms. Footman's symptoms persisted and diagnostic testing revealed a worsening of her nerve dysfunction, Dr. Green performed a left carpal tunnel surgery (November 9, 2010). Although he allowed her to resume working approximately six weeks later, Dr. Green did not release Ms. Footman to unrestricted activity, **but instead indicated she could "progressively use the hand as tolerated."** (See, Record on Appeal, p. 50).

After completing a final examination on April 20, 2011, Dr. Jackson reiterated the causal relationship of Ms. Footman's multiple injury components and assigned impairment ratings for these respective conditions. At that time, this orthopaedic surgeon also **identified continuing physical restrictions, including "lifting no more than 25 lbs, lifting no more than 12 pieces of chicken on a tray. . . [and] only opening 10 large cans per day."** (See, Record on Appeal, pp. 253 – 254).

Following a June 8, 2011 hearing, the single commissioner, per Order dated September 16, 2011, noted: (a) **Ms. Footman's "present job duties and responsibility with the Defendants are within the restrictions, which were placed upon the Claimant by Dr. Jackson"**; (b) **"she does experience ongoing pain and problems with her left upper extremity and right upper extremity while in the course and scope of her employment with the Defendants"**; and (c) **"Defendants readily provide the Claimant with accommodations when she experiences left upper extremity and right upper extremity pain and problems while working with Defendants."** (See, Record on Appeal, p. 9).

Additionally, when analyzing the evidence that was particularly relevant to assessment of Ms. Footman's degree of residual permanent disability, the single commissioner found the inconsistency/ambiguity of Dr. Green's impairment ratings necessitated focusing on "other factors", particularly:

(a) Dr. Jackson's February 1, 2008 reference to grip strength consistency, which was **"give[n] . . . great weight for the reason that these are the notes of Claimant's own expert"**;

(b) her lack of prescription medication use or need for "future medicals"; and

(c) the fact she “has been released with no restrictions, and has returned to work (full duty)” (See, Record on Appeal, p. 12).

Based upon these findings, the single commissioner determined Ms. Footman had experienced a 6% permanent partial disability to each arm per S.C. Code Ann. Section 42-9-30 (1976). Although Ms. Footman subsequently challenged the single commissioner’s rulings on various grounds, including a lack of evidentiary support and the use of an arbitrary/unlawful method of analysis, an Appellate Panel of the Full Commission: (a) declined to specifically address these issues; (b) affirmed the single commissioner’s factual findings in their entirety; and (c) mistakenly calculated the value of her permanent disability compensation entitlement. (See, Record on Appeal, pp. 34 – 38).

Pursuant to a Petition filed on July 29, 2012, Ms. Footman sought judicial review of the Commission’s decision. Subsequently, by Order dated April 1, 2013, Judge Cooper: (a) affirmed the Panel’s ruling in their entirety; and (b) characterized the mistaken reduction in Ms. Footman’s disability compensation entitlement as a scrivener’s error. Shortly thereafter, by Order dated May 28, 2013, he likewise denied Ms. Footman’s Motion to Alter/Amend Judgment. This appeal followed.

ARGUMENT I

The Circuit Court erred in affirming the Commission's May 30, 2012 permanent disability award when: (a) this determination is materially based upon a factual finding that Appellant, Latonya Footman, "has been released with no restrictions, and has returned to work (full duty) with both of her employers"; (b) the evidence of record firmly establishes that neither her authorized treating physician nor the second opinion specialist granted the purported "full duty" release; (c) a review of the relevant evidence, as referenced in the Commission's Order, unquestionably confirms she is working within restrictions imposed by the second opinion specialist, while receiving accommodations in connection with her limitations; and (d) this absence of evidentiary support rendered the Commission's disability assessment legally erroneous per S.C. Code Ann. Section 1-23-380 (A) (5) (Supp. 2012).

S.C. Code Ann. Section 1-23-380 (A) (5) (Supp. 2012), which governs judicial review in the current context, provides in pertinent part:

The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decision are:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) affected by other error of law;
- (e) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
- (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Pursuant to the scope of review established by this statute, the "court may not substitute its judgment for that of the Appellate Panel as to the weight of the evidence on questions of fact, but may reverse or modify the Appellate Panel's decision if the appellant's substantial rights have been prejudiced because the decision is affected by an error of law or is 'clearly erroneous in view of the reliable, probative and substantial

evidence on the whole record.” Rabon v. Arrow Exterminating, Inc., 393 S.C. 510, 713 S.E. 2d 347, 349 (Ct. App. 2011); See also, Therrell v. Jerry’s, Inc., 370 S.C. 22, 633 S.E. 2d 893, 894 - 895 (2006).

Our Appellate Courts have repeatedly held that where “there is no evidence to support a finding of fact made by the Commission”, the resulting determination should be reversed. Sanders v. Richardson, 251 S.C. 325, 162 S.E. 2d 257, 259 (1968); Hutson v. South Carolina State Ports Authority, 399 S.C. 381, 732 S.E. 2d 500, 504 (2012). This rule stems from the recognition that, absent this evidentiary basis, the Commission’s award necessarily “rest[s] . . . upon [impermissible] . . . surmise, conjecture, or speculation.” Glover v. Rhett Jackson Company of Bush River Road, 274 S.C. 644, 267 S.E. 2d 77, 80 (1980); Hutson, 732 S.C. 2d at 503.

A review of Dr. Green’s December 27, 2010 report confirms that upon releasing Ms. Footman from care for the final time, he did not, as on previous occasions, indicate she was capable of performing unrestricted work activities. Rather, he advised her that she could “progressively use the hand **as tolerated.**” (Emphasis added). After performing his final reexamination of Ms. Footman on April 20, 2011, Dr. Jackson similarly declined to allow a return to unrestricted duty and again imposed several restrictions, specifically precluding her from lifting weights exceeding 25 lbs. or trays containing more than 12 pieces of chicken, while limiting her from opening more than 10 large cans per day.

The Commission’s Order likewise references undisputed testimony verifying: (a) Ms. Footman’s “present job duties and responsibilities with the Defendant . . . are within **the restrictions, which were placed upon the Claimant by Dr. Jackson**”; (b) she

continues to “**experience ongoing pain and problems with her left upper extremity and right upper extremity while in the course and scope of her employment with the Defendants**”; and (c) “**Defendants readily provided the Claimant with accommodations when she experiences left upper extremity and right upper extremity pain and problems while working with the Defendant.**”

Given these facts, it cannot be legitimately contested that Dr. Jackson assigned specific work restrictions or that Johnson Food Service is providing accommodations to ensure Ms. Footman’s work activities comply with these restrictions. Additionally, while the Circuit Court held Dr. Green’s December 27, 2012 statement did not constitute a work restriction, this ruling conflicts with relevant decisions of both this Court and the Supreme Court.

Specifically, in Grayson v. Carter Rhoad Furniture, 317 S.C. 306, 454 S.E. 2d 320, 321 – 322 (1995) the Supreme Court determined: (a) the employee’s physician allowed him to return to work, “but warned he ‘should be somewhat careful with lifting, etc.’”; and (b) as the nature of the employee’s job “involved lifting and moving heavy objects . . . , there was no evidence [he] . . . had ever returned to work ‘without restriction’”. More recently, this Court held that medical instructions “to refrain from ‘heavy lifting’ . . . , ‘strenuous activity’ . . . [and] ‘take it easy’” were indicative of restrictions. Cranford v. Hutchinson Construction, 399 S.C. 65, 731 S.E. 2d 303, 308 (Ct. App. 2012).

In this instance, Ms. Footman, at minimum, was medically instructed to limit her performance of work activities (“as tolerated”) in a manner consistent with the scenarios addressed in both Grayson and Cranford. This inability to engage in “full duty” is

actually validated by her need for and receipt of “accommodations” from her employer, as well as the unrefuted evidence establishing “that her present job duties and responsibilities with the Defendants are within the restrictions . . . placed upon [her] . . . by Dr. Jackson.” Based upon these facts, in light of the Courts’ prior analysis of unrestricted work, “there is, in reality, no evidence” to support the Commission’s finding that Ms. Footman “has been released with no restrictions, and has returned to work (full duty)” Grayson, 454 S.E. 2d at 322.

Further, the only reasonable inference which may be gleaned from the evidence of record indicates: (a) Ms. Footman was instructed by Dr. Green to perform only those activities which she could physically tolerate; (b) she came to recognize the restrictions imposed by Dr. Jackson had proven accurate (See, Record on Appeal, p. 174); (c) Ms. Footman actually requires and receives assistance in performing her job duties; and (d) her work activities have not only been restricted by each of her physicians, but Johnson Food Service is also recognizing the presence of these restrictions through provision of assistance with the completion of her job duties.

Consequently, Ms. Footman respectfully submits: (a) the Commission’s finding that she was released to unrestricted work is not supported by any evidence of record, much less the substantial evidence; (b) the absence of work restrictions was identified as a material factor in assessing her degree of residual permanent disability; and (c) this legal error requires a remand of this issue to the Commission for redetermination.

ARGUMENT II

The Circuit Court erred in failing to conclude the Commission has engaged in a legally insufficient fact finding process relative to its determination to afford a remote (February 1, 2008) reference to grip strength consistency “great weight” in connection with the 2012 assessment of her permanent disability because: (a) the purported basis for this finding (“these are notes of Claimant’s own expert”) provides no insight as to the relationship between this isolated statement and Ms. Footman’s degree of residual permanent disability; (b) our Appellate Courts have consistently required an administrative agency to enter factual findings which sufficiently explain the underlying rationale for its rulings; (c) this Court has similarly rejected the notion that the Commission’s “medical opinion” constitutes either evidence or an appropriate basis for affirming a ruling of this nature; and (d) entry of this conclusory finding, which offers no legally tenable explanation as to the reasoning behind attributing “great weight” to this comment, constituted an error of law.

It is axiomatic that the Commission’s factual findings “must be founded on evidence of sufficient substance to afford a reasonable basis for” them. Wynn v. People’s Natural Gas Co. of S.C., 238 S.C. 1, 118 S.E. 2d 812, 818 (1961); Mullinax v. Winn-Dixie Stores, Inc., 318 S.C. 431, 458 S.E. 2d 76, 83 (Ct. App. 1995); Burnette v. City of Greenville, 401 S.C. 417, 737 S.E. 2d 200, 206 (Ct. App. 2012). Additionally, “. . . [i]t is not the role of the Commission to render expert opinion.” Edmonds v. Fresenius Medical Care, 165 N.C. App. 811, 600 S.E. 2d 501, 506 (2004) (Steelman, J. dissenting rev’d per curium for reasons stated in dissent), 319 N.C. 313, 608 S.E. 2d 755 (2005); Nale v. Ethan Allen, 199 N.C. App. 511, 682 S.E. 2d 231, 247 (2009) (“It is not for the Commission to render its own expert medical opinion”); accord Burnette, supra (holding “the medical opinion of the single commissioner” neither constituted nor was supported by substantial evidence).

It is equally certain that: (a) conclusory findings of fact “are insufficient.” Baldwin v. James River Corporation, 304 S.C. 485, 405 S.E. 2d 421, 422 (Ct. App.

1991); and (b) “implicit findings of fact are. . . [likewise] not sufficient.” Brayboy v. Clark Heating Company, Inc., 306 S.C. 56, 409 S.E. 2d 767, 768 (1991).

After examining Ms. Footman on February 1, 2008, Dr. Jackson “pointed out the consistency of effort in grip strength as a basic element of building a doctor/patient relationship.” Although a review of the evidence of record verifies the absence of any similar references during the ensuing three year course of treatment (which included additional surgery), the Commission found this remote statement deserved “great weight for the reason that these are the notes of Claimant’s own expert. . . .”

At this stage of the proceedings, the Commission is charged with the obligation of assessing Ms. Footman’s degree of permanent partial disability/loss of use. While the respective orthopaedic surgeons have somewhat differing views as to the nature of her residual impairment, neither of these physicians: (a) questioned the legitimacy of the Footman’s current symptoms/limitations; or (b) otherwise indicated Dr. Jackson’s remote statement was, to any extent, relevant to the determination of her permanent disability/loss of use in 2012. As a consequence, Ms. Footman respectfully submits: (a) the decision to afford “great weight” to this now innocuous reference necessarily constitutes “the medical opinion of the single commissioner, adopted by the Commission”; (b) this rather stale evidence is hardly indicative of her permanent disability following the passage of four years and performance of surgery; and (c) there is no reviewable indication as to why this statement deserves “great weight” in this context. Burnette, 737 S.E. 2d at 206; See also generally, Smith v. South Carolina Department of Mental Health, 329 S.C. 485, 494 S.E. 2d 630, 637 (Ct. App. 1997) (expressing concern

that “[m]uch of the medical evidence upon which the single commissioner relied . . . [in assessing permanent disability] was more than two years old at the time of the hearing.”).

In this regard, the fact finding duty imposed by S.C. Code Ann. Sections 1-23-350 (Supp. 2012) and 42-17-40 (1976, as amended) "requires not only. . . [that] findings of fact be made upon the essential factual issues, but that they. . . [also] be sufficiently definite and detailed to enable the appellate court to properly determine whether the findings of fact are supported by the evidence and whether the law has been properly applied to those findings." Drake v. Raybestos-Manhattan, Inc., 241 S.C. 116, 127 S.E. 2d 288, 292 (1962); Hill v. Jones, 255 S.C. 219, 178 S.E. 2d 142, 144 (1970). "If a material fact is contested. . . [the Commission] must make a specific, express finding on it." Aristizabal v. I.J. Woodside-Division of Dan River, Inc., 268 S.C. 366, 234 S.E. 2d 21, 23 (1977).

A Court sitting in an appellate capacity "will not accept an administrative agency's decision at face value without requiring the agency to explain its reasoning." Able Communications, Inc. v. South Carolina Public Service Commission, 290 S.C. 409, 351 S.E. 2d 151, 152 (1986); Kiawah Property Owners Group v. Public Service Commission of South Carolina, 338 S.C. 92, 425 S.E. 2d 863, 865 (1999). While the Commission clearly found Dr. Jackson's remote comment warranted "great weight", the stated rationale (because this physician was Ms. Footman's expert): (a) has no medical basis, to the extent it necessarily constitutes an impermissible medical opinion of the Commission that this isolated occurrence had some bearing on her current level of dysfunction; and (b) offers no legally plausible insight as to what relevance, if any, this statement had in terms of resolving the factual disputes surrounding her degree of

residual permanent disability. Further, as this issue was clearly contested, the controlling authorities demanded a specific factual finding that cogently outlined a legally sustainable basis for its ultimate determination.

Although Respondents argue a possible reason (witness credibility) may be inferred from the Commission's Order, this argument ignores: (a) the longstanding prohibition against implicit findings in this context. Aristizabal, supra; Able, supra; and (b) consistent holdings that "require an administrative agency to make specific findings of fact and explain its rationale" Porter v. South Carolina Public Service Commission, 333 S.C. 12, 507 S.E. 2d 328, 332 (1998).

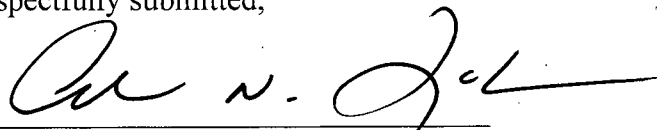
Given the absence of any medical evidence which can conceivably be deemed to support the materiality of Dr. Jackson's February 1, 2008 statement in the context of Ms. Footman's 2012 disability, it is respectfully submitted that the Commission's determination to afford it "great weight": (a) constitutes, in and of itself, an error of law; and (b) is wholly inconsistent with the substantial evidence of record. Accordingly: (a) this finding should be vacated in conjunction with reversal of the Commission's permanent partial disability award; and (b) on remand, the Commission should be instructed that it does not have the authority to generate medical opinions of this nature.

CONCLUSION

As the Commission's disability determination was substantially premised upon legally erroneous findings, Ms. Footman respectfully requests that it be reversed and remanded for redetermination. She further prays that the Commission be instructed to:

(a) conduct a *de novo* hearing before the single commissioner, particularly in view of the period of time which has passed since the June 8, 2011 evidentiary hearing; and (b) recognize her true work status, as well as the impermissibility of rendering medical opinions.

Respectfully submitted,



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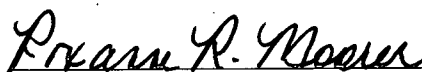
vs.

Johnson Food Services, LLC, Employer, and The Hartford, Carrier, ... Defendants/Respondents.

CERTIFICATE OF SERVICE

I, Roxanne R. Moorer, paralegal for Andrew N. Safran, Esquire, Attorney for Appellant, do hereby certify that on the 10th day of March, 2014, I caused to be filed, via hand delivery, the original and fourteen (14) copies of the Final Brief of Appellant, with the Clerk of the South Carolina Court of Appeals. One (1) copy of the Final Brief of Appellant was furnished to counsel for Respondents via first class mail at the following address:

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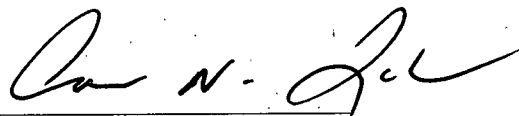
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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Brief complies with Rule 211(b),

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