THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

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S.C. Supreme Court

Opinion No. 5205

Case No. 2013-000005

Neal Beckman, Employee, ... Respondent

v.

Sysco Columbia, LLC, Employer, and
Gallagher Bassett Services, Inc., Carrier ..... Petitioners

RETURN TO PETITION FOR A WRIT OF CERTIORARI

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INDEX

ARGUMENT

1. The Decision of the Court of Appeals is not immediately appealable.

The Court of Appeals remanded the case to the Commission to address Beckman's eligibility for an award under section 42-9-20. Beckman v. Sysco Columbia, LL, Op. No. 5205 (S.C.Ct.App. withdrawn, submitted and refiled July 9, 2014)(Shearouse Adv.Sh. No. 27 at 42, 49). An order remanding a case back to the Workers' Compensation Commission is not immediately appealable. See Bone v. U.S. Food Service, 404 S.C. 67, 744 S.E.2d 552 (2013).

As this Court explained in Bone and Martinez, only "final judgments" are appealable beyond the initial level of judicial review . "A 'final judgment" means an order "that finally disposes of the whole subject matter of the action or terminates the action, leaving nothing to be done but to execute the judgment . . . ." Bone, 404 S.C. at 83, 744 S.E.2d at 561. The instant decision is not an appealable final judgment because the Court of Appeals "remanded the matter to the Commission for further proceedings, and thus left matters to be determined rather than disposing of the whole subject matter of the action." Martinez v. Spartanburg County, Op. No. 27343 (S.C.Sup.Ct. filed January 8, 2014)(Shearouse Adv.Sh. No. 27 at 40).

2. The Court of Appeals applied the correct standard of review in reversing the Commission's finding that "the greater weight of the evidence showed only Beckman's back was affected by the March 25, 2010 admitted injury by accident."

In their Petition, Petitioners suggest the Court of Appeals overlooked pertinent evidence in the record. A close comparison of the evidence with the court's opinion shows otherwise – in fact, it was the Commission which overlooked and miscited pertinent evidence.

To use a metaphor, Petitioners are asking the Court to overlook the forest for a handful of

trees. Beckham had numerous visits with his treating physician, Dr. Zgleszewski (along with testing, injections and surgery). Dr. Zgleszewski consistently documented radicular signs and symptoms. His diagnosis: lumbar radiculopathy. [R. P. 121, 123, 125, 127, 129, 131, 135, 138, 142, 144, 146, 150, 152, 155, 157, 161, 163, 167, 173, 175, 178, 182, 185, 188, 194, 191, 193].

The Court of Appeals went into this evidence in unusual detail, concluding "the evidence in the record indicates Beckman suffered from radiculopathy as a result of his back injury." Beckman v. Sysco Columbia, LL, Op. No. 5205 (S.C.Ct.App. withdrawn, submitted and refiled July 9, 2014)(Shearouse Adv.Sh. No. 27 at 42, 48). The court could have been even more detailed – the evidence of radiculopathy is consistent and persistent.

On the very first doctor visit with Palmetto Health on March 26, 2010 (one day after the accident), Beckman reports "moderate numbness and pain which is located in his low back and left leg." [R. P. 121]. On March 29, 2010, Beckman saw Dr. Byron Williams – who reported "pain in low back that radiates around bilateral hips and down left leg into toes [and experiencing numbness into left leg." [R.P. 123]. On April 6, 2010, Dr. Williams documented: "c/o pain mostly on L side and radiating down into L leg." [R. P. 125].

Following an MRI, treatment was transferred to Dr. Timothy Zgleszewski. Beckman continually complained of radicular symptoms – mostly on the left side. As the Court of Appeals noted, Dr. Zgleszewski stated a diagnosis of radiculitis on June 7, 2010 and July 9, 2010, with continued complaints of pain that radiated to his left buttock and left hip. [R. P. 152, 157].

Moreover, not only did Beckman report radicular complaints to his doctor on virtually every visit, Dr. Zgleszewski confirmed the diagnosis with objective testing on physical examination. [R. P. 152, 157, 163, 182, 191]. In the September 2, 2011 Form 14B (Physician's Statement), Dr.

Zgleszewski states Beckman's diagnosis is: "sacroiliitis; lumbar disc injury & *radiculopathy.*" [R. P. 193]. As the Form 14B was created by the Commission specifically for summarizing the employee's diagnosis at MMI, overlooking the listed diagnosis seems a grave error indeed.

Petitioners point to the Appellate Panel's finding: "The Claimant also underwent an EMG/NCS study that revealed normal results with no objective evidence of radiculopathy." [R. p. 25]. The problem is this statement is based on the Single Commissioner's own medical opinion – not that of Dr. Zgleszewski. Dr. Zgleszewski is the physician qualified to interpret the EMG/NCS test; not a lay commissioner. See Burnette v. City of Greenville, 737 S.E.2d 200, 401 S.C. 417 (Ct. App. 2012)(medical opinion of a commissioner is not evidence). Dr. Zgleszewski personally reviewed and interpreted the EMG/NCS study – and maintained his diagnosis of radiculopathy. He repeatedly stated that the test is an "imperfect diagnostic tool" for diagnosing radiculopathy. [R. pp. 153, 158]. The EMG/NCS is a confirmatory test. If positive, it confirms the clinical diagnosis of radiculopathy. However, as it is prone to a high percentage of false negatives, a normal test in the face of clinical evidence means nothing.

There is nothing magical about so-called objective testing versus the clinical diagnoses made by medical providers. See Crisp v. SouthCo Inc., 738 S.E.2d 835, 844, 401 S.C. 627 (2013)("In light of [testimony for multiple valid methods of diagnosing brain injury], we are reluctant to require use of a specific diagnostic tool in proving these medically-technical brain injury cases."). The Appellate Panel must rely on the opinions of the doctors involved in treating and evaluating the patient. These opinions may be based on imaging studies and other technology based diagnostic tools – or they may be based on physical examination along with the history and complaints reported by the patient.

Beckman's testimony mirrored the reports to his doctors.[1] Beckman testified: "The initial pain was to the lower back, but it then radiated to my left hip down to my knee, and my right toes are numb or have been periodically numb since." [R. P. 67, line 67-p. 20, line 3]. He further testified "when I have a flare up . . . it's hard for me to lift my left leg up normally to walk." [R. P. 29, lines 19-24]. "It's the left hip that bothers me constantly." [R. P. 33, line 23]. His back pain radiates to his knee. [R. P. 34, lines 9-15]. Beckman had a severe flare up with left sided pain from most of nine days. [R. P. 36, lines 1-6]. His injury causes him substantial limitations – sufficient to disqualify him from returning to work with the Employer. [R. P. 36, lines 21-page 40, line 11].

All the evidence supports a finding that Beckman's leg was affected by his back injury with radiculopathy. Dr. Williams, Dr. Zgleszewski, and Dr. Boyd consistently document radicular complaints into the left leg. Dr. Zgleszewski never waivered from the diagnosis of radiculopathy. There is no evidence on which a reasonable trier of fact could hold as the Commission did. See Doe v. South Carolina Dept. of Disabilities and Special Needs, 377 S.C. 346, 660 S.E.2d 260 (2008)(reversing Commission's denial of claim because the "only evidence of causation is that Claimant's mental injury was caused by her stress at work as stated by Dr. Lowe"); Shealy v. Aiken Cnty., 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000)("Substantial evidence is not a mere scintilla of evidence nor evidence viewed from one side, but such evidence, when the whole record is considered, as would allow reasonable minds to reach the conclusion the Full Commission reached.").

Petitioners devote the bulk of their argument to an analysis of Dr. Boyd's report. Yet,

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[1]Some of Beckman's complaints are related to the separate sacroiliac (SI) joint injury. Dr. Zgleszewski assigned a 5% impairment rating to the SI joint and provided SI joint injections. Even if Certiorari were granted, the Court should remand to the Court of Appeals to address the issue raised by Respondent regarding the SI joint injury.

Petitioners quote the very language that illustrates the error made by the Commission, to wit: "His pain occasionally *radiates down into his left leg* and he states that *he has some numbness around his foot.*" [R. 205 (emphasis added)]. Dr. Boyd's report exposes the complete lack of evidentiary support for the Appellate Panel's finding that: "We find the greater weight of the evidence shows only the Claimant's back was affected by the March 25, 2010 admitted injury by accident. [R. p. 28].

Dr. Boyd specifically saw Beckman for a one-time surgical evaluation. His report – particularly as to Beckman's radicular complaints – essentially comports with that of Dr. Zgleszewski. Petitioners submit that "Dr. Boyd did not conclude or diagnose the Appellant with radiculopathy or radiculitis." [Petition for Writ of Certiorari, page 10]. This is precisely the point – Dr. Boyd did not address radiculopathy one way or the other. To infer that this absence of an opinion supports the Commission's findings is to rely on speculation. See Burnette v. City of Greenville,737 S.E.2d 200, 401 S.C. 417 (Ct. App. 2012)("the medical opinion of the single commissioner, adopted by the Commission," is not evidence and cannot form the basis of a finding). Cf. Hutson v. S.C. State Ports Authority, 399 S.C. 381, 732 S.E.2d 500 (2012)(reversing because findings relied on speculation by the witness, "thus, there is no evidence in the record supporting the commissioner's order.").

Petitioners isolate various snippets from the record, suggesting that these points may have been overlooked by the Court of Appeals. However, the court exhaustively reviewed the record – as demonstrated by the detailed analysis in the Opinion. No pertinent facts were overlooked; no evidence went unreviewed.

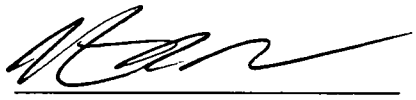
This is simply a case where the decision below is unsupported by substantial evidence. See Massey v. W.R. Grace & Co., 286 S.C. 434, 334 S.E.2d 122 (1985)("evidence supporting a compensable injury is overwhelming and there was no evidence in the record to support the decision

of the Industrial Commission."). The Court of Appeals got it right. None of the factors favoring further review by this Court are present here. Therefore, the Petition for Writ of Certiorari should be denied.

CONCLUSION

For the foregoing reasons, the Court should deny the Petition for Writ of Certiorari.

Respectfully Submitted,



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September 7, 2014
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PROOF OF SERVICE

I certify that I, Angi O'Connell, am paralegal to Stephen B. Samuels and I have served the **Return to Petition for a Writ of Certiorari** upon the Respondents/Petitioners by mailing a copy of the same in the United States mail, with sufficient postage affixed thereto and return address clearly marked on **September 8, 2014**, addressed as follows:

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September 8, 2014