

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Opinion No. 5205

Appellate Case No. 2014-001691

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S.C. Supreme Court

Neal Beckman, Employee,.....Respondent,

v.

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

REPLY TO RESPONDENT'S RETURN TO
PETITION FOR A WRIT OF CERTIORARI

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ARGUMENT

1. South Carolina Appellate Court Rule 242 governs the Supreme Court's authority to consider a petition for a writ of certiorari.

The Respondent asserts that Opinion No. 5205 from the Court of Appeals is not immediately appealable based on the Bone decision. Bone v. U.S. Food Service, 404 S.C. 57, 744 S.E.2d 552 (2013); Beckman v. Sysco Columbia, LLC, Op. No. 5205 (Ct.App. withdrawn, substituted and refiled July 9, 2014)(Shearouse Adv. Sh. No. 27, p. 42). The Petitioners respectfully assert that a decision by the Court of Appeals is eligible for review pursuant to South Carolina Appellate Court Rule (SCACR) 242. SCACR 242(a) states that the Supreme Court may issue a writ of certiorari to review a final decision of the Court of Appeals. The appeal eligibility discussed in Bone applies when analyzing whether a decision of the administrative agency is immediately appealable as a final judgment pursuant to the Administrative Procedures Act, S.C. Code Ann. §1-23-390 (Supp. 2012). Bone at 72-84, 556-562. There is no question that the Commission entered a final award in this case and thus the Respondent was able to appeal the decision of the Commission to the Court of Appeals. The review of the Court of Appeals subsequent decision is not governed by the Administrative Procedures Act but rather the SCACR. The Petitioners' Petition for a Writ of Certiorari is made pursuant to SCACR 242, therefore, the Supreme Court has the authority to issue a writ of certiorari to review Opinion No. 5202. As evidence of this Court's authority is the fact that the decision in the Bone matter followed a petition for a writ of certiorari to review the decision of the Court of Appeals. Bone v. U.S. Food Service, 399 S.C. 566, 733 S.E.2d 200 (2012).

2. The Respondent's citations to the record and case law are distinguishable.

The Respondent cites twenty-seven pages of the record in asserting that Dr. Zgleszewski diagnosed the Respondent with radiculopathy. Reply p. 4. Of those citations, five pages are not

even records from Dr. Zgleszewski. R. pp. 121, 123, 125, 127, 129. The vast majority of the additional cited pages do not contain any diagnosis of radiculopathy. R. pp. 131, 135, 138, 142, 146, 150, 152, 157, 163, 167, 173, 175, 178, 182, 185, 188, 191, 194. The Petitioners concede that Dr. Zgleszewski references the Respondent's subjective complaints of radicular symptoms; however, the physical evaluations and diagnostic testing do not support a diagnosis of radiculopathy. As outlined in the Petition for a Writ of Certiorari, there is substantial evidence in the record that would allow a reasonable mind to reach the conclusion of the Commission. Pratt v. Morris Roofing, Inc., 357 S.C. 619, 622, 594 S.E.2d 272, 274 (2004).

In his Return, the Respondent asserts that his normal EMG/NCS study results constitute a medical opinion by a commissioner as discussed in the Burnette decision. Burnette v. City of Greenville, 737 S.E.2d 200, 401 S.C. 417 (Ct.App. 2012). The Respondent's argument is contradicted by his admission that the authorized treating physician was the person who interpreted the EMG/NCS study. Dr. Zgleszewski states "Mr. Beckman given his EMG/NCS does not have a radiculopathy in either leg...". R. p. 153. Although the Respondent asserts that the EMG/NCS is prone to a high percentage of false negatives, there is no evidence in the record to support this assertion.

There is evidence in the record to support that the Claimant does not have radiculopathy. For example, the MRI as interpreted by Dr. Boyd, a spine surgeon, did not reveal any nerve root compromise. R. pp. 205-206. Further, the physical examinations by Dr. Zgleszewski never reference sensory and motor changes which would support true radiculopathy. To the contrary, the "physical examination" and "lower extremity motor/sensory/dtr" sections of Dr. Zgleszewski's notes consistently state that the Respondent's gait and station is nonantalgic; he is able to raise up on his heels and toes; the bilateral lower extremity motor examination is normal;

the deep tendon reflexes of the bilateral patella and Achilles tendon are normal; and the bilateral lower extremity sensory examination is normal. R. pp. 132, 139, 147, 153, 158, 164, 168, 176, 179, 183, 186, 189, 192. The Respondent's videotaped exercise routine at Gold's Gym also did not reveal any motor deficiencies to support his alleged radiculopathy. R. p. 249 and video. Therefore, the Respondent's assertion that his radicular complaints are supported by objective physical examination is rebuttable by the evidence in the record.

The Respondent cites the Crisp decision in arguing that objective testing is not necessary to support his radiculopathy claims if there is a physical examination consistent with complaints reported by a patient. Crisp v. SouthCo, Inc., 401 S.C. 627, 738 S.E.2d 835 (2012). In the Crisp case, the physicians were discussing various methods to evaluate brain damage. Id. The matter at hand does not involve a medically-technical brain injury or any other methods of testing such as the neuropsychological report relied upon by Dr. Collings in evaluating the extent of Crisp's injury. Crisp at 645, 28. The record does contain imaging reports, an EMG/NCS study and physical examinations that are all supportive of the Commission's conclusion that the Respondent does not have radiculopathy. R. pp. 129-130, 228-229, 132, 139, 147, 153, 158, 164, 168, 176, 179, 183, 186, 189, 192.

As such, there is substantial evidence to support the Commission's decision that the Respondent is only entitled to compensation for permanent loss of use of his back as a result of his admitted back injury. The Petitioners hereby submit that all of the diagnostic tools, tests, a commissioner's eye witness account, physical evaluations, and video surveillance are not snippets of the record as suggested by the Respondent but rather are objective and substantial evidence relied upon by the finder of fact. Contrary to the Respondent's assertion, this is not the

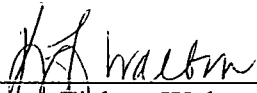
same situation as in Massey where there was no evidence in the record to support the decision of the Commission. See Massey v. W.R. Grace & Co., 286 S.C. 434, 334 S.E.2d 122 (1985).

The Respondent states in FN 1, page 6, of his Return that if Certiorari were granted, the Court should remand to the Court of Appeals to address the other issue raised by the Respondent in his appeal. The Petitioners assert that the issue of whether the SI Joint is a separate injured body part is not preserved for review. The Respondent did not file a petition for rehearing to the Court of Appeals or a petition for a writ of certiorari with this Honorable Court following the Court of Appeals decision. Further, the issue of whether the SI joint was a separate injured body part was not raised before the Commission thus it was not preserved for review by the Court of Appeals. See Elam v. S.C. DOT, 361 S.C. 9, 602 S.E.2d 772 (2004)(The long-established preservation requirement is that the losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments).

CONCLUSION

For the reasons outlined hereinabove and in the Petition for a Writ of Certiorari, Petitioners respectfully request that the Court grant the Petition for a Writ of Certiorari to determine whether there is substantial evidence in the record to support the Commission's December 5, 2012 Decision & Order.

RESPECTFULLY SUBMITTED,

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September 16, 2014