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SC Court of Appeals

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THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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.

PETITION FOR REHEARING

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Attorney for Appellant, Latonya Footman

Pursuant to Rules 221 and 240, SCARC, Appellant, Latonya Footman, hereby petitions this Court to rehear and reconsider its ruling in Latonya Footman, Employee, Appellant, v. Johnson Food Services, LLC, Employer, and The Hartford, Carrier, Respondents, filed January 14, 2015. Ms. Footman asserts this Court overlooked and/or misapprehended the following points in affirming the Circuit Court's affirmance of the May 30, 2012 Order of the South Carolina Workers' Compensation Commission's Appellate Panel:

1) The Court overlooked/misconstrued the contents of the Record on Appeal in concluding the Appellate Panel's finding she "has been released with no restrictions, and has returned to work (full duty) with both of her Employers" is supported by the substantial evidence of record. Specifically, this determination is materially inconsistent with the uncontradicted facts: (a) her treating physician's only/final pronouncement in connection with her post-November 9, 2010 resumption of activity was to **"use the hand as tolerated"**; (b) **"her present job duties and responsibilities with . . . [Johnson Food Services, LLC] are within the restrictions, which were placed upon [her] . . . by Dr. Jackson"**; (c) **"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" Johnson Food Services, LLC**; and (d) her Employer **"readily provided [her] . . . with accommodations** when she experiences left upper extremity and right upper extremity pain and problems while working" (Record on Appeal, pp. 32-33; 289).

The Court's ruling similarly misapprehends: (a) Dr. Michael S. Green's allowing Ms. Footman to engage in only those activities she could physically tolerate necessarily recognized the potential presence of limitations, which would become evident as she used her hand; (b) her realization that she was capable of working with the restrictions assigned by Dr.

Jackson, but readily received accommodation from her Employer relative to the performance of work tasks, was unquestionably indicative of restrictions envisioned by Dr. Green; (c) **the Supreme Court's holding that an outright medical prohibition against performance of certain activities is not required to constitute a restricted work status**; and (d) the Panel's contrary finding, which constituted an essential element of its disability determination, is simply not supported by the substantial evidence of record.

In this regard, 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. Joseph P. Jackson, Jr. 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."

While the Circuit Court held Dr. Green's December 27, 2012 statement did not constitute a work restriction, this determination clearly ignores the Supreme Court's ruling in Grayson v. Carter Rhoad Furniture, 317 S.C. 306, 454 S.E. 2d 320 (1995). Specifically, Grayson was instructed to resume work activities by his treating physician, who cautioned that he "should be somewhat careful with lifting, etc." Grayson, 454 S.E. 2d at 321. Despite Carter Rhoad's contention substantial evidence supported the Commission's finding Grayson had returned to work without restriction, the Court concluded that in view of the nature of his job duties and the physician's statement to be "somewhat careful with lifting", "there was no evidence Grayson had ever returned to work 'without restriction'"

Here, as in Grayson, Ms. Footman was cautioned to "progressively use the [left] . . . hand as tolerated." Upon resuming work activities, she discovered she was capable of performing duties within the restrictions identified by Dr. Jackson, but required/received "accommodations . . . [from Johnson Food Services, LLC] when she experiences left upper extremity and right upper pain and problems while working" (See, Record on Appeal, p. 33). In view of these facts, "there is, in reality, no evidence" to support the Panel's finding she "has been released with no restrictions, and has returned to work (full duty) with" Johnson Food

Services, LLC., as the provision of accommodations was indicative of limitations contemplated by the prior “as tolerated” work release. Grayson, 454 S.E. 2d at 322.

Inspection of the Panel’s Order reveals the Commission considered the purported absence of medical restrictions and return to full duty work to be a material factor assessing Ms. Footman’s degree of residual permanent disability. Consequently, this error clearly impacted upon her permanent disability compensation award.

Accordingly, Ms. Footman respectfully requests this Court to grant her Petition, withdraw/amend its prior decision, rehear the matter (affording the parties oral argument) and issue a new decision reversing the Circuit Court’s and Panel’s rulings on this point, while remanding her case to the Commission for *de novo* reassessment of her degree of residual permanent disability.

2) The Court misapplied the Supreme Court’s ruling in Pierre v. Seaside Farms, Inc., 386 S.C. 534, 689 S.E. 2d 615 (2010), to the effect it has concluded the Panel’s factual findings are supported by substantial evidence, based upon: (a) the grounds/reasons outlined in Exception No. 1 of this Petition, which are incorporated herein as if fully repeated verbatim; (b) the fact the Panel’s finding she “has been released with no restrictions, and has returned to work (full duty)” is not only unsupported by the substantial evidence of record, but also the only reasonable inference arising from the contents on of the Record on Appeal; and (c) the material distinction between the current circumstances (lack of adequate evidentiary basis constitutes an error of law) and the scenario (presence of conflicting evidence) envisioned by the Pierre ruling.

Accordingly, Ms. Footman respectfully requests this Court to grant her Petition, withdraw/amend its prior decision, rehear the matter (affording the parties oral argument) and issue a new decision reversing the Circuit Court’s and Panel’s rulings on this point, while

remanding her case to the Commission for *de novo* reassessment of her degree of residual permanent disability.

3) The Court misapplied its prior ruling in Hall v. United Rentals, Inc., 371 S.C. 69, 636 S.E. 2d 876 (Ct. App. 2006), to the effect it has concluded the Panel's factual findings are supported by substantial evidence, based upon: (a) the grounds/reasons outlined in Exception No. 1 of this Petition, which are incorporated herein as if fully repeated verbatim; (b) the fact the Panel's finding she "has been released with no restrictions, and has returned to work (full duty)" is not only unsupported by the substantial evidence of record, but also the only reasonable inference arising from the contents on of the Record on Appeal; and (c) the material distinction between the current circumstances (lack of adequate evidentiary basis constitutes an error of law) and the scenario (presence of conflicting evidence) envisioned by the Hall ruling.

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4) The Court misapplied its prior ruling in Hargrove v. Titan Textile Co., 360 S.C. 276, 599 S.E. 2d 604 (Ct. App. 2004) to the effect it has concluded the Panel's factual findings are supported by substantial evidence, based upon: (a) the grounds/reasons outlined in Exception No. 1 of this Petition, which are incorporated herein as if fully repeated verbatim; (b) the absence of any variance between the single commissioner's and Panel's factual determinations; (c) the fact the Panel's finding she "has been released with no restrictions, and has returned to work (full duty)" is not only unsupported by the substantial evidence of record, but also the only reasonable

inference arising from the contents on of the Record on Appeal; (d) the absence of any contrary evidence which the Panel was obliged to weigh or adverse finding of witness credibility; and (e) the material distinction between the current circumstances (lack of adequate evidentiary basis constitutes an error of law) and the scenario (weighing conflicting evidence; witness credibility) envisioned by the Hargrove ruling.

Accordingly, Ms. Footman respectfully requests this Court to grant her Petition, withdraw/amend its prior decision, rehear the matter (affording the parties oral argument) and issue a new decision reversing the Circuit Court's and Panel's rulings on this point, while remanding her case to the Commission for *de novo* reassessment of her degree of residual permanent disability.

5) The Court misapplied its prior ruling in Mullinax v. Winn-Dixie Stores, Inc., 318 S.C. 431, 458 S.E. 2d 76 (Ct. App. 1995) to the effect it has concluded the Panel's factual findings are supported by substantial evidence, based upon: (a) the grounds/reasons outlined in Exception No. 1 of this Petition, which are incorporated herein as if fully repeated verbatim; (b) the fact the Panel's finding she "has been released with no restrictions, and has returned to work (full duty)" is not only unsupported by the substantial evidence of record, but also the only reasonable inference arising from the contents on of the Record on Appeal; (c) the absence of any conflict in the medical evidence as to the presence of work restrictions; and (d) the material distinction between the current circumstances (lack of adequate evidentiary basis constitutes an error of law) and the scenario (presence of conflicting medical evidence) envisioned by the Mullinax ruling.

Accordingly, Ms. Footman respectfully requests this Court to grant her Petition, withdraw/amend its prior decision, rehear the matter (affording the parties oral argument) and

issue a new decision reversing the Circuit Court's and Panel's rulings on this point, while remanding her case to the Commission for *de novo* reassessment of her degree of residual permanent disability.

6) The Court overlooked/misconstrued the legal insufficiency of the arbitrary/capricious process through which the Panel determined to afford "great weight" to a stale/remote notation referencing an isolated 2008 grip strength measurement 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.

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).

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. . . .”

As a consequence: (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.”).

While the Panel has the discretion to weigh the evidence when determining factual disputes, this process must have a rational basis and cannot be the product of an arbitrary/capricious “unusual finesse of reasoning”. See, Young v. Hyman Motors, 199 S.C. 233, 19 S.E. 2d 109, 112 (1942). In essence, the notion of attaching “great weight” to the 2008 comment in the current context is nonsensical, as it has absolutely no relevance to the loss of use of an arm (following intervening surgery and subsequent satisfactory grip tests) in 2012.

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).

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 Panel 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 Panel 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, Ms. Footman respectfully requests this Court to grant her Petition, withdraw/amend its prior decision, rehear the matter (affording the parties oral argument) and issue a new decision remanding her case to the Commission with specific instructions that, absent identification of a legal cognizable rationale, explained through entry of sufficient findings of fact, this stale and currently irrelevant comment should not be considered in assessing her degree of permanent disability.

7) The Court misapplied the Supreme Court's ruling in Pierre v. Seaside Farms, Inc., 386 S.C. 534, 689 S.E. 2d 615 (2010) to the effect it has concluded the Panel's factual findings are supported by substantial evidence, based upon: (a) the grounds/reasons outlined in Exception

No. 6 of this Petition, which are incorporated herein as if fully repeated verbatim; (b) the fact the Panel's stated "logic" for affording the February 1, 2008 "great weight" has no rational evidentiary basis in the context of assessing her permanent disability in 2012; (c) the utilization of an arbitrary/capricious/unlawful process in assessing Ms. Footman's residual permanent disability; and (d) the material distinction between the current circumstances (lack of adequate evidentiary basis constitutes an error of law; use of arbitrary/capricious/unlawful process for assessing evidence) and the scenario (presence of conflicting evidence) envisioned by the Pierre ruling.

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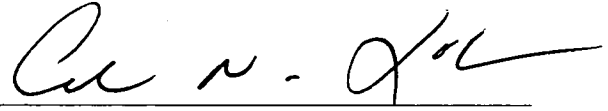
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10) The Court misapplied its prior ruling in Mullinax v. Winn-Dixie Stores, Inc., 318 S.C. 431, 458 S.E. 2d 76 (Ct. App. 1995) to the effect it has concluded the Panel's factual findings are supported by substantial evidence, based upon: (a) the grounds/reasons outlined in Exception No. 6 of this Petition, which are incorporated herein as if fully repeated verbatim; (b) the fact the Panel's stated "logic" for affording the February 1, 2008 "great weight" has no rationale evidentiary basis in the context of assessing her permanent disability in 2012; (c) the utilization of an arbitrary/capricious/unlawful process in assessing Ms. Footman's residual permanent disability; (d)) the absence of any conflict in the medical evidence as to the legitimacy of her residual symptoms/limitations; and (e) the material distinction between the current circumstances (lack of adequate evidentiary basis constitutes an error of law; use of arbitrary/capricious/unlawful process for assessing evidence) and the scenario (presence of medical conflicting evidence) envisioned by the Mullinax ruling.

Accordingly, Ms. Footman respectfully requests this Court to grant her Petition, withdraw/amend its prior decision, rehear the matter (affording the parties oral argument) and issue a new decision remanding her case to the Commission with specific instructions that, absent identification of a legal cognizable rationale, explained through entry of sufficient findings of fact, this stale and currently irrelevant comment should not be considered in assessing her degree of permanent disability.

Respectfully submitted,



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January 27, 2015

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY

COURT OF COMMON PLEAS

G. THOMAS COOPER, JR., CIRCUIT COURT JUDGE

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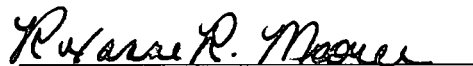
vs.

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

CERTIFICATE OF SERVICE

I, Roxanne R. Moorner, paralegal for Andrew N. Safran, Esquire, Attorney for Appellant, do hereby certify that on the 27th day of January, 2015, I caused to be filed, via hand delivery, the original and six (6) copies of the Appellant's Petition for Rehearing with the Clerk of the South Carolina Court of Appeals. One (1) copy of the Petition for Rehearing was furnished to counsel for Respondents via first class mail at the following address:

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January 27, 2015