THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. Supreme Court

APPEAL FROM CHARLESTON COUNTY

COURT OF COMMON PLEAS

G. THOMAS COOPER, JR., CIRCUIT COURT JUDGE

APPELLATE CASE NUMBER: 2013-001382

Latonya Footman,........................................................................... PETITIONER.

v.

Johnson Food Services, LLC, Employer, and The Hartford, ................RESPONDENTS.

# PETITIONER'S REPLY TO RESPONDENTS' RETURN TO PETITION FOR WRIT OF CERTIORARI

Andrew N. Safran
Post Office Box 12089
Columbia, South Carolina 29211
(803) 256-6689

and

Ann McCrowey Mickle, Esquire
Mickle and Bass, LLC
Post Office Box 5639
Columbia, South Carolina 29250
803-929-0029
Attorneys for Petitioner, Latonya Footman

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## ARGUMENTS

**A. <u>THE COURT OF APPEALS ERRED IN AFFIRMING THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION'S MAY 30, 2012 PERMANENT DISABILITY AWARD BECAUSE: (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 UNDISPUTED FACTS 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 UNDISPUTED FACTS, 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)</u>.**

After effectively characterizing Ms. Footman's obvious dissatisfaction with the process through which her permanent disability was assessed by the Commission as a Sherlockian discovery, Respondents predictably argue this determination "is supported by substantial evidence it specifically identified as support for its award." (See, <u>Respondents' Return in Opposition to Petition of Writ of Certiorari, p. 10</u>). However, this contention not only misconstrues an essential component of the Commission's Order, but also reflects a fundamental misapprehension as to the basis for this agency's disability determination.

As confirmed by a review of Finding of Fact No. 11 of their respective Orders, both the single commissioner and Appellate Panel felt "Dr. Green's assignment of impairment ratings to be somewhat inconsistent or, at the very least, ambiguous." (See, <u>Appendix, pp. 11 & 35</u>). In support of this ruling, they noted:

> A. ". . . [i]nitially (by medical report), authorized treating physician Dr. Green assigned a 2% impairment rating for each upper extremity" (**<u>"Defendants' APA No. 1, pp. 8, 13, and 19" - - Appendix, pp. 270, 297 and 302</u>**);
>
> B. ". . . [a]t his deposition, Dr. Green states that he agrees with an impairment rating in the range of 2% - 5%

**("Deposition of Dr. Green, pp. 26 – 28" - - Appendix, pp. 340 – 342)**;

C. "Dr. Green also considers the same range to be appropriate for cubital tunnel symptoms (leading the undersigned to conclude that the initial rating was for the carpal tunnel symptoms only)" (**Id.**);

D. ". . . [l]ater in his deposition, Dr. Green assigned a total ('collective') 2% impairment rating" **("Deposition of Dr. Green, p. . . 33" - - Appendix, p. 347)**;

E. ". . . [h]owever, the last page of the deposition appears (at least to the undersigned) to revert to the 4% - 10% impairment rating for each upper extremity" **("Deposition of Dr. Green, p. . . 34" - - Appendix, p. 348)**; and

F. ". . . [t]hen finally, in a 2011 report, Dr. Green seems to revert (again) to a 2% total rating for each upper extremity" **("Claimant's APA No. 2, p. 31" - - Appendix, p. 308).**

While Respondents maintain these excerpts represent "reliable, probative and substantial evidence in the record that supports the Commission's disability rating", a review of Finding of Fact No. 11 **actually reveals** the Panel cited this evidence as the basis for its recognition that: (a) the presence of these highly contradictory statements precluded it from premising Ms. Footman's "disability rating" on Dr. Green's opinions; and (b) its award necessarily had to be premised on other evidence (**"Regardless, my awards are based upon other factors as noted herein . . . ."**).

The Commission then proceeded to consider four additional factors, including: (a) Dr. Jackson's impairment ratings; (b) the remote (February 1, 2008) statement as to grip strength testing (more fully discussed in Argument B); (c) her occasional utilization of over-the-counter, as opposed to prescription, medication; and (d) its apparent belief she had "been released with no restrictions, and ha[d] . . . returned to work (full duty) with both of her employers". (See, Appendix, p. 12).

Ms. Footman does not challenge either the accuracy of Dr. Jackson's impairment ratings or her current medication regimen, but respectfully submits: (a) the relevant

evidence unequivocally establishes she was neither "released with no restrictions", nor working "full duty"; (b) the Commission's Order actually acknowledges her receipt of "accommodations" (assistance with tasks she cannot perform), as well as the fact she is now working "within the restrictions . . . which were placed upon [her] . . . by Dr. Jackson"; and (c) the finding as to "no restrictions" is wholly inconsistent with the undisputed evidence of record.

In this regard, inspection of Dr. Green's December 27, 2010 report verifies that, unlike prior occasions (See, Appendix, pp. 296 and 301), Respondents' designated physician did not identify Ms. Footman's "work status" as "[r]egular duty . . . [with] no restrictions", but instead indicated she could "progressively use the hand **as tolerated**." (See, Appendix, p. 289). Although Respondents' argue this Court's ruling in Grayson v. Carter Rhoad Furniture, 317 S.C. 306, 454 S.E. 2d 320 (1995) and the Court of Appeals' decision in Cranford v. Hutchinson Construction, 399 S.C. 65, 731 S.E. 2d 303, 308 (Ct. App. 2012) are not relevant to the current dispute, these cases unquestionably recognize: (a) medical restrictions in this context encompass more than outright prohibitions against specified activities; and (b) explicit instructions of the nature provided by Dr. Green constitute a restriction.

When this final pronouncement from Dr. Green as to Ms. Footman's work status is considered in light of the specific restrictions assigned by Dr. Jackson, as well as the Commission's specific acknowledgements that Ms. Footman's injuries necessitate her working within these restrictions and receipt of "accommodations" from her employer, it is readily apparent: (a) the relevant evidence is truly undisputed with respect to the presence of medical restrictions from each orthopaedic surgeon; (b) her working within the restrictions imposed by Dr. Jackson, in conjunction with the need for work "accommodations", belies any notion Ms. Footman "has returned to work (full duty)"

with Johnson Food Service; and (c) Finding of Fact No. 15 contained in the Commission's May 30, 2012 Order lacks evidentiary basis.

Given the Commission's admitted/unquestioned reliance "upon other factors" (rather than Dr. Green's ratings) in connection with the assessment of Ms. Footman's residual permanent disability and specific focus on her current work status as a material element of this process, it was obliged to **accurately** analyze the evidence as to each factor. However, the Commission failed to do so, as: (a) "there is, in reality, no evidence" to support its finding that Ms. Footman "has been released with no restrictions, and has returned to work (full duty)"; and (b) its factual finding to this effect, notwithstanding the presence of undisputed evidence, constitutes legal error at the most basic level. See, Hutson v. South Carolina State Ports Authority, 399 S.C. 381, 732 S.E. 2d 500, 504 (2012) (Reversing factual determination where "there is no evidence in the record supporting the commissioner's Order . . . .").

Based upon the nature and materiality of this legal error, Ms. Footman respectfully submits: (a) the absence of evidentiary support for an essential element of the Commission's disability determination is hardly a "peripheral issue"; and (b) her contention as to the legal insufficiency of the Commission's disability determination is accurate, rather than simply "inflated rhetoric". She consequently again requests this Court to grant her Petition for Writ of Certiorari, review the Court of Appeals' decision, permit oral argument and issue a decision endorsing/adopting her arguments on this issue.

**B. THE COURT OF APPEALS 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) THE DECISION TO AFFORD THIS STATEMENT "GREAT WEIGHT" HAS NO RATIONAL BASIS AND CAN ONLY BE CONSTRUED AS AN IMPERMISSIBLE COMMISSION-GENERATED MEDICAL OPINION; 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.**

During his February 1, 2008 examination, Dr. Jackson felt Ms. Footman did not provide maximal effort in connection with grip strength testing. This belief prompted him to "point . . . out the consistency of effort in grip strength as a basic element of building a doctor/patient relationship." (See, Appendix, p. 247). Ms. Footman obviously heeded this advice, as none of Dr. Jackson's subsequent reports reference inconsistent effort with grip strength testing (performed during each examination) or questioned the legitimacy of her injuries (reported symptoms, clinical presentation, etc.).

In fact, inspection of this physician's subsequent reports confirms: (a) Dr. Jackson's impairment ratings were based upon universally acknowledged nerve dysfunction that manifested itself through bilateral carpal and cubital tunnel syndromes; (b) he assigned several restrictions, which proved to be accurate; and (c) no indication that the February 1, 2008 grip strength anomaly was in anyway relevant to the current or future consequences of her compensable injuries. Significantly, had Dr. Jackson, whose narrative reports accurately reflect his blunt and independent personality, even suspected the February 1, 2008 episode had any bearing on Ms. Footman's impairment rating,

physical restrictions or long term prognosis in 2011, he would have surely acknowledged this fact. Consequently, the absence of any mention of the remote grip strength anomaly: (a) conclusively validates its lack of materiality; and (b) establishes that the determination to afford this comment as to a medical issue necessarily constitutes "the medical opinion of the single commissioner, adopted by the Commission." Burnette v. City of Greenville, 401 S.C. 417, 737 S.E. 2d 200, 206 (Ct. App. 2012).

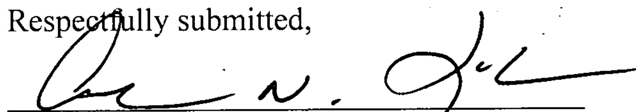
Additionally, assuming *arguendo* Finding of Fact No. 13 could be characterized as something less than the rendering of a medical opinion, it: (a) is not supported by substantial evidence, as "reasonable minds could not conclude, based upon the record as a whole, that" this innocuous statement impacted Ms. Footman's degree of permanent disability so as to warrant "great weight". (See, Weaver v. South Carolina Coastal Council, 309 S.C. 368, 429 S.E. 2d 340, 342 (1992) (affirming circuit court's reversal of agency decision based on several grounds, including absence of substantial evidence that granting dock permit would create unavoidable environmental hazard); Carolina's Recycling Group v. South Carolina Second Injury Fund, 398 S.C. 480, 730 S.E. 2d 324, 328 (Ct. App. 2012) (reversing Commission denial of Second Injury Fund reimbursement when "the only reasonable conclusion to be drawn from the substantial evidence in the record is that Carrier is entitled to partial reimbursement from the Fund.")); and (b) to irrationally ascribe "great weight" to this statement simply because it was generated in the remote past by Ms. Footman's "own expert", absent any identification of a plausible basis for doing so, is the epitome of arbitrary procedure. See, Leventis v. South Carolina Department of Health and Environmental Control, 340 S.C. 118, 530 S.E. 2d 643, 660 (Ct. App. 2000).

Respondents finally question the need for a *de novo* hearing before the Commission, maintaining there is "absolutely no reason that would justify" this request. In this connection, Ms. Footman would respectfully note: (a) approximately four years

have past since generation of the last component of medical evidence contained in the current record; (b) "disability . . . [in this context] reaches into the future" (Bennett v. Gary Smith Builders, 271 S.C. 94, 245 S.E. 2d 129, 131 (1978); Forrest v. A.S. Price Mechanical, 373 S.C. 303, 644 S.E. 2d 784, 787 (Ct. App. 2007)); (c) given the lapse of time, the present record does not necessarily reflect Ms. Footman's current degree of disability; and (d) a *de novo* hearing would best allow the parties to present, and the Commission to consider, evidence addressing her current degree of permanent disability.

Accordingly, Ms. Footman renews her request that the Court grant her Petition for Writ of Certiorari, review the Court of Appeals decision, permit oral argument and issue a decision finding: (a) the Court of Appeals' affirmance of the Commission's determination to place "great weight" on Dr. Jackson's February 1, 2008 statement constituted legal error, as the stated rationale was clearly arbitrary; (b) vacates the Commission's Order; and (c) remands this case to the Commission for the purpose of conducting a *de novo* hearing with the instruction that Dr. Jackson's February 1, 2008 comment is not relevant to the determination of her degree of permanent residual disability. As an alternative to the *de novo* hearing, she would respectfully request that the Commission be reminded as to its finding relative to the inconsistency and/or ambiguity of Dr. Green's impairment ratings, which constitutes the law of this case.

Respectfully submitted,



Andrew N. Safran, Esquire
Post Office Box 12089
Columbia, South Carolina 29211
(803) 256-6689

and

Ann McCrowey Mickle, Esquire
Mickle and Bass, LLC
Post Office Box 5639
Columbia, South Carolina 29250\
803-929-0029
Attorneys for Petitioner, Latonya Footman

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I, Roxanne R. Moorer, paralegal for Andrew N. Safran, Esquire, Attorney for Petitioner, do hereby certify that on the 5th day of May, 2015, I caused to be filed, via hand delivery, the original and six (6) copies of the Petitioner's Reply to Respondents' Return to Petition for Writ of Certiorari, with the Clerk of the South Carolina Supreme Court. One (1) copy of the Petitioner's Reply to Respondents' Return to Petition for Writ of Certiorari was furnished to counsel for Respondents via first class mail at the following address:

Jason W. Lockhart, III, Esquire
McAngus, Goudelock & Courie, LLC
Post Office Box 12519
Columbia, South Carolina 29211-2519
Attorney for Respondents

Helen F. Hiser, Esquire
McAngus, Goudelock & Courie, LLC
Post Office Box 650007
Mt. Pleasant, South Carolina 29465
Attorney for Respondents

Roxanne R. Moorer
Post Office Box 12089
Columbia, South Carolina 29211
(803) 256-6689

May 5, 2015