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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
APPELLATE PANEL, WORKERS' COMPENSATION COMMISSION

Opinion No. 2015-UP-339 (S.C. Ct. App. filed July 8, 2015)

LeAndra Lewis, ... Petitioner,

v.

L.B. Dynasty Inc., d/b/a
Boom Boom Room Studio 54, and
the S.C. Uninsured Employer's Fund, ... Defendants,

Of whom

The S.C. Uninsured Employer's Fund
is the . . . . . Respondent.

PETITION FOR A WRIT OF CERTIORARI

Blake A. Hewitt # 73674
John S. Nichols # 4210
BLUESTEIN NICHOLS
THOMPSON & DELGADO
Post Office Box 7965
Columbia, South Carolina 29202
(803) 779-7599
Attorneys for Petitioner

Other Counsel of Record:

Lisa C. Glover
SOUTH CAROLINA UNINSURED EMPLOYERS' FUND
100 Executive Center Dr., Ste. 101
Columbia, South Carolina 29210
(803) 798-2722
Attorneys for Respondent

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CERTIFICATE OF COUNSEL

The Court of Appeals issued its decision July 8, 2015. (App.pp.2-4). Petitioner's counsel certifies he filed for rehearing July 23, 2015. (App.pp.5-10). The court denied rehearing October 23, 2015. (App.p.18).

QUESTION PRESENTED

> Whether this Court should grant certiorari, dispense with further briefing, and remand this case to the Workers' Compensation Commission because the commission's calculation of LeAndra Lewis's earnings is clearly erroneous as a matter of fact and as a matter of law?

STATEMENT OF THE CASE

This petition follows proceedings after a remand from this Court.

This is a workers' compensation case. After this Court reversed the Court of Appeals on the claim's compensability, the Court of Appeals reviewed whether the commission correctly calculated LeAndra Lewis's past earnings. The Court of Appeals affirmed.

This Court may recall the salient facts from having already considered the case once. In July of 2008, Ms. Lewis was shot in the abdomen while working as a topless dancer. (App.p.144). She suffered extensive injuries, *id.*, and she filed a claim for workers' compensation benefits in December of 2008. (App.p.164).

L.B. Dynasty – the club's owner – has never appeared in this litigation. The Uninsured Employers' Fund began defending the case after the commission could not determine whether the club was subject to the Workers' Compensation Act. (App.pp.338-40). The Fund answered Ms. Lewis's claim with a general denial. (App.pp.165-67).

A single hearing commissioner denied the claim, holding Ms. Lewis failed to prove she was an employee rather than an independent contractor. (App.pp.150-52, Order ¶11). That finding ended the claim, but the order continued and held *if* Ms. Lewis *had* been an employee, her "compensation rate" would be $75 per week. (App.pp.152-53, Order ¶12).

The hearing commissioner gave three reasons for his conclusion on Ms. Lewis's income. First, he explained there was "no evidence whatsoever" of Ms. Lewis's earnings. (App.p.152). Second, he said the "only evidence" was Ms. Lewis's own self-serving testimony. *Id.* Finally, he held Ms. Lewis was bound by the wages she earned from L.B. Dynasty. (App.pp.152-53). Ms. Lewis said she worked full-time, dancing at various clubs throughout the Carolinas, but the hearing commissioner viewed Ms. Lewis's failure to file "Form 20s" from other clubs as fatal. *Id.* A Form 20 is published by the commission.

Of course, it was completely pointless for the hearing commissioner to address the compensation rate. The finding of no employment relationship barred Ms. Lewis's claim.

Ms. Lewis appealed and an appellate panel affirmed. The panel's order is not materially distinguishable from the hearing commissioner's order. Compare (App.pp.148-154) with (App.pp.157-162). The panel filed its order in June of 2010. (App.p.155). Ms. Lewis initiated an appeal to the Court of Appeals in early July. (App.pp.215-16).

The Court of Appeals affirmed in a split decision. (App.pp.68-77). The majority reasoned Ms. Lewis was an independent contractor. *Id.* The dissenting judge disagreed. *Id.* Neither the majority nor the dissent reached Ms. Lewis's argument that the commission inaccurately calculated her earnings. Ms. Lewis briefed the earnings issue, (App.pp.115-18), but the compensability ruling controlled the outcome. (App.p.74, section III).

This Court granted a writ of certiorari, reversed the Court of Appeals, and held Ms. Lewis was an employee. (App.pp.19-27). The Court remanded the earnings question. (App.p.26, Conclusion). This followed the approach Ms. Lewis suggested. (App.p.47, III).

The Court of Appeals did not conduct further argument or request any briefs. It presumably relied on the briefs filed in 2010 and 2011, though the Fund only filed an initial brief; it never filed a final brief. (App.pp.120-29). The parties did not receive anything from the court before the court issued its unpublished decision to affirm. (App.pp.2-4).

The Court of Appeals adopted the commission's logic. The court's analysis appears on the decision's final page. The court points to the absence of any Form 20, downplays Ms. Lewis's evidence, holds that earnings is a "factual" issue, and opines that the commission's decision is supported by the evidence and free from legal error. (App.p.4).

Ms. Lewis filed a petition for rehearing offering three arguments. (App.pp.5-10). They will not be recited here as they are repeated in the "argument" section below.

The Court of Appeals asked the Fund for a return. (App.p.11). The Fund filed one after getting an extension. (App.pp.12-16). Ms. Lewis filed a pointed reply. (App.p.17).

Over a month later, the court denied rehearing in a form order. (App.p.18).

ARGUMENTS

This is an error correction case. Nothing is novel, but there are three reasons this Court should dispense with further briefing and remand this case to the commission.

First, the Court of Appeals committed clear error in saying the commission's findings are supported by the evidence. It is uncontested that the commission's decision mis-states

key facts and does not consider all of the relevant testimony: the commission said there was "no evidence whatsoever" except Ms. Lewis's own testimony, but that "finding"—repeated in both commission orders—is plainly inaccurate. The commission's "facts" are wrong.

Second, the Form 20 is irrelevant. Period. A Form 20 is completed by an employer—*not* an employee—to report the money the employer pays a claimant. But a dancing club does not pay a dancer anything. Here again, the point is uncontested. Ms. Lewis's income was limited to tips from customers. Furthermore, the law requires multiple Form 20s when a claimant alleges "dual employment," but Ms. Lewis made no such allegation. Instead she asked the commission to follow the average weekly wage statute and vary the standard method of computing her earnings. A Form 20 is not germane.

Finally, the only evidence in the record is evidence that supports Ms. Lewis's claim. The Fund's trial strategy consisted of nothing more than cross-examining Ms. Lewis's witnesses. The Fund did not put up a case of its own. Nothing is wrong with that approach, but the result is that the *only* evidence in the record—which necessarily means the greater weight of the evidence—supports Ms. Lewis. The finding that Ms. Lewis failed to carry her burden of proof is clearly erroneous. The Court of Appeals erred in holding otherwise.

I. The commission's decision mis-states key facts and does not consider all of the relevant testimony.

The Court of Appeals believed the commission based its decision on two things: the absence of a Form 20 and the lack of any evidence except Ms. Lewis's and her witnesses' testimonies. (App.p.4). This section discusses the witness testimony. The Form 20 is discussed in section II.

The Court of Appeals mis-stated the commission's order. Yes, the commission heard from two witnesses who corroborated Ms. Lewis's testimony: a fellow dancer testified an "average night" working at a dancing club would yield $200 to $300 dollars, (App.p.231, lines 4-12), and Ms. Lewis's sister testified Ms. Lewis worked at least five days a week, fifty-two weeks a year. (App.p.313, lines 1-9). But the commission's findings of fact *never discussed these witnesses*. Instead, the decision inaccurately finds—as a fact—that there was "no evidence whatsoever" of Ms. Lewis's earnings or work schedule. (App.p.152, Order ¶12). Then, it inaccurately finds—as a fact—that the "only evidence is [Ms. Lewis's] testimony, which is self-serving." *Id.*; see also (App.p.161, Order ¶24.12) (panel's order).

Strangely, the commission cited the witnesses in other parts of its decision, although the decision omits that Ms. Lewis's sister corroborated Ms. Lewis's work schedule. (App.pp.145-46). Yet, despite noting these witnesses' existence, the relevant finding describes *only* Ms. Lewis's testimony, awkwardly transitions from one sentence declaring the absence of any evidence to an immediate admission that evidence does in fact exist, and describes Ms. Lewis's testimony as "self-serving," which curiously implies it would be better for Ms. Lewis to undermine her case rather than support it. The order never discredits Ms. Lewis's fellow dancer or Ms. Lewis's sister. The record reveals no basis for doing so.

In order to base its decision on the evidence, the commission must consider all of the evidence. This decision does not. The Court of Appeals gave the commission's decision too much credit. The pertinent part of the order never mentions the witnesses. Amazingly, the Fund repeats this omission in every brief it has filed throughout this case. (App.pp.12-16); (App.pp.49-58); (App.pp.120-129); (App.pp.168-173). Ms. Lewis is at a loss to explain this.

II. The absence of forms recording Ms. Lewis's "wages" is irrelevant—a club does not pay a dancer *anything*. Also, these forms are used for "dual employment," which Ms. Lewis never claimed.

Like the commission, the Court of Appeals gave weight to the absence of a Form 20, which is used to document a claimant's wages. (App.p.4). There are two reasons this analysis was error.

First, as the relevant regulation and the form plainly provide, a Form 20 is completed by an employer—*not* an employee—and is used to report the money the employer pays a claimant. See 8 S.C. Code Ann. Regs. 67-1603A (2012); see also Form 20, *available at* http://www.wcc.sc.gov/welcomeandoverview/forms/Pages/default.aspx. The form explains how the employer should calculate the "average weekly wage." Then, it walks the employer through calculating the "compensation rate."

But the club never paid Ms. Lewis anything. This point is uncontested; the commission's order specifically notes all of Ms. Lewis's earnings were tips from customers. (App.p.149, Order ¶8); (App.p.158, Order ¶9). Ms. Lewis's experience is typical. As a U.S. District Court in Florida noted, "it seems fairly obvious that [the exotic dancing club] would have no way of knowing how much money each of its dancers . . . took home at the end of a shift." *Harrell v. Diamond A Entm't*, 992 F. Supp. 1343, 1349 (M.D. Fla. 1997). Suppose Ms. Lewis had sought Form 20s from the other clubs where she danced. The clubs could not have completed them. The forms would be blank.

The Fund has never answered this argument. It has instead insisted Ms. Lewis was required to submit Form 20s from all clubs employing her. (App.p.57); (App.p.128).

This leads to the *second* reason the Court of Appeals erred in attaching significance to the Form 20: the law requires multiple Form 20s when a claimant is alleging "dual employment," which Ms. Lewis never claimed. As the Court of Appeals correctly explained, when an employee works concurrent jobs, the employee's wages from his multiple jobs may be combined to compute his average weekly wage. (App.p.3) citing *Steele v. Self Serve*, 335 S.C. 323, 326, 516 S.E.2d 674, 676 (Ct. App. 1999). But Ms. Lewis never argued dual employment to the commission. Her argument focused on the average weekly wage statute.

The average weekly wage statute contains multiple mechanisms for approximating a claimant's future earnings. It explains that when it is impractical to use one of the standard methods of calculating the average weekly wage because of the shortness of the time the worker has been employed, the commission is supposed to consider the average earnings of someone in the same class of employment in the same locality or community. See (App.pp.183) and (App.p.211), both quoting S.C. Code Ann. § 42-1-40 (2015).[1]

This is why Ms. Lewis brought a fellow dancer to testify. Though Ms. Lewis had only worked a few times at the club where she was injured, she sought to establish her average weekly wage based on the earnings of someone else who worked in this community. The commission missed this argument. The Court of Appeals followed suit.

III. The *only* evidence in the record is evidence supporting Ms. Lewis's claim. The Fund did not put up a case.

The commissioner found Ms. Lewis failed to carry her burden of proof and limited Ms. Lewis to the wages she earned from the club where she was injured. (App.p.153);

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[1]Ms. Lewis's brief to the hearing commissioner quotes the statute correctly but cites the wrong statute number. (App.p.183).

(App.p.161). It then held Ms. Lewis's weekly compensation rate would be $75; although, as Ms. Lewis's petition for rehearing describes, even based on the L.B. Dynasty earnings alone, the correct compensation rate vastly exceeds $75. (App.pp.5-6).

Candor requires Ms. Lewis to concede she is barred from focusing her argument on the commission's obvious mathematical error. It was not raised to the commission. Instead, Ms. Lewis focused on the Fund's nonsensical emphasis of the Form 20 and on the fact that the *only* evidence in the record is evidence that supports her claim.

This case was entirely about witness testimony. Four people testified; a police officer who investigated the shooting, Ms. Lewis, a fellow dancer, and Ms. Lewis's sister. See (App.pp.ii-iii) (Index, listing the witnesses). The single commissioner's summary of the Fund's position dealt only with Ms. Lewis's employment status. (App.pp.144-45). The Fund's only documented argument on average weekly wage appears in a post-trial brief. That brief summarizes Ms. Lewis's testimony and argues Ms. Lewis should be bound by her earnings from L.B. Dynasty because she did not obtain completed Form 20s from other dancing clubs. (App.pp.172-73). It never mentions the other witnesses. As with the pertinent sections of the commission's orders, the witness testimony is simply ignored.

The Fund did not put up a case, call any witnesses, or attack anyone's credibility. The *only* evidence in the record is evidence Ms. Lewis offered. It is hardly surprising that Ms. Lewis's evidence supports her claim. Claimants do not set out to undermine themselves.

If the *only* evidence in the record supports Ms. Lewis's claim, it necessarily follows that Ms. Lewis carried her burden of proof. Her case might not meet a higher standard like the "clear and convincing" standard, but it is more than nothing. The Fund offered nothing.

CONCLUSION

The Court of Appeals erred in affirming. The commission's decision mis-states key facts and does not consider all of the relevant testimony. Also, the Form 20 is completely irrelevant to this case, and the only evidence in the record is evidence that supports Ms. Lewis. Cf. *Grayson v. Carter Rhoad Furniture*, 317 S.C. 306, 310, 454 S.E.12d 320, 322 (1995) (noting there was actually "no evidence" to support a commission ruling the Court of Appeals had described as being based on a "mistaken" view of the evidence).

Rather than answer these arguments, the Court of Appeals ignored them. Ms. Lewis does not seek anything more than a fair award, and as requested in the brief she filed over 4 years ago, (App.p.119), on a claim that began over 7 years ago, (App.p.164), this case should be remanded for the commission to render an accurate calculation of Ms. Lewis's earnings.

Respectfully submitted,

November 23, 2015

Blake A. Hewitt
John S. Nichols
BLUESTEIN NICHOLS THOMPSON & DELGADO
Post Office Box 7965
Columbia, SC 29202
(803) 779-7599
(803) 779-8995 (facsimile)
bhewitt@bntdlaw.com
jsnichols@bntdlaw.com

Attorneys for Petitioner

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PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below she served counsel for the Respondent with a copy of the *Petition for Writ of Certiorari* and *Appendix* by mailing copies of the same by United States Mail with first class postage prepaid to the following address:

Lisa C. Glover, Esquire
State Accident Fund
P.O. Box 210039
Columbia, SC 29221-0039

Erin Bridges

November 23, 2015