

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

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APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

SC Court of Appeals

Melody L. James, Appellate Panel Chairman, Commissioner

Appellate Case No.: 2014-002294
WCC File No.: 1106833

Timothy McMahan, (Employee/Claimant),Appellant/Respondent,

vs.

S.C. Department of Education - Transportation (Employer) and
State Accident Fund (Carrier),..... Respondents/Appellants.

RESPONDENTS/APPELLANTS' FINAL REPLY BRIEF

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ARGUMENT

I. THE SOUTH CAROLINA WORKERS' COMPENSATION ACT DOES NOT PROVIDE FOR A POSTHUMOUS DETERMINATION OF A CLAIMANT'S PERMANENT DISABILITY.

In Appellant/Respondent's Initial Respondent's Brief, Appellant/Respondent argues that Respondents/Appellants are asking this Court to change the law regarding when a claimant's next of kin can receive an award after the claimant dies from unrelated causes. Appellants/Respondents are not asking for the law to be changed, but instead are simply requesting that this Court apply the law as it is written in the Act. "The rights and liability of employee and employer under the Workers' Compensation Act are purely statutory and are to be judged by the terms of the Act. Policy consideration as to what benefits should be conferred or obligations imposed are strictly for the Legislature." Owens v. Herndon, 252 S.C. 166, 167, 165 S.E.2d 696, 697 (1969).

S.C. Code Ann. §42-9-280, titled "Payment of an unpaid balance of compensation when employee dies," is the controlling statute in this situation. By its title alone, the statute clearly references an "unpaid balance" of compensation, as opposed to compensation that has not yet been awarded. S.C. Code §42-9-280 allows for two situations in which a claimant's next of kin can receive payment of the unpaid balance of compensation. First, the statute covers situations in which an employee has received compensation. Appellant/Respondent does not fall into this category. Second, the statute covers an employee who is "entitled to compensation under this Title for any injury covered by the second paragraph of §42-9-10 or §42-9-30." As stated in Respondent/Appellant's Initial Brief, the justification for the provision including the second group of claimants in the statute ("claimants entitled to compensation") is clear and rooted in the

history of the statute. South Carolina Code Ann. § 42-9-280 was originally created in 1936 (§1231), and codified as written in 1976. At that time, the previous lump sum Statute, S.C. Code § 42-9-300 (1976) was in effect, and provided:

Whenever any weekly payment has been continued for not less than six weeks, the liability therefor may, in unusual cases ... be redeemed, in whole or in part, by the payment by the employer of a lump sum which shall be fixed by the Commission....

S.C. Code § 42-9-300 (1976) (emphasis added).

Thus, at the time § 42-9-280 was written into law, the usual disability award was paid on a weekly basis, and lump sum payments were only in “unusual cases.” With the language of § 42-9-280, the Legislature addressed what to do with the remaining benefits if a claimant died while still receiving a weekly disability award. It is clear from the title and language of § 42-9-280 that it only applies to claimant’s who have been awarded disability by the Commission or through settlement, and have an “unpaid balance” of weekly benefits.

Despite this clear reading of the law, Appellant/Respondent asserts that the Commission has the right to award compensation if Appellant/Respondent was deemed to be at MMI and he received an impairment rating. This argument fails first because Appellant/Respondent was found to have not reached MMI by the Full Commission Appellate Panel. Even if this Court disagrees with the Full Commission and determines there was a finding of MMI prior to his death, the impairment rating assigned by Dr. Bolt was improper since it was not assigned until February 27, 2013, approximately four (4) months after Appellant/Respondent’s death. It is well settled law in South Carolina that an award cannot be based on surmise, conjecture, or speculation. Tiller v. National Health Care Center of Sumter, 334 S.C. 333, 339, 513 S.E.2d 843, 845 (1999); *see also*, McDowell v. Stilley Plywood Co., 210 S.C. 173, 41 S.E.2d 872 (1947) (holding testimony that is based on surmise, conjecture, and speculation has no probative

value). Dr. Bolt's February 27, 2013 finding of MMI and rating are based purely on surmise, speculation, or conjecture, since the Appellant/Respondent was not available for a final evaluation. The proper time to assign an impairment rating would be at the time the doctor releases a claimant at MMI. In this case, Dr. Bolt was still recommending pain management treatment and an EMG/NCS test that was never completed prior to Appellant/Respondent's death. (R. p. 91). As such, additional medical evidence was necessary to determine an impairment rating with a reasonable degree of medical certainty.

In support of his argument, Appellant/Respondent submits a list of Workers' Compensation awards dating from 2002 – 2012. First, these cases have no precedential value in this Court, and Appellant/Respondent provides minimal facts regarding the cases themselves and any specific similarities to the current case before the Court. In addition, Appellant/Respondent cites multiple cases decided prior to July of 2007, when the rules of the Act were changed to allow for a rebuttable presumption of permanent and total disability for a rating of 50% to the back or higher, while all pre July-2007 cases involving 50% or greater to the back were automatically deemed permanent and total disability.

Further, Appellant/Respondent argues that Respondent/Appellant's due process rights were not violated because they did not depose Dr. Bolt, cross examine Appellant/Respondent's wife, or hire another independent doctor to provide another opinion. This argument lacks merit because it cherry picks pieces of a party's methods to argue against an award of permanent and total disability. Appellant/Respondent completely ignores some of the most important discovery tools in workers compensation claims, including deposing a claimant to investigate their educational and work background and obtaining expert vocational evaluations. Further, Appellant/Respondent's argument that Respondents/Appellants could have obtained their own

independent doctor to challenge Dr. Bolt's finding of MMI or rating makes no sense since Appellant/Respondent was deceased and there would be no patient to evaluate.

The language of §42-9-280 only allows for a claimant's next of kin to receive compensation when an employee has already received it or is entitled to it. "Maximum medical improvement is a factual determination by the Commission." Curiel v. Environmental Management Services, 376 S.C. 23, 655 S.E.2d 482 (2007). "Expert medical testimony is intended to aid the Appellate Panel in coming to the correct conclusion." Potter v. Spartanburg Sch. Dist., 7, 395 S.C. 17, 716 S.E.2d 123 (Ct. App. 2010). "[W]hile medical testimony is entitled to great respect, the fact finder may disregard it if there is other competent evidence in the record." Tiller v. Nat'l Health Care Center, 334 S.C. 333, 340 (1999).

Any award of permanency based on a posthumous findings of MMI and rating would be purely speculative and based on surmise or conjecture. As a result, §42-9-280 does not provide an avenue for a claimant's next of kin to receive compensation before an award of disability has been determined by a Commissioner who has the benefit of access to all necessary evidence to evaluate and award permanency.

II. IF THE COURT DETERMINES THAT S.C. CODE ANN. §42-9-280 DOES ALLOW FOR A POSTHUMOUS ADJUDICATION OF PERMANENT DISABILITY, APPELLANT/RESPONDENTS AWARD FOR BENEFITS WOULD ABATE SINCE HE WAS PARAPLEGIC IN ACCORDANCE WITH S.C. CODE ANN. §42-9-10(C) AND CONTROLLING CASE LAW.

Appellant/Respondent next argues that the Commission was correct in concluding that the Respondent did not prove paraplegia. This statement is false on its face, since the Order of the Full Commission Appellate Panel states "[g]iven that we find that the Claimant was not at MMI at the time of his death, neither he nor his estate are entitled to a disability award, and we need not reach the issue." (R. p. 22). The Commission did not reject Respondents/Appellants

argument on this issue, but instead never felt the need to address it in more detail since they concluded Appellant/Respondent was not at MMI anyway.

Regardless, Respondents/Appellants maintain that S.C. Code Ann. § 42-9-280 only allows for awards to go to beneficiaries when they arise from § 42-9-10(B) (permanent and total statute due to loss of both hands, arms, shoulders, feet, legs, hips or vision, or any two thereof), or § 42-9-30 (scheduled member statute). Since S.C. Code Ann. § 42-9-280 makes no reference to § 42-9-10(C), any award for permanent and total disability to a claimant whose injuries result in paraplegia in accordance with S.C. Code Ann. § 42-9-10(C) would abate under the Act.

Appellant/Respondent was specifically diagnosed at MUSC on June 16, 2011 with “T12 compression fracture with retroplulsion” and “paraplegia.” (R. p. 105). There is a clear diagnosis by his treating physician of paraplegia, and no physician ever refutes this diagnosis. Further, the medical evidence consistently shows that Appellant/Respondent remained wheel-chair bound throughout his treatment, with significant neurological problems consistent with paraplegia, including significant gait and walking problems, dysesthetic pain, and neurogenic bladder. In his February 27, 2013 note, Dr. Bolt states “every time that I saw him he was confined to a wheelchair.” (R. p. 95).

In Dr. Bolt’s February 27, 2013 note, after the claimant’s death, he diagnosed the Appellant/Respondent with a “partial spinal cord injury/myelopathy” as a result of a “thoracic bust fracture with bony repulsion into the canal.” (Id.). Dr. Bolt specifically diagnoses Appellant/Respondent with neurogenic bladder, dysesthetic pain, and a significant gait disorder. (Id.).

Appellant/Respondent argues that even though Appellant/Respondent’s initial medical records from MUSC include a diagnosis of paraplegia, Appellant/Respondent continued to

improve and examinations of Appellant/Respondent showed the ability to walk with full leg strength. Obviously, this contradicts Dr. Bolt's last report, stating "every time that I saw him he was confined to a wheelchair." (Id.).

Even without subsequent mentioning of the word "paraplegia" in the medical records, this case is directly on point with the Court of Appeals decision in Reed-Richards v. Clemson University, 371 S.C. 304, 638 S.E.2d 77 (Ct.App. 2006). In upholding a lifetime benefits award where the claimant was found to have partial paraplegia, the Reed-Richards Court held that "the Commission and circuit court correctly interpreted the term 'paraplegic' to include a diagnosis of incomplete paraplegia." Id. at 309, 638 S.E.2d at 80 (emphasis added). Further, the claimant's condition in Reed-Richards is on point with Appellant/Respondent in this matter. The Court noted:

As a result of the accident, Reed-Richards has to use a walker, something she never needed before. She has also lost the ability to control her bowels; they empty at random times, forcing her to wear adult diapers and restricting her from going out in public because of odor problems. Her bladder condition originating from her 1973 accident has worsened, requiring her to catheterize herself more often than she had to in the past. Because of these problems, she is able to perform only menial tasks and cannot pursue additional vocational training.

Reed-Richards at 306, 638 S.E.2d at 78.

In Reed-Richards, the claimant was able to walk with the assistance of a walker, whereas in this case, Appellant/Respondent was wheelchair bound. Both the claimant in Reed-Richards and Appellant/Respondent had neurogenic bladders, with need for cathertizations due to neurogenic bladders. Further, the Court in Reed-Richards noted the opinion of the treating physician, who stated that "'[p]araplegia', according to the International Standards of Neurologic Classification of Spinal Cord Injury, Revised Sixth Edition, dated 2000, is 'impairment or loss of motor and/or sensory function in the thoracic, lumbar, or sacral segments of the spinal cord

secondary to damage of neural elements within the spinal canal.” This classification, relied upon in Reed-Richards to support a diagnosis of paraplegia, is completely consistent with Appellant/Respondent’s condition, and it supports the diagnosis of paraplegia by MUSC, and incomplete paraplegia described by Dr. Bolt.

Further evidence for the finding of paraplegia, in addition to the diagnosis at MUSC, is the impairment rating relied upon by Appellant/Respondent’s estate. In a normal back injury claim, without paraplegia, impairment is calculated by the Guides to Permanent Impairment under Chapter 17, “The Spine and Pelvis.” (R. pp. 148-192). Spinal cord injury impairments involving paraplegia or incomplete paraplegia are calculated under Chapter 13, “The Central and Peripheral Nervous System.” (R. pp. 123-147). Dr. Bolt indicates in his February 27, 2013 note that Appellant/Respondent’s spinal cord injury results in a 44% whole person impairment alone, pursuant to Chapter 13 of the AMA Guides. (R. pp. 95-96).

Based on the arguments above, if this Court determines that Appellant/Respondent was at MMI at the time of his death, any award of permanency would abate under S.C. Code Ann. §42-9-280 since Appellant/Respondent was paraplegic based on the medical records and the controlling law of Reed-Richards.

CONCLUSION

The substantial evidence in the record leads to the conclusion that the South Carolina Workers’ Compensation Act does not allow for a posthumous determination of disability. The Workers Compensation Commission Full Appellate Panel’s Decision that Appellant/Respondent was not entitled to compensation because he died prior to reaching MMI is not erroneous in light of the substantial evidence in the record, but Respondents/Appellants request an Order containing additional findings of fact and conclusion of law that the South Carolina Workers’

Compensation Act does not provide for a posthumous determination of disability. In the alternative, if the Court determines that the Workers' Compensation Act does allow for posthumous determination of permanent disability, Respondents/Appellants request an Order stating that Appellant/Respondent's award would abate as a result of him being paraplegic in accordance with S.C. Code § 42-9-10(C).

Respectfully Submitted,



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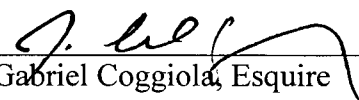
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CERTIFICATE OF COUNSEL

Respondents/Appellants, by and through their undersigned counsel, certify that
Respondent/Appellants' Final Reply Brief complies with Rule 211 (b), SCACR.



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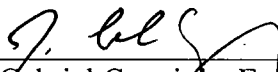
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PROOF OF SERVICE

The undersigned certifies that on the date indicated below he served counsel for Appellant/Respondent with a copy of the **Respondents/Appellants Final Reply Brief** by mailing copies of the same by United States Mail postage prepaid to the following addresses:

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