

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE S.C. WORKERS'
COMPENSATION COMMISSION

Appellate Case No. 2015-002112

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MAR 21 2016

SC Court of Appeals

Lettie Spencer, Employee, Appellant,

v.

NHC Parklane, Employer, and Premier Group Insurance Co., Inc., Carrier,
Respondents.

FINAL BRIEF OF RESPONDENTS

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STATEMENT OF ISSUES ON APPEAL

1. DID THE COMMISSION ERR IN FAILING TO FIND THAT MRS. SPENCER IS PERMANENTLY AND TOTALLY DISABLED?
2. IN THE EVENT THAT MS. SPENCER IS NOT PERMANENTLY AND TOTALLY DISABLED, DID THE COMMISSION ERR IN FAILING TO ADDRESS MS. SPENCER'S WAGE LOSS CLAIM?

STATEMENT OF THE CASE

This is a workers' compensation case. The Appellant, Lettie Spencer, sustained injuries to her lower back and psyche on June 22, 2011 as a result of an accident arising out of and in the course of her employment as a nurse with the Respondent Employer. (R. pp. 16 - 21). Following this accident, the Respondents paid for certain medical treatment rendered to Mrs. Spencer for these injuries, and also paid temporary total compensation to her. (Id.).

The Claimant contends that she is permanently and totally disabled as a result of the accident which forms the basis for this case. (R. pp. 22 - 23). She contends that she is entitled to an award of compensation for such permanent and total disability, as well as provision and payment for causally related medical care for the remainder of her life. (Id.). In the alternative she contends that she is entitled to benefits for a diminution in her ability to earn wages and pursuant to S.C. Code Ann. § 42-9-20 (1976).

The Respondents agree that Mrs. Spencer has sustained some degree of permanent partial disability as a result of the accident here, but deny that she is permanently and totally disabled. (R. pp. 24 - 25). They further deny that Mrs. Spencer is entitled to wage loss benefits. (Id.). The Respondents further agree that Mrs. Spencer is entitled to ongoing authorized, causally related and reasonable and necessary medical care which tends to lessen any disability sustained by her. (Id.).

A hearing to consider the issues set forth in the Parties' Forms 50 and 51 was conducted before Commissioner Michael Campbell on September 3, 2014. Following that hearing he issued his Decision and Order setting forth his findings of fact and conclusions of law. (R. pp. 1 - 15). Mrs. Spencer then requested Full Commission Review of Commissioner Campbell's decision. (R. pp. 26 - 27). A hearing was then held before an Appellate Panel of the Commission which affirmed Commissioner Campbell's decision for this case. (R. pp. 16 - 21).

Mrs. Spencer then filed a Notice of Appeal of the Commission's Decision and Order for this case. (R. pp. 28 - 29).

ARGUMENTS

I. THE FULL COMMISSION'S FINDING THAT MRS. SPENCER SUFFERED A 21% PARTIAL DISABILITY TO HER LOWER BACK IS SUPPORTED BY THE SUBSTANTIAL EVIDENCE.

Upon review in South Carolina, a decision of an administrative agency should be affirmed unless that decision is clearly erroneous in view of the reliable, probative and substantial evidence on the record as a whole. S.C. Code Ann. Section 1-23-380(g)(6) (1976); Lark v. Bi-lo, Inc., 276 S.C. 130, 276 S.E. 2d 304 (1981). The court reviewing the agency's decision should not substitute its own findings of fact for those of the agency nor should the court substitute its judgment for that of the agency as to the weight of the evidence. Tobey v. L & P Construction Company, 296 S.C. 122, 370 S.E. 2d 897 (Ct. App. 1988).

Substantial evidence is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the agency involved reached to justify its decision. Harrell v. Pacific Columbia Mills, 291 S.C. 469, 471, 354 S.E. 2d 384, 385 (1987). The substantial evidence rule means that the court will not overturn findings of fact by an administrative

agency unless there is no reasonable probability that the fact could be as related by the witness upon whose testimony the finding was based. Lark v. Bi-Lo, Inc., *infra*. When factual findings are supported by substantial evidence, analogous to a jury's finding of fact on disputed issues, the agency's conclusions should be affirmed. Hunter v. Patrick Construction Company, 289 S.C. 46, 344 S.E. 2d 613 (1986).

The thrust of Mrs. Spencer's argument in this case is that there is overwhelming expert and medical evidence to establish that she is either permanently or totally disabled or entitled to a substantial award of a compensation based upon an alleged diminution of her ability to earn wages as a result of the injuries she sustained. The Respondents do not deny that there is such evidence contained in the record for this case.

The question, however, is whether that expert medical evidence is reliable or credible, and especially when viewed alongside the vast and overwhelming lay and other evidence presented at the hearing for this case.

The South Carolina Supreme Court, on numerous occasions, has addressed the requirement that all types of evidence, both lay and expert, be considered in reaching a decision in a workers' compensation case. In Tiller v. National Health Care Center of Sumter, 334 S.C.333, 513 S.E.2d 843, (1999) the Supreme Court reached a seminal decision in this regard, by stating:

The Commission is given discretion to weigh and consider all the evidence, both lay and expert, when deciding whether causation has been established. See Ballenger v. Southern Worsted Corp., 209 S.C. 463, 40 S.E.2d 681 (1946) (despite doctor's testimony that there was not a connection with the accident that caused almost boiling dye to fly in claimant's face and eyes and his subsequent eye problems, lay testimony of claimant's good vision before the accident was sufficient to support an award); Poston v. Southeastern Construction Co., 208 S.C. 35, 36 S.E.2d 858 (1946) (lay/testimony that claimant's eyes became runny and inflamed after some construction material blew into them and that claimant lost vision in eyes subsequent

to the accident was sufficient to support an award, even though doctor testified vision loss was not related to job injuries).

Granted, in Tiller, and the cases cited by the Supreme Court awards of benefits and compensation were made to injured workers in the absence of clear, expert medical evidence establishing causation or a particular finding or conclusion, the rule of law established clearly flows in both directions.¹

Thus, while medical testimony is entitled to great respect, the Commission as the ultimate fact finder may disregard it if there is other competent evidence in the record. Ballenger, supra. As stated by the Supreme Court, “indeed, medical testimony should not be held conclusive irrespective of other evidence.” Ballenger, 209 S.C. at 467, 40 S.E.2d at 682-83. Expert medical testimony is designed to aid the Commission in coming to the correct conclusion; therefore, the Commission determines the weight and credit to be given to the expert testimony. Poston, supra; Hines v. Pacific Mills, 214 S.C. 125, 51 S.E.2d 383 (1949).

Finally, and perhaps most importantly, expert testimony, once admitted, is to be considered just like any other testimony. Smith v. Southern Builders, 202 S.C. 88, 24 S.E.2d 109 (1943).

The reason and basis for this well-established precedent is clear - just because an expert offers an opinion, does not mean that it is not subject to being challenged. Such is especially the case when an expert's opinion is built upon an unstable foundation. That is, facts which are not accurate. Otherwise, the opinion rests on nothing but shifting sand and is not reliable.

¹ Of course, the ruling in Tiller was subsequently modified by legislation enacted by the General Assembly in 2007. However, that legislation did not abrogate the requirement that the Commission consider all types of evidence in reaching its decisions.

Commissioner Campbell and three other Commissioners, sitting as an Appellate Panel, reviewed the evidence contained in the record for this case and chose to decide that the principle expert opinions offered by Mrs. Spencer in this case did not reach the level of such reliability as to support the foundation upon which she builds her case. As part of the summary of the evidence presented in this case, Commissioner Campbell noted the following:

“Counsel for the Claimant offered reports prepared by Patrick Mullen, M.D. and Leanna Hollenbeck, MS, CLCP, CRC in support of his position that the Claimant suffers from major depressive symptoms and is incapable of engaging in gainful employment at the present time.

“Upon cross examination by Counsel for the Defendants, Mrs. Spencer admitted that as a health care professional it is very important that a provider obtain an accurate history from a patient before reaching a diagnosis and assessing that patient’s condition and needs. She agreed that medical professionals must have accurate information in order to reach the opinions that they offer.

“Mrs. Spencer agreed that Dr. Mullen’s report for this matter indicates that she experienced minor medical problems until the accident in this matter, after which she began experiencing chronic pain and depression. She also agreed that Dr. Mullen’s report included in her history that she had never received any psychiatric care.

“The Defendants introduced records documenting medical treatment received by the Claimant prior to the accident involved in this case. Included in that evidence are records documenting treatment for Mrs. Spencer at Chester Regional Medical Center in January 2009. In those records it is noted that she reported a past medical history of chronic pain and depression. The Claimant testified that she did not recall providing that information to providers at Chester Regional, but does not have information to demonstrate that the referenced medical report is inaccurate.

“Prior medical records for Mrs. Spencer show that she underwent neck surgery in 2004. Medical records produced by Amy Dorn, M.D. demonstrate that in 2006 the Claimant reported symptoms of “hyperlipidemia, hypertension, chronic back pain, chronic neck pain status post surgery, carpal tunnel syndrome, restless leg syndrome, smoking and anxiety.” An insurance claim form prepared by the Claimant in 2005 reflects that she experiences neck pain and lower back pain.

“The Claimant also admitted that she provided a history to Dr. Mullen to the

effect that following the accident in this case, she had “to stay in her bed and the pain has grown worse.” Upon questioning she stated that her problems have improved to the point where she does not “stay in bed all the time anymore.”

“Mrs. Spencer further admitted that she did not provide an accurate history to Dr. Mullen regarding her marital status. Dr. Mullen’s report indicates that the Claimant resides with her husband, who is a truck driver and is not home on a regular basis. The evidence for this matter shows that Mrs. Spencer separated from her husband following a domestic dispute, and during which she was assaulted by him. When asked, she agreed that it is important for a mental health provider to fully understand the circumstances surrounding the stability of a patient’s family life before reaching a medical opinion.

“Dr. Mullen also set forth in his report that Mrs. Spencer “raised beautiful flowers, but has not done any gardening since the accident.” The Claimant testified that she does perform some yard work from time to time. She further agreed that Dr. Mullen’s statement that she is “completely dysfunctional” is not accurate.

“Mrs. Spencer agreed that Ms. Hollenbeck set forth in her report for this matter that she “reports being in agony by 5:00 p.m. after a day at home with little or no physical activity during the day.” She also agreed that Ms. Hollenbeck understood that she “uses a cane when she leaves her home.” The video evidence presented in this matter reflects no use of a cane by the Claimant. Further, she testified that she uses a cane only while outside and actually at her house.

“Upon cross examination the Claimant also testified that she planned to work until she reached the age of sixty-years of age and then work part-time. She also testified that she wants to perform volunteer work to assist individuals suffering from Alzheimer’s Disease.

“The Parties stipulate that the Claimant is shown in the video sequences and segments offered into evidence in this case. The Claimant agrees that the video does show her outside of her home, driving by herself, shopping and performing errands at any given times of the day, including the morning, afternoon and into the evening and night. She further agrees that portions of the video sequences show that she walks on occasion without difficulty. She, however, contends that this is only for short distances.

“With respect to the business known as Car Toys, Mrs. Spencer agrees that it was placed in her name, her name was on the lease, the power bill, water bill and the business checkbook. She also testified that she applied for the necessary permits to operate the business. She also stated that she paid the bills incurred by the business. When asked, she related that she did not inform either Dr. Mullen or Ms.

Hollenbeck that she was engaging in such business activities. She contends, however, that she never received any wages or compensation from Car Toys.

“After Car Toys ceased operations, the evidence shows that Mrs. Spencer participated in winding-up its affairs. Segments of the video offered into evidence shows Mrs. Spencer assisting with clearing debris from the garage where the business was located.

“Other video segments offered by the Defendants show the Claimant shopping. Specifically, she is shown emptying the contents of her shopping cart into her automobile.

“One segment of video shows the Claimant operating her John Deere lawn tractor at 2:00 p.m. on July 29, 2014. Mrs. Spencer agrees that the outside temperature on that date, and at that time, was approximately ninety-seven degrees. A review of the videotape shows that the Claimant spent an extended period of time operating the tractor and cutting her large lawn. Additional video evidence shows the Claimant filling gasoline cans on other dates, which she agrees are used to supply gasoline to her tractor. Mrs. Spencer also testified that she is able to perform a number of these physical tasks with the assistance of her TENS Unit.

“Terry Sartin, the Claimant’s son, testified as part of this matter. He stated that he actually operated the business known as Car Toys, which was financed by his Mother. He also testified that his Mother was depressed following her accident, and he encouraged her to get out of the bed and attempt to “do something.” Upon cross examination, he admitted that his Mother did perform some tasks for the business, including sweeping the floor areas and paying bills.

(R. pp. 7 - 11).

The video evidence in this case, visually depicting Mrs. Spencer in daily activities and spanning a wide period of time, is compelling. (Defendants’ APA Submissions and Exhibits). The summary of the evidence outlined above, including the video evidence, was used by Commissioner Campbell in crafting the findings of fact and conclusions of law set forth in his Decision and Order. (R. pp. 1 - 15). They further served as the foundation for the Appellate Panel’s Decision and Order for this case. (R. pp. 16 - 21). Obviously, the Panel deferred greatly to Commissioner Campbell’s opportunity to personally observe and hear Mrs. Spencer at the hearing

held before him.

There is clearly reliable and substantial evidence to support the Commission's decision in this case, not only with respect to whether or not she is permanently and totally disabled but also as to the award of permanent partial disability to her. As such the Respondents respectfully submit that it should be affirmed.

II. THE FULL COMMISSION DID NOT ERR WITH RESPECT TO MRS. SPENCER'S CLAIM FOR A WAGE LOSS UNDER § 42-9-20

The Respondents do not dispute that the Commission did not specifically make findings of fact or conclusions of law with regard to Mrs. Spencer's claim for wage-loss benefits under S.C. Code Ann. § 42-9-20 (1976). The Respondents contend, however, that such ruling is not necessary in this case given the evidence presented to the Commission, and the manner in which Mrs. Spencer presented her case below.

As noted, Mrs. Spencer's principle argument and theme in this case is that she is permanently and totally disabled as a result of her job-related accident in June 2011. Indeed, she relies upon the numerous expert opinions submitted to the Commission in this regard. The Commission, however, found and concluded that those opinions were undercut and outweighed by the other credible evidence in the record for this case.

In the face of such assertions the Respondents submit that it is difficult for Mrs. Spencer to argue an alternative theory here and ask the Court to accept it. In one breath Mrs. Spencer states that she is not able to engage in any meaningful work activity whatsoever, but in the next breath says she is capable of earning wages to some degree. From the Respondents' perspective such contentions are necessarily mutually exclusive, and given the manner in which the evidence has

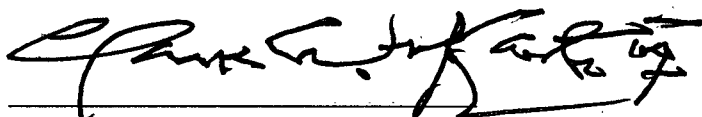
been presented by her in this case.

That said, and while the Respondents submit that the Commission's decision should be affirmed, to the extent that this Court accepts Mrs. Spencer's argument that a wage-loss claim should be addressed by the Commission more specifically, the Respondents welcome this Court's decision to remand this matter to the Commission solely for that purpose.

CONCLUSION

The Commission's decision in this matter is supported by substantial evidence and should be affirmed.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Clarke W. McCants, III", written over a horizontal line.

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March 15, 2016

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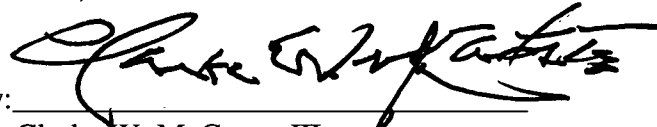
MAR 21 2016

SC Court of Appeals

CERTIFICATE OF COUNSEL

I hereby certify that the Final Brief of the Respondents complies with Rule 211(b) SCACR.

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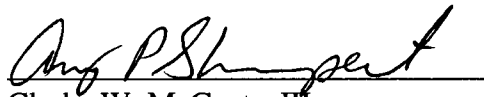
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PROOF OF SERVICE

I certify that I have served a copy of the Final Brief of Respondents on counsel for the Appellant, Andrew W. Creech, Esquire, by depositing a copy of the documents in the United States Mail, postage prepaid, on March 17, 2016 addressed to Andrew W. Creech, Esquire, Elrod Pope Law Firm, P.O. Box 11091, Rock Hill, SC 29731

March 17, 2016



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