

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Tanya A. Gee, Circuit Court Judge

Appellate Case No.: 2015-002486
Trial Court Case No.: 2015-CP-40-00169

RECEIVED

MAY 25 2016

SC Court of Appeals

Gertrude Shiver,.....Appellant,

v.

Palmetto Health Richland, Employer,
Palmetto Health Trust, Carrier,..... Respondents.

INITIAL BRIEF OF RESPONDENTS

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RESTATEMENT OF ISSUE ON APPEAL

Respondents would restate the issue on appeal as follows:

- I. DID THE CIRCUIT COURT ERR IN AFFIRMING THE DENIAL OF APPELLANT'S MOTION FOR SANCTIONS AGAINST RESPONDENTS FOR FAILING TO PAY TEMPORARY TOTAL DISABILITY BENEFITS FROM MARCH 23, 2002 THROUGH APRIL 8, 2002?

STATEMENT OF THE CASE

The case giving rise to this appeal has a tortuous procedural history. It arises from a worker's compensation claim for an admitted injury by accident to Appellant Gertrude Shiver's ("Shiver") lower back that occurred on March 23, 2002 (WCC File Number 0217755). That claim was consolidated with six other worker's compensation claims Shiver filed which stemmed from a number of work-related injuries that allegedly occurred between 1995 and 2006. Although the claims involved multiple employers and carriers, all matters pending before the Workers' Compensation Commission were ruled upon in an October 23, 2007 Decision and Order of Commissioner David W. Huffstetler (October 23, 2007 Decision and Order). With respect to the particular claim giving rise to this appeal, Commissioner Huffstetler found that Shiver had sought out unauthorized medical treatment for which the Defendants were not responsible; that Shiver did not suffer any permanent disability; that Defendants did not contest the payment of temporary total disability benefits from March 23, 2002 through April 8, 2002; and that Defendants had submitted evidence showing they had paid all authorized medical costs. The Order did not command Defendants to pay any temporary total disability benefits at that time. (October 23, 2007 Decision and Order).

In response to the October 23, 2007 Decision and Order denying her claims,

Shiver delivered a letter dated November 5, 2007 addressing the merits and seeking leave to submit additional evidence. (November 2007 letter). Commissioner Huffstetler treated Shiver's November 5, 2007 correspondence both as a motion for leave to submit additional evidence to the Commission and as a Form 30 Request for Commission Review of the October 23, 2007 Decision and Order.

In December 6, 2007, the Full Commission denied Shiver's motion to submit additional evidence but did not address the underlying merits of her claims. (December 6, 2007 Decision and Order). Thereafter, Shiver filed a notice of appeal to the circuit court, which was dismissed as interlocutory and remanded for Full Commission consideration of the merits via order dated July 9, 2010. (July 9, 2010 Order). Shiver's successive motion to include additional evidence was denied by the Full Commission, which thereafter issued a May 3, 2011 Order affirming the single commissioner's Decision and Order in its entirety. (May 3, 2011 Order). On May 28, 2011, Shiver filed a notice of appeal via letter to the Commission, followed by the filing of a second notice of appeal in the circuit court on or after June 1, 2011. After oral argument on November 1, 2012, the circuit court entered an Order dated March 26, 2013 in which it concluded the findings of fact and conclusions of law reached by the Commission were supported by substantial evidence and, accordingly, affirmed that order in its entirety. (March 26, 2013 Order). That order is currently on appeal to this Court.

On March 21, 2014, Shiver filed a Form 50 and Motion for Sanctions with the Commission, alleging that Respondents had failed to pay any temporary total disability benefits and had likewise failed to pay all authorized medical costs with respect to the March 23, 2002 injury. Respondents sought to dismiss Shiver's filing in light of the

pending appeal. Commissioner Andrea C. Roche issued an Order on June 20, 2014 finding that Commissioner Huffstetler's September 4, 2007 Order did not command Respondents to pay any temporary total disability benefits, so the appeal of that Order to the South Carolina Court of Appeals did not divest the Commission of jurisdiction over the issue. She noted that Respondents had indicated a willingness to make certain that the temporary total disability payment from March 23, 2002 through April 8, 2002 at the Appellant's applicable compensation rate of \$350.76 had either already been paid or would be paid to the Appellant. She also found that the Respondents had further confirmed that the cost of all authorized medical treatment had been paid, and because there had never been an Order compelling the Respondents to pay any temporary total disability benefits in this claim, it was inappropriate to award any sanctions or penalties against the Respondents.

Pursuant to a Form 30 filed on July 7, 2014, Appellant petitioned the Full Commission for review of the Hearing Commissioner's findings of fact and conclusions of law. The Full Commission heard the appeal and issued an Order affirming Commissioner Roche's findings on December 17, 2014. (December 17, 2014 Order).

Appellant filed a Notice of Intent to Appeal and Petition For Review of Decision and Order of The South Carolina Workers' Compensation Commission on January 12, 2015 with the Richland County Clerk of Court.

On November 9, 2015, Judge Tanya A. Gee affirmed the Full Commission's December 17, 2014 Order. She found the delay in paying temporary total disability benefits was occasioned by the confusing procedural history of Appellant's claims, which did not warrant the imposition of sanctions. (November 9, 2015 Order). Shiver again

appealed to this court on the ground that the failure to award her a 25% penalty was an error of law. Shiver's claim involving WCC File Number 0217755 is still pending in the Court of Appeals as to her claims for additional indemnity and medical benefits. No final Order has been issued regarding those matters.

ARGUMENT

Standard of Review

Section 1-23-380 of the South Carolina Code of Laws establishes the "substantial evidence" rule as the standard of review for decisions of the Workers' Compensation Commission. *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 276 S.E.2d 304 (1981). Pursuant to that rule, the circuit court reviewing an award or denial of benefits may reverse or modify the agency's decision only if the findings, rulings, and conclusions of the administrative agency are "clearly erroneous in view of the reliable and substantive evidence of the whole record." *Id.*, 276 S.C. at 135, 276 S.E.2d at 306. Substantial evidence is defined as:

Such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. It must be enough to justify, if the trial went to a jury, refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury. This is something less than the weight of the evidence and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.

Id., 276 S.C. at 135-136, 276 S.E.2d at 307. Appellate courts are not at liberty to substitute their view of the evidence for that rendered by the Commission. Rather, "[t]he Circuit Court's role is appellate only, and is limited to deciding whether the Commission's decision is not supported by substantial evidence or is controlled by some error of law." *Rogers v. Kunja Knitting Mills Co.*, 312 S.C. 377, 440 S.E.2d 401 (Ct. App. 1994). When reviewing an appeal from the Workers' Compensation Commission, the appellate court

may not weigh the evidence or substitute its judgment for that of the Full Commission as to the weight of the evidence and questions of fact. *Farrell v. Jerry's, Inc.*, 370 S.C. 22, 26, 633 S.E.2d 893, 894-895 (2006).

Moreover, "the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Palmetto Alliance, Inc. v. South Carolina Pub. Serv. Comm'n*, 282 S.C. 430, 432, 319 S.E.2d 695, 696 (1984). In workers' compensation cases, the Appellate Panel is the ultimate finder of fact. *Shealy v. Aiken County*, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000). When the evidence is conflicting over a factual issue, the findings of the Appellate Panel are conclusive. *Hargrove v. Titan Textile Co.*, 360 S.C. 276, 290, 599 S.E.2d 604, 611 (Ct. App. 2004). The final determination of witness credibility and the weight to be accorded evidence is reserved for the Appellate Panel. *Bass v. Kenco Group*, 366 S.C. 450, 458, 622 S.E.2d 577, 581 (Ct. App. 2005).

I. DENIAL OF APPELLANT'S MOTION FOR SANCTIONS WAS PROPER.

Shiver was entitled to temporary total disability benefits from March 23, 2002, until April 8, 2002. There was a long delay in paying those benefits, but they have been paid. (June 20, 2014 Motion Order). The Commission found that Respondents acted reasonably in delaying the payment. (November 9, 2015 Order). The total amount of those temporary total disability benefits is \$851.68. Shiver contends that because of the delay, Palmetto Health should be required to pay to her a 25% penalty in the amount of \$212.92.

Section 42-9-260 of the South Carolina Code of Laws governs the payment of

temporary total disability benefits. It provides, in pertinent part:

(A) When an employee has been out of work due to a reported work-related injury or occupational disease for eight days, an employer may start temporary disability payments immediately and may continue these payments for up to one hundred fifty days from the date the injury or disease is reported without waiver of any grounds for good faith denial. Upon making the first payment, the employer immediately shall notify the commission, in accordance with a form prescribed by the commission, that payment of compensation has begun.

....

(G) Failure to comply with this section shall result in a twenty-five percent penalty imposed upon the carrier or employer computed on the amount of benefits withheld in violation of this section, and the amount of the penalty must be paid to the employee in addition to the amount of benefits withheld. However, the penalty does not apply if the employer or carrier has terminated or suspended benefits when the employee has returned to any employment at the same or similar wage.

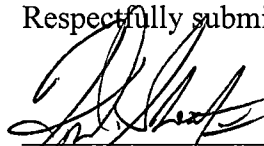
S.C. Code Ann. § 42-9-260 (Rev. ed. 2015).

Shiver relies upon section (G) of § 42-9-260 and *Martin v. Rapid Plumbing*, 369 S.C.278, 631 S.E.2d 547 (Ct. App. 2006) for the proposition that the imposition of sanctions was mandatory in this instance. However, for that to be the case, Shiver would have to show the Respondents' failure to comply with some other provision of § 42-9-260. She has not done so. While Respondents admitted that temporary total disability benefits were owed—and have since been paid-- no order was ever entered *compelling* that they be paid, and the order that merely acknowledged the Respondents' admission that the benefits were owed remains on appeal to this day. The Orders denying Shiver's request for sanctions are therefore supported by substantial evidence and should be affirmed.

CONCLUSION

For all of the reasons stated herein, the Order of the circuit court affirming the order of the Full Commission should likewise be affirmed.

Respectfully submitted,



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May 25, 2016.

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Tonya A. Gee, Circuit Court Judge

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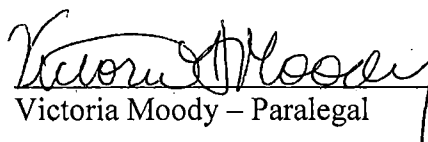
Gertrude Shiver,Appellant,

v.

Palmetto Health Richland, Employer
Palmetto Health Trust, Carrier, Respondents.

PROOF OF SERVICE

I certify that I have served the Initial Brief of Respondent and Respondent's Designation of Matter to Be Included in the Record on Appeal on Appellant Gertrude Shiver by depositing a copy of each document in the United States Mail, postage prepaid, on May 25, 2016, addressed to 1026 Congaree Church Road, Gadsden, South Carolina 29052.


Victoria Moody – Paralegal

May 25, 2016.

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May 25, 2016

VIA Hand Delivery:

The Honorable Jenny Abbott Kitchings
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RE: *Gertrude Shiver v. Palmetto Health Richland and Palmetto Health Trust*
Case No. 2015-CP-40-000169
Appellate Case No. 2015-002486
A&R File No. 050015-093730

Dear Ms. Kitchings:

Enclosed for filing in the above-referenced matter are the originals and one copy each of Respondent's Initial Brief and Designation of Matter to Be Included in the Record on Appeal. Please file the originals and return the clocked-in copies to me via our courier. By copy of this letter, I am serving opposing counsel with the brief and designation of matter as set forth in the enclosed Proof of Service. Thank you for your attention to this matter.

Sincerely,



Kirby D. Shealy III

KDSIII/vhm
Enclosures

cc: Gertrude Shiver, *Pro Se*
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