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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

W.C.C. File No.: 1414226

Court of Appeals Case No. 2016-000595

Laurent W. Britton, Decedent/Employee, and
Marsha P. Britton, Claimant, ... Respondents,

v.

Charleston County, Employer, and
SC Association of Counties, SIF, Carrier, ... Appellants.

FINAL REPLY BRIEF OF APPELLANTS

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ARGUMENT

I. RESPONDENT FAILED IN ANY MEANINGFUL WAY TO REBUT THAT THE SCWCC COMMITTED AN ERROR OF LAW IN FINDING THE DECEDENT'S HEART ATTACK COMPENSABLE UNDER THE ACT.

A. RESPONDENT'S ARGUMENT AGAINST AN ERROR OF LAW IS PREDICATED ON SPECULATION.

Respondent's focus throughout her Initial Brief, much like the SCWCC, is restricted to the very sympathetic and sensational nature of the standoff and the surrounding events, rather than focusing on the Decedent's actual job and whether the activities he was performing on the night of his heart attack were extraordinary or unusual for his specific job. Outside of one reference from the Director of Communications William Tunick, Decedent's supervisor, that the Decedent "sounded stressed" while driving back to work that evening, the remaining statements and assertions made in this regard are without any evidentiary foundation and are purely speculative in nature. Specifically, the Respondent notes the Appellants "left out facts" that show the Decedent had "great mental stress and worry, emotional involvement, and long hours as he managed the county radio system." *See* Resp't. Br., p. 3. Simply put, there are no *facts* indicating the Decedent suffered from great mental stress and worry, emotional involvement, or long hours. These alleged facts are nothing more than subjective speculation created by the Respondent, which cannot form the basis for any finding, conclusion, or analysis as to the compensability of the heart attack. *See Linen v. Ruscon Constr. Co.*, 286 S.C. 67, 332 S.E.2d 211 (1985). While it is unfortunate, it is also true that as the Decedent is no longer alive it is impossible to ascertain whether he felt any of the emotions assumed by Respondent throughout her Initial Brief.

B. NEITHER RESPONDENT NOR APPELLATE PANEL ADDRESSED WHETHER THE HEART ATTACK WAS INDUCED BY UNEXPECTED STRAIN OR OVEREXERTION.

The Respondent asserts the Appellants have relied upon an incomplete statement of the legal standard for heart attack cases, noting the correct standard is whether the heart attack was induced by unexpected strain or overexertion in the performance of the duties of employment or by unusual and extraordinary conditions of the employment. *See* Resp't. Br., p. 12 (*citing McWhorter v. S.C. Dept. of Insurance*, 252 S.C. 90, 165 S.E.2d 365 (1969)). Specifically, Respondent asserts the Appellants failed to consider and address whether the heart attack was caused by unexpected strain or overexertion. Importantly, the Respondent and the Appellate Panel also failed to address this part of the standard. In fact, per Finding of Fact #1 from the Appellate Panel, the Respondent "alleges that Decedent-employee died of a work-related heart attack/injury . . . as a result of the extraordinary and usual conditions of employment." (R. p. 15). The Respondent has never alleged that the heart attack was caused by unexpected strain or overexertion, but has instead continuously asserted the alleged extraordinary and unusual conditions of the Decedent's employment as the cause. Of course, and as has been argued by the Appellants, the Appellate Panel completely failed to provide any finding to fact or conclusion of law addressing the proper legal standard, or how that standard may have been satisfied by the Respondent.

In addition, neither the Respondent in her Initial Brief, nor the Appellate Panel have identified any facts representing Decedent's unexpected strain or overexertion. That is because the job duties Decedent was performing on this unfortunate night did not create unusual strain or overexertion, but rather were duties that were performed as "standard and necessary conditions" of his employment. *See Bentley*, 398 S.C. 418; 730 S.E.2d 296. In fact, Respondent's in her Initial Brief actually supports Appellants' position that what Decedent did at work on the evening of his heart attack was not unusual and extraordinary.

For instance, in her recitation of the facts, Respondent points to the active shooter incident wherein one police officer was shot and killed and another was seriously injured. *See* Resp't. Br., p. 12. However, Respondent conveniently omits the fact at that moment in time, Decedent was not even working as he was attending another off duty function. In fact, at no time during Decedent's return to work between approximately 8:30 p.m. and 1:30 a.m. were any shots fired by anyone at the scene of the standoff. Instead, Decedent's job upon his return to work, miles from the shooting, was to presumably monitor the radio communications during the standoff for all of the emergency responders to make certain that nothing interfered with those communications. As the "Radio Communications Manager," this is an exact requirement of his job, and is certainly not an unusual and extraordinary condition of his specific employment.

Furthermore, Respondent directs the Court to Mr. Tunick's testimony that "Mr. Britton was an extremely dedicated employee [who] **always** gave 110 percent to support the public safety communications... **At any time day or night** Larry would support a major public safety incident in the county." *See* Resp't. Br., p. 3 (*citing* R. p. 140, ll. 5-10) (emphasis added). It seems inconsistent to argue on the one-hand that someone who "always" gives 110% and who would work "at any time day or night" was then on the other hand involved in unusual and extraordinary conditions of employment because he was working one overtime shift of several hours due to a county emergency.

Appellants do not dispute that this was an emergency situation involving potential threat to life or limb of police officers, or that police officers and other emergency responders have a close bond. However, these police officers put their lives on the line every day as they respond to emergency situations involving firearms, and the other emergency responders do as well when they become involved. It is the normalcy of these

jobs to deal with threats of life and limb and emergencies. Because of the very nature of their jobs, such emergencies are by definition not unusual or extraordinary. While some emergencies may be worse than others, they are all emergencies hence the term emergency response. Based upon the testimony of all of the witnesses, it was because officers were shot that made this situation different from other emergencies. While such shootings are thankfully infrequent, the very threat of same is a constant in the lives of police officers. As stated by the Supreme Court in *Bentley*, the analysis should not concern the frequency of particular events or circumstances. 398 S.C. at 427, 730 S.E.2d at 301. In fact, these incidents should not be considered compensable if they result from any event or series of events which are incidental to normal employer/employee relations.

As was noted earlier, Decedent was not working when the officers were shot. Moreover, Decedent's normal and customary duties were to monitor communications to make sure the lines were clear for communication during any emergency, which is exactly what he was doing on the night of his heart attack. Thus, he was performing his specific, normal job duties of monitoring the radio frequency to make certain no problems developed with overload. The subject matter of those radio communications was not relevant to his job duties. Respondent supposes that human nature would result in Decedent listening to the content of the communications. (Resp't. Br., p. 12). However, Appellants would argue that human nature is by definition not unusual or extraordinary but rather the norm of all humans. Further, this supposition is speculative.

Respondent then cites the cases of *Fulmer v. Elec. & Gas Co.*, 306 S.C. 34, 410 S.E.2d 25 (Ct. App. 1991) and *Jennings v. Chambers Development Co.*, 335 S.C. 249, 516 S.E. 2d 453 (Ct. App. 1999), in further support of her position in this case. Specifically, she claims the complete heart attack standard is "[i]f a heart attack occurs as a consequence

of the ordinary exertion that is required in the performance of employment duties in the ordinary and usual manner, **and without any outward untoward event**, it is not compensable." *Id.* Respondent emphasizes the phrase "and without any outward untoward event" to support her argument there was such an event in this case to support compensability. However, the flaw in this logic is that the normal, customary, usual, and ordinary nature of the Radio Communications Manager is to be available 24/7 to manage the communications for all emergencies (i.e. "outward untoward events") no matter what time of day or night they may occur. In short, the Decedent's normal and written job requirements included the handling of radio communications for any type of emergencies or events as a usual and ordinary part of his job. Therefore, in reality both *Fulmer* and *Jennings* support the proper conclusion that there was nothing unusual or extraordinary about Decedent's job on the evening of his heart attack as he was monitoring an outward emergency event as were the normal requirements of his job.

Respondent also focuses on the case of *Shealy v. Aiken County*, 341 S.C. 448, 535 S.E.2d 438 (2000) to support her position in this case that the perceived combination of events and circumstances support that Decedent's employment was unusual and extraordinary on the night he suffered his heart attack. *See* Resp't. Br., p. 13. The Respondent, however, misconstrues this case in making this leap. Specifically, the combination of events described in *Shealy* occurred over a period of several months, not one evening. Shealy, 341 S.C. 448, 535 S.E.2d 438 (see also *Stokes v. First National Bank*, 306 S.C. 46, 410 S.E.2d 248 (1991) ("the extreme **prolonged** increase in Stokes' work hours, combined with additional job responsibilities, constitutes 'unusual and extraordinary conditions of employment'") (emphasis added)).

To the contrary, Decedent was only working an emergency situation a few hours after his job had ended that day, which of course is consistent with the expectations provided by job description. Although Respondent claims Decedent dealt with the time pressures of getting the equipment together and loaded on the van to be taken to the scene, the only evidence in the record was that particular job was actually performed by Mr. Krantz. But even had Decedent participated in that job, it was part of the normal sequence of events in monitoring emergency scenes for radio clearance. In short, there is no combination of unusual events as was the case in *Shealy* occurring over a period of months to make a heart attack compensable.

Respondent, next cites to the case of *Doe v. Dept. of Disabilities*, 377 S.C. 346, 660 S.E.2d 260 (2008). However, Respondent again misconstrues the result, which is clearly distinguishable from our case. In *Doe* there was a complete change in the specific work environment of the claimant at her job, again occurring over a significant period of months. *Id.* at 348, 660 S.E.2d at 261. The Supreme Court found the change over time to be extraordinary and led to a significant increase in violent behavior towards claimant which was unusual and extraordinary. *Id.* Appellants submit that *Doe* appears to be limited to cases with those specific over time stressful, unusual and extraordinary job changes. In the case at hand, there is no change in work environment at all, and certainly nothing occurring over a significant period of time as in *Doe* and *Shealy*. Decedent was simply performing his usual job maintaining the ability for communications between several emergency responders during a very stressful public emergency as he normally did same pursuant to his experience and training. He was called upon to work in these austere conditions when they arose.

Ultimately, the Respondent just like the Appellate Panel focuses entirely on the nature of the circumstances surrounding the standoff site rather than focusing on the Decedent's actual job duties. Respondent does not point to any specific Finding of Fact or Conclusion of Law recited by the Appellate Panel which addresses directly or recites what the Appellate Panel believed were the unusual and extraordinary conditions of Decedent's job sufficient to cause the heart attack. Rather, the Respondent does exactly what the Appellate Panel did and improperly focuses on Finding of Fact #18 which simply concludes, "every single witness testified that the circumstances surrounding the shooting were unusual and/or not typical and extraordinary when compared to other emergencies." *See* Resp't. Br., p. 17.

Therefore, Appellants assert the Respondent has failed to rebut the argument that an error of law was committed by the Appellate Panel in finding the unfortunate heart attack compensable under the Act. The Appellants request the claim be reversed and remanded to the Appellate Panel for an application of the proper legal standard, as outlined herein.

II. THE SUBSTANTIAL EVIDENCE STANDARD DOES NOT APPLY BECAUSE THE UNDERLYING FACTS ARE NOT IN DISPUTE.

The question of whether an incident arises to the level of a compensable accident becomes a question of law when the underlying facts are not in dispute. *Douglas v. Spartan Mills, Startex Div.*, 245 S.C. 265, 140 S.E.2d 173 (1965). As a question of law, the Court may apply its own analysis and weight to those facts to determine if the incident equates to a compensable accident. *Gray v. Club Grp., Ltd.*, 339 S.C. 173, 182, 528 S.E.2d 435, 440 (Ct. App. 2000). *See* S.C. Code Ann. §1–23–380(A) (6) (d), (e) (Supp.1997). Respondent readily admits at that "the evidence was essentially undisputed." *See* Resp't. Br., p. 2. Therefore, the substantial legal standard does not apply in this scenario. Moreover, because the Appellate Panel failed in its Order to even

address what specifically about Decedent's job was unusual or extraordinary, even if the substantial evidence standard did apply, which the Appellants deny, this Court could not address the standard based upon the insufficiency of the Findings of Fact and Conclusions of Law within the Order.

III. THE APPELLATE PANEL FAILED TO MAKE SUFFICIENTLY DEFINITE AND DETAILED FINDINGS OF FACT.

The Respondent asserts the Appellants' argument that the Appellate Panel failed to make sufficient findings of fact to enable judicial review is without merit. In support of this assertion, however, amazingly the Respondent misstates the finding of fact relied upon by the Respondent as the pivotal "sufficient finding of fact." After reminding the Court that the Appellate Panel issued twenty-two (22) findings of fact and twenty-seven (27) conclusions of law, the Respondent noted these findings and conclusions supported the ultimate conclusion in Finding of Fact #1, ". . . Decedent-Employee died of a work-related heart attack/injury on September 9, 2014, as a result of extraordinary and unusual conditions of employment." *See* Resp't. Br., p. 15. This is a blatant and inexcusable misstatement of the Finding of Fact, as the Respondent failed to include the phrase "Claimant alleged that . . ." at the beginning of the Finding of Fact. Simply put, the Appellate Panel was not issuing a finding of fact that the claim was compensable, but simply noting the Claimant alleged such.

Additionally, the quantity of the insufficient Findings of Fact and Conclusions of Law should not be substituted for quality. The APA requires quality, not quantity. Nowhere in her Initial Brief does Respondent identify a basis for what the Appellate Panel considered unusual and extraordinary about Decedent's job that evening other than all the witnesses who testified said it was. The reason Respondent fails in this regard is because no basis exists. Thus, the only way for this Court to properly assess the reasoning of the

Appellate Panel's ruling that a compensable heart attack occurred would be to remand the case back to the Appellate Panel with specific instructions to provide a specific factual basis for such a decision. It is simply insufficient and inexplicable for the Appellate Panel to state twenty-two (22) Findings of Facts without any specific explanation as to the nexus between those facts and the compensability of the claim. Implicit Findings of Fact are not sufficient. *Heater of Seabrook, Inc.*, v. SCPSC, 332 S.C. 20, 503 S.E.2d 739 (1998). In *Heater*, the Court held that the need for specificity is particularly great when complex issues are involved. *Id.* at 28, 503 S.E.2d at 743. The Appellate Panel actually describes this as a complex emergency, yet does not specify why the Decedent's job was unusual and extraordinary that evening. (R. p. 16). This constitutes an unequivocal violation of the Court's requirement in *Heater*.

It is of equal importance that the Respondent herself recognized and attempted unsuccessfully to remedy the deficient Order of the Appellate Panel. As part of her Return to the Appellants' Motion for Rehearing, the Respondent submitted a proposed amendment to Conclusion of Law #7, which attempted to remedy the exact deficiencies raised by the Appellants' in this appeal. (R. pp. 44-45, 47-49). The Appellate Panel, however, rejected this amendment. So, not only did the Respondent attempt to remedy the deficiency in her Return, but then unbelievably went so far as to misrepresent to this Court Finding of Fact #1 to find the claim was compensable.

IV. ORDER DENYING THE PETITION FOR REHEARING VIOLATED APPELLANTS' RIGHT TO DUE PROCESS AND VIOLATED REGULATION 67-709 OF THE ACT.

Respondent argues in her Initial Brief that a direct violation of the SCWCC Regulation 67-709 is forgivable as "harmless error" because all three members of the Appellate Panel voted to deny the Appellants' Petition for Rehearing. However, the

February 22, 2016 Form Order denying the Motion for Rehearing reveals that the body that contemplated and ruled on the Motion for Rehearing also included the original Hearing Commissioner and Commissioners who were not members of the Appellate Panel. Clearly, Appellants were denied their right to have their Motion for Rehearing heard in a meaningful way in that not all of the reviewing members, including the Commissioner that drafted the Order Denying Appellant's Motion for Rehearing, heard the arguments of counsel at the November 17, 2015 Hearing. Moreover, the tribunal that reviewed and ruled on Appellants' Motion for Rehearing was clearly not impartial nor a legally constituted tribunal. The clear language of Regulation 67-709 prohibits the original Hearing Commissioner from participating in the review process of his or her own decision because once the original Hearing Commissioner has ruled on the merits of the claim, it is statutorily determined that the original Hearing Commissioner is no longer an impartial adjudicator. Because no transcript exists and, moreover, no record or details of the meeting exist, it violates Appellants' due process rights by allowing these Commissioners to participate.

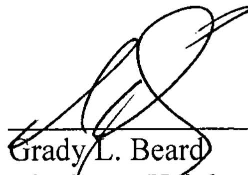
Respondent is correct that Appellants are unable to cite any evidence of impropriety in the review of the Petition for Rehearing because no transcript or recording of the meeting exists. Moreover, Appellants do not allege any impropriety on the part of the Commission, rather that the procedure followed in this case in reviewing Appellants' Motion for Rehearing is violative of the provisions of Regulation 67-709, which requires the participation of all *members* of the Appellate Panel and the *exclusion* of the original Hearing Commissioner and Commissioners not appointed to the Appellate panel to review an assigned case. Appellants have properly noted that four Commissioners improperly participated in this decision in violation of the SCWCC Regulations and the APA, and as such their due process rights have been violated. Appellants would note that when a Petition

for Rehearing is filed with this Court, only those Judges who were involved with the opinion can accept or deny the Petition.

CONCLUSION

Based upon the foregoing, the Appellants respectfully request the Court of Appeals to reverse the Decision and Order of the South Carolina Workers' Compensation Commission Appellate Panel based upon an error of law. The Appellants further request the Court to hold that Decedent did not sustain a compensable heart attack by accident under §42-1-160 or, in the alternative, remand the claim to the South Carolina Workers' Compensation Commission to reconsider the compensability of the claim under the proper standard, required by §42-1-160 and *Bentley*. Further, the Appellants request the Court to acknowledge and rule that the Appellate Panel failed to make sufficient findings of fact and conclusions of law to allow a proper review by the Court. Finally, the Appellants request the Court to confirm that the Full Commission violated the Appellants due process by the Full Commission's improper handling of the Appellants' Motion for Rehearing request.

Respectfully submitted,



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