

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Opinion No. 5415 (S.C.Ct. App. filed March 30, 2016)
Supreme Court Case No. 2016-002164

RECEIVED

NOV 28 2016

S.C. SUPREME COURT

Timothy McMahan, (Employee/Claimant),.....

Respondent,

vs.

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

Petitioner.

**REPLY TO RETURN TO PETITION FOR
WRIT OF CERTIORARI**

J. Gabriel Coggiola, Esquire
George T. Miars, Jr., Esquire
Willson Jones Carter & Baxley, P.A.
4500 Fort Jackson Boulevard
Columbia, South Carolina 29209
(803) 227-2889
Attorneys for Petitioner

OTHER COUNSEL OF RECORD:

Kevin B. Smith, Esquire
Hoffman Law Firm
708 Rivers Avenue
North Charleston, South Carolina
(843) 769-7077
ksmith@hoffmanlaw.net

Attorney for Respondent

Index

Statement of the Case.....1

Arguments.....2

 I. The Petition should be granted because the Court of Appeals erred in finding that S.C. Code Ann. §42-9-280 allows for a posthumous award of permanent disability, and such a posthumous award violates Petitioner’s rights to due process.....2

 II. The Petition should be granted because the court of appeals erred in awarding Appellant/Respondents Estate benefits pursuant to §42-9-280 and by holding finding that MMI is not dispositive to the question of whether Estate is entitled to a posthumous award of disability pursuant to §42-9-280.....4

 III. The Petition should be granted because the Court of Appeals erred in reversing the Full Commission Appellate Panel’s decision that the substantial evidence did not support a finding that Appellant/Respondent reached MMI at the time of his death.....6

Conclusion.....8

STATEMENT OF THE CASE

On March 24, 2014, the Single Commissioner issued an Order awarding Appellant/Respondent's Estate an award of permanent and total disability. (Appendix, pp. 29-39). Petitioner appealed to the Full Commission Appellate Panel, who issued a Decision and Order reversing the decision of the Single Commissioner on September 30, 2014. (Appendix, pp. 42-55). The Full Commission Appellate Panel ruled that based on the medical evidence in the record, Appellant/Respondent had not reached MMI prior to his death, and therefore his Estate was not entitled to permanent disability benefits on his behalf. (Appendix, p.49). The Full Commission Appellate Panel went on to state that since Appellant/Respondent was not at MMI at the time of his death, the Appellate Panel did not feel the need to reach the additional issues raised by Petitioner. (R. p. 22).

Appellant/Respondent appealed the Full Commission Appellate Panel's decision that Appellant/Respondent was not at MMI to the Court of Appeals. While Petitioner agreed with the Appellate Panel's decision that Appellant/Respondent was not at MMI at the time of his death, Petitioner also cross-appealed the Appellate Panel's Order, arguing the Appellate panel failed to include findings of fact and conclusions of law stating that the South Carolina Workers' Compensation Act does not allow for the posthumous adjudication of permanent disability. The Court of Appeals consolidated the multiple notices of appeal for consideration by the Court, and following briefing of all issues by the parties, oral arguments were held before the Court of Appeals on March 15, 2016. On June 15, 2016, the Court of Appeals issued a public opinion reversing the decision of the Full Commission Appellate Panel. McMahan v. S.C. Dept. of Transportation, (Opinion No. 5415 – filed June 15, 2016). (Appendix, pp.1-13).

On October 24, 2016, Petitioner filed a petition for writ of certiorari, and Appellant/Respondent filed a return to the petition on November 15, 2016. This Reply follows.

ARGUMENTS

Appellant/Respondent contends there are no novel questions of law, conflicts with prior Supreme Court cases, or constitutional issues involved. Petitioner argues that that the current petition for writ of certiorari contains all three (3) factors that weigh in favor of granting the petition for writ. First, the question of whether S.C. Code Ann. §42-9-280 allows for a posthumous award of disability is a novel question that has not been answered by the appellate courts. Second, a determination of whether such a posthumous adjudication violates Petitioner's rights to due process certainly involves substantial constitutional issues. Third, the Court of Appeals decision in this case conflicts with previous holdings of the Supreme Court. As such, Petitioner respectfully requests that the Court grant the petition for writ of certiorari.

I. The Petition should be granted because the Court of Appeals erred in finding that S.C. Code Ann. §42-9-280 allows for a posthumous award of permanent disability, and such a posthumous award an award violates Petitioner's rights to due process.

In his return to the current petition, Appellant/Respondent correctly states that in construing a workers' compensation statute, the words must be given their plain and ordinary meaning and not require "subtle or forced" construction to apply the statute's operation. In this case, S.C. Code Ann. §42-9-280, clearly states both in its title and subsequent language that the legislature created the statute to deal with payment of an unpaid balance of compensation, not payment of an award of permanent disability that has yet to be adjudicated. In order for there to be an unpaid balance, there must be an order from the commission awarding compensation for permanent disability, or

a previous agreed-upon settlement of permanent disability by the parties. A future permanent disability award that has yet to be adjudicated and awarded cannot have an unpaid balance.

Appellant/Respondent argues that because the statute includes language dealing with both a deceased injured worker who “receives” compensation or “is entitled to compensation,” the Legislature intended to allow for a posthumous adjudication of permanent disability. Appellant/Respondent argues that any other interpretation of the statute ignores the class of people “entitled to compensation,” but this is simply not the case.

The purpose of the statutory language dealing with an “unpaid balance” is clear when placed in a historical context. At the time the statute was drafted, the normal practice in worker’s compensation cases was to award permanent disability in weekly payments, and only in “unusual cases” was permanent disability paid in a lump sum. In an effort to deal with situations where an injured worker died from unrelated causes before the balance of unpaid compensation from a permanent disability award had been paid in completion, the Legislature drafted a statute that specifically dealt with cases in which an injured worker had already received partial payment, or was “entitled to” begin receiving payment. Although the typical practice has now shifted to payment of permanent disability in a lump sum, there are still a number of instances in which permanent disability is paid on a weekly basis, such as an injured worker determined unable to manage a lump sum payment. In addition, the statute would still cover injured workers who had been awarded permanent disability pursuant to a commission order, but had not yet received payment of their award from the insurance carrier.

While the purpose of the statute was to provide an injured workers’ Estate the compensation he would have been entitled under the law to had he lived, it was not the intention of the Legislature to allow for the adjudication of permanent disability to take place after the death

of the injured worker. If that was the intention of the legislature, there would be no reason for the Legislature to include the word “balance” in the title and statutory language of §42-9-280.

In further support of his position, Appellant/Respondent provides a list of unpublished opinions from the Worker’s Compensation Commission that he feels demonstrates the customary practice of the Commission. First, these cherry picked unpublished opinions hold no precedential value. Petitioner would argue that the list of cases cited by Appellant/Respondent do not stand for the commission’s long-standing interpretation of the law, nor do they provide sufficient factual and procedural information to even compare them to the facts in the instant case. Further, the fact that Appellant/Respondent was unable to cite any case law with precedential value, and instead relies on unpublished opinions dating back as 2002, is further support for the argument that this is a novel legal issue, and has yet to be addressed by our appellate courts. As such, Petitioner respectfully requests that this Court grant the petition for writ of certiorari and allow for additional briefing on the issues.

II. The petition should be granted because the Court of Appeals erred in awarding Appellant/Respondents Estate benefits pursuant to §42-9-280 and by holding that MMI is not dispositive to the question of whether the Estate is entitled to a posthumous award of disability pursuant to §42-9-280.

Although Appellant/Respondent never made any argument that the issue of whether an injured worker has reached maximum medical improvement was dispositive to the question of his estate’s entitlement to benefits when he dies from unrelated causes, Appellant/Respondent now attempts to argue that MMI and permanent disability are not always “inextricably combined,” and therefore a finding of MMI is not necessary for an injured worker’s estate to recover an unpaid balance of compensation.

The Court of Appeals is correct in stating that maximum medical improvement is a different concept than permanent disability, but maximum medical improvement is still necessary in order to make a determination of permanent disability. The Dodge case simply stands for the principle that an injured worker may receive ongoing medical treatment that may “tend to lessen his period of disability” after receipt of a permanent disability award, but the case clarifies the difference between medical treatment that could reduce an injured workers level of impairment, or simply maintenance treatment to tend to lessen the period of disability. If there is still treatment that could reduce the injured workers level of impairment, the claimant has not reached MMI and a determination of permanent disability is premature.

Although the Court of Appeals cites their own 2005 holding in Bass v. Kenco that MMI is not required for an award of temporary benefits, the Supreme Court has held otherwise. The Court of Appeals in Bass states “it is true in a claimant receiving temporary total disability benefit reaches MMI and is still disabled, temporary benefits are terminated and the claimant is awarded permanent benefits... but it does not follow however, that a claimant who is not reached MMI is precluded from an award of permanent benefits” 366 S.C. 450, 622 S.E.2nd 277 (Ct. App. 2005). Since that time, the Supreme Court has made it clear that Worker’s Compensation benefits accrue on a time continuum, and MMI is the point in which benefits are awarded as either permanent and total or permanent and partial disability, as opposed to temporary total disability benefits. Curiel v. Environmental Sciences 376 S.C. 23, 655 S.E.2nd 482 (S.C. 2007). To place the impossible task on the Worker’s Compensation commission of adjudicating permanent disability prior to the claimant reaching maximum medical improvement would result in a large number of cases that would require a ruling based on speculation and surmise.

Since the Court of Appeals holding in this case conflicts with the well-known principle stated in Curiel, Petitioner respectfully requests that this Court grant the petition for writ and allow for additional briefing by the parties.

III. The Petition should be granted because the Court of Appeals erred in reversing the Full Commission Appellate Panel's decision that the substantial evidence did not support a finding that Appellant/Respondent reached MMI at the time of his death.

The South Carolina Supreme Court has described MMI as the point when “a person has reached a plateau that, in the physician’s opinion, no further medical care or treatment will lessen the period of impairment.” Curiel v. Environmental Management Services, 376 S.C. 23, 655 S.E.2d 482 (2007). “Maximum medical improvement is a factual determination by the Commission.” *Id.* “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).

In this case, Appellant/Respondent argues that Dr. Bolt was the only medical provider to specifically address MMI, and the Appellate Panel failed to identify any physician who was of the opinion that there was further medical care or treatment that would tend to lessen his period of disability. This argument is without merit.

First, there was no opportunity to have a doctor address MMI at the time of Appellant/Respondent’s death, since Dr. Bolt was still seeing Appellant/Respondent until the completion of his recommended diagnostic testing. Further, pAppellant/Respondent was referred for pain management treatment, but he never had the opportunity to attend even the first

appointment with a pain management provider. While the Dodge case described above allows for additional medical treatment after MMI, that case deals with treatment that may "tend to lessen the period of disability" and not treatment aimed at reducing the injured worker's degree of physical impairment.

In this case, Appellant/Respondent attempts to argue that the Appellate Panel did not identify the treatment still required for Appellant/Respondent to reach MMI. This argument is without merit. First, Appellant/Respondent the record does not contain any evidence that Appellant/Respondent completed the diagnostic testing recommended by Dr. Bolt to confirm if any additional surgery would be beneficial. For the first time in his return to the current petition, Appellant/Respondent attempts to argue that all diagnostic testing was completed based on a statement by Dr. Bolt that Appellant/Respondent's "workup included an EMG", but there was no evidence in the record of EMG results for the Commission or Appellate courts to review. This point was never argued to the Full Commission Appellate Panel or the Court of Appeals, and it would be improper for Appellant/Respondent to rely on this argument for the first time now.

Further, Appellant/Respondent was referred to pain management for further treatment, but he died from unrelated causes prior to any pain management evaluation. Although Appellant/Respondent tries to downplay this recommendation for treatment, in the practice of worker's compensation, pain management treatment can vary from treatment as minimal as medication management all the way to highly invasive treatment, such as placement of a spinal cord stimulator. Appellant/Respondent died before ever seeing a pain management doctor and receiving a prognosis and opinion on what additional treatment Appellant/Respondent required, and whether any additional treatment would reduce the Appellant/Respondent's degree of physical impairment or simply maintain his current level and tend to lessen his period of disability.

CONCLUSION

For the reasons set forth above, Petitioner respectfully requests that this Court grant the Petition for Writ of Certiorari and allow further briefing on the issues.

Respectfully submitted,



J. Gabriel Coggiola, Esquire
George Trask Miars, Jr., Esquire
Willson, Jones, Carter & Baxley, P.A.
4500 Fort Jackson Boulevard
Columbia, South Carolina 29209
(803) 227-2889
jgcoggiola@wjlw.net
Attorneys for Petitioner

November 28, 2016

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

RECEIVED

NOV 28 2016

Opinion No. 5415 (S.C.Ct. App. filed March 30, 2016) S.C. SUPREME COURT

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


vs.

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

PROOF OF SERVICE

Petitioner, by and through their undersigned counsel, certify that on the date indicated below, he served counsel of record with a copy of the **Reply to Return to Petition for Writ of Certiorari** by mailing a copy of the same by United States Mail with first class postage prepaid the following addresses:

Kevin B. Smith, Esquire
Hoffman Law Firm
7087 Rivers Ave.
N. Charleston, SC 29406
Attorney for Appellant/Respondent



J. Gabriel Coggiola, Esquire
George T. Miars, Jr., Esquire
Willson Jones Carter & Baxley, P.A.
4500 Fort Jackson Boulevard
Columbia, South Carolina 29209
(803) 227-2889
Attorneys for Petitioner

November 28, 2016
Columbia, South Carolina