

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

RECEIVED

APR 24 2017

SC Court of Appeals

WCC File No. 1222136
Appellate Case No.: 2015-001277

Otis Nero, Appellant,

vs.

South Carolina Department of Transportation, Employer,
and State Accident Fund, Carrier, Respondents.

RETURN TO RESPONDENTS' PETITION FOR REHEARING

Appellants by and through their undersigned counsel hereby opposes the Respondents' Petition for Rehearing as follows:

ARGUMENT

Respondents argue that the Court of Appeals misapprehended the evidence, law, or arguments involving the standard of review. This case involved the application of the following undisputed facts:

On June 20, 2012, the Claimant was working on a South Carolina Department of Transportation road crew supervised by lead man Benjamin Durant and supervisor Danny Bostick. (R. p. 69, lines 17-20; R. p. 107, lines 10-12).

Claimant, along with other members of the crew, worked that day pulling a “squeegee board”, that is, a 30 foot 2x4, to level freshly poured concrete on a 30 foot by 30 foot concrete pad. (R. p. 69, lines 20-24; R. p. 107, lines 11-12; R. p. 194, line 20 - p. 197, line 24).

The pad was located in the center of a field; there was no shade; it was summertime; and it was very hot. (R. p. 220, lines 10-12; R. p. 70, lines 1, 7).

During the work, Mr. Bostick became concerned that the Claimant appeared overheated, and he temporarily pulled the Claimant off of the squeegee board. (R. p. 69, line 24 - p. 70, line 10).

Claimant testified that he felt an onset of pain in his neck prior to being taken off the squeegee board. (R. p. 79, lines 11-17). This fact was contested by the Employer; however, it is undisputed that the Claimant did not tell his Employer at that point, or at any time during the notice period, that he suffered pain in his neck while pulling the board. (R. p. 70, lines 10-13; R. p. 79, lines 18-20; R. p. 125, lines 6-8).

After being given a break by Bostick, Claimant returned to work pulling the squeegee board. (R. p. 107, lines 14-15).

After finishing their work and cleaning up, though while still on the clock, the crew, including the Claimant, Durant, and Bostick, were standing around the supervisor’s truck talking and joking when the Claimant passed out and fell to the ground unconscious; witnessed by Durant and Bostick. (R. p. 70, lines 15-22; R. p. 107, lines 15-19; p. 125, lines 9-10).

The Claimant regained consciousness, got up, told his supervisors he was fine, and drove himself home; where he passed out a second time in his driveway. (R. p. 107, lines 19-21).

His wife immediately took him to the hospital where he was admitted and treated by hospitalist Dr. Robert Richey and neurosurgeon Dr. William Naso. (R. pp. 331-351).

Claimant spoke with his supervisors while in the hospital and they were aware he was in the hospital and ultimately aware that he underwent cervical spine surgery at the hands of Dr. Naso. (R. p. 123, lines 16-20).

Plaintiff never returned to work thereafter. (R. p. 229, lines 11-12).

The Claimant's lead man, Mr. Durant, testified that he did not report Mr. Nero's incident to his supervisor, Mr. Bostick, because Mr. Bostick was "right there". (R. pp. 24-28).

Where the relevant facts are undisputed, the appellate court may rule as a matter of law. See, Gibson v. Spartanburg Sch. Dist. #3, 338 S.C. 510, 518 (Ct. App. 2000)(finding "where, as here, the facts are undisputed, the question of whether an accident is compensable is a question of law"). See also, Jordan v. Dixie Chevrolet, Inc., 218 S.C. 73 (1950)(finding "upon admitted or established facts the question of whether an accident is compensable is a question of law and this is not an invasion of the fact finding field of the commission on the part of the court.").

The Respondent argues that there are facts in dispute. In particular, Respondent argues "the facts of the claim were unquestionably in dispute with regard to (1)¹ whether

¹Respondents also cite, as facts in dispute, "(2) whether Appellant sustained his burden in proving that his injuries and resulting treatment were the result of a compensable work accident..." (Respondents Petition for Rehearing, p. 3)

Whether or not there was an issue of fact as to medical causation is irrelevant to the question of the proper standard of review on the issue of notice.

The Single Commissioner found medical causation based, to a large extent, on the testimony of the Claimant's treating physician Dr. Robert Richey. (R. pp. 20-23). The Appellant Panel reversed the Single Commissioner's award on the issue of notice alone. (R. pp. 55-56). The parties briefed and argued this case to the Court of Appeals on the issue of notice. It is well established that a party cannot raise a new argument, such as medical causation, on a Petition for Rehearing, as the Respondent seeks to do here. See Kennedy v. S.C. Pet. Sys, 349 S.C. 531 (2001).

there were sufficient accompanying facts connecting the injury or illness with the employment to signify to a reasonably conscientious supervisor that the case might involve a potential claim.” (p. 3, Respondents’ Petition for Rehearing). The Respondent has not identified any genuine facts in dispute. Instead, the Respondent seeks to recast the legal standard for notice set by the Court in Etheredge v. Monsanto as a factual issue.

For adequate notice, as a matter of law, the facts must demonstrate that the employer had, “ ‘some knowledge of accompanying facts connecting the injury or illness with the employment, and indicating to a reasonably conscientious manager that the case might involve a potential compensation claim.’ ” Etheredge v. Monsanto Co., 349 S.C. 451, 457 (Ct. App. 2002)(quoting Larson’s Workers’ Compensation Law, §126.03[1][6](2001)(footnotes omitted)).

It is certainly the case that the legal issue as to whether the undisputed facts meet the legal standard of notice was directly contested in this appeal. What is critical to the applicable standard of review, however, is that the legal conclusion was in dispute, not the underlying facts.

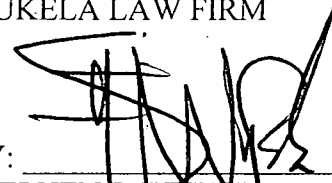
The Court did not misapply the standard of review or invade the province of the Commission by making its own findings of fact. Instead, the Court applied the law to undisputed facts.

In truth, the Court applied a stricter standard of review, substantial evidence, then was required, given that the Court is entitled to review questions of law de Novo. Even under the substantial evidence standard, however, the Court properly found that the Commission’s decision was contrary to the substantial evidence. That is to say, the Court considered the undisputed evidence of the record as a whole and found it insufficient to allow reasonable minds to reach the conclusion that Nero failed to put the South Carolina Department of Transportation on notice of a potential injury.

For the foregoing reasons the Respondents Petition for Rehearing should be denied.

Respectfully submitted,

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BY: _____
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April 21st, 2017

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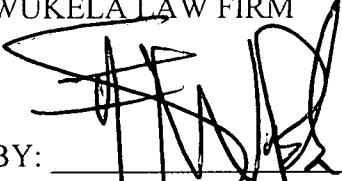
vs.

SC Department of Transportation, Employer,
and State Accident Fund, Carrier, Respondents.

PROOF OF SERVICE

I certify that I have served the Return to Respondents' Petition for Rehearing on Respondents by mailing a copy on April 21, 2017, addressed to their attorney of record, John Gabriel Coggiola, Esquire, Willson, Jones, Carter & Baxley, PA, 4500 Fort Jackson Boulevard, Columbia SC, 29209.

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April 21, 2017

Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
PO Box 11629
Columbia, SC 29211

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Re: Otis Nero v. SC Department of Transportation
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Appellate Case No. 2015-001277

Dear Ms. Kitchings:

Enclosed for filing, please find the original and six (6) copies of the Return to Respondents' Petition for Rehearing.

By copy of this letter, I am serving counsel for Respondents, John Gabriel Coggiola, with a copy of the Return to Respondents' Petition for Rehearing indicated by the enclosed Proof of Service. Thank you for your consideration in this manner. Please do not hesitate to contact me with any questions or if additional information is needed from our office.

With kind regards, I am

Yours truly,

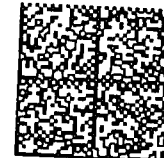
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SJW:bjm

Enclosures

cc: John Gabriel Coggiola, Esquire



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