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APR 28 2017

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE APPELLATE PANEL
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Appeal No: 2015-001350

Henton T. Clemmons, Jr., Employee, ... Petitioner,

v.

Lowes Home Centers, Inc.-Harbison, Employer,
and Sedgwick Claims Management Services,
Inc., Carrier, ... Respondents.

RETURN TO PETITION FOR REHEARING

Petitioner respectfully submits the following Return.

I. **This Court did not err by basing its Opinion on an argument that was plainly presented to the Commission and to the Court of Appeals.**

The essential issue for decision by the Full Commission as was presented under II. of the injured worker's Brief to the Full Commission was:

> "II. **UNDER THE EVIDENCE IN THIS CASE**, DID THE COMMISSIONER ERR AS A MATTER OF LAW BY NOT AWARDING THE CLAIMANT AN AWARD FOR TOTAL AND PERMANENT DISABILITY FOR HAVING

> LOST MORE THAN 50% OF THE USE OF HIS BACK AND BY FAILING TO MAKE A DETERMINATION THAT THE CLAIMANT HAD SUSTAINED A 50% OR GREATER LOSS OF USE OF THE BACK?"
> (App., p. 321). (Emp. add.)

That issue was presented to the Court of Appeals in the identical format:

> "Did the Commission err as a matter of law under the substantial evidence in the Record by failing to make a determination that the Appellant had sustained a 50% or greater loss of use of the back and by considering wage loss and by not awarding the Appellant an Award for total and permanent disability for having lost 50% or more of the use of his back under the back presumption in the scheduled member Statute?"
> (App., p. 26).

In granting certiorari and in this Court's Opinion on the issues upon which it granted certiorari, under I. the Court set forth its review and Opinion as follows:

> "I. Did the Court of Appeals properly apply the substantial evidence standard to the evidence in this case when affirming the Commission's Findings?"
> (Op., p. 3).

In its Opinion, the Court then stated: "We find the Commission's conclusion with respect to loss of use is unsupported by the substantial evidence in the record." (Op., p. 5).

The issue presented to the Full Commission, to the Court of Appeals, and as properly decided by this Court in its Opinion was whether or not there was substantial evidence in the Record to support the conclusion under the scheduled member Statute

that the Claimant had lost 50% or more of the functional use of his back and was permanently and totally disabled. That was, and is, the essential issue.

The Petitioner cannot say it better than the Court said it in its own words in its Opinion. Quoting the Court:

> "While there is medical evidence that Clemmons' whole person was impaired less than 50%, **the issue under the scheduled-member statute is not impairment as to the whole body, but rather it is the loss of use of a specific body part - in this case, Clemmons' back.**" (Op., p. 5).

The issue as presented to the Full Commission, to the Court of Appeals, and to this Court by the Petitioner was and is that there is no substantial evidence in the Record to support a finding that the Claimant has lost less than 50% of the functional loss of use of his back.

II. This Court did not engage in impermissible fact finding in order to overturn the Commission's Finding of Fact that the Claimant sustained a 48% permanent partial disability to his back.

Respondents in this argument and several others which are simply rephrased versions of the same argument try to make the Court's Opinion much broader than it is. The Court's Opinion in fact is quite narrow. Quoting in pertinent part from the Court's Opinion:

> "We further hold that based on the Record before us, the presumption of permanent and total disability has not been rebutted. While this Court has indicated a claimant's return to work is not probative to an analysis under the

> scheduled member statute, we have not squarely addressed whether return to employment may be considered to rebut the presumption of total and permanent disability . . . . Today, we hold **the mere fact a claimant continues to work is insufficient to defeat the presumption** of permanent and total disability for loss of use of the back . . . .
>
> To allow a claimant's ability to work alone to rebut the presumption of total and permanent disability undermines the established principle that the scheduled-member statute is separate and distinct from the general disability statute . . . (citation omitted). Separating wage loss from the analysis in establishing the presumption, only to allow earning capacity to come in after the fact and conclusively rebut it renders the presumption meaningless." (Emp. add). (Op., pp. 5-7).

Respondents before the Hearing Commissioner, before the Appellate Panel, and during oral argument before this Court, took the position that the fact the Claimant was working was the evidence rebutting the presumption of permanent and total disability. The Court correctly held that return to work alone is insufficient to rebut the presumption as a contrary conclusion would be inconsistent with the medical model of compensation contained in §42-9-30. Respondents now advocate for a shifting analysis, jumping from the medical model to the economic model, and then returning to the medical model. This was not the argument made to this Court before the Opinion. That argument, again, was that Petitioner's return to work

constituted sufficient evidence to push his loss of use rating below 50%.

In addition, the Respondents talk in terms of general statutory construction ignoring two guiding principles in reference to workers' compensation. The first being (which the Court refers to throughout its Opinion and to which it holds true to the principle in its Opinion) is that the Act is to be liberally construed in favor of benefits to the injured worker and his dependents with its provisions reconciled if possible, its purposes effectuated and its presumptions and penalties directed towards the end of providing coverage. Cokely v. Robert Lee, Inc., 197 S.C. 157, 14 S.E.2d 889 (1941). Also, citing from Cokely, which has been repeated by this Court ever since the inception of the Act and which is a rule of general statutory construction as well, is that while the Act is to be liberally construed in favor of benefits, as to its wording since the Act is in derogation of the common law, the wording of the statute is to be strictly construed and is to be given its plain and ordinary meaning. However, the Court will reject any type of meaning when to take that meaning would defeat the plain legislative intention and not give effect to its overall purpose and a liberal interpretation. Cokely v. Robert Lee, Inc., supra. That is exactly what the Respondents try to do in this case by taking the word "disability" out of context in the

statute. The Respondents take the word "disability" which is defined under SC Code §42-1-120 out of context in reference to its use in §42-9-30(21) and §42-9-10(B) as part of a phrase. In both of those statutes the word "disability" is part of a phrase and refers to the award to be made, which is that the claimant is either presumed or deemed to have suffered, quoting from both statutes, "total and permanent disability" and compensated under §42-9-10(B). In other words, in both of the statutes, §42-9-10(B) and §42-9-30(21), the word "disability" is part of the phrase and the award that is to be made to the claimant where the claimant has lost certain members or has lost 50% or more of the use of his back.

The argument made by the Respondents is directly opposite of these guiding fundamental principles and to the numerous decisions by this Court in reference to the phrases and wording of the Act. For example, in the case of Glover by Cauthen v. Suitt Construction Co., 318 S.C. 465, 458 S.E.2d 535, reh. den. (1995), because the prohibition against "lump sum" awards under §42-9-10(**D**) provided that the Commission could make, "no total lump sum payment", the Court held that because of the word "total" the Commission was not prevented from making a partial lump sum award. In reaching that conclusion, this Court referred to all the guiding principles of the Act and also general statutory guiding principles. Again, the word

"disability" is simply part of the phrase referring to the award that is to be made, which is an award for, "total and permanent disability".

III. This Court should not remand this case to the Commission for additional rebuttal evidence as remand is not appropriate.

Having found that there was no substantial evidence to support that the Claimant had lost less than 50% of the use of his back as a separately rated member, the Respondents/ Petitioners argue that in essence the case should be remanded to allow them, as the Court put it, to have a second bite of the apple to basically rebut the presumption by presenting additional evidence. That is actually the essence of what they are arguing for remand. As the Court put it in its Opinion, which again is extremely well reasoned and as was argued repeatedly to the Full Commission, to the Court of Appeals and to this Court, the Respondents/Petitioners' position and argument and rebuttal to the presumption was as stated by their Counsel before the Hearing Commissioner. Quoting Respondents'/ Petitioners' Counsel as to their position:

> "The basis of the rebuttal presumption obviously is his return to work for almost two (2) years in response to Appellant's position that he is perm total based on greater than 50% loss of use of the back." (App., p. 364, ll. 7-16; p. 4). (Emphasis added).

In reference to this issue, this Court in its Opinion clearly stated, "we further hold that based on the Record before us, the presumption of permanent and total disability has not been rebutted.". This Court then went on to hold specifically that, "today, we hold the mere fact a claimant continues to work is insufficient to defeat the presumption of permanent and total disability for loss of use of the back." (Op., pp. 4-5).

In filing the Petition for Rehearing, the Respondents/Petitioners on the one hand want to argue that the Petitioner did not preserve arguments or did not present arguments to the Commission and then raised those on appeal, but then on the other hand in this argument while they took the position and presented that the only evidence that was needed to rebut the presumption under the scheduled member statute in reference to loss of use of the back was that the Claimant was working; now, in the Petition for Rehearing, they want the case remanded to the Commission to consider all the evidence; or in other words, to again revamp their argument under the evidence to try to rebut the presumption. This is nothing more than a request for a second bite of the apple and this Court has clearly and definitively and appropriately ruled that the presumption in reference to a scheduled member injury to the back for having lost more than 50% of use of the back cannot be rebutted simply by a showing that the Claimant is working.

CONCLUSION

This Court addressed in its Opinion every issue that has been raised and in fact a Petition for Rehearing is supposed to be and is generally considered to be for the Court to look at issues that were overlooked or not addressed. The Court's Opinion was thorough and as set forth in this Return, the Court addressed every issue necessary to its Opinion. There is nothing new, there is nothing misapprehended and there is nothing overlooked by the Court in its Opinion. The Petition for Rehearing should be denied.

Respectfully submitted,

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April 28, 2017

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PROOF OF SERVICE

I certify that I have served the **RETURN TO PETITION FOR REHEARING** on April 28, 2017, addressed as follows to its Attorneys of Record:

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