

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
Workers' Compensation Commission

Appellate Case No.: 2015-001606

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JUN 29 2017
SC Court of Appeals

Jenna Foran, Employee.....Appellant,

v.

Murphy USA (Employer), and
Liberty Mutual Corporation (Carrier),.....Respondents.

PETITION FOR REHEARING

This is an appeal involving a denied workers' compensation case. Respondents, by and through their undersigned counsel, hereby files this Petition for Rehearing pursuant to Rule 221, SCACR. On June 14, 2017, this Court filed an opinion reversing the July 14, 2015 Decision and Order of the South Carolina Worker's Compensation Full Commission Appellate Panel ("Appellate Panel"). Foran v. Murphy USA, (Opinion No. 5491 – filed June 14, 2017). As a brief matter of background, the Single Hearing Commissioner ("Single Commissioner")in the case denied Claimant's entitlement to benefits under the Workers Compensation Act in a Decision and Order dated July 14, 2015. (R., pp.2-24). The Workers' Compensation Full Commission Appellate Panel subsequently affirmed the Single Commissioner's decision, denying Appellant's entitlement to benefits in a Decision and Order dated July 14, 2015.

Appellant then filed an appeal before this Court. The issue under appeal involves whether the he Full Commission correctly concluded that, based on the evidence in the record, Appellant's injury to her left ankle was the result of an idiopathic fall and therefore was an exception to compensability. (R., p. 23). Although the Single Commissioner and Full Commission both found that based on evidence in the record, including hearing testimony of both Appellant and Respondent Employer representative Stokes Rogers, medical evidence in the record, and video surveillance, Appellant's fall was idiopathic and therefore not compensable, this Court reversed and found that "after careful review of the record, particularly the surveillance video, we find for Foran's injury occurred while she was in constant motion -- stocking cigarettes, rising from one knee while turning around toward the register, and stepping forward with her left foot. The video shows for an invisible pain before both her feet were planted in facing the register." This Court then goes on to conclude that "while we agree with the Appellate Panel that the surveillance was the "key to the compensability of this case," we conclude the Appellate Panels finding that the injury occurred while both of Foran's feet were planted on the mat was clearly erroneous." Foran at pp.5-6. This Court went further to state "the Appellate Panel committed an error of law by failing to strictly construe the idiopathic exception to coverage as Barnes and Nicholson require; thus, we reverse its denial of compensation." Id at 6.

QUESTIONS PRESENTED FOR REVIEW

As grounds for this petition, Respondents would respectfully argue that this Court may have overlooked or misapprehended the evidence, law, or arguments involving the following

1. Whether this Court appropriately applied the "substantial evidence" standard of review, or exceeded their role as an appellate court by substituting its judgment for that of the Worker's Compensation Commission, who is the appropriate factfinder in the case.

2. Whether this Court may have overlooked or misapprehended the evidence, law, or arguments involving whether the Commission committed error of law based on a failure to strictly construe the idiopathic exception to workers compensation coverage.

Statement of the Case

Appellant alleged an April 29, 2014 work accident while working for Respondent Employer. Specifically, Appellant's pleadings alleged "Appellant was kneeling down stocking cigarettes and went to get up," causing injury to her "left lower extremity." (R. p, 41). Respondents denied that Appellant was entitled to benefits under the Workers Compensation Act because her injury did not arise out of her employment, Appellant had a pre-existing chronic instability, and Appellant's fall was idiopathic, and therefore an exception to compensability. (R. p.133, lines 21-25). In support of their denial, Respondents relied on evidence, including video surveillance, pre and post-accident medical records, and testimony of both Appellant and Respondent Employer representative Stokes Rogers.

Following a hearing on October 31, 2014, the Single Commissioner issued a Decision and Ordered, dated January 14, 2015, wherein he denied Appellant's entitlement to workers' compensation benefits based on his finding that Appellant's injury did not arise out of her employment and fell under the "idiopathic fall" exception to compensability. On the same day, the Supreme Court issued two (2) decisions involving the "idiopathic fall" exception to compensability. (*see Barnes v. Charter 1 Realty*, 768 S.E. 2nd 411 S.C. 391 (S.C. 2015) and *Nicholson v. S.C. DSS*, 769 S.E.2nd 1, 411 S.C. 281 (S.C. 2015)). Appellant appealed the Single Commissioner's Decision to the Full Commission Appellate Panel and argued the Single Commissioner erred in denying the claim and concluding the injury was idiopathic and not compensable in light of the recent Supreme Court cases in *Barnes* and *Nicholson*. Appellant

further argued the Single Commissioner erred in giving greater weight to the testimony of Respondent Employer Representative Stokes Rogers, then to that of Appellant.” (R., p.3).

The parties briefed the issues on appeal to the Full Commission Appellate Panel and oral arguments were held on April 21, 2015. It is significant to note that at the time the parties briefed the issues on appeal and participated in oral arguments, both the parties and the Commission had the benefit of the new Supreme Court decisions in Barnes and Nicholson and the both the parties and the Commission addressed the Supreme Court’s new holdings in their brief’s and ultimate Decision and Order. On July 14, 2015, the Full Commission Appellate Panel issued a Decision and Order affirming the Single Commissioner’s decision in full, and denying Appellant’s entitlement to benefits under the Act. Appellant then appealed the Commission’s decision to this Court, who reversed the Full Commission Appellate Panel’s findings on compensability and remanded for determination of benefits. Foran, (Opinion No.5491 – filed June 14, 2017).

ARGUMENTS

- I. The Court of Appeals may have overlooked or misapprehended the evidence, law, or arguments involving the “substantial evidence” standard of review and exceeded their role as an appellate court by substituting their view of the evidence instead of correctly deferring to the Full Commission’s role as the appropriate fact finder in this case.**

The South Carolina Administrative Procedures Act (APA) governs the standard of judicial review in workers' compensation cases. Lark v. Bi-Lo, Inc., 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981). Under the APA, this Court's review is limited to deciding whether the Appellate Panel's decision is unsupported by “substantial evidence” or is controlled by an error of law. Hargrove v. Titan Textile Co., 360 S.C. 276, 289, 599 S.E.2d 604, 610-11 (Ct. App. 2004).

In workers' compensation cases, the Commission is the ultimate fact finder. Holmes v. Nat'l

Serv. Indus., Inc., 395 S.C. 305, 308, 717 S.E.2d 751, 752 (2011) (citing Jordan v. Kelly Co., 381 S.C. 483, 674 S.E.2d 166 (2009)). This Court must affirm the Commission's factual findings if they are supported by substantial evidence. Id. (citing Pierre v. Seaside Farms, Inc., 386 S.C. 534, 540, 689 S.E.2d 615, 618 (2010)). “ ‘Substantial evidence’ is not a mere scintilla of evidence nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached or must have reached in order to justify its action.” Adams v. Texfi Indus., 341 S.C. 401, 404, 535 S.E.2d 124, 125 (2000) (quoting Lark, 276 S.C. at 135, 276 S.E.2d at 306).

“The substantial evidence test ‘need not and must not be either judicial fact-finding or a substitution of judicial judgment for agency judgment;’ and a judgment upon which reasonable men might differ will not be set aside.” Holmes, 395 S.C. at 308–09, 717 S.E.2d at 752 (quoting Lark, 276 S.C. at 136, 276 S.E.2d at 307). A reviewing court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. S.C.Code Ann. § 1-23-380(A)(5)(d)(e) (Supp.2006); *see also* Hall v. United Rentals, Inc., 371 S.C. 69, 77, 636 S.E.2d 876, 881 (Ct.App.2006). Further, the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence. Sharpe, 336 S.C. at 160, 519 S.E.2d at 105; Smith v. NCCI Inc., 369 S.C. 236, 247, 631 S.E.2d 268, 274 (Ct.App.2006); DuRant v. S.C. Dep't of Health & Envtl. Control, 361 S.C. 416, 420, 604 S.E.2d 704, 707 (Ct.App.2004).

In this case, the Full Commission was tasked with making a specific factual decision, albeit a difficult one, involving whether Appellant’s fall was “idiopathic, “meaning it was an injury brought on by a condition particular to the employee that could have manifested itself

anywhere and was the result of an internal failure of breakdown purely personal condition unrelated to the Appellant's employment. After careful review of the evidence in the record, including hearing testimony of both the Appellant and Respondent Employer Representative Stokes George, a careful review of the medical evidence in the record, and viewing video surveillance of the fall itself, the Full Commission Appellate Panel concluded that Appellant's fall was idiopathic and therefore not compensable. The Full Commission's order cited the following evidence:

1. The Medical Evidence showed a history of chronic instability of the left ankle. Specifically, pre-accident medical records from a left ankle surgery that indicated surgery was performed due to a history of recurrent sprains to the left ankle (R. p.17 and p.84), May 23, 2015 record stating "there is significant weakness of these lateral ligaments. This is under the surgical scar of the tendon repair the patient had a 14 years of age. There is numbness to light touch of entire foot up to the ankle, which is old." (R., p. 17 and p.85).
2. The Appellant's testimony, which the Full Commission described as "very confusing" and "unclear and contrary to the video surveillance." (R., p.19 and p.22). The Full Commission went on to state that they gave greater weight to the credibility of the testimony of Respondent Employer representative Stokes Rogers, including his testimony that prior to her accident, Appellant walked with an obvious limp and complained multiple times about having a "bad ankle." (R., p.23).
3. The video surveillance, which the Full Commission viewed and concluded that Appellant was merely standing at the register with both feet forward when her left ankle rolled.

Instead of giving the proper deference to the commission as the factfinders in the case, this

Court simply disagreed with the Commission's interpretation of the evidence, and instead came to their own conclusion that Appellant's injury occurred while she was in constant motion stocking cigarettes. This Court concluded that the Appellate Panel's finding that the injury occurred while both of Appellant's feet were planted on the mat was clearly erroneous, which is a clear-cut example of a difference in opinion on the interpretation of the evidence, but not unsupported by substantial evidence. As stated above, the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence.

The Full Commission also relied on the medical records and testimony of the respondent employer representative Stokes George, who the commission found to be more credible. This court focused on the fact that appellant's previous ankle injuries did not preclude her from performing job duties or working as a lifeguard or playing volleyball and softball; however, those facts are irrelevant as to whether the claimant's injury on April 29, 2014 was a result of an internal breakdown personal to the appellant.

Based on the Commissions findings and conclusion that are supported by substantial evidence, including not only video surveillance, but pre-and post-accident medical records and hearing testimony, the commission's finding that Appellant's fall was idiopathic and therefore not compensable is supported by the substantial evidence, and respondents respectfully request that this Court grant the current petition for rehearing.

II. The Court of Appeals may have overlooked or misapprehended the evidence, law, or arguments involving whether the Commission committed error of law based on a failure to strictly construe the idiopathic exception to workers compensation coverage.


In addition to finding that the Commission's decision was not supported by substantial

evidence, this Court found that the Commission committed error of law in failing to strictly construe the idiopathic exception to coverage as required by the holdings in Barnes and Nicholson. In their order, the Full Commission Appellate Panel specifically stated that they found the Single Commissioner did not err in finding the injury was idiopathic and not compensable, even in light of the recent Supreme Court decisions. The Appellate Panel explained the difference between the holdings in Barnes and Nicholson from the current case by appropriately pointing out that the Supreme Court holding in Barnes was careful to differentiate that an idiopathic fall was not simply an injury where no cause could be identified, but instead, as laid out in Crosby, was one that was caused by an internal failure, breakdown, or weakness, which was the Commission's conclusion in this case. (R., p. 17).

Although the Supreme Court holdings in Barnes and Nicholson indicate that the idiopathic exception should be strictly construed as an exception to coverage, both holdings dealt with cases that did not involve an internal breakdown personal to the injured worker, as was the case with Appellant. As a result, Respondents would respectfully submit that the commission did not commit error of law, and request that the current petition for rehearing be granted.

CONCLUSION:

Respondents respectfully submit that this Court's decision may have overlooked or misapprehended the evidence, law, or arguments involving the application of the "substantial evidence" standard of review, substituting their own judgment of the evidence in record for that of the commission, who is the appropriate finder in the case, and whether the Commission committed error of law in their application of the holdings in Barnes and Nicholson. As a result, Respondents respectfully request that this Court grant their Petition for Rehearing..



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Workers' Compensation Commission

Appellate Case No.: 2015-001606

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SC Court of Appeals

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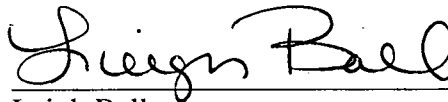
v.

Murphy USA (Employer), and
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PROOF OF SERVICE

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

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June 29, 2017
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June 29, 2017

Via Hand Delivery

The Honorable Jenny Abbott Kitchings
The South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: Jenna Foran vs. Murphy Oil USA, Inc.
WCC File No.: 1405375/2015-001606
WJC&B File No.: 0010.04220
Appellate Case No. 2015-001606

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JUN 29 2017

SC Court of Appeals

Dear Ms. Kitchings:

Pursuant to Rules 221(a) and 240, SCACR, please find enclosed for filing the original and six (6) copies of the Respondents' **Petition for Rehearing**, along with filing fee in the amount of twenty-five and No/100 Dollars (\$25.00).

By copy of this letter and enclosure to C. Scott Masel, counsel of record for the Appellant, I am serving him with a copy of our **Petition for Rehearing** as 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 kindest regards,

WILLSON JONES CARTER & BAXLEY, P.A.



John Gabriel Coggiola

JGC/jgc

Enclosure(s)

cc: Ms. Jackie Martinez-Rivera (via email)
Mr. C. Scott Masel