THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Opinion No. 5477 (S.C. Ct. App. filed August 23, 2017)

Otis Nero, Claimant,.....Respondent,

v.

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

PETITIONERS' REPLY TO RESPONDENT'S RETURN TO PETITION FOR WRIT OF CERTIORARI

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Statement of the Case

This appeal involves a workers compensation claim resulting from an alleged injury on June 20, 2012. On January 6, 2014, Respondent filed a Form 50 request for hearing, alleging injuries to the neck and bilateral shoulders as a result of pulling cement with a road crew using a large squeegee board on June 20, 2012, which was subsequently followed by an episode of syncope. (Appendix, p. 141). Respondent's Form 50 Request for workers compensation benefits was filed over eighty (80) weeks after his alleged accident. Petitioner's timely filed responsive pleadings, denying Respondent sustained a compensable injury by accident arising out of and in the course of his employment as alleged by Respondent. Petitioners further argued that respondent failed to provide the employer with the proper ninety (90) period of Notice in accordance with S.C. Code Ann. §42-15-20. (Appendix, p.141).

The case was argued before the Single Commissioner on March 28, 2014, and on August 5, 2014, the Single Commissioner issued a Decision and Order, wherein she found Respondent sustained a compensable injury by accident to his neck out of and in the course of his employment on June 20, 2012 while pulling a squeegee board leveling concrete, and that claimants work accident aggravated a pre-existing cervical condition. (Appendix, pp. 124-125, Finding of Fact #3). With regards to notice, the single Commissioner found,

> "Claimant (Respondent)had a reasonable excuse for not formally reporting his work injury due to the fact that his lead man, Mr. Durant, and the crew supervisor, Mr. Bostic, were both present and had knowledge of the pertinent facts surrounding the accident sufficient to indicate the possibility of a compensable injury and followed up with the claimant after the accident; moreover, the Department of Transportation was aware that the claimant had not returned since his syncopal episode on June 20, 2012 and they were further aware that he had been hospitalized and he had ultimately been treated by a neurosurgeon and undergone neck surgery.

(Appendix, p.128, Finding of Fact #6).

Petitioners appealed the Single Commissioner's decision to the Workers Compensation

Full Commission Appellate Panel. After briefing by the parties and oral arguments, the Full Commission issued a May 29, 2015 Decision and Order, reversing the Single Commissioner's August 5, 2014 order. The Full Commission found that pursuant to S.C. Code Ann. §42-15-20, Respondent failed to provide a reasonable excuse made to the satisfaction of the Commission for failure to provide timely notice is required by the act, and Petitioners suffered a prejudice as a result of respondent's failure to provide timely notice. (Appendix, p.157).

Respondent filed an appeal with the South Carolina Court of Appeals, and on March 29, 2017, the Court of Appeals issued an opinion reversing the Full Commission's denial of benefits, stating "although Nero failed to give SCDOT formal notice, his excuse was reasonable because the supervisors were both present at the time of his injury and were aware of his treatment." The Court stated, "we find the substantial evidence in the record does not support the appellate panels finding that respondent failed to put SC DOT on notice of a potential injury" (Appendix, p.7) Petitioners filed a Petition for Rehearing, arguing the Court of Appeals did not follow the substantial evidence standard of review, and they exceeded their role as an appellate court by substituting their view of the evidence instead of correctly deferring to the commission as the appropriate factfinders. (Appendix, p.22) On August 22, 2017, the Court of Appeals issued an Order granting the petition for rehearing. (Appendix, p. 50). The Order stated, "we dispense with further briefing and argument. The attached opinion is substituted for the previous opinion, which is withdrawn." (Appendix, p.50). The Court of Appeals withdrew, substituted, and refiled the new opinion on August 23, 2017. (Appendix, pp.11-21). In the substituted opinion, the Court of Appeals found that because the issue of timely notice is a jurisdictional question, "the court may take its own view of the preponderance of the evidence." (Appendix, p.14) Based on the Court of Appeals new opinion on the standard of review, they maintained their reversal of the Worker's Compensation commission's denial of the claim.

Out of an abundance of caution, Petitioners simultaneously filed a Successive Petition for

Rehearing, (Appendix, p.39) since a new order was issued, and the current Petition for Writ of Certiorari, which was filed on September 21, 2017. Respondents filed a Return to the Petition for Writ of certiorari on August 21, 2017, and this reply follows.

Argument

I. This is a case involving disputed facts, and the Court of Appeals exceeded their role as an appellate court, by substituting their view of the evidence instead of correctly deferring to the commission as the appropriate factfinders, and there were sufficient facts in dispute that the Court of Appeals could not rule as a matter of law.

In his Return to Respondents' Petition for Writ of Certiorari, Respondent erroneously states that the Court of Appeals in this case could rule as a matter of law, since the relevant facts are not in dispute. Respondent goes even further to state that Petitioners' conflate factual findings with legal conclusions and never identify what facts, relevant to notice, were in dispute.

In support of his argument, Respondent relies on the following "undisputed facts;" (1) Claimant was working on a road crew with his supervisors on June 20, 2012, (2) Respondent, along with other crews members worked that day pulling a "squeegee board" to level concrete, (3) there was not shade and Respondent was working in the heat, (4) during the day or work, Respondents supervisors allowed him to take a break before he returned to work pulling the squeegee board, (5) Respondent testified that he felt a sudden onset of pain in his neck that he described as a "snap" or a "pop," (6) Respondent never told his employer at that point, or at any time within the ninety (90) day notice period that he suffered pain in his neck while pulling the squeegee, (7) after finishing their work and cleaning up, Claimant passed out by the work shed in front of his supervisors, (8) Respondent got himself up and walked around before telling his supervisors he as fine to drive home, (9) upon arriving home, Respondent suffered a second syncope episode in his driveway and was taken to the hospital by his wife, (10) Respondent spoke with his supervisors at the hospital and they were aware that he eventually underwent

surgery, and (11) Respondent never returned to work.

Although Petitioner agrees that the facts set forth above were not disputed; however, Petitioner would respectfully show that additional facts were in dispute, and these were facts directly relevant to whether Respondent/Employer had enough knowledge to signify to a reasonably conscientious supervisor that the case might involve a potential compensation claim, as required by the test in *Etheredge v. Monsanto Co.* 349 S.C. 451, 457 (S.C.Ct. App. 2002).

In the May 29, 2017 Decision and Order of the Workers' Compensation Full Commission, the Full Commission set forth a number of Findings of Fact, which highlight Petitioners' argument that there were facts in dispute. Included in the full commission's findings of fact, where the following:

- FOF #5: We find that the knowledge the employer had that anything was wrong with claimant on June 20, 2012, was when he suddenly passed out at the shed while talking, laughing, and joking with his supervisors and other employees after the conclusion of their work shift. (Appendix, p.156)

- FOF #6: we find that claimant (respondent) admitted to having other previous dizzy spells on the job. (Appendix, p. 156)

- FOF #7: we find that none of the medical records of Dr. Ritchie or Dr. Naso make any mention of an incident pulling a squeegee board, and instead the records consistently reference a mechanism of injury as claimant passing out while talking to his boss. (Appendix, p.156)

- FOF #8. We find that on June 28, 2014, Claimant's handwritten answers on a "patient health questionnaire" stated that his problems were not related to a job and this was not a workers compensation injury. (Appendix, p.156)

- FOF #9: We find that there is conflicting medical evidence regarding whether claimants (Respondent's) alleged incident pulling the squeegee board cause the subsequent syncopal episode. Specifically, claimant's family doctor, Dr. Ritchie, testified that he had a "hypothesis" that "the cause of the sink I had to do with his spinal canal stenosis and a reflex mechanism." On the other hand, Dr. Nay so, the neurosurgeon who performed the claim and surgery, stated, I do not think his syncope is related to his spinal pathology." (Appendix, p.156)

- FOF #10: We find that the only actual or in formal notice the employer had of an injury was that claimant, who previously suffered from dizzy spells on the job, passed out in front of the supervisors at the shed at the conclusion of the workday.

- FOF #11: We find the claimant assured the employer he was fond to return home, and he suffered a second syncopal episode in his driveway, he was taken to the hospital by his wife. (Appendix, p.156)

- FOF #12: We find that claimant spoke with both Mr. Durant and Mr. Bostic while he was in the hospital and although he informed them he was having neck surgery, claimant never reported any work related accident. (Appendix, p.157)

- FOF # 13: We find that claimant submitted FMLA paperwork to his employer, describing his condition as several years -- neck and syncope," but again claimant made no mention of a work accident to his employer at that time. (Appendix, p.157)

The most important of the facts in dispute involves the facts that Respondent not only admittedly never reported his alleged work accident to his employers, but Respondent also submitted paperwork to his Employer on July 9, 2012, only 19 days after his alleged accident, requesting FMLA. (Appendix, p.419). On the paperwork prepared and signed by Respondent, when asked the approximate date the condition commenced, Respondent wrote "Several Years – Neck and Syncope." (Appendix, p.4129) This is significant for two reasons. First, it involves a disputed fact over when the Respondent's condition commenced, or at least when he thought it commenced. Respondent's statement on his FMLA paperwork to petitioner/employer that he suffered from his condition for years directly contradicted his hearing testimony that he never had any neck pain or problems before June 20, 2012. (Appendix, p.187, lines 11-13). Respondent's contradictory statements alone create a factual dispute.

Second, the paperwork submitted by Respondent to Petitioner/Employer supports the argument that Respondent had knowledge of how to report his condition to his employer through formal paperwork in order to request FMLA, but he did not tell his Employer that his condition was a result of the accident as alleged in his pleadings. Respondent's excuse that he didn't tell his Employer about his accident because they were standing there not only contradicts Respondent's pleadings wherein he alleged took place as a result of pulling cement with a road crew using a large squeegee board, but it also fails to explain why he never told his Employer

about the accident in subsequent conversations at the hospital, but at the same time submitted FMLA but making no reference to a work accident or resulting benefits.

Petitioner cannot emphasize enough the importance of Respondent's post-accident preparation and submission of paperwork to his Employer, which Petitioners argue distinguish his case from other cases involving notice and reasonable excuse. Respondent's FMLA submission was essentially an affirmative statement that his Employer that condition had lasted for a duration of years, and making no mention of a work accident or the conditions of his employment. This kind of statement to an employer from an injured worker should clearly absolve the Employer from any ongoing responsibility to investigate whether the injured worker's medical condition was related to an alleged work accident. It would be unreasonable and illogical to place this heightened expectation, which petitioners argue is more than what is required in *Etheredge*, and the result would create a landscape of cases where injured workers could wait years to tell their employer that a previous medical condition for which they sought medical treatment and requested FMLA only, without requesting or inquiring about workers compensation benefits, can then later come back and file a claim, eliminating the 90 day statutory notice requirement.

Finally, petitioners would respectfully submit that the findings of fact listed above clearly demonstrate a factual dispute involving the medical records and opinions on causation. If the courts were to allow petitioner benefits based on the sink go episode alone, which is all petitioner/employer witnessed, any finding that respondent's aggravation of his pre-existing condition was a result of his syncopal episode at work, as opposed to his subsequent syncopal episode at home, would be improper as it is based on speculation and surmise.

Conclusion

In conclusion, petitioners would respectfully submit that respondent erroneously states

that there were no facts in dispute. Further, petitioners respectfully argue that this is a case that is appropriate before the Supreme Court, since it deals with a novel issue of law, specifically the heightened requirement placed on an employer investigating a potential accident without formal notice is given after the injured worker submitted paperwork contradicting the time and cause of his medical condition. Therefore, petitioners respectfully request that the court grant the pending petition for writ of certiorari.

Respectfully submitted,

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PROOF OF SERVICE

Petitioner, by and through their undersigned counsel, certifies that on the date indicated below, he served counsel of record with a copy of the **Petitioners' Reply to Respondent's Return to Petition for Writ of Certiorari** by hand deliver and/or mailing copies of the same by United States Mail with first class postage prepaid the following addresses:

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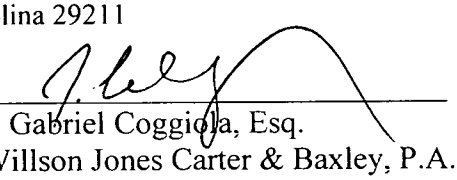

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