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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE S.C. WORKERS'
COMPENSATION COMMISSION

Appellate Case No. 2015-002112

RECEIVED
DEC 13 2017
SC Court of Appeals

Lettie Spencer, Employee Appellant,

v.

NHC Parklane, Employer/Respondent,

and

Premier Group Insurance Co., Inc. Carrier/Respondent.

PETITION FOR REHEARING

Pursuant to Rule 221, SCACR, the Respondents respectfully petition this Court for a rehearing in the above-entitled case and submit the following memorandum in support thereof. The basis for this Petition is that the Court misapprehended the Appellate Panel Decision and Order dated September 11, 2015 and by concluding that it is not supported by substantial evidence and is affected by errors of law.

Clarke W. McCants, III
Nance, McCants & Massey
Post Office Box 2881
Aiken, S.C. 29802
(803) 649-6200 ext. 3
Counsel for Respondents

December 13, 2017

CITATION OF AUTHORITIES

Cases

Harrell v. Pacific Columbia Mills, 291 S.C. 469, 471, 354 S.E. 2d 384, 385 (1987) 2

Hunter v. Patrick Construction Company, 289 S.C. 46, 344 S.E. 2d 613 (1986) 2

Lark v. Bi-lo, Inc., 276 S.C. 130, 276 S.E. 2d 304 (1981) 2

Tobey v. L & P Construction Company, 296 S.C. 122, 370 S.E. 2d 897 (Ct. App. 1988) 2

Statute

S.C. Code Ann. Section 1-23-380(g)(6) (1976) 2

MEMORANDUM IN SUPPORT OF
PETITION FOR REHEARING

I. THE COMMISSION'S FINDINGS AND CONCLUSIONS ARE SUPPORTED
BY THE SUBSTANTIAL EVIDENCE CONSIDERING THE RECORD FOR THIS
MATTER AS A WHOLE.

The law in this State is well-settled. A decision of an administrative agency should be affirmed unless that decision is clearly erroneous in view of the reliable, probative and substantial evidence on the record as a whole. S.C. Code Ann. Section 1-23-380(g)(6) (1976); Lark v. Bi-lo, Inc., 276 S.C. 130, 276 S.E. 2d 304 (1981). The court reviewing the agency's decision should not substitute its own findings of fact for those of the agency nor should the court substitute its judgment for that of the agency as to the weight of the evidence. Tobey v. L & P Construction Company, 296 S.C. 122, 370 S.E. 2d 897 (Ct. App. 1988).

Substantial evidence is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the agency involved reached to justify its decision. Harrell v. Pacific Columbia Mills, 291 S.C. 469, 471, 354 S.E. 2d 384, 385 (1987). The substantial evidence rule means that the court will not overturn findings of fact by an administrative agency unless there is no reasonable probability that the fact could be as related by the witness upon whose testimony the finding was based. Lark v. Bi-Lo, Inc., *infra*. When factual findings are supported by substantial evidence, analogous to a jury's finding of fact on disputed issues, the agency's conclusions should be affirmed. Hunter v. Patrick Construction Company, 289 S.C. 46, 344 S.E. 2d 613 (1986).

In its decision for this case this Court determined that the Commission's decision that

the Appellant is not totally disabled is unsupported by substantial evidence on the basis that when the record is examined as a whole, including the medical evidence, no reasonable mind could have reached the conclusion that she is anything but permanently and totally disabled. Using the standard outlined above, the Court necessarily finds that there is no reasonable probability that four members of the South Carolina Workers Compensation Commission could have reached the decision they made in this case. The Respondents respectfully submit that a reasonable mind could certainly reach the decision made by the Commission in this case.

Without any question there is a great deal of medical evidence in this case. From the Respondents' perspective the threshold question is whether or not the medical evidence presented by the Appellant, and upon which she bases her claim for benefits for a permanent and total disability, is reliable and credible.

Medical and other expert opinions must rest on a firm foundation. That foundation is built on an accurate history provided by the person for whom the opinion is offered. It follows that absent an accurate history the opinion is not reliable.

As outlined in the Respondents' Brief for this case, there are multiple examples and instances where the Appellant did not provide an accurate history to her medical providers and her vocational expert. For example, and as cited in this Court's decision, the Appellant did not accurately state her marital status to Dr. Mullen. The Respondents did not offer this single inaccuracy to the Commission just to show whether or not the Appellant was married, but rather to show that Dr. Mullen did not have an accurate view of her family life. The Appellant herself admits that her marital status was important for purposes of enabling Dr. Mullen to provide a reliable opinion. As the Commission noted:

Mrs. Spencer further admitted that she did not provide an accurate history to Dr. Mullen regarding her marital status. Dr. Mullen's report indicates that the Claimant resides with her husband, who is a truck driver and is not home on a regular basis. The evidence for this matter shows that Mrs. Spencer separated from her husband following a domestic dispute, and during which she was assaulted by him. When asked, she agreed that it is important for a mental health provider to fully understand the circumstances surrounding the stability of a patient's family life before reaching a medical opinion.

It is further without dispute in this case that the Appellant withheld from her providers significant information regarding her pre-existing physical and psychiatric problems. A fair reading of the medical opinions upon which the Appellant relies in this case is to the effect that the work-related injury sustained by her in June 2011 directly caused the physical and mental problems which have created her alleged total disability.

Those opinions are obviously inaccurate. At best, the Appellant suffered aggravations of pre-existing problems and conditions. If such is the case, then the providers involved in this case should state their opinions in that regard. And once they do, the next question is to what extent has the Appellant's pre-existing condition been so aggravated and to what degree have any increased problems contributed to the Appellant's disability. One cannot evaluate the combined effects of an injury and a pre-existing condition, unless they fully know and understand the nature and extent of that pre-existing condition.

The video evidence submitted by the Respondents in this case overwhelmingly shows that the Appellant is physically active to a significant degree. The Commission found that this evidence, factually and legally, demonstrates that the Appellant is not totally disabled. This Court agrees that the Commission has discretion to weigh the evidence in this case, but also suggests that the manner in which it was done in this case was arbitrary.

The Single Commissioner, as well as the Appellate Panel, outlined the specific evidence, revealed by the uncontradicted and reliable visual video images, to support the Commission's decision in this case. The Respondents certainly agree that an injured worker need not show abject helplessness in order to be deemed totally disabled, but submit here that the Appellant's physical capabilities rise well beyond such a level.

And again, the video evidence must be paired and compared with the medical evidence to view the totality of the circumstances here and reach a fair and just decision with respect to an appropriate award of compensation for Mrs. Spencer. The Respondents submit that the Commission properly weighed and evaluated the evidence in this case, and reached a fair and just decision.

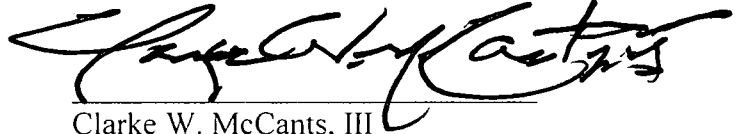
II. THE FULL COMMISSION DID NOT ERR WITH RESPECT TO MRS. SPENCER'S CLAIM FOR A WAGE LOSS UNDER § 42-9-20.

The Respondents do not dispute that the Commission did not specifically make findings of fact or conclusions of law with regard to Mrs. Spencer's claim for wage-loss benefits under S.C. Code Ann. § 42-9-20 (1976). The Respondents continue to contend, however, that such a ruling is not necessary in this case given the evidence presented to the Commission, and the manner in which Mrs. Spencer presented her case below.

CONCLUSION

For the reasons stated above the Respondents respectfully submit that this Court should grant their Petition for rehearing in this case.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Clarke W. McCants, III", written over a horizontal line.

Clarke W. McCants, III
Nance, McCants & Massey
PO Box 2881
Aiken, SC 29802
(803) 649-6200 Ext. 21
Counsel for Respondents

Dated: December 13, 2017

Nance, McCants & Massey
218 Newberry Street, S.W.
Aiken, South Carolina 29801
Telephone (803) 649-6200

James D. Nance, LLC
Clarke W. McCants, III, P.C.
A. Shane Massey, LLC
Amy Patterson Shumpert

Post Office Box 2881
Aiken, SC 29802-2881
Telephone: (803) 649-6200
FAX: 803-649-5566
MCCANTS3rd@aol.com

December 13, 2017

VIA HAND-DELIVERY

The Honorable Jenny Abbott Kitchings
Clerk of Court - S.C. Court of Appeals
Post Office Box 11629
Columbia, S.C. 29211

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In Re: Lettie Spencer v. NHC Parklane, et al.
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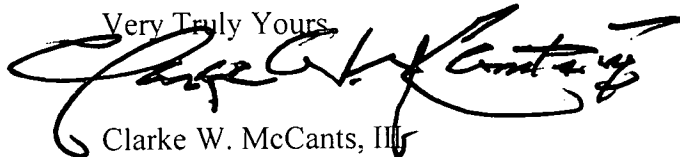
Dear Ms. Kitchings:

Please file in the above-referenced matter the enclosed Petition for Rehearing with Proof of Service thereof upon Counsel for the Appellants.

Also enclosed is this firm's payment for the filing fee for this Petition.

Thank you. With best regards, I am

Very Truly Yours,



Clarke W. McCants, III

CWMIII
Enclosure

cc: Andrew W. Creech, Esquire