

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM THE S.C. WORKERS'
COMPENSATION COMMISSION

RECEIVED
FEB 23 2018
SC Court of Appeals

Opinion No. 2017-UP-443 (S.C. Ct. App. filed Nov. 29, 2017)

Lettie Spencer, Respondent,

v.

NHC Parklane, Employer/Petitioner,

and

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

PETITION FOR A WRIT OF CERTIORARI

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

Other Counsel of Record:

Andrew Wade Creech
Garrett Brendan Johnson
Elrod Pope Law Firm
Post Office Box 11091
Rock Hill, South Carolina 29731

INDEX

Certificate of Counsel	1
Questions Presented	1
Statement of the Case	2
Arguments	
1. THE COURT OF APPEALS ERRED BY FINDING AND CONCLUDING THAT THE COMMISSION'S DECISION IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE AND IS AFFECTED BY ERRORS OF LAW	3
2. THE COURT OF APPEALS ERRED IN SUBSTITUTING ITS JUDGMENT FOR THAT OF THE COMMISSION AND BY REMANDING THIS MATTER FOR FURTHER PROCEEDINGS	7
Conclusion	9

CERTIFICATE OF COUNSEL

Counsel for the Petitioners certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on January 18, 2018.

QUESTIONS PRESENTED

1. Did the Court of Appeals err by finding and concluding that the Commission's Decision and Order is not supported by substantial evidence and is affected by errors of law.
2. Did the Court of Appeals err by substituting its judgment for that of the Commission and by remanding this matter for further proceedings?

STATEMENT OF THE CASE

This is a workers' compensation case. The Respondent in this matter, Lettie Spencer, sustained injuries to her lower back and psyche on June 22, 2011 as a result of an accident arising out of and in the course of her employment as a nurse with the Employer. (Record on Appeal pp. 22 - 23). Following this accident, the Petitioners paid for certain medical treatment rendered to Mrs. Spencer for these injuries, and also paid temporary total compensation to her. (Record on Appeal pp. 3 - 4).

Mrs. Spencer contends that she is permanently and totally disabled as a result of the accident which forms the basis for this case. (Record on Appeal pp. 22 - 23). She contends that she is entitled to an award of compensation for such permanent and total disability, as well as provision and payment for causally related medical care for the remainder of her life. (Record on Appeal Id.). In the alternative she contends that she is entitled to benefits for a diminution in her ability to earn wages and pursuant to S.C. Code Ann. § 42-9-20 (1976).

The Petitioners agree that Mrs. Spencer has sustained some degree of permanent partial disability as a result of the accident involved in this case, but deny that she is permanently and totally disabled. (Record on Appeal pp. 24 - 25). They further deny that Mrs. Spencer is entitled to wage loss benefits. (Record on Appeal Id.). The Petitioners further agree that Mrs. Spencer is entitled to ongoing authorized, causally related and reasonable and necessary medical care which tends to lessen any disability sustained by her. (Record on Appeal Id.).

A hearing to consider the issues set forth in the Parties' Forms 50 and 51 was conducted before Commissioner Michael Campbell on September 3, 2014. Following that hearing he issued his Decision and Order setting forth his findings of fact and conclusions of law. (Record

on Appeal pp. 1 - 15). Mrs. Spencer then requested Full Commission Review of Commissioner Campbell's decision. (Record on Appeal pp. 26 - 27). A hearing was then held before an Appellate Panel of the Commission which affirmed Commissioner Campbell's decision for this case. (Record on Appeal 16.- 21).

Mrs. Spencer then filed a Notice of Appeal of the Commission's Decision and Order for this case. (Record on Appeal pp. 28 - 29). The Court of Appeals heard oral arguments in this matter and subsequently issued its Opinion dated November 29, 2017 reversing the Decision and Order of the Commission, and remanding this case for further proceedings.

The Petitioners then filed a Petition for Rehearing which was denied by the Court of Appeals by its Order date January 18, 2018.

The Petitioners contend that the Opinion of the Court of Appeals in this case conflicts with prior decisions of this Court. They respectfully ask that this Court grant their Petition for a Writ of Certiorari, and review that Opinion.

ARGUMENTS

1. THE COURT OF APPEALS ERRED BY FINDING AND CONCLUDING THAT THE COMMISSION'S DECISION IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE AND IS AFFECTED BY ERRORS OF LAW.

In workers' compensation cases in this State, the Workers' Compensation Commission is the ultimate finder of fact. Holmes v. National Service Industries, Inc., 395 S.C. 305, 717 S.E.2d 751 (2011). If the Commission's decision is supported by substantial evidence it must be affirmed. Id, also Pierre v. Seaside Farms, Inc., 386 S.C. 534, 689 S.E.2d 615 (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. Lark v. Bi-lo, Inc., 276 S.C. 130, 276 S.E. 2d 304 (1981). 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, supra.

The findings of an administrative agency are presumed correct and will be set aside only if unsupported by substantial evidence. Rodney v. Michelin Tire Corp., 320 S.C. 515, 466 S.E.2d 357 (1996). A court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. Id. The court may reverse the decision if substantial rights of an appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are clearly erroneous in view of the reliable, probative and substantial evidence of the whole record. Id.

The precedent cited above is longstanding in this State and strong in its terms. All parties in a workers’ compensation cases in South Carolina are subject to clear and express parameters of the substantial evidence rule.

In its Opinion for this case the Court of Appeals concluded that there is not substantial evidence in the record for this matter to support the Commission’s decision. The Court of Appeals further held that the Commission committed an error of law by awarding compensation and benefits to Mrs. Spencer only under the provisions of S.C. Code Ann. § 42-9-30 (1976) (the “scheduled member statute”). Finally, the Court of Appeals appears to have made its own findings of fact and conclusions of law in this case, and substituted its judgment for that of the Commission, by concluding that “no reasonable mind could have reached the conclusion that [Mrs.] Spencer is

anything but permanently and totally disabled.”

First, there is no prohibition against awarding compensation to an injured worker under § 42-9-30 when that worker has sustained injuries to multiple body parts. It is routinely done by the Commission in cases where an employee is capable of working, or in fact has returned to gainful employment and is earning the same wages they earned before they sustained a work-related accident. Indeed, an injured worker in South Carolina has had on a longstanding basis and rightfully so the option pursuing an award of compensation for a “scheduled member loss” or a “wage loss” in circumstances where multiple injured body parts are involved. Singleton v. Young Lumber Co., 236 S.C. 454, 114 S.E. 2d 837 (1960). It was, therefore, not an error of law for the Commission to make an award to Mrs. Spencer as it did in this case.

The Court of Appeals also substituted its own findings and judgment as to the merits of the evidence presented to four members of our Workers’ Compensation Commission. More importantly, the Court of Appeals substituted its judgment for that of the Commission with respect to the weight to be given to that evidence. Such actions contravene legions of precedence established by this Court over decades of time.

In its Opinion the Court of Appeals stated that the Commission’s decision that Mrs. Spencer is not totally disabled “was based on video evidence of [Mrs.] Spencer performing various tasks.” This statement is not correct. The Commission based its rulings not only on non-controverted and unopposed video evidence, spanning a significant period of time, but also on the fact that certain statements and opinions of Mrs. Spencer’s expert witnesses as to her physical and mental condition are not reliable and carry little weight in this case because they are based on

inaccurate information, including her own statements as to her physical and mental condition.¹

As outlined in its brief to the Court of Appeals there are numerous instances where Mrs. Spencer provided inaccurate and untrue information to medical providers, which they relied upon to support their opinions. Any medical or similar opinion which is based on an inaccurate history or other untrue information is inherently unreliable.

It is without dispute in this case that Mrs. Spencer withheld from her expert witnesses significant information regarding her pre-existing physical and psychiatric problems. A fair reading of those opinions 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 unreliable. At best, Mrs. Spencer suffered aggravations of pre-existing problems and conditions as a result of her accident in 2011. As such, the experts involved in this case should be required to state their opinions in that regard. And once they do, the next question is to what extent have Mrs. Spencer's pre-existing conditions been so aggravated and to what degree have any increased problems contributed to her 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.

Further, and with respect to the video evidence showing the degree to which Mrs. Spencer is, in fact, significantly and physically active the Court of Appeals wrote in its Opinion:

“Admittedly, the [Commission] has discretion to weigh the evidence. However, to

¹ For example, Mrs. Spencer related to one of her physicians that she has to use a cane while ambulating. The Court of Appeals wrote that the Petitioners “introduced video surveillance of [Mrs.] Spencer not using a cane in one instance while outside her home” (emphasis added). This statement is not accurate. The video submitted in this case shows not one instance when Mrs. Spencer is in fact using a cane to walk.

allow the [Commission] to find certain evidence does not negate a finding of total disability in one circumstance and find that same evidence does negate a finding of total disability in another circumstance, would be to allow the [Commission] to arbitrarily exercise its discretion.”

In making this statement the Court of Appeals made reference to other cases where the Commission apparently determined that certain video evidence did not negate a finding of total disability. No where in the record for this matter is there any video or similar evidence which was used in any other workers' compensation cases. To allow the Court of Appeals to reach such a far-reaching conclusion here, based upon evidence not contained in the record before this Court, is highly prejudicial to the Petitioners.

The real and visual images of Mrs. Spencer are solely unique to her. Those images, coupled with the lack of reliability of the expert opinions in this case, fully support the Commission's findings and conclusions here.

And again, the video evidence must be paired and compared with the medical evidence to view and understand the totality of the circumstances in this matter and to reach a fair and just decision for all involved. The Respondents submit that the Commission properly weighed and evaluated the evidence in this case, and reached a fair and just decision.

2. THE COURT OF APPEALS ERRED IN SUBSTITUTING ITS JUDGMENT FOR THAT OF THE COMMISSION AND BY REMANDING THIS MATTER FOR FURTHER PROCEEDINGS.

In its decision for this case the Court of Appeals remanded this matter to the Workers' Compensation Commission “for a determination of [Mrs.] Spencer's compensation consistent with this opinion.” As noted earlier, the Court of Appeals also wrote that “no reasonable mind could have reached the conclusion that [Mrs.] Spencer is anything but permanently and totally disabled.” This language suggests that the Court of Appeals found as a matter of law that Mrs. Spencer is

permanently and totally disabled. By doing so the Court of Appeals has clearly substituted its own judgment for that of the Commission.

As noted above the Petitioners contend that the Commission, after considering and weighing all of the evidence presented in this case, correctly and fairly entered an award of compensation and benefits to Mrs. Spencer for the injuries she sustained. The Court of Appeals, however, appears to have retried this case on appeal and made its own findings of fact and conclusions of law. Such an action contravenes a longstanding history in South Carolina of honoring the presumptive validity of an administrative agency's decision.

The law in South Carolina in that is well-established by this Court. 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. Lark, supra. 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. Id. 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 other words, while minds may differ decision of the Commission must be afforded the same respect a jury receives when it undertakes to spend the time and effort to hear and consider the evidence presented in a contested matter and render a decision. All parties and those otherwise involved in workers compensation cases in this State - injured workers, their employers and their insurance carriers, as well as attorneys who practice in this area - recognize and accept this well-reasoned legal concept. Not always does a party in a contested matter receive the decision it wants,

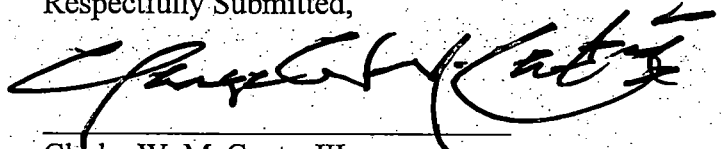
but by following the law all parties know and understand that a case has been fairly ruled upon.

CONCLUSION

The Commission's decision in this case is not affected by an error of law. The Court of Appeals simply views the evidence in a fashion different from the Commission. Longstanding precedent in this State establishes that in such circumstances the decision of the agency below has to be affirmed.

For these reasons the Petitioners respectfully ask that their Petition for a Writ of Certiorari in this matter be granted.

Respectfully Submitted,



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

Dated: February 20, 2018

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM THE S.C. WORKERS'
COMPENSATION COMMISSION

RECEIVED
FEB 23 2018
SC Court of Appeals

Opinion No. 2017-UP-443 (S.C. Ct. App. filed Nov. 29, 2017)

Lettie Spencer, Respondent,

v.

NHC Parklane, Employer/Petitioner,

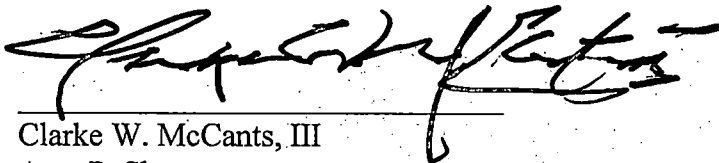
and

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

PROOF OF SERVICE

I certify that I have served a copy of the Petition for Writ of Certiorari and Appendix on counsel for the Respondent, Andrew W. Creech, Esquire, by depositing a copy of the documents in the United States Mail, postage prepaid, on February 20, 2018 addressed to Andrew W. Creech, Esquire, Elrod Pope Law Firm, P.O. Box 11091, Rock Hill, SC 29731

February 20, 2018



Clarke W. McCants, III
Amy P. Shumpert
P. O. Box 2881
Aiken, SC 29802-2881
(803) 649-6200
Attorneys for Petitioners

Nance, McCants & Massey
Attorneys & Counselors at Law
218 Newberry Street, S.W.
Aiken, South Carolina 29802
Telephone (803) 649-6200

 **COPY**

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
Fax: (803) 649-5566

February 20, 2018

The Honorable Daniel Shearouse
Supreme Court Clerk of Court
P. O. Box 11330
Columbia, SC 29211

RECEIVED

FEB 23 2018

SC Court of Appeals

In Re: Lettie Spencer v. NHC Parklane, Inc., et al.
WCC File No.: 112078
Appellate Case No.: 2015-002112

Dear Mr. Shearouse:

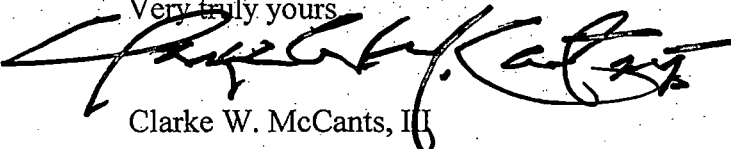
Please file in the above-referenced matter the original and six copies of the Petition for Writ of Certiorari, two copies of the Appendix and the Proof of Service thereof upon opposing Counsel. Also enclosed is the filing fee for this Petition.

I would note that compact discs containing certain video evidence were made part of the original record on appeal for this matter, and are in the possession of the Court of Appeals. By a copy of this letter I would respectfully ask the Clerk there transmit those CD's to you for inclusion in the Record for this case. If I should take any other action in that regard, I would appreciate your assistance in advising me accordingly.

Thank you for your consideration as part of this matter.

With best regards, I remain

Very truly yours


Clarke W. McCants, III

CWM,III/aps
Enclosures

cc: The Honorable Jenny Abbott Kitchings
Andrew W. Creech, Esquire

Nance McCants & Massey
218 Newberry Street, S.W.
P.O. Box 2881
Aiken, South Carolina 29802

RECEIVED

FEB 23 2018

SC Court of Appeals

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

