THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM THE S.C. WORKERS' COMPENSATION COMMISSION

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.

RETURN TO PETITION FOR A WRIT OF CERTIORARI

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Is certiorari warranted if the Court of Appeals correctly found that the Commission's Decision and Order were not supported by substantial evidence?

2. Is certiorari warranted if the Court of Appeals properly remanded this matter for further proceedings?

COUNTER-STATEMENT OF THE CASE

Respondent Lettie Spencer suffered admitted work-related injuries to her low back and psyche while pushing a medical cart on June 22, 2011. On February 28, 2014, she filed a Form 50 seeking permanent and total disability pursuant to § 42-9-10 or § 42-9-30, or, in the alternative, seeking a partial wage loss award under § 42-9-20. (Record on Appeal p. 22). Petitioners filed a Form 51 denying permanent and total disability and seeking a determination of compensation pursuant to § 42-9-30. (R. p. 24).

A hearing was held before Commissioner R. Michael Campbell, II on September 3, 2014. Prior to the hearing, counsel for Ms. Spencer made an oral motion clarifying his alternative positions, requesting that if Ms. Spencer was not found permanently and totally disabled under §§ 42-9-10 and 42-9-30, she be entitled to an award for wage loss under § 42-9-20. (R. p. 35, lines 11-14). Counsel for Petitioners consented to the motion. (R. p. 35, line 15). In an order filed on March 12, 2015, Commissioner Campbell found that Ms. Spencer "sustained permanent partial disability to the back in the amount of 21%." (R. p. 12, par. 15). The commissioner made no findings with regard to Ms. Spencer's wage loss claim under § 42-9-20. Ms. Spencer timely filed a Form 30 request for appellate review. (R. p. 26).

On June 15, 2015, oral argument was presented before an Appellate Panel of the South Carolina Workers' Compensation Commission consisting of Commissioners Avery B. Wilkerson, Jr.; Aisha Taylor; and Susan S. Barden. In its order of September 11, 2015, the Commission acknowledged that seven issues were properly before the panel; five of these related to whether Ms. Spencer was permanently and totally disabled, while one pertained to alleged overpayment of temporary total compensation. (R. pp. 17-18). The remaining issue was whether "the Single

Commissioner err[ed] in failing to make a finding under 42-9-20 regarding the extent of the Claimant's wage loss." (R. p. 18, par. 6).

The Commission simply re-affirmed the findings of the Single Commissioner verbatim, finding that Ms. Spencer sustained only a 21% permanent partial disability to her back and that Petitioners were not entitled to a credit for overpayment of temporary compensation. (R. p. 5). However, the Full Commission failed to enter any rulings whatsoever concerning Ms. Spencer's wage loss. Neither their Findings of Fact nor their Conclusions of Law so much as mention wage loss or § 42-9-20. The terms never appear again after being listed as an issue on appeal. (R. pp. 17-21).

On October 9, 2015, Ms. Spencer filed a Notice of Appeal with the South Carolina Court of Appeals. (R. p. 28). After hearing oral arguments, the Court of Appeals, in a per curiam decision dated November 29, 2017, reversed the Appellate Panel's finding and remanded for a determination of Spencer's compensation consistent with its opinion. Petitioners subsequently filed this Petition for Writ of Certiorari.

ARGUMENTS

1. CERTIORARI IS NOT WARRANTED BECAUSE THE COURT OF APPEALS PROPERLY FOUND THAT THE COMMISSION'S DECISION WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

Pursuant to Rule 242(b) of the South Carolina Rules of Appellate Practice, "a writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons." The rule lists five reasons to indicate the character of considerations used in granting such a review: (1) Where there are novel questions of law; (2) Where there is a dissent in the decision of the Court of Appeals; (3) Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court; (4) Where substantial

constitutional issues are directly involved; and (5) Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.

None of these five factors are present in the current case. There are no novel questions of law. The opinion of the Court of Appeals was issued per curiam without a dissent. The decision does not conflict with any decisions of the Supreme Court. No substantial constitutional issues are involved, and no federal question is present. The Court should deny Petitioners' Petition due to the absence of these considerations.

Furthermore, the Court of Appeals properly applied the law to the record. An appellate court may reverse a decision of the Appellate Panel if it is "affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence." Brunson v. Am. Koyo Bearings, 395 S.C. 450, 455 (Ct. App. 2011); accord S.C. Code Ann. § 1-23-380(5)(d)-(e) (Supp. 2017). 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 the administrative agency reached in order to justify its action." Houston v. Deloach & Deloach, 378 S.C. 543, 550 (Ct. App. 2008). The Commission's findings "may not be based upon surmise, conjecture, or speculation, but must be founded on evidence of sufficient substance to afford a reasonable basis for it." Edwards v. Pettit Constr. Co., Inc., 273 S.C. 576, 579 (1979).

The Appellate Panel is the ultimate finder of fact in workers' compensation cases. See Hall v. Desert Aire, Inc., 376 S.C. 338 (Ct. App. 2007). However, an appellate court is free to decide a workers' compensation case as a matter of law when the facts are not in dispute. See Davaut v. Univ. of S.C., 418 S.C. 627, 632 (2016)("Because the facts are not in dispute, we are free to decide this [workers' compensation] case as a matter of law.") In such circumstances, the

court is no longer bound by the substantial evidence rule. Id. Consistent with the purpose of the Workers' Compensation Act, questions of law should be liberally construed in favor of coverage while restrictions and exceptions are to be strictly construed. See James v. Anne's, Inc., 390 S.C. 188, 198 (2010).

The Court of Appeals correctly held that the Appellate Panel lacked substantial evidence to find that Ms. Spencer suffered a 21% impairment to her back and was not totally disabled. In reaching its opinion, the court found two sources of error in the Appellate Panel's decision. First, it was an error of law to rely solely on S.C. Code Ann. § 42-9-30 in awarding Ms. Spencer compensation and not to consider S.C. Code Ann. § 42-9-10. Second, the finding that Ms. Spencer was not totally disabled was unsupported by substantial evidence. The court is correct in both lines of reasoning.

Generally, an injured claimant may proceed under either the general disability statutes, (§§ 42-9-10 and 42-9-20) or under the scheduled member statute (§ 42-9-30) to maximize recovery. Colonna v. Marlboro Park Hosp., 404 S.C. 537, 548 (Ct. App. 2013). The scheduled recovery statute is exclusive only when a scheduled loss is not accompanied by additional complications affecting another part of the body. Id. The Court of Appeals correctly pointed out that both Petitioners and Respondent agreed that Ms. Spencer suffered injuries to her lower back affecting her legs and to her psyche. Because she had suffered physical injury and mental injury, recovery was appropriate under § 42-9-10.

The Court of Appeals found ample support for their reasoning under both Colonna and Bass v. Kenco Grp., 366 S.C. 450, 462-64 (Ct. App. 2005). In Colonna, the claimant's ability to proceed under § 42-9-10 was strictly conditioned on her ability to show injury or impairment to a two separate body parts. Id. at 549. In Bass, an award was appropriate under the general disability

statutes because the claimant had suffered a physical as well as a mental injury. The exact same scenario holds true in Ms. Spencer's case. This fact was not in dispute, and so the Court of Appeals was justified in relying on § 42-9-10.

The Court of Appeals also held that the Appellate Panel's decision that Ms. Spencer "is not totally disabled is unsupported by substantial evidence because... no reasonable mind could have reached the conclusion that Spencer is anything but permanently and totally disabled." The evidence in the record wholly supports the court's opinion.

Ms. Spencer introduced the testimony of the following six medical professionals:

William Lehman, M.D.: "It is obvious that Ms. Spencer is functioning at a less than sedentary level." (R. p. 247).

Kern Carlton, M.D.: "She was placed in a sedentary work category." (R. p. 408).

Sanjay Nandurkar, M.D.: "The claimant is unable to return to work at his or her current employment. Less than sedentary restriction." (R. p. 288).

Tracy Hill, PT: "She qualifies for limited sedentary (less than sedentary) work." (R. p. 417).

Patrick B. Mullen, M.D.: "She cannot work at all and she will remain permanently disabled for the rest of her life." (R. p. 447).

Leanna Hollenbeck, M.S., C.L.C.P., C.R.C.: "Ms. Spencer is not employable now, nor will her employability increase in the future... Given her less than sedentary work restriction, combined with her age, chronic pain level, emotional and cognitive instability, and her lack of transferrable skills, it is my professional opinion that she has experienced a 100% loss". (R. p. 456).

Medical testimony such as this is entitled to great respect in Workers' Compensation hearings. Potter v. Spartanburg Sch. Dist. 7, 395 S.C. 17, 23 (Ct. App. 2011). The Commission may only disregard such evidence in favor of other competent evidence in the record. Id. When an opinion does not originate from a medical provider, but is instead the medical opinion of the single commissioner, adopted by the Commission, any findings based on that opinion should be overruled. See Burnette v. City of Greenville, 401 S.C. 417, 428 (Ct. App. 2012).

Petitioners dedicate a page of their brief to an attempt to discredit these expert opinions. Significantly, their arguments regarding the medical testimony are strictly negative. They do not introduce any affirmative evidence to show that Ms. Spencer is capable of working in a competitive marketplace. "Total disability does not require complete, abject helplessness. Rather, it is an inability to perform services other than those that are so limited in quality, dependability, or quantity that no reasonably stable market exists for them." McCollum v. Singer Co., 300 S.C. 103, 107 (Ct. App. 1989). All of the evidence showed that Ms. Spencer was in fact totally disabled under this definition. There is no competent, much less substantial evidence, to support a finding that Ms. Spencer is not permanently and totally disabled, and the Court of Appeals was correct to set it aside.

The fact that Ms. Spencer had previously suffered from depression and chronic pain neither supports the single commissioner's finding nor neutralizes the expert testimony provided by six different witnesses. Ms. Spencer is entitled to compensation as long as there is a greater disability than otherwise would have existed simply due to the combined effects of an injury and pre-existing condition. Bartley v. Allendale Cty. Sch. Dist., 392 SC 300, 309 (2011). Given that Ms. Spencer was able to perform her job duties before suffering these injuries, the court appropriately found that the medical evidence still had probative value.

The Court of Appeals likewise acted appropriately regarding the surveillance footage of Ms. Spencer. This footage showed her driving; grocery shopping; putting small bags of groceries into her car; walking, often with difficulty; and standing and sitting at her son's place of business. This video was in accord Ms. Spencer's testimony, as well as that of her son, Terry Sartin. Mr. Sartin testified that Ms. Spencer never worked for the business and was never paid any wages; he would ask her to come by to get her out of the house, and was happy simply to see her. (R. p. 111, lines 10-12). While she was there, Mr. Sartin said that his mother mostly sat on the couch in the office, watched TV, or talked to the customers as they came in. (R. p. 111, lines 17-22).

The surveillance footage did nothing to contradict Ms. Spencer's or Mr. Sartin's testimony. As discussed previously, total disability does not equate to abject helplessness. McCollum at 107. The true test is whether the claimant is able to perform services for which a reasonably stable market exists. Id. The footage relied upon by Petitioners may have shown that Ms. Spencer was not helpless, but it certainly does not establish that she has the requisite skills that would make her anything other than completely and totally disabled. The Court of Appeals correctly found that the Appellate Panel's decision was not supported by substantial evidence, and Petitioners' Petition for Writ of Certiorari should be denied on that ground.

2. THE COURT OF APPEALS PROPERLY REMANDED THIS MATTER FOR FURTHER PROCEEDINGS.

Petitioners further object to the Court of Appeals' statement that "no reasonable mind could have reached the conclusion that Ms. Spencer is anything but permanently and totally disabled." They argue that this quote demonstrates that the court "clearly substituted its own judgment for that of the Commission." On the contrary, this is a clear application of the standard of review, which states that "substantial evidence... is evidence which, considering the record as a whole,

would allow reasonable minds to reach the conclusion the administrative agency reached in order to justify its action." Houston at 550.

The actual evidence on the record included five out of six expert witnesses stating that Ms. Spencer was disabled or qualified for less than sedentary work. The sixth, although he stated that Ms. Spencer was in the sedentary work category, actually found that she was only capable of lifting "7 lbs occasionally" and was observed "sitting for 60 minutes at a time," despite putting forth excellent effort. (R. pp. 403-404). Under 20 CFR § 404.1567, this is less than the requirements for a sedentary position. This places his opinion squarely in line with those of the other five experts and make their opinions unanimous: Ms. Spencer was completely and totally disabled, and qualified for less than sedentary work. Additionally, the only vocational expert who considers her age, permanent restrictions, work history, education, and transfer of skill opined that she was totally disabled. This opinion was uncontradicted.

The Court of Appeals did nothing more than accurately summarize this uncontroverted medical evidence. Given these opinions and the medical evidence was not in dispute, the court had every right to decide that Ms. Spencer was permanently and totally disabled as a matter of law. See Davaut at 632. The single commissioner's finding was clearly erroneous in view of the evidence on the record, and the Court of Appeals acted appropriately in reversing and remanding the decision of the Appellate Panel. Petitioners' Petition for Writ of Certiorari should accordingly be denied.

CONCLUSION

There are no considerations present in this case that weigh in favor of the Court granting Petitioners' Petition for a Writ of Certiorari. Moreover, the Court of Appeals acted appropriately in reversing and remanding the Appellate Panel's decision because it was governed by an error of

law and was not supported by substantial evidence. For the foregoing reasons, Respondent respectfully requests that the Petitioners' Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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April 4, 2018

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PROOF OF SERVICE

I certify that I have served a copy of the Return to Petition for Writ of Certiorari on counsel for the Petitioners, Clarke W. McCants, III, Esquire, by depositing a copy of the documents in the United States Mail, postage prepaid, on April 3, 2018, addressed to Clarke W. McCants, III, Esquire; Nance, McCants & Massey; P.O. Box 2881; Aiken, SC 29802.

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