

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APR 16 2018

APPEAL FROM SOUTH CAROLINA S.C. SUPREME COURT
WORKERS' COMPENSATION COMMISSION

Appellate Case No.:2017-001970

Opinion No.: 27789 (Submitted March 7, 2018 - Filed April 4, 2018)

Otis Nero, (Claimant),.....Respondent,

v.

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

PETITIONERS' RETURN TO RESPONDENT'S PETITION FOR REHEARING

Petitioners, by and through their undersigned attorney, hereby file this return to Respondent's April 6, 2018 petition for rehearing. A petition for rehearing must state with particularity the points to have been overlooked or misapprehended by the court. (Rule 221(a), SCACR). The purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is the purpose of a petition for rehearing to have the case tried in the appellate court a second time. Kennedy v. South Carolina Retirement System, 564 S.E.2d 322, 349 S.C. 531 (S.C. 2001).

Petitioner argues this Court overlooked or misapprehended the evidence, law, and arguments involving whether the *de novo* standard of review applies to the Court of Appeals' decision, based on his argument that the "relevant" facts are allegedly undisputed facts, and therefore all that remained for the Court of Appeals was the *de novo* application of the law to those established facts.

Petitioners respectfully disagree that the relevant facts in the case are undisputed, and assert that this Court appropriately remanded the case to the Court of Appeals to issue a ruling applying the substantial evidence standard of review. As such, Petitioners respectfully request this Court deny respondent's petition for rehearing.

ARGUMENT

In support of its argument, Respondent relies on the South Carolina Court of Appeals holding in Gibson vs. Spartanburg School Dist. #3, wherein the Court of Appeals stated, "where, as here, the facts are undisputed, the question of whether an accident is compensable is a question of law." A substantial difference between Gibson and the current case is that in Gibson, the hearing Commissioner did not take any testimony, and instead relied upon the administrative submissions and a stipulation of the facts by the parties. In this case, there was no stipulation to the facts, and all the Respondent views the facts he deems relevant to be undisputed, Petitioner would argue that a factual dispute exists in several areas.

Most importantly, a factual dispute exists over the actual mechanics of the accident that caused Respondent's injury to the cervical spine and resulting need for surgery, and whether the mechanism of injury that did in fact cause Respondent's injury was causally related to the work accident as he alleged it to be. This factual dispute over the causation of the alleged accident to

the resulting injuries plays a direct role in the extent of a reasonably conscientious manager's responsibility to further investigate a potential Worker's Compensation claim after it was not only reported, but also denied by the employee in paperwork submitted just one month after his accident.

Respondent's petition cites Jordan v. Dixie Chevrolet for the proposition that upon admitted or established facts, the question of whether an accident that did in fact take place is compensable is a question of law and therefore is not an invasion of the fact-finding field of the commission on the part of the appellate courts. 218 S.C. 73, 61 S.E.2nd 654 (S.C. 1050). Jordan is distinguishable from this case because in Jordan, there was no question as to the cause of injury, since the injured worker was sitting alone idle in a car and on his own released a teargas bomb inside the car. Although this Court held that the issue of compensability of the accident was a question of law, there was no way to dispute the facts involving the cause of injury whether they were compensable under the Worker's Compensation Act or not.

This case involves three (3) separate incidents that could have been the cause of Respondent's neck injury and need for resulting treatment. First, there was the accident Respondent alleged in his pleadings, and he described in his hearing testimony under oath as an immediate onset of pain and a "snap." Next, there was Respondent's second incident when passed out from a dizzy spell, which he admitted to having done in the past, in front of his supervisors while laughing and joking at the cleanup shed at the end of his shift. Finally, after informing his supervisors he was fine to drive home, Respondent was involved in his third incident, in which he passed out and fell again in his own front yard, resulting in his wife taking him to the hospital.

The evidence in the record also contained conflicting medical expert evidence regarding causation, since Respondent's neurosurgeon, Dr. Naso, commented, "I don't think his syncope is related to cervical spine pathology." On the other hand, Respondent's family doctor, Dr. Ritchie, testified it was his opinion Respondent's pre-existing cervical spine condition was aggravated by his pulling of the squeegee board and that this, along with Respondent's work in the heat, caused the syncope episodes.

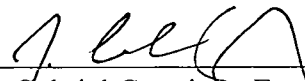
The factual dispute over the cause of Respondent's injury and need for resulting treatment has a direct impact on the issue of notice, since the factual dispute was further compounded by the "Certification Of Health Care Provider For Employee's Serious Health Condition (Family Medical Leave Act)" paperwork Respondent signed and submitted to his employer only one (1) month after his alleged accident, stating that his injury was not work related and his neck and syncope condition had been present for "several years." Petitioners stress the significance of the factual dispute over the alleged mechanism of injury and causal relationship between respondents alleged accident and resulting injuries and need for medical treatment, since it is well settled principal under workers compensation law in South Carolina that an injured worker has the burden of proving facts that the injury arose out of employment, and award must not be based on surmise, conjecture or speculation. Clade v. Champion Laboratories, 330 S.C. 8, 496 S.E.2nd 856 (S.C. 19987).

In this case, the conflicting evidence involving the multiple incidents that could have caused Respondent's injuries presents a series of facts in dispute, which again are compounded by the Respondent's submission of paperwork to his employer that his condition was not is not related to a work injury and had existed for years are all relevant facts necessary for determining whether a reasonably conscientious manager might have an ongoing duty to continue to

investigate a potential workers compensation injury, despite affirmative statements from the employee that his injuries were not related to a work accident. As such, this Court appropriately reversed the Court of Appeals and found that it erred in applying the *de novo* standard when it is well-settled law that the Commission's determination of whether an injured worker gave timely notice under §42-15-20 is not a jurisdictional determination, and therefore must be reviewed on appeal under the substantial evidence standard.

CONCLUSION

For the reasons set forth above, Petitioners respectfully requests this Court deny Respondent's petition for rehearing. Respondent has failed to demonstrate any material facts or principles of law that were overlooked or misapprehended by the Court, and instead Respondent simply restates its previous arguments submitted to this Court.



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Columbia, South Carolina

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PROOF OF SERVICE

Petitioner, by and through their undersigned counsel, certifies that on APRIL 16, 2018, he served counsel of record with a copy of the **Petitioners' Return to Respondent's Petition for Rehearing** 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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