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SC Court of Appeals

LAURENS COUNTY

STATE OF SOUTH CAROLINA)
COUNTY OF LAURENS)

IN THE COURT OF COMMON PLEAS
EIGHTH JUDICIAL CIRCUIT

Annette B. Lee, Employee,)
Claimant/Appellant,)

C.A. No. 2010-CP-30-0710

WCC File No. 0701597

vs.)

Action Staffing/American Services, Inc.,)
Employer, and Liberty Mutual Ins. Co.,)
Carrier,)

Defendants/Respondents.)

ORDER

A TRUE COPY OF ORIGINAL

Lynn W. Lancaster
Lynn W. Lancaster
Laurens County CCCP & GS

This is an appeal from the Workers' Compensation Commission. By previous Consent Order approved by the Commission on or about May 1, 2009, Annette Lee sustained compensable injury by accident on or about January 2007 causing injuries to her right shoulder, right upper extremity (carpal tunnel syndrome), and neck. Her employer, Action Staffing, and its workers' compensation insurance carrier, Liberty Mutual, provided medical treatment and weekly compensation benefits, but on May 29, 2009, Liberty Mutual filed a Form 21 request for hearing with the Commission seeking a determination of permanent disability contending Lee had reached maximum medical improvement. In response, Lee filed a Form 50 request for hearing contending she is in need of additional medical treatment and compensation benefits. The matter came before a single Commissioner for hearing on July 21, 2009.

At that hearing, Lee contended she is entitled to such additional benefits and that she has also sustained injury to her psyche in addition to and because of her physical injuries. If she was

determined to have reached maximum medical improvement, she contended she is permanently and totally disabled, or alternatively, that she has sustained significant wage loss under S.C. Code Ann. § 42-9-20. Liberty contended Lee reached maximum medical improvement on May 7, 2009 and sought credit for temporary total disability paid after that date. Liberty admitted Lee is entitled to some permanent partial disability for the injuries to her neck and right upper extremity and concede continuing medical treatment; however, it denied she is entitled to permanent total disability or benefits under § 42-9-20.

The parties also sought a determination of claimant's average weekly wage, with Lee contending the figure should be \$937.43, for a corresponding compensation rate of \$624.95, and Liberty contending the figure should be \$505.60, for a corresponding compensation rate of \$337.08.

By Order dated September 22, 2009, the single Commissioner found Lee sustained compensable injuries to her right upper extremity, carpal tunnel, right shoulder, neck, and psyche, that she had reached maximum medical improvement, and that she has sustained permanent partial loss of earning capacity entitling her to permanent compensation benefits under § 42-9-20. The Commissioner determined her average weekly wage is \$937.43.

Both parties appealed the decision to the Full Commission Panel. Lee contended primarily the Commissioner erred in failing to find that she is entitled to permanent total disability, and Liberty contended the Commissioner erred in his determination of the average weekly wage and in failing to grant their request for credit against the permanency award for temporary compensation benefits paid after the date of maximum medical improvement. On or about June 2, 2010, the Commission's Appellate Panel by majority decision issued an Order reversing the Commissioner on the average weekly wage issue and the credit issue. The Panel found an average weekly wage of \$505.60 based

on Liberty's Form 20. Of note, one Commissioner dissented and specifically stated that he would affirm the single Commissioner's decision since it was a well reasoned compromise between the positions taken by the parties.

Lee now appeals to this Court. Liberty did not file an appeal from the Appellate Panel's Order.

SCOPE OF REVIEW

In Brown v. Greenwood Mills, Inc., the Court of Appeals explained at length the standard of review in workers' compensation cases.

The South Carolina Administrative Procedures Act ("APA") establishes the standard for judicial review of decisions of the workers' compensation commission. A reviewing court may reverse or modify a decision of an agency if the findings, inferences, conclusions, or decisions of that agency are "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." Under the scope of review established in the APA, this Court may not substitute its judgment for that of the appellate panel as to the weight of the evidence on questions of fact, but may reverse where the decision is affected by an error of law.

The substantial evidence rule of the APA governs the standard of review in a workers' compensation decision. Pursuant to the APA, this Court's review is limited to deciding whether the appellate panel's decision is unsupported by substantial evidence or is controlled by some error of law. 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.

The appellate panel is the ultimate fact finder in workers' compensation cases and is not bound by the single commissioner's findings of fact. The final determination of witness credibility and

the weight to be accorded evidence is reserved to the appellate panel. The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence. Where there are conflicts in the evidence over a factual issue, the findings of the appellate panel are conclusive.

The findings of an administrative agency are presumed correct and will be set aside only if unsupported by substantial evidence. It is not within our province to reverse findings of the appellate panel which are supported by substantial evidence.

Brown v. Greenwood Mills, Inc., 366 S.C. 379, 391-93, 622 S.E.2d 546, 553-54 (Ct. App. 2005)(citations omitted).

ANALYSIS

Lee appeals contending the Commission's Appellate Panel erred in reversing the single Commissioner to find an average weekly wage of \$505.60 based on the Form 20 submitted by defendants, in failing to find she is entitled to permanent total disability, and in granting Liberty credit for temporary total disability compensation benefits paid after the date of maximum medical improvement. As set out more fully below, I find substantial evidence supports the Panel's determinations concerning the extent of permanent disability and credit for benefits paid after maximum medical improvement and affirm those decisions based on the standard of review. However, I find the Panel's determination concerning the average weekly wage is based on a misapplication of the law and reverse and remand that issue to the Commission for reconsideration.

Average weekly wage. The Act provides that an injured worker's average weekly wage is generally calculated by dividing actual earnings in the four quarters prior to the injury by 52 weeks.

S.C. Code Ann. § 42-1-40 (2007). But if the worker did not work for the employer for a full 52 weeks prior to the injury, the Act provides several alternative computational methods.

When the employment, prior to the injury, extended over a period of less than fifty two weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages shall be followed, as long as results fair and just to both parties will be obtained. Where by reason of a shortness of time during which the employee has been in the employment of his employer or the casual nature or terms of his employment, it is impracticable to compute the average weekly wages as defined in this section, regard is to be had to the average weekly amount which during the fifty-two weeks previous to the injury was being earned by a person of the same grade and character employed in the same class of employment in the same locality of community.

When for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury.

Id. (emphasis added). Of course, "[t]he primary purpose of the Workers' Compensation Act is to protect the worker," it is "entitled to a liberal construction in order to accomplish the ends and purposes for which it was enacted," and "[a]ny reasonable doubts as to its construction should be resolved in favor of its claimants." Booth v. Midland Trane Heating & Air Cond., 298 S.C. 251, 254, 379 S.E.2d 730, 731 (Ct. App. 1989).

Here, Lee did not work for Action Staffing for a full 52 weeks prior to the injury by accident but only worked for about two weeks. She testified that she started working for Action Staffing about January 15, 2007 and that the injury occurred in January 2007. (Record "I" - tr. p. 38, line 21- p. 39, line 5) Therefore, the usual method for figuring average weekly wage cannot be used, and the

Commission correctly looked to an alternate method. See Pilgrim v. Eaton, 391 S.C. 38, 703 S.E.2d 241 (Ct. App. 2010)(impermissible for Commission to use usual method of calculating average weekly wage where injured worker had been working for less than one week).


The first alternate method divides the actual wages the claimant earned by the number of weeks worked. However, the statute clearly states that this method can only be used if "practicable" and "results fair and just to both parties will be obtained," and in the next sentence recognizes that "shortness of time" in the employment is a situation which would render such an unfair result. As in Pilgrim, two weeks of wages is too short a period of time to be practicable or "fair and just."

The next alternate method mentioned is a calculation based on the earnings of a similar employee. The statute specifically states that "regard is to be had to the average weekly amount which *during the fifty-two weeks previous to the injury* was being earned by a person of the same grade and character employed in the same class of employment in the same locality of community." S.C. Code Ann § 42-1-40 (2007). The Commission used this alternate method and based its determination on an similar employee Form 20 provided by defendants. (see Findings of Fact #7, 11) However, the similar employee Form 20 provided by defendants did not provide the wages of a similar employee over 52 weeks prior to claimant's date of injury but rather provided wages of a similar employee over only a 12-week period. (see Record "R" – Form 20) Such is clear error of law, as it is directly contrary to the plain language of the statute. It is also unfair to claimant since the Panel's average weekly wage is neither based on her actual earnings nor a full 52 weeks of earnings. As such, the Commission's finding of an average weekly wage of \$505.60 based on this Form 20 is erroneous a matter of law.

The absence of the primary method and the first two alternative methods would seem to be an exceptional reason for the Commission to revert to the catch-all provision in the statute – “such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury.” However, it is up to the Commission to make that determination. Further, as in Pilgrim, it is up to the Commission to decide whether to allow the parties to present additional evidence or to decide whether an exceptional reason now exists under the statute and find an average weekly wage based on the evidence currently in the record.

Remaining issues. Claimant also contends the Commission erred in failing to find she is entitled to permanent total disability and in granting defendants credit for temporary compensation payments made after the date of maximum medical improvement. Defendants counter that there is substantial evidence on the record to support the Commission's determination on permanent disability compensation under S.C. Code Ann. § 42-9-20 and credit for overpayment of benefits based on Curiel v. Environmental Mg't Serv., 376 S.C. 23, 655 S.E.2d 482 (2007). This Court is of the opinion that there is substantial evidence on the record to support the permanent disability award and that there is no error in the award of credit to defendants. As such, the Commission is affirmed on those issues.

IT IS SO ORDERED.

S/ Frank R. Addy, Jr.
Frank R. Addy, Jr. 
Judge, Eighth Judicial Circuit

Dated: 3/30/12

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF LAURENS
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

Annette S. Lee, Employee,

CASE NO. 2010-CP-30-710
Action Staffing / American
Services, The Employer, and
Liberty Mutual Insurance
Co. Carrier,
DEFENDANT(S)

PLAINTIFF(S)

CHECK ONE:

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other _____.
- ACTION STRICKEN (CHECK REASON):** Rule 40(j) SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other _____.

IT IS ORDERED AND ADJUDGED: See attached order; Statement of Judgment by the Court:

Order

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Dated at _____, South Carolina, this _____ day of _____, 20_____.

PRESIDING JUDGE

This judgment was entered on the 2nd day of April, 2012, and a copy mailed first class this 2nd day of April, 2012 to attorneys of record or to parties (when appearing pro se) as follows:

Kathryn Williams, Esq.

Lawson B. Watson, Esq.

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Lynn M. Lancaster
CLERK OF COURT