THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers Compensation Commission
Appellate Panel

Appellate Case No.: 2015-001702

James Dent, Employee, ... Appellant,

v.

East Richland County Public Service
District, Employer, and State Accident
Fund, Insurance Carrier..... Respondents.

RETURN TO RESPONDENTS' PETITION FOR REHEARING

STATEMENT OF THE CASE

This claim went before the Hearing Commissioner pursuant to Form 50 filed by the Claimant/Appellant, Mr. James L. Dent on September 20, 2013. Therein, Mr. Dent alleged injuries by accident to the back, right leg and left leg, occurring on May 1, 2012 and arising out of and in the course of his employment with East Richland County Public Service. Specifically, the Appellant alleged that he injured his back while attempting to singlehandedly move a heavy manhole cover. Appellant further alleged that he is permanently and totally disabled as a result of the accident both as a result of complete loss of earning capacity and as a result of a 50% or greater loss of use of his back to perform work. The Respondent/Defendants admitted the accident of May 1, 2012. However, the Defendants denied that the Appellant has sustained permanent and total disability and argued that the claim should be limited to the lumbar spine only.

The claim was heard by the Hearing Commissioner on February 7, 2014 in Columbia, South Carolina. On April 14, 2014, the Hearing Commissioner issued her Decision and Order, finding, *inter alia*, that the Appellant suffered an admitted injury to the back, that the Appellant's right leg is affected by the Appellant's back injury and that the Appellant's left leg is not affected; that Appellant's right leg is "only *minimally* affected"; despite the Hearing Commissioner's finding that the Appellant's right leg is affected by his back injury, she found that this is a "one body part" (i.e. *Singleton*) case; that Appellant's disability stems primarily from his cancer condition; that Appellant is entitled to an award of 35% permanent partial disability to the back.[1]

[1] The Hearing Commissioner initially awarded the Appellant 40% permanent partial disability to the back but lowered her award to 35% without explanation after the first proposed

Pursuant to timely Form 30, the Appellant petitioned the Full Commission for review of the Hearing Commissioner's findings of fact and conclusions of law. The case was heard by the Full Commission and remanded to the Hearing Commissioner for consideration of two recent cases on point in further review of her finding that the case is a "this is a "one body part" (i.e. *Singleton*) case" case. In response, the Hearing Commissioner issued Remand Order, withdrawing her finding that this is a "this is a 'one body part' (i.e. *Singleton*) case" yet still erroneously finding that the Appellant is not permanently and totally disabled as a result of his back injury. The Appellant appealed the Hearing Commissioner's remand Order back to the Full Commission. The case was heard by the Full Commission on May 18, 2015 and the Full Commission issued its Order on July 10, 2015 fully affirming the Hearing Commissioner's erroneous decision, including the Commissioner's withdrawal of her finding that this is a "one body part" case.[2]

Ironically, the withdrawal of the Hearing Commissioner original ruling on "one body part" issue and instead essentially finding that the case at bar is not a "one body part" case is perhaps the only correct substantive finding and/or conclusion ultimately reached by either the Hearing Commissioner or the Full Commission. The Full Commission erroneously affirmed the Hearing Commissioner's findings that the Appellant is not permanently and totally disabled and

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Order was submitted by counsel for the Defendants. See R., pp. 203 - 210.

[2] Neither the Appellant nor the Respondents ever appealed the Hearing Commissioner's original finding that the right leg was affected by the Appellant's injury. Similarly, the Respondents did not appeal Single Commissioner's Order withdrawing her original erroneous finding that this is a "this is a "one body part" (i.e. *Singleton*) case" to the Full Commission. The Respondents further neglected to appeal the Full Commission's Order affirming the Single Commissioner's Order withdrawing her original erroneous finding that this is a "this is a "one body part" (i.e. *Singleton*) case" to the SC Court of Appeals.

patently unsupported by substantial evidence in the record and were founded in large part based on speculation and by the Commission's substitution of its own lay opinions for those of the medical experts in the case. From the Full Commission's Order, the Appellants appealed to the South Carolina Court of Appeals, which correctly reversed the Workers' Compensation Commission's flawed decision and instead found that the Appellant proved a permanently and total disability case. Relying on extremely questionable arguments, the Respondents have petitioned this Court for rehearing of the case.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY APPLIED THE STANDARD OF REVIEW IN THIS CASE AND FOUND THAT THE WORKERS' COMPENSATION COMMISSION'S ORDER WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD.

First, the Respondents submit to the Court that it applied an "inverse" of the substantial evidence standard which constitutes a "logical fallacy" and further states that the Court erred in applying this "logical fallacy" as a mechanism to substitute its own opinion for that of the Commission. Respondents proceed to boldly suggest that the Court, in applying this supposed "inverse" of the substantial evidence, actually applied a *de novo* standard of review in deciding the case. This argument is patently without merit.

For purposes of its review, the Court may reverse or modify the decision if substantial rights of the Appellant have been prejudiced because the administrative findings and decisions are "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record" or they are "arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." (Emphasis added) S.C. CODE ANN. §1-23-380(G)(5)-(6) (1976, as amended); *Hutson v. S.C. State Ports Auth.*, 399 S.C. 381, 387, 732 S.E.2d 500, 503 (2012). Thus, under the substantial evidence standard, a decision of the South Carolina Workers'

Compensation Commission must be affirmed if the factual findings are supported by substantial evidence in the record. *Jennings v. Chambers Development Co.*, 335 S.C. 249, 516 S.E.2d 453 (S.C. App. 1999).

In essence, the Respondents are arguing to the Court that as long as there is any evidence, however tenuous, relied upon by the Commission to reach a decision, the reviewing Court must affirm. On the contrary, Appellant would submit that the only "logical fallacy" at play herein rests within the Respondents' flawed argument that essentially invites the Court to disregard the substantial evidence standard of review altogether and replace it with the "any competent evidence" standard. See, e.g, *Jones v. Anderson Cotton Mills*, 205 S.C. 247, 31 S.E.2d 447 (1944). Unfortunately for the Respondents, this standard which they are impliedly proposing has long since been rejected by the State's higher courts in favor of the substantial evidence standard which the Court correctly applied in the case at bar. See, e.g., *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 276 S.E.2d 304 (1981).

The higher courts of South Carolina have repeatedly explained that extraneous bits of evidence in the record that may support the Commission's findings do not constitute substantial evidence. Instead, while substantial evidence is of course a relaxed standard in comparison with a *de novo* standard, it is still determined by a review of the record as a whole. "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 reached by the administrative agency in order to justify its action." (Emphasis added) *Miller v. State Roofing Co.*, 312 S.C. 452, 441 S.E.2d 323 (1994); *Shealy v. Aiken County*, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000).

Here, the Respondents are particularly grieved by the Court's refusal to recognize Dr.

Gunter's release of Appellant to medium duty alone, in a vacuum, as substantial evidence to support the Commission's decision when viewed on the record as a whole and, as a result, Respondents offer this as proof of Court's alleged "inverse" substantial evidence analysis. To wit, Respondents seize upon a statement in the Court's opinion stating, "the record contains substantial evidence that Dent is permanently and totally disabled..." This is the primary basis for the Respondents' spurious argument of an inversion of the substantial evidence standard in this case.

However, the Court proceeds in the same paragraph to note that the Commission relied "primarily" on "Dr. Gunter's imposition of medium duty work restrictions." The Court then clarifies, "However, we find substantial evidence does not support a finding that Dent is qualified for medium duty or even sedentary work." This is the correct finding. The Commission impermissibly relied on one sole nugget evidence, less than a mere scintilla in fact, while simultaneously neglecting to consider the remaining evidence in the record that completely negated the Commission's scintilla of evidence. Thus, the Court correctly applied the substantial evidence standard of review in this case by viewing the record as a whole and determining that the Commission's finding was not supported by substantial evidence in the record. Hence, the Respondents' argument that the Court of Appeals applied an "inverse" standard is without merit and the Respondents' Petition for Rehearing should be denied.

II. THE COURT OF APPEALS WAS CORRECT IN NEGLECTING TO REVERSE THE COMMISSION'S OPINION BASED ON RESPONDENTS' CONTENTION THAT THE CASE AT BAR IS A "ONE BODY PART I.E. SINGLETON CASE.

Next, the Respondents argue that the Court of Appeals should have reversed the Workers' Compensation Commission's order in this case because "the Commissioner's original finding that this is a 'one body part' claim is well founded." The Hearing Commissioner

originally found that the case at bar is a "one body part" (i.e. *Singleton*) case, referring to the line of cases starting with *Singleton v. Young Lumber Co.*, 236 S.C. 454, 114 S.E.2d 837 (1960) ("where an injury is confined to a scheduled member, and there is no impairment to any other part of the body, the employee is limited to the scheduled compensation for that body part"). However, the Hearing Commissioner's Order also contained a fatal contradictory finding that the Appellant's right leg was affected by the injury to his back. That finding was never appealed by either party and is the law of the case. Neither the Hearing Commissioner's Order retracting her finding that this is a "one body part" claim nor the Full Commission's Order affirming the Hearing Commissioner's amended Order were appealed by the Respondents and, therefore, that retraction is also the law of the case. Thus, while it was absolute correct for the Court of Appeals to comment on the "one body part" issue, the matter was obviously not properly before the Court as a means of reversing the Commission's order. Thus, the Respondents' contention that the Court of Appeals should have reversed on this basis is manifestly without merit.

The Hearing Commissioner first made the finding at issue in her initial order dated April 14, 2014. As the Respondents are fond of discussing "logical fallacies", they should truly appreciate the fact that the Hearing Commissioner's first finding of fact in that Order found, "Claimant injured his back in an admitted accident on May 1, 2012. He alleges that the injury also affect [sic] his legs (primarily his right), a claim that is supported by the greater weight of the evidence as far as the right leg is concerned..." (Emphasis added) (R. pp. 4-5). Thus, in her very first finding, the Hearing Commissioner found that the Appellant's right leg was affected by the injury to his back. Consequently, the Hearing Commissioner indulged in a "logical fallacy" in her original order by finding on one hand that the Appellant's leg was affected by his back injury while at the same time finding that this is a "one body part" claim.

Finding of Fact #1in the Hearing Commissioner's Order negated any opportunity that this case could ever be correctly couched as a "one body part" claim. Nevertheless, the original finding by the Hearing Commissioner that the Appellant's right leg was affected by his admitted work injury has never been appealed by either party. On appeal of that original order to the Full Commission, the Appellant contested the finding of "one body part" and application of the *Singleton* rule but did not appeal the Hearing Commissioner's finding that the Appellant's right leg was affected by the injury to his back. Respondents chose not to appeal at all. In failing to appeal, the Respondents waived their right to contest said finding. That finding, therefore, stands as the law of the case and is not subject to reversal by the Court of Appeals. Thus, the Hearing Commissioner's original Finding of Fact #1 alone defeats any attempt to classify the case at bar as a "one body part" claim.

In addition, the Respondents invite the Court of Appeals to reverse the later orders of the Hearing Commissioner and the Full Commission on the basis that those orders did not find that the case at bar was a "one body part" claim. The Full Commission's Order remanding the case to the Hearing Commissioner for further consideration of her finding that this case was a "one body part" claim was filed on November 21, 2014. The Hearing Commissioner Order on Remand, in which she removed her finding that this is a "one body part" claim, was filed on February 24, 2015. The Full Commission's Order affirming the Hearing Commissioner's Order was filed on July 10, 2015. Thus, the Respondents had three opportunities to appeal the Commission's decisions on the "one body part" claim issue. However, the Respondents neglected to appeal any of those orders and only now raise the issue in a Petition for Rehearing before the Court of Appeals.

South Carolina Code Ann. Section 42-17-50, the controlling statute with regard to this

issue, provides,

> If an application for review is made to the Commission within fourteen days from the date when notice of the award shall have been given, the Commission shall review the award and, if good grounds be shown therefor, ***reconsider the evidence, receive further evidence, rehear the parties or their representatives and, if proper, amend the award.*** (Emphasis added) S.C. CODE ANN. §42-17-50 (1976, as amended).

An appeal from a finding or conclusion of the Hearing Commissioner cannot be taken directly to an appellate court without first being reviewed by the Full Commission. *Janhrette v. Union Camp Paper Corp.*, 293 S.C. 59, 358 S.E.2d 704 (1987). Thus, the parties in a workers' compensation case are ***required*** to exhaust their administrative remedy by appeal to the Full Commission. In *Ham v. Mullins Lumber Co.*, 193 S.C. 66, 7 S.E.2d 712 (1940), the Supreme Court held that all findings of fact and conclusions of law by the Hearing Commissioner become and are the law of the case, ***except*** those within the scope of the exception and the notice given to the parties.

To the extent that the Respondents have never appealed it at any level, the "one body part" is not properly before the Court as a means of reversal. Again, while it was proper for the Court to comment on the Commission's correct handling of the "one body part" issue, the Court does not have the procedural authority reverse the Commission's Order on that basis as neither party appealed that issue and it is not within the Court's scope of review. Thus, the Respondents' argument for reversal on this basis is patently without merit.

Moreover, even assuming, purely *arguendo*, that the Respondents could correctly bring the "one body part" issue before the Court of Appeals as an argument for reversible error by the

Commission, the Respondents once again engage in "logical fallacy" by attempting to convince the court there are "legal precedents" regarding the status of lower extremities subject to radiculopathy as potentially "affected" body parts in a workers' compensation claim. This is not an issue of law for which precedents exist. Whether or not additional body parts affected by a workers' compensation claimant's injury exist in a particular claim is purely an issue of fact to be decided by the Workers' Compensation Commission. Thus, while the Respondents ironically argue for the Court of Appeals to apply a *de novo* or "inverse" standard of review to this issue, which is not even within the Court's scope of review, the Court's review would be subject to the substantial evidence standard.

This "one body part" rule has consistently been interpreted to mean that where one or more additional body parts have been **affected** by the injury, then the claimant is entitled to pursue his or her remedy under the general disability statutes. For example, in *Simmons v. City of Charleston*, 349 S.C. 64, 362 S.E.2d 476 (S.C. App. 2002), the South Carolina Court of Appeals indicated that the policy behind allowing a claimant to proceed under the general disability Sections 42-9-10 and 42-9-20 "allows for a claimant whose injury, while falling under the scheduled member section, nevertheless **affects** other parts of the body and warrants providing the claimant with the opportunity to establish a disability greater than the presumptive disability provided for under the scheduled member section." (Emphasis added) *Id.*, at p. 76. The *Simmons* court further clarified the "two body part rule" by succinctly stating, "**All** that is required is that the injury to a scheduled member also **affec**t another body part." (Emphasis added) *Id.*

Here, every medical expert in the record, including four doctors and a physical therapist, identified substantial pain symptoms in the Appellant's right leg. Thus, the record is replete with

evidence that the Appellant's right leg is an affected body part in this case. As a result, the Commission's withdrawal of the Hearing Commissioner's original finding that this is a "one body part claim" is squarely supported by substantial evidence in the record. As a result, the Appellant respectfully requests that the Court **deny** the Respondents' Petition for Rehearing in this case.

CONCLUSION

Thus, based on the arguments presented, Appellant submits that it is patently obvious that Respondents have identified no valid points of law which have been overlooked and/or misapprehended by the Court of Appeals in this matter. Wherefore, the Appellant respectfully requests that the Court **deny** the Respondents' Petition for Rehearing in this case.

RESPECTFULLY SUBMITTED,

MATTHEW C. ROBERTSON
McDaniel Law Firm
1315 Elmwood Avenue
Columbia, South Carolina 29201
(803) 771-7211
mrobertson@pfmcdlaw.com
ATTORNEY FOR APPELLANT

Columbia, South Carolina
April 20, 2018

THE STATE OF SOUTH CAROLINA

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Workers Compensation Commission

Appellate Panel

Appellate Case No.: 2015-001702

James Dent, Employee, ... Appellant

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East Richland County Public Service
District, Employer, and State Accident
Fund, Insurance Carrier..... Respondents.

PROOF OF SERVICE

I, Matthew C. Robertson, do hereby certify that on April 23, 2018, I served copy of ***Return to Respondents' Petition for Rehearing*** in the above-captioned case upon counsel for the Respondents, David H. Keller, Esquire, and Page P. Snyder, Esquire, by depositing a copy of same in the United States Mail with sufficient postage affixed and

addressed to:

David H. Keller, Esquire
Turner, Padget, Graham & Laney, P.A.
200 E. Broad Street
Greenville, South Carolina 29201

Page P. Snyder, Esquire
The State Accident Fund
Post Office Box 102100
Columbia, South Carolina 29221-5000

MATTHEW C. ROBERTSON
McDaniel Law Firm
1315 Elmwood Avenue
Columbia, South Carolina 29201
(803) 771-7211
mrobertson@pfmcdlaw.com
ATTORNEY FOR APPELLANT

Columbia, South Carolina
April 23, 2018

McDANIEL LAW FIRM
ATTORNEYS AND COUNSELORS AT LAW
1315 ELMWOOD AVENUE
COLUMBIA, SOUTH CAROLINA 29201

Proudly representing injured workers for over 30 years.

Preston F. McDaniel

Matthew Robertson

Telephone (803) 771-7211

Facsimile (803) 252-0709

April 23, 2018

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

RE: James Dent, Appellant, v. East Richland County Public Service District, Employer, and State Accident Fund, Insurance Carrier, Respondents.
WCC File No.: 1205879
Appellate Case No. 2015-001702

Dear Ms. Kitchings:

Pursuant to Rule 240 (e), SCACR, please find enclosed for filing an original and six (6) copies of Return to Respondents' Petition for Rehearing, along with Certificate of Service for the same.

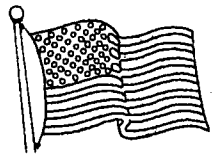
By copy of this letter, I am also serving copies on the attorney for Respondent's and Page S. Hilton, Esquire.

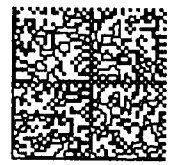
Sincerely yours,

Matthew C. Robertson

MCR/crl
Enclosures

cc: David H. Keller, Esquire
Page P. Snyder (Hilton), Esquire





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