THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission
Appellate Panel

Appellate Case No.: 2015-001702 (Opinion No. 5548, Filed March 28, 2018)

James Dent, Employee ..... Appellant,

vs.

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

**REPLY TO RETURN TO RESPONDENTS' PETITION FOR REHEARING**

Respondents hereby delineate specific points of opposition to Appellant's Return below and incorporate all arguments from their Petition for Rehearing as further support in opposition to the Return.

## ARGUMENT

### I. THE APPELLANT DISINGENUOUSLY MISCHARACTERIZES THE RESPONDENTS' PETITION FOR A REHEARING BY ASSERTING THAT RESPONDENTS BELIEVE AN "ANY COMPETENT EVIDENCE" STANDARD OF REVIEW SHOULD APPLY.

To be clear, the Respondents requested that this Court grant their Petition for Rehearing in order to **properly apply the substantial evidence standard of review**—not the "any competent evidence" standard. Previously, the Court inverted the substantial evidence standard effectively resulting in a de novo review. Because this is contrary to well-settled precedent, a

rehearing affords this Court the opportunity to re-examine what the substantial evidence standard requires and properly apply this standard to the case at bar.

Our Supreme Court has recently made clear it will not hesitate to remand cases to the Court of Appeals with instructions to issue a new ruling applying the correct standard of review. See Nero v. S.C. Dept. of Transp., No. 2017-001970, 2018 WL 1614332, at *1-2 (S.C. Apr. 4, 2018) (remanding workers' compensation case to this Court with instructions to issue a new ruling applying the correct standard of review). With this in mind, Respondents urge simply for application of the correct standard of review as clearly and consistently required by our highest court.

Because a different standard would be contrary to Supreme Court precedent, the Respondents in no way request that the Court apply an "any competent evidence" standard. The old "any competent evidence" standard was legislatively overturned by the Administrative Procedures Act. There is simply no support for the application of such a standard, and this Court will find no argument by Respondents for the application thereof in the Petition for Rehearing. To the contrary, Respondents ask only that this Court apply the proper substantial evidence standard of review as plainly delineated in the case law cited and explained by Respondents.

Even with the list of controlling case law now in our Petition at the forefront, the substantial evidence standard is most succinctly distilled as follows:

> "The commission's decision ***must*** be affirmed if the factual findings are supported by substantial evidence in the record." Jennings v. Chambers Dev. Co., 335 S.C. 249, 516 S.E.2d 453, 458 (S.C. Ct. App. 1999) (quoting Minor v. Philips Prods., 329 S.C. 321, 494 S.E.2d 819 (1997)) (emphasis added).

Here, the Full Commission's decision is supported by substantial evidence in the record. Thus, the decision must be affirmed by the Court.

As the evidentiary record makes clear—and as articulately outlined by Judge Thomas in her dissent—substantial evidence in the record supports the Full Commission's findings and conclusions that:

1. The Appellant sustained a back injury on May 1, 2012. (R. 6, 59).
2. The Appellant was treated conservatively for his back, did not undergo surgery, was placed at maximum medical improvement for his back injury on May 8, 2013, and was assigned a 10 percent impairment rating. (R. 6-7, 9, 123-32).
3. The Appellant was entitled to compensation under Section 42-9-30(21) for the disability suffered to his back. (R. 33, 35, 123).
4. The Appellant was not assigned an impairment rating for any other body part. Even the Appellant's own IME failed to make any mention of the left leg other than to note that there is no deficit. (R. 29, 33, 92-97, 123-32).
5. The Appellant was not PTD under Section 42-9-10. He sustained a back injury only and is capable of performing medium work pursuant to a physician's recommendations. Thus, he did not lose his earning capacity. While physical therapy recommendations of "limited light" restrictions were made, the Full Commission gave these less weight than the physician's recommendation. The Full Commission also considered a vocational report and a report from Dr. Forrest on this issue. But, as Appellants' authorized treating physician, the Full Commission gave Dr. Gunter's medical opinions the most weight **as is within their discretion as ultimate fact-finder**.

This is patently not "evidence viewed blindly from one side" as Appellant contends. (R. 8-9, 70,72, 75, 84, 85, 98-99, 123, 136, 138).

Therefore, this Court, under the correct application of the substantial evidence standard of review, should **not** re-examine the Record in search of "substantial evidence" to support a different decision than that made by the Full Commission. See, e.g., Dent, 2018 WL 1513963, at *4 ("We find the evidence of Dent's leg pain in the record is substantial evidence of an injury affecting Dent's right leg."). Neither should the Court engage in any re-weighing of the evidence and determine which evidence it finds to be the most persuasive. See, e.g., Id., at*5 ("Although Dr. Gunter opined Dent could work at a medium duty level, we note a transferable skills capacity analysis...."). To do otherwise results in nothing less than the impermissible de novo review.

## II. IT IS PATENTLY OBVIOUS THAT WHETHER OR NOT THIS IS "A ONE BODY PART" CLAIM REMAINS BEFORE THIS COURT AS IT GOES TO THE VERY EART OF THIS CASE.

This Court has every opportunity to embrace the Commissioner's original finding that this is a "one body part" claim as the very basis for the Appellant's appeal is that this is not a case concerning a single body part. Indeed, the fact that he argued in the alternative in hopes of establishing at minimum permanent and total disability under Section 42-9-30(21) based on one body part, makes it clear that this question remains at issue.

However, this Court, through its misapplication of the substantial evidence standard as it pertained to Section 42-9-10, never reached the issue of a single body part claim under Section 42-9-30. See, e.g., Dent, 2018 WL 1513963, at *5. If this Court had reached the issue, the Court would have—and should upon rehearing—conclude that precedent makes plain that radiculopathy is simply not considered a separate injury within the South Carolina Workers' Compensation Act. See, e.g., Fishburne v. ATI Sys. Int'l, 384 S.C. 76, 89, 681 S.E.2d 595, 601

(S.C. Ct. App. 2009) (affirming Commission's order that specifically stated 10 percent award for loss of use of the back under the schedule in Section 42-9-30 encompassed any right lower extremity radiculopathy and noting that claimant presented no evidence of a separate injury to her right leg).

In fact, the only case in which radiculopathy has been held to constitute an injury to a separate body part was Beckman v. Sysco Columbia, LLC, 408 S.C. 501, 759 S.E.2d 750 (S.C. Ct. App. 2014). This decision was stricken and de-published by our Supreme Court. 414 S.C. 538, 779 S.E.2d 554 (2015). Therefore, this really is only a "one body part" claim. (R. 6, 8, 31, 33).

Accordingly, compensation is limited to that provided under the schedule in Section 42-9-30 and the Appellant cannot recover under the general disability statute in Section 42-9-10. Singleton, 236 S.C. at 473, 114 S.E.2d at 846. See also Wigfall v. Tideland Utils, Inc., 354 S.C. 1000, 101-02, 580 S.E.2d 100, 104 (2003) (reaffirming holding in Singleton that a claimant is limited to scheduled compensation when the injury is confined to a single scheduled member). The Full Commission's Order, from which this appeal came, properly limited the Appellant's award under Section 42-9-30 as a single body part claim.

## CONCLUSION

For the foregoing reasons, the Respondents respectfully request that this Court grant their Petition for Rehearing to properly apply the substantial evidence standard of review, and in turn, affirm the Full Commission's award under Section 42-9-30 for disability to a single body part. Precedent is clear that radiculopathy does not constitute separate injury to either of the lower extremities within the South Carolina Workers' Compensation system. The Court is therefore constrained by the proper standard of review to make such a finding.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

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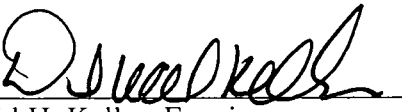
I certify that I have served the Reply to Return to Respondents' Petition for Rehearing on counsel for the Appellant by depositing a copy of the same in the United States Mail, postage prepaid, on April 27, 2018, addressed to the following:

Matthew C. Robertson, Esquire
McDaniel Law Firm
1315 Elmwood Avenue
Columbia, SC 29201
Attorney for Appellant



TURNER PADGET GRAHAM & LANEY, P.A.



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April 27, 2018

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The Honorable Jenny Abbott Kitchings
Clerk of Court
The South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: James Dent, Employee/Appellant v. East Richland County Public Service District, Employer, and State Accident Fund, Carrier, Respondents.
TPGL File No.: 04206.00189
WCC File No.: 1205879
Appellate Case No.: 2015-001702

Dear Ms. Kitchings:

Pursuant to Rule 221 and 240, SCACR, please find enclosed for filing an original and six (6) copies of the Reply to Return to Respondents' Petition for Rehearing, along with Certificate of Service for the same.

By copy of this letter, I am also serving a copy of the Reply to Return to Respondents' Petition for Rehearing on the attorney for the Appellant by United States Mail with first class postage prepaid.

Very truly yours,

Turner Padget Graham & Laney, P.A.

David H. Keller, Esquire

DHK/EAN
Enclosures
cc: Matthew C. Robertson, Esquire (w/enclosures)
Page Snyder Hilton, Esquire, (w/enclosures) (via email)

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