THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
APPELLATE PANEL

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

James Dent, Employee ..... Respondent,

vs.

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

PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

CERTIFICATE OF COUNSEL

The Court of Appeals issued its decision on March 28, 2018. (App. 260). Counsel for Petitioners certifies that the Petition for Rehearing was timely made on April 12, 2018, (App. 289), and denied on May 29, 2018. (App. 290).

QUESTIONS PRESENTED

1. Did the Court of Appeals err in applying the incorrect standard of review applicable to appeals from the South Carolina Workers' Compensation Commission?
2. Did the Court of Appeals err in impermissibly applying the inverse of the substantial evidence standard, thereby committing a logical fallacy?
3. Did the Court of Appeals err in applying the inverse of the substantial evidence standard to reverse-engineer an opportunity to improperly re-weigh the evidence and act as fact-finder?
4. Did the Court of Appeals err in applying the inverse of the substantial evidence standard, which essentially resulted in the application of the de novo standard reserved for review of jurisdictional questions only?
5. Did the Court of Appeals err in unnecessarily convoluting an otherwise simple "one body part" claim by completely misapplying the well-settled appropriate standard of review?

STATEMENT OF THE CASE

Pursuant to the Rule 242, SCACR, East Richland County Public Service District and its carrier the South Carolina State Accident Fund (together "Petitioners"), through their undersigned counsel, respectfully petition this Court to issue a writ of certiorari based on facts,

points, and arguments overlooked or misapprehended by the Court of Appeals as concisely set forth in the dissenting opinion of Judge Thomas.

In accordance with the South Carolina Workers' Compensation Act, the Petitioners provided proper and adequate medical care and treatment to James Dent ("Respondent") following an admitted low back injury on May 1, 2012. (R. 59). Initial care included a lumbar spine MRI that incidentally revealed a neoplasm in the lung. Referrals were made to a back specialist, Dr. Brett Gunter, for the workers' compensation injury and an oncologist for the unrelated lung neoplasm. (R. 61-67, 147). Dr. Gunter ordered a repeat MRI that revealed moderate spinal stenosis at L3-4 and L4-5, physical therapy, and lumbar epidural steroid injections. (R. 123-32, 146). Simultaneously, the Respondent was diagnosed with small cell lung cancer and began months of chemotherapy and radiation treatments. (R. 129).

While still in chemotherapy, Dr. Gunter ordered a work hardening program, but the Respondent complained of shortness of breath and was unable to complete the program evaluation. (R. 82-83; 161:12-16). At the evaluation, the Respondent indicated to the physical therapist that he did not plan to return to work and, instead, planned to retire as soon as his workers' compensation claim closed. (R. 82).

Dr. Gunter placed the Respondent at maximum medical improvement on May 8, 2013, releasing the Respondent to work in a medium duty capacity, assigning a 10 percent permanent impairment rating to the whole person for the back injury, but not assigniing a separate impairment rating for any other body part. (R. 123).

Upon referral by his counsel, the Respondent underwent a one-time independent medical evaluation by Dr. Leonard Forrest on July 8, 2013, which lasted a mere hour and a half. (R. 92-97, 182:19-21). Based on this short exam, Dr. Forrest assigned a 21 percent impairment rating to

the whole person, opined that the Respondent could not return to work at any level, yet nowhere assigned a separate impairment rating to either leg. (R. 92-97). The Respondent also procured a vocational evaluation in November 2013, which heavily relied upon physical therapy notes instead of those produced by Dr. Gunter. (R. 98-120). The Petitioners never obtained their own vocational evaluation because the Respondent only sustained an injury to a single body part and should therefore be barred from recovery beyond the schedule, rendering any vocational evaluation superfluous. The Petitioners maintain that any further disability is a result of the unrelated lung cancer, for which the Respondent continued chemotherapy treatments many months *after* he reached maximum medical improvement. (R. 161:12-16).

By Decision and Order dated April 14, 2014, the Single Commissioner held that the Respondent sustained a single member injury to the back, his right leg was only minimally affected, and the record contained no impairment rating for the leg. (R. 6-11). As a one body part claim, the Commissioner held that the Respondent was thus only entitled to an award for 35 percent loss of use of the back pursuant to Section 42-9-30 and causally-related future medical treatment for the back. (R. 9-11). The Commissioner also concluded that any other disability stemmed from the Respondent's unrelated lung cancer. (R. 8).

The Respondent appealed to the Full South Carolina Workers' Compensation Commission, which remanded only for clarification regarding the finding that the right leg was "affected" but this was "a one body part" claim. (R. 9-12). By Order on Remand, the Commissioner withdrew language in Findings of Fact #16 and 22, which stated, respectively that the "Claimant's right leg is only minimally affected" and "this is a 'one body part' (i.e. Singleton) case." (R. 6, 8). Otherwise, the Commissioner reaffirmed her previous findings that "there is no impairment rating in evidence as far as either leg is concerned—even from

Claimant's IME." (R. 31, 33). The Commissioner again concluded that the Respondent was not permanently and totally disabled and was only entitled to an award for loss of use of the back pursuant to Section 42-9-30. (R. 34-36). The Appellate Panel affirmed. (R. 53).

In its reversal, the Court of Appeals inverted the substantial evidence standard of review to make its own findings that the Respondent sustained a separate injury to the right leg, was permanently and totally disabled under Section 42-9-10 due to the work-related injury, and was not disabled because of the unrelated lung cancer for which the Respondent continued to treat after release from care for his work-related injury. Dent v. E. Richland Cnty. Pub. Serv. Dist., No. 2015-001702, 2018 WL 1513963, at*3-6 (Ct. App. Mar. 28, 2018). Notably, in her dissent, Judge Thomas believed the Court of Appeals was constrained by the substantial evidence standard of review and should affirm. Id. at *7 (Thomas, J., dissenting). Pursuant to Rule 242(b)(2), SCACR, the Supreme Court has strong reason to grant Petitioners' Petition for Writ of Certiorari based on said dissent.

Because the Court of Appeals did not apply the proper standard of review in its decision to reverse the Full South Carolina Workers' Compensation Commission, the Petitioners respectfully request this Court grant their Petition for Writ of Certiorari and re-affirm the Full Commission based on the proper application of the "substantial evidence" standard.

ARGUMENT

I. The Court of Appeals Applied the Incorrect Standard of Review Applicable to Appeals from the South Carolina Workers' Compensation Commission.

The Supreme Court should grant this Petition for Writ of Certiorari because the Court of Appeals utterly failed to apply the correct standard of review. Here, the correct standard of review on appeal from the Full South Carolina Workers' Compensation Commission is the

substantial evidence standard. No jurisdictional question is presented to trigger the application of the only other standard of review possibly applicable: de novo review.

In South Carolina, the Administrative Procedures Act establishes the "substantial evidence" standard for judicial review of decisions by the South Carolina Workers' Compensation Commission and other state agencies. Lark v. Bi-Lo, 276 S.C. 130, 133-34, 276 S.E.2d 304, 305-06 (1981) (citing S.C. Code Ann. § 1-23-380) (stating the Commission "is clearly an 'agency'" within the meaning of S.C. Code Ann. § 1-23-310 et seq.).

Under this standard, the Court of Appeals' review "is limited to deciding whether the appellate panel's decision is unsupported by substantial evidence or is controlled by some error of law." Gadson v. Mikasa Corp., 368 S.C. 214, 221, 628 S.E.2d 262, 266 (Ct. App. 2006) (citing S.C. Code Ann. § 1-23-380) (emphasis added). "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 (Ct. App. 1999) (quoting Minor v. Philips Prods., 329 S.C. 321, 494 S.E.2d 819 (1997)) (emphasis added).

"Substantial evidence" is "evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached." Lark, 276 S.C. at 135, 276 S.E.2d at 306 (quoting Laws v. Richland Cnty. School Dist. No. 1, 270 S.C. 492, 243 S.E.2d 192 (1978). This means that, even if the Court of Appeals disagrees with the decision of the Full Commission, the Court of Appeals must, nonetheless, affirm if the decision is supported by substantial evidence. Jennings, 335 S.C. at 516 S.E.2d at 458.

However, instead of utilizing the substantial evidence standard, the Court of Appeals inverted the substantial evidence standard to effectively apply a de novo review. As well-settled

precedent makes clear, such a review is simply prohibited here. Thus, the Supreme Court should grant this Petition so that the case *sub justice* can be re-examined through the appropriate lens.

In short, as recently ordered in Nero v. S.C. Department of Transportation, this Court should remand the case at bar with instructions to issue a new ruling applying the correct standard of review. 422 S.C. 424, 424, 812 S.E.2d 735, 737 (2018) (remanding workers' compensation case to Court of Appeals with instructions to issue a new ruling applying the correct standard of review).

II. Instead of Utilizing the Substantial Evidence Standard, the Court of Appeals Applied an Inverted Version of the Same, Which Constitutes a Logical Fallacy.

The Supreme Court should further grant this Petition for Writ of Certiorari because not only did the Court of Appeals entirely fail to apply the correct standard of review, it also concomitantly committed a logical fallacy. Plainly, such a contrived application constitutes reversible error.

Basic propositional logic dictates that the inverse of a conditional statement cannot be inferred from that conditional statement. The conditional statement here is simply: if there is substantial evidence in the record to support the Commission's decision, then the Court of Appeals must affirm. Jennings, 335 S.C. at 516, S.E.2d at 458. Pursuant to basic tenants of logical reasoning, then from this statement **one cannot also infer: if there is substantial evidence in the record to support the opposite of the Commission's decision, then the Court of Appeals must reverse.** This proscription from logic holds firm no matter the degree to which the Court of Appeals *wishes* the Commission would have reached the opposite decision.

But here, the Court of Appeals defied all logic to make this impermissible inference. First, the Court re-examined the Record in search of "substantial evidence" to support its desired, opposite decision. See, e.g., Dent, 2018 WL 1513963, at*4 (identifying evidence in the Record

of pain in the leg and labeling as "substantial evidence" of injury). In certain aspects, the search for "substantial evidence" to support its desired decision proved decidedly strained—a fact remarked upon by the dissent. Compare Dent, 2018 WL 1513963, at*5 ("[W]e note a transferable skills capacity analysis ... revealed there were no job titles that would be within [Respondent's] current transferable abilities."), with Id. at *7 (Thomas, J., dissenting) ("[T]he majority's reliance on the 'transferable skills capacity analysis,' which is located within the above-mentioned vocational report, is misplaced . . . the analysis searched for potential jobs for [Respondent] based on criteria that assumed he could not physically perform any manual labor or even a sedentary job. Predictably, such an analysis returned zero potential jobs."). For this reason, Judge Thomas stated in her dissent that the Court of Appeals was constrained by the substantial evidence standard of review and should affirm. Upon this dissent, the Supreme Court should grant Petitioners' Petition for Writ of Certiorari. See Rule 242(b)(2), SCACR.

Next, upon this new "substantial evidence" basis, the Court of Appeals reversed the Appellate Panel's decision. Because this means of reversal endorsed a logical fallacy, produced a result not allowed by all the case law cited herein, and reduced the proper standard of review to a mere shell of the required deference to the agency in this case, the Supreme Court should grant this Petition and swiftly restore the deference due to the Full Commission's determination.

III. In Applying the Inverse of the Substantial Evidence Standard, the Court of Appeals Reverse-Engineered an Opportunity to Improperly Re-Weigh the Evidence and Act as Fact-Finder.

Even though the improper application of the correct standard of review constitutes a sufficient basis, alone, for granting this Petition for Writ of Certiorari, the Supreme Court should also grant this Petition because the Court of Appeals erred in engaging in re-weighing of the evidence and acting as fact-finder.

In South Carolina, it is well-settled that the Appellate Panel of the Commission—not the Court of Appeals—serves as the ultimate fact-finder. Hartzell v. Palmetto Collision, LLC, 415 S.C. 617, 622, 785 S.E.2d 194, 197 (2016). As such, the Appellate Panel makes "the final determination of witness credibility and the weight to be accorded evidence." Shealy v. Aiken Co., 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000).

In dereliction of duty, the Court of Appeals nevertheless engaged in a re-weighing of the evidence when it relied upon, and repeatedly cited to, the opinions of Dr. Forrest, the physical therapist, and the Respondent's vocational expert over the opinion of the authorized treating physician, Dr. Gunter, upon which the Appellate Panel of the Commission chose to rely and afforded the most weight. See, e.g., Dent, 2018 WL 1513963, at*5 ("Although Dr. Gunter opined Dent could work at a medium duty level, we note a transferable skills capacity analysis...."). The Court of Appeals, in turn, re-labeled this evidence as more persuasive than that relied on by the Appellate Panel.

After, the Court of Appeals took on the prohibited roll of fact-finder and made its own specific findings that contradict those made by the Appellate Panel such as, *inter alia*: "We find the evidence of Dent's leg pain in the record is substantial evidence of an injury affecting Dent's right leg." Id. at*4. However, these findings must be overruled because the Appellate Panel of the Commission—not the Court of Appeals—serves as the ultimate fact-finder. See, e.g., Hartzell, 415 S.C. at 622, 785 S.E.2d at 197.

The Court of Appeals was in error when making its own, new factual findings. See, Id., 415 S.C. at 623, 785 S.E.2d at 197 (the court "must not engage in fact-finding that would disregard the Commission's factual findings"). Therefore, the Supreme Court should grant this

Petition for Writ of Certiorari and force the Court of Appeals to disengage as fact-finder and re-assume its proper role.

IV. By Applying the Inverse of the Substantial Evidence Standard, the Court of Appeals Essentially Applied the De Novo Standard Reserved for Review of Jurisdictional Questions Only.

The Supreme Court should grant this Petition because the Court of Appeals applied—for all intents and purposes—a de novo standard of review. But, this Supreme Court has repeatedly, and recently, made clear that only in the review of jurisdictional questions should the de novo standard be applied. See, e.g., Nero, 422 S.C. at 424, 812 S.E.2d at 737 (holding the substantial evidence standard applies to review of non-jurisdictional issue).

While only in jurisdictional cases may the Court of Appeals "take its own view of the preponderance of the evidence," the Court of Appeals did exactly that here. Wilkinson ex rel. Wilkinson v. Palmetto State Transp. Co., 382 S.C. 295, 299, 676 S.E.2d 700, 702 (2009) (citing S.C. Workers' Comp. Comm'n v. Ray Covington Realtors, Inc., 318 S.C. 546, 547, 459 S.E.2d 302, 303 (1995)). The only difference is simply that the Court of Appeals cleverly labeled its review as the "substantial evidence" standard of review.

In actuality, the Court of Appeals "took its own view," re-weighed the evidence, and made its own findings contrary to those made by the Appellate Panel. But, the Court of Appeals must be made to apply the true and correct version of the substantial evidence standard of review without regard to the decision that the Court would have made if it had been in the Commission's position. For this reason, the Petitioners respectfully request that the Supreme Court grant this Petition for Writ of Certiorari.

V. In Reality, this is Simply "a One Body Part" Claim Unnecessarily Convoluted by a Complete Misapplication of the Well-Settled Appropriate Standard of Review.

Finally, the Supreme Court should grant this Petition because the Court of Appeals erred in finding that this case is anything other than a mere "one body part" claim. Precedent makes plain that radiculopathy is simply not considered a separate injury within the South Carolina Workers' Compensation Act. Thus, the Court of Appeals overstepped the bounds of its authority in imposing a new finding that it should have never made and that flies in direct contravention of established law.

South Carolina precedent plainly prohibits characterizing radiculopathy as a separate body part in workers' compensation cases. See, e.g., Fishburne v. ATI Sys. Int'l, 384 S.C. 76, 89, 681 S.E.2d 595, 601 (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).

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 (Ct. App. 2014). Importantly, this decision was subsequently stricken and de-published by the Supreme Court. 414 S.C. 538, 779 S.E.2d 554 (2015). Thus, radiculopathy complaints do not equate to injury to a separate body part in South Carolina.

But here, the Court of Appeals made new and separate findings that the Respondent sustained injury to a second body part—the leg based on radiculopathy due to the admitted back injury—without regard to the above case law. Indeed, all medical evidence in the Record supports that the Respondent sustained only an injury to his back and no other body part. (R. 61-119, 123-48). The Record is also devoid of any impairment rating to either leg to support a

separate injury to either body part. (R. 61-119, 123-48). Even the Respondent's own IME did not produce evidence of any injury to a second body part despite radicular complaints. (R. 92-97).

As a result, this case constitutes nothing more than "a one body part" claim and the Respondent failed to establish a second body part was injured. But, when an injury is confined to a single scheduled member, compensation is limited to that provided under the schedule in Section 42-9-30 and a claimant cannot recover under the general disability statute in Section 42-9-10. Singleton v. Young Lumber Co., 236 S.C. 454, 473, 114 S.E.2d 837, 846 (1960). See also Wigfall v. Tideland Utils, Inc., 354 S.C. 100, 101-02, 580 S.E.2d 100, 104 (2003) (reaffirming the holding in Singleton).

Thus, the Court of Appeals erred in finding that this is not "a one body part" claim when the entirety of the Record and more than 50 years' of precedential case law supported just the opposite conclusion. On this basis, the Supreme Court should grant this Petition and reverse the Court of Appeals' decision.

CONCLUSION

For the foregoing reasons, the Petitioners respectfully request that the Supreme Court grant their Petition for Writ of Certiorari regarding Dent v. E. Richland Cnty. Pub. Serv. Dist., No. 2015-001702, 2018 WL 1513963, at*1-6 (Ct. App. Mar. 28, 2018), which improvidently reversed the decision of the Appellate Panel of the Workers' Compensation Commission.

In patent error, the Court of Appeals misapplied the substantial evidence standard of review. This not only constituted a logical fallacy, but also gifted the Court of Appeals with an unprecedented power to engage in re-weighing of evidence and fact-finding. As a result, the Court of Appeals conducted nothing short of a de novo review, which is strictly reserved for

jurisdictional questions. In short, this is a mere "one body part" claim mired by the Court of Appeals' tortured misapplication of the correct standard of review.

Thus, Petitioners request the Supreme Court grant the Petition for Writ of Certiorari and issue a re-affirm the Order of the Full South Carolina Workers' Compensation Commission.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I have served the Petition for Writ of Certiorari on opposing counsel by depositing a copy of the same in the United States Mail, postage prepaid, on June 27, 2018, addressed to the following:

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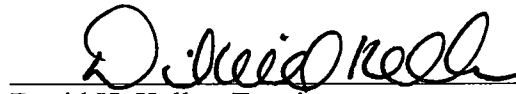

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