THE STATE OF SOUTH CAROLINA

In the Supreme Court

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
APPELLATE PANEL

Appellate Case No.: 2018-001210

James Dent, Employee, ... Respondent

v.

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

RETURN TO PETITION FOR WRIT OF CERTIORARI

MATTHEW C. ROBERTSON
McDaniel Law Firm
1315 Elmwood Avenue
Columbia, SC 29201
(803) 771-7211
ATTORNEY FOR RESPONDENT

STATEMENT OF THE CASE

This claim went before the Hearing Commissioner pursuant to Form 50 filed by the Claimant/Respondent, 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 Respondent alleged that he injured his back while attempting to singlehandedly move a heavy manhole cover. Respondent 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 Petitioners admitted the accident of May 1, 2012. However, the Petitioners denied that the Respondent has sustained permanent and total disability, argued that the claim should be limited to the lumbar spine only and argued that the Respondent's cancer was the true cause of his disability.

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 Respondent suffered an admitted injury to the back, that the Respondent's right leg is affected by the Respondent's back injury and that the Respondent's left leg is not affected; that Respondent's right leg is "only *minimally* affected"; despite the Hearing Commissioner's finding that the Respondent's right leg is affected by his back injury, she found that this is a "one body part" (i.e. *Singleton*) case; that Respondent's disability stems primarily from his cancer condition; that Respondent is entitled to an award of 35% permanent partial disability to the back.

The Respondent 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 "this is a "one body part" (i.e. *Singleton*) case." In response, the Hearing Commissioner issued Remand Order, withdrawing her finding that "this is a 'one body part' (i.e. *Singleton*) case" yet still erroneously finding that the Respondent is not permanently and totally disabled as a result of his back injury and that the Respondent's disability stems primarily from his lung cancer. The Respondent 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 erroneously affirming the Hearing Commissioner's decision, including the Commissioner's withdrawal of her finding that this is a "one body part" case.[1]

Ironically, the withdrawal of the Hearing Commissioner's original ruling on the "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 in this case. The Full Commission erroneously affirmed the Hearing Commissioner's findings that the Respondent is not permanently and totally disabled and that the Respondent's disability stems primarily from his cancer condition. These findings were patently unsupported by substantial evidence in the record and were founded in large part on speculation and the Commission's substitution of its own lay opinions

[1] Neither the Respondent nor the Petitioners 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 "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 "one body part" (i.e. *Singleton*) case" to the SC Court of Appeals.

for those of the medical experts in the case.

From the Full Commission's Order, the Respondent appealed to the South Carolina Court of Appeals, which correctly reversed the Workers' Compensation Commission's flawed decision and instead found that substantial evidence in the record did not exist to validate the Commission's ruling that the Respondent failed to prove a permanently and total disability case.

It is worthy of note that Petitioners assert in their Statement of the Case, "the Court of Appeals 'inverted' the substantial evidence standard to make its own findings that the Respondent sustained a separate injury to the right leg..." (See Petition for Writ of Certiorari, p. 4). This is a misstatement of the procedural history of the case. The Workers' Compensation Commission made the finding that the Respondent's right leg was affected by his work-related injury. The Court of Appeals merely commented on the Commission's finding as to that issue and did not make its own finding and there was never a finding of a separate injury to the right leg at any level. The Petitioners next make reference to the dissenting opinion to the Court of Appeals decision and Judge Thomas' misreading of the standard of review.

Essentially, the evidence in the record relied upon in the dissenting opinion and by Petitioners to argue substantial evidence actually supported the Commission's decision consisted solely of an opinion by one doctor who released the Respondent to Medium duty with no cogent explanation for that opinion. However, on judicial review, the the record must be viewed as a whole in order to determine if substantial evidence supports the agency's decision. Thus, a further analysis was required to determine if that scintilla of evidence was bolstered by other evidence in the record.

In this case, there is simply no evidence to support the doctor's opinion that Respondent was capable of performing Medium duty. First, his entire job history consisted of heavy duty

labor. Respondent worked twenty-seven years performing heavy labor in his job with Petitioner East Richland County Public Service District. (R., pp. 167-168). His previous employment included heavy labor jobs such as furniture delivery with a company called J. B. White's, glass window installation with Blyco Glass Company and vending machine installation with Wometco vending. (R., pp. 163-167).

In addition to having never performed Medium duty in his life, the Respondent's academic deficits rendered his ability to be retrained nearly impossible. Mr. Dent did have a high school diploma but a closer examination of that record revealed that his grades were poor and that he probably graduated with a "D" average. (R., p. 163). In addition, vocational expert Harriet Fowler did a closer examination of Respondents high school record in discovered that he actually qualified for special education classes. (R, pp. 98-99, 117-118,120). Ms. Fowler's academic testing of Respondent indicated that he performed at 3rd grade level at arithmetic, 4th grade level in spelling, and at 5th grade level in reading." (R., p. 117). Thus, both the expert and the lay evidence demonstrate the Respondent completely unable to perform Medium duty work and the Court of Appeals correctly held that substantial evidence does not support the Commission's decision in this case

Relying on an attack of the Court of Appeals' appropriate application of the correct standard of review in addition to a doubtful argument that the case at bar is a "one body part" case, which argument was never preserved for appeal and long ago waived, the Petitioners moved the Court or Appeals for rehearing of the case, which Petition was denied. From the Court of Appeals' decision, the Petitioners have now petitioned this Court for writ of certiorari.

ARGUMENTS I, II, III, IV AND V

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, in Petitioners' Arguments I, II, III and IV, they submit that the Court of Appeals applied an "inverse" of the substantial evidence standard which constitutes a "logical fallacy" and further state that the Court erred in applying this "logical fallacy" as a mechanism to substitute its own opinion for that of the Commission. Petitioners 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. Respondent would submit that these arguments are manifestly without merit.

For purposes of judicial review, the reviewing Court may reverse or modify the decision if substantial rights of the Respondent 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).

Essentially, the Petitioners argue that so long as there is any evidence, however tenuous, relied upon by the Commission to reach a decision, the reviewing Court must affirm. Thus, where the Commission's decision favoring the Petitioners was overturned because substantial

evidence did not exist in the record to support that decision, the Court of Appeals must have applied an "inverse" standard of review. Here, the Petitioners, bolstered by Judge Thomas' dissenting opinion, which the Respondent respectfully submits as flawed analysis, argue that one doctor's unexplained release of Respondent to perform Medium duty constitutes sufficient evidence to affirm the Commission's decision even when confronted, as noted by the Court of Appeals, with a mountain of evidence in the record that the Respondent is not capable of performing Medium duty.

This being the case, Respondent would submit that the only "logical fallacy" at play herein rests with the Petitioners' implied invitation for this Court to disregard the substantial evidence standard of review altogether and replace it with the "any competent evidence" standard which was applied in the distant past in judicial review of decisions made by the Workers' Compensation Commission. See, e.g, *Jones v. Anderson Cotton Mills*, 205 S.C. 247, 31 S.E.2d 447 (1944). However, the "any competent evidence" 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 Petitioners are again particularly grieved by the Court's refusal to recognize Dr. Gunter's release of Respondent to medium duty, when viewed alone in a vacuum, as substantial evidence to support the Commission's decision when considering the record as a whole. This is the sole basis for the Petitioners' spurious argument of an "inversion" of the substantial evidence standard in this case. However, there was no "re-weighing" of the evidence in the record by the Court of Appeals, as suggested by Petitioners in their Argument III or application of a *de novo* standard of evidence as advanced by Petitioners in their Argument IV.

Instead, the Court of Appeals noted 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 of 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 Petitioners' Arguments I, II, III and IV that the Court of Appeals applied an "inverse" standard is without merit and the Petitioners' Petition for Writ of Certiorari should be denied.

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

Finally, in Argument V, the Petitioners submit, "in reality, this is simply a 'one body part' claim unnecessarily 'convoluted'..." by the alleged "misapplication" by the Court of Appeals of the standard of review. (See Petition for Writ of Certiorari, p. 10). This is a frivolous argument that the Petitioners continue to advance in spite of all evidence and law to the contrary and, more importantly, in spite of the fact that the Petitioners never preserved the issue for appeal. Moreover, Petitioners apparently now go so far as to allege that the Court of Appeals actually *sua sponte* made a finding of its own that this is not a one body part case. On the contrary, this allegation is entirely inconsistent with the procedural history of the case.

The finding that the case at bar is not a "one body part" claim, unappealed by either party, was made by the Workers' Compensation Commission, not by the Court of Appeals. 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 contained a fatal contradictory finding that the Respondent's right leg was affected by the injury to his back. The finding that the Respondent's right leg was an affected body part completely negated any chance that this claim could ever legitimately be couched as a "one body part" case and that finding was never appealed by either party. Therefore, the Hearing Commissioner's finding that the Respondent's right leg was affected by his work injury is the law of the case. 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.

Respondent filed his appeal to the Full Commission alleging error on, *inter alia*, the Hearing Commissioner's finding that this is a "one body part" claim. Upon hearing, the Full Commission remanded the case to the Hearing Commissioner for clarification of her "one body part" finding. As a result, the Hearing Commissioner issued a revised order retracting her finding that the case *sub judice* was a "one body part claim".

Similarly, 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 Petitioners. 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 Petitioners had <u>three</u> opportunities to appeal the Commission's decisions on the "one body part" claim issue. However, the Petitioners neglected to appeal <u>any</u> of those orders but suddenly first raised the issue in a Petition for Rehearing before the Court of Appeals. In failing to appeal, the Petitioners 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.

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 Petitioners have never appealed either the Hearing Commissioner's finding that the right leg was affected by the Respondent's injury or the Hearing Commissioner's Order retracting her finding that this is a "one body part" case, at any level, the "one body part" issue was not properly before the Court of Appeals for possible reversal. While it was proper for the Court of Appeals to comment on the Commission's correct handling of the "one body part" issue, the Court did not make its own *sua sponte* finding on the issue nor did not have the procedural authority reverse the Commission's Order on that basis as neither party appealed the issue to the Court of Appeals and, therefore, it was not within the Court's scope of review. Thus, the Petitioners' argument for reversal on this basis is patently without merit.

Moreover, even assuming, *arguendo*, that the Petitioners could bring the "one body part"

issue before the Supreme Court as an argument for reversible error by the Commission, the Petitioners 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. Whether or not additional body parts affected by a workers' compensation claimant's injury exist in a particular claim is not an issue of law for which precedents exist. Instead, affected body parts in a particular case is purely an issue of fact to be decided by the Workers' Compensation Commission on a case by case basis.

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, four doctors and a physical therapist, including Dr. Gunter, on whose release to Medium duty the Petitioners rely so heavily, identified substantial causally-related pain symptoms in the Respondent's right leg. Thus, the record is

replete with evidence that the Respondent'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 Respondent respectfully requests that the Court **deny** the Petitioners' Petition for Writ of Certiorari in this case.

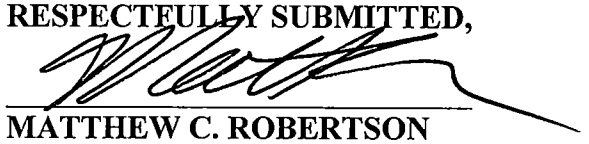
CONCLUSION

Thus, based on the arguments presented, Respondent submits that it is patently obvious that Petitioners have identified no legal error by the Court of Appeals in this matter. The Petitioners' argument that the Court somehow misapplied the standard of review in its analysis of the case is without merit. A cursory review of the evidence in the record shows that, when viewed on the record as a whole, substantial evidence simply does not exist to support the decision of the Workers' Compensation Commission and, therefore, the Court of Appeals correctly applied the standard of review and appropriately reached the only possible decision.

Moreover, again, the Petitioners continue to advance an argument regarding the "one body part" issue that they have never preserved for appeal and only raised in a Petition for Rehearing at the Court of Appeals. Furthermore, even assuming the issue were properly preserved for appeal, the issue of body parts affected in a work-related injury is an issue of fact for the Commission to decide. Here, the Commission correctly made a finding, supported by substantial evidence in the record, that the Respondent's right leg is an affected body part and, therefore, the case at bar is not "simply a 'one body part' claim" that has been "unnecessarily convoluted" by an imaginary misapplication of the standard of review by the Court of Appeals.

Wherefore, the Respondent respectfully requests that the Court **deny** the Petitioners' Petition for Writ of Certiorari 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 RESPONDENT

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S.C. SUPREME COURT

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CERTIFICATE OF SERVICE

I, Matthew C. Robertson, do hereby certify that on July 23, 2018, I served copy of ***Return to Petition for Writ of Certiorari*** in the above-captioned case upon counsel for the Petitioners, David H. Keller, Esquire, Evelyn A. Norton, Esquire, 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
Evelyn A. Norton, Esquire
Turner, Padgett, Graham & Laney, P.A.
Post Office Box 1509 (29602)
Greenville, South Carolina 29602

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
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