

THE STATE OF SOUTH CAROLINA
In the Court of Appeals of the State of South Carolina

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

WCC File No. 1307602

Appellate Case No. 2016-001003

RECEIVED

AUG 14 2018

SC Court of Appeals

Verma Tedder, Petitioner,

vs.

Darlington County Community Action Agency, Employer,
and State Accident Fund, Carrier, Respondents.

APPELLANT'S PETITION FOR REHEARING

Appellant, Verma Tedder, hereby files this Petition for Rehearing pursuant to Rule 221, SCACR. By Order of August 1, 2018, the Court of Appeals affirmed the decision of the South Carolina Workers' Compensation Commission.

The Appellant, and here Petitioner, Verma Tedder, respectfully requests that the Court reconsider its decision on the grounds that the Court may have overlooked or misapprehended certain aspects of the Appellant's argument. By this Petition, the Petitioner reiterates the arguments set out in her brief herein as if set out verbatim. Moreover, the Petitioner offers the following additional argument:

ARGUMENT

I. **THE COMMISSION'S ENFORCEMENT OF S.C. CODE §42-15-80 DID NOT DEPRIVE THE RESPONDENTS OF DUE PROCESS AND COULD NOT JUSTIFY THE COMMISSION'S VIOLATION OF THE CLEAR PROVISIONS OF R.67-612.**

This Court's decision of August 1, 2018 affirmed the Workers' Compensation Commission's decision to refuse the admission of Claimant's APA No. 8, Vocational Report of J. Adger Brown, Jr. The Commission found:

5. Claimant's request to reconsider the Order excluding the Claimant's Vocational Report dated August 7, 2015 is hereby denied. **Claimant's unwillingness to submit to a Vocational Evaluation for the Defendant causes the undersigned not to consider the Vocational Report contained in Claimant's APA #8.**

(R. p. 20).

In affirming, this Court acknowledged that Regulation 67-612 states, in pertinent part, that any "report submitted to the opposing party in accord with [S.C. Code Ann. Regs. 67-612(B)(1) or (B)(2)] ... shall be submitted as an APA exhibit at the hearing unless withdrawn with the consent of the other party..." S.C. Code Ann. Regs. 67-612(D)(2012)(emphasis added).

As the record reflects, the Claimant submitted APA No. 8 to the opposing party in accord with R.67-612(B) over ten (10) months prior to the hearing. (R. p. 235). The Court found that exclusion of that report, in contravention in of R.67-612, was justified because it found that Tedder's refusal to submit to an evaluation by Respondents' vocational expert would have placed Respondents at an unfair disadvantage had the Commission considered and given any weight to Tedder's vocational report, thus depriving Respondents of due process. In so doing, this Court cited Smith

v. SC Dep't of Mental Health, 329 S.C. 485 (1997), which found: "In cases where important decisions turn on questions of fact, due process at least requires an opportunity to present favorable witnesses."

Respectfully, the Court has misapprehended the finding of the Smith Court. Certainly, the Court of Appeals in Smith cited the South Carolina Constitution Article 1, §22, for the proposition that "[n]o person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard." The Smith Court went on to note: "Administrative agencies are required to meet minimum standards of due process." S.C. Const. Art. 1, §3; Stono River Env. Protection Ass'n v. South Carolina Dep't of Health & Env. Control, 305 S.C. 90, 406 S.E.2d 340 (1990). The Smith Court held that in cases where important decisions turn on questions of fact, due process at least requires an opportunity to present favorable witnesses. See e.g., Brown v. South Carolina State Bd. of Educ., 301 S.C. 326, 391 S.E.2d 866 (1990); Tall Tower, Inc. V. South Carolina Procurement Review Panel, 294 S.C. 225, 363 S.E.2d 683 (1987).

The Smith Court concluded that the Commission erred in stopping a hearing and refusing to permit further evidence, thus depriving the claimant of his due process rights to a full hearing. Nowhere in Smith, or any other precedent of which the Petitioner is aware, have the courts held that due process requires the exclusion of otherwise admissible evidence. In fact, Smith and the jurisprudence of due process stand for precisely the opposite proposition. That is to say, due process requires the opportunity to present evidence, such as the Claimant's vocational expert's opinion.

Respectfully, the Commission's exclusion of otherwise admissible evidence, and this Court's affirmation, were driven by dissatisfaction with the effect of the Commission's enforcement of the

mandates of S.C. Code §42-15-80.

S.C. Code §42-15-80, by its clear language, requires claimants to submit to examination by a “qualified physician or surgeon.” Without dispute, the Respondents’ vocational expert is neither. The Respondents moved before the Commission to compel the Claimant to submit to examination by their vocational expert. (R. p. 410). Claimant opposed that Motion citing S.C. §42-15-80. (R. p. 425). Respondents argued to the Commission that the enforcement of §42-15-80 would violate due process. (R. pp. 410, 412). The Commission, faced with the clear language of §42-15-80, denied the Respondents’ Motion to Compel. (R. p. 1). The Respondents did not appeal that determination.

The Court of Appeals found that “[Tedder’s] refusal to submit to an evaluation by a vocational expert would have placed Respondents at an unfair advantage and deprived Respondents of due process.” Stated differently, the Court found that the Commission’s enforcement of S.C. Code §42-15-80 would have placed Respondents at an unfair advantage; depriving Respondents of due process.

This Court’s decision is tantamount to a finding that the Commission’s enforcement of the clear language of the legislative dictates of S.C. Code §42-15-80 violated the Respondents’ due process rights and, in order to cure the due process violation produced by §42-15-80, the Commission was justified in violating R.67-612 which, if followed, would mandate that the Claimant’s evidence be admitted.

S.C. Code §42-15-80 is the product of the Legislature’s comprehensive weighing of rights which produced the specific and detailed provisions of the S.C. Workers’ Compensation Act. The Legislature specifically abrogated the common law by creating the Workers’ Compensation Act and deprived the parties of certain rights that they enjoyed under the common law, including the

Constitutional right to a jury trial.

The courts have consistently refused to impose their own views of fairness over the provisions of the Workers' Compensation Act. For example, in Wigfall v. Tideland Utils., 354 S.C. 100 (2003), the Supreme Court affirmed the Commission's decision to deny a claimant his request for a permanent and total disability award and ordered, instead, that he be compensated for a single scheduled injury, in spite of the fact that the Commission and the Court acknowledged that the claimant's age, education and work history rendered him totally disabled by a leg injury. The Court held:

... Workers' compensation statutes abrogate traditional common law approaches to compensate workers injured on the job.

* * *

By displacing traditional tort law the Legislature intended to provide a no-fault system focusing on quick recovery, relatively ascertainable awards and limited litigation.

* * *

One such cost is workers' compensation claims may not be equitable in all situations.

* * *

However, such sources of inequities are the province of the Legislature to correct by balancing the interests, risks and rewards of such a large, comprehensive program. This Court may only take such equitable arguments into account where legislative intent and statutory language are not clear. Our decision does not dispute that the result [the claimant] desires may be, in the abstract, the most just result of those in his condition. Nor does it dispute the idea that equity may continue to play a part in this Court's decision-making process. Our decision does maintain the rule that equity cannot prevail over a positive legislative enactment. Town of Zebulon v. Dawson, 216 N.C. 520, 5 S.E.2d 535 (1939). As the South Carolina

Court of Appeals explained:

There is a sound reason for this principle. An important function of legislation is to consider and to balance the competing interests and equities arising from the conduct of human affairs. Worker's compensation laws are a classic example of this legislative balancing of the equities. When the legislature has struck a balance by enacting a statutory rule, the courts have no prerogative to annul the legislative choice by applying "chancellor's foot" notions of equity in its place. Stated differently, "It is not the province of this Court to perform legislative functions." The function of equity is to supplement the law, not to displace it.

Spoone v. Newsome Chevrolet Buick, 306 S.C. 438, 440, 412, S.E.2d 434, 434-35 (Ct. App. 1991), affirmed, 309 S.C. 432, 424 S.E.2d 489 (1992)(citations omitted).

We "are not at liberty to extend by construction the meaning implicit in the language found in the Workmen's [sic] Compensation Act in order to provide a more liberal rule of compensation than that which the legislature has seen fit to adopt." Singleton, 236 S.C. at 473, 114 S.E.2d at 846 (citing Rudd v. Fairforest Finishing Co., 189 S.C. 188, 220 S.E. 727 (1939).

* * *

We may apply such rules of statutory construction when the meaning of the act is ambiguous. We may not, however, read a statute liberally when the legislative enactment is susceptible of only one inference. We cannot read "shall" in §42-9-30 to mean anything other than an exclusive "must", just as we cannot read 195 weeks in §42-9-30(15) to mean anything other than 195 weeks, no more or no less.

Wigfall v. Tideland Utils., 354 S.C. 100 (2003)

The Legislature enacted §42-15-80 as part of that comprehensive and reticulated act. It detailed specifically which examinations claimants would be required to undergo; including the Claimant's obligation, unknown to the common law, to undergo treatment by physicians chosen by their employer. See S.C. Code §42-15-60 (providing that refusal of employee to accept medical

treatment by employer chosen physician results in bar of compensation). The Legislature did not include examination by vocational experts among those to which claimants must submit. The Commission enforced that provision, in spite of the Respondents' due process arguments. The Respondents did not appeal.

By its ruling, this Court has, in effect, determined that the Petitioner's insistence upon the enforcement of a statute violates due process. Petitioner respectfully requests that the Court reconsider the implications of, in effect, finding S.C. Code §42-15-80 violative of the Constitution's due process guarantee, hence unconstitutional.

Moreover, Petitioner would contend that the enforcement of §42-15-80 did not, in fact, deprive the Respondents of due process. The Constitution guarantees the Respondents due notice and an opportunity to be heard. To that end, R.67-612 allows the Respondents ten (10) days, prior to a hearing, to produce evidence in response to Claimant's APA Submissions. In this case, the Respondents had ten (10) months from the filing and service of the Claimant's submissions. (R. p. 235, R. p. 3). The Respondents had the opportunity to, and did, depose the Claimant. They submitted that deposition testimony at the time of the hearing. (R. p. 5).

The Respondents could have provided the Claimant's deposition testimony to their vocational expert, along with the Claimant's medical records, which they also had, and produced an expert report of their own. The Defendants could also have deposed and cross-examined the Claimant's vocational expert. They chose to do neither.

Instead, the Respondents' argument rests on their contention that the legislative mandates of S.C. Code §42-15-80 treat them unfairly; depriving them of due process. The Respondents had an opportunity to appeal the Commission's denial of their Motion to Compel on due process grounds.

They chose not to do so.

Nothing in the Workers' Compensation Act, the South Carolina Constitution Article 1, or this Court's previous interpretation of the Constitution in Smith v. SC Dep't of Mental Health, provides for the exclusion of Petitioner's otherwise admissible evidence as a sanction for the Petitioner's insistence on the Commissioner's enforcement of the clear provisions of the Workers' Compensation Act, §42-15-80.

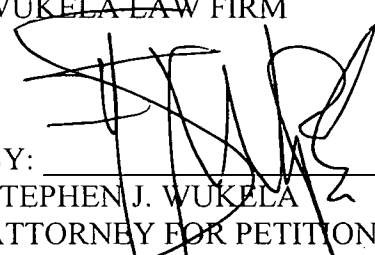
CONCLUSION

The Commission's exclusion of otherwise admissible evidence presented by the Petitioner was driven by the Commission's explicitly stated intent to penalize the Petitioner for her insistence that the Commission enforce a provision of the Act. The Petitioner is entitled to the law's enforcement. This Court should not allow the Petitioner to be sanctioned for asserting the law, particularly under the rationale that the law is so unfair that its enforcement offends the Constitution's due process guarantee.

For the foregoing reasons, the Petitioner respectfully requests that the Court reconsider its ruling.

Florence, South Carolina
August 10th, 2018

WUKELA LAW FIRM


BY: _____
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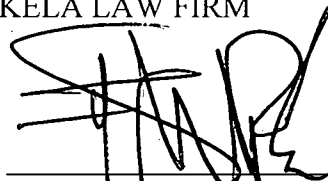
vs.

Darlington County Community Action Agency, Employer,
and State Accident Fund, Carrier, Respondents.

PROOF OF SERVICE

I certify that I have served the Appellant's Petition for Rehearing on Respondents, by depositing a copy of it in the United States Mail, postage prepaid, on August 10, 2018, addressed to their attorney of record, G. Murrell Smith, Jr., at his office at PO Box 580, Sumter, SC, 29151.

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August 10, 2018

Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
PO Box 11629
Columbia SC 29211

Re: Verma Tedder v. Darlington County Community Action Agency
Appellate Case No. 2016-001003

Dear Ms. Kitchings:

Enclosed please find for filing the following:

1. Original and six (6) copies of Appellant's Petition for Rehearing;
2. Proof of Service of the Petition for Rehearing on the Respondents;
3. A filing fee of Twenty-Five (\$25.00) Dollars.

By copy of this letter, I am serving Respondents' counsel, G. Murrell Smith, Jr., with a copy of the Appellant's Petition for Rehearing.

With kind regards, I am

Yours truly,

WUKELA LAW FIRM

STEPHEN J. WUKELA

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AUG 14 2018

SC Court of Appeals

SJW:jpb

Enclosures

cc: G. Murrell Smith, Jr., Esquire