THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

Appellate Case No. 2018-000769
Lower Court Case No. 0824526

Robert L. Harrison, Employee,.....Petitioner,

v.

Owen Steel Company, Inc., Employer, and
Old Republic Insurance Company
c/o Gallagher Bassett Services, Inc., Carrier,.....Respondents.

BRIEF OF PETITIONER

Frank A. Barton
Attorney at Law, P.A.
Post Office Box 3972
West Columbia, South Carolina 29169
803-739-1824 / fax 803-739-1888
ATTORNEY FOR PETITIONER

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STATEMENT OF ISSUES ON APPEAL

1. Did the Court of Appeals err in concluding SC Code Section 42-9-170 barred recovery by the Petitioner-Claimant?

STATEMENT OF CASE

By Form 50 dated May 8, 2013, Petitioner-Claimant sought worker's compensation benefits for an admitted accident which occurred on September 17, 2008. The Employer accepted the claim for injury to Petitioner-Claimant's back and provided treatment through Dr. Thomas Holbrook, a neurosurgeon. Dr. Holbrook subsequently performed surgery on November 10, 2009. On July 21, 2010, Dr. Holbrook released Claimant with permanent restrictions and a twenty-five (25%) percent permanent disability. Claimant sought disability benefits for the impairment and loss of use of his spine and future medical treatment.

At an initial hearing before a Hearing Commissioner held on August 8, 2013, Employer argued and the Commissioner found Claimant had failed to file a claim within the applicable two year statute of limitations. The Commissioner ruled this way even though a notice of claim letter had been filed in September of 2009. That decision of November 7, 2013, was appealed to the Full Commission. By the decision of the Full Commission issued May 12, 2014, the decision of the Hearing Commissioner was reversed. The Commission determined the claim had been timely filed and remanded the claim for rehearing.

A second hearing before a Hearing Commissioner was held on August 1, 2014, to address the issues on remand as ordered by the Full Commission. Again, Claimant sought benefits for the permanent injury suffered to his spine and medical benefits. This time Employer argued the claim should be barred by the doctrine of latches and also

argued benefits should be denied because of intervening causes. By decision issued February 12, 2015, the Hearing Commissioner ruled the claim was barred by the doctrine of latches and by subsequent accidents suffered by Claimant.

An appeal by Claimant was heard by the Full Commission on May 18, 2015. By Decision issued September 8, 2015, the Commission affirmed the Hearing Commissioner's determination the claim was barred by laches. The Panel also affirmed the Commissioner's ruling in regard to subsequent accidents. Notice of the Appellate Panel Decision was received by Claimant on September 8, 2015.

Claimant's Notice of Appeal to the South Carolina Court of Appeals was filed on October 7, 2015. Oral argument was held by the Court of Appeals on October 3, 2017. The Court of Appeals issued its Opinion Number 5528, filed on January 10, 2018, affirming the decision of the Full Commission. The decision of the Court of Appeals did not fully address the arguments raised in Claimant's brief, although it did indicate the claim was not barred by laches or the subsequent accidents.

In affirming the Commission the Court of Appeals relied upon an issue not addressed by the Commission and not raised or addressed by either party in their briefs. In its opinion, the Court of Appeals relied upon SC Code Section 42-9-170 to conclude Claimant was barred from pursuing his workers compensation claim. Claimant previously settled a second workers compensation claim for an injury to his spine which occurred on October 4, 2010, with the same Employer. Claimant and Employer settled the 2010 workers compensation claim for the second injury to Claimant's spine in August

of 2011. The Court of Appeals, relying on Section 42-9-170, concluded Claimant was barred from pursuing the claim for his 2008 on the job spinal injury, because he settled the claim for the 2010 spinal injury first.

Claimant's Petition for Rehearing was denied by the Court of Appeals on March 22, 2018. Claimant's Petition for Certiorari was filed on April 23, 2018. By Order of August 2, 2018, this Court granted the petition for writ of certiorari on the issue of the application of SC Code 42-9-170.

STATEMENT OF FACTS

On September 17, 2008, Petitioner-Claimant Robert Harrison was working as a gantry welder for Owen Steel Company. On that date he suffered an admitted on the job injury to his back. The Employer accepted the claim and provided medical treatment through Dr. Thomas Holbrook, a neurosurgeon. Dr. Holbrook performed an anterior cervical discectomy with fusion on November 10, 2009. On July 21, 2010, Dr. Holbrook released Claimant with permanent restrictions and a twenty-five (25%) percent permanent disability. Dr. Holbrook noted Claimant had reached maximum medical improvement and had sustained a permanent disability rating of a twenty-five (25%) percent to the whole person as a result of the spinal injury. (R., p. 86).

Dr. Donald R Johnson conducted an independent medical evaluation of Claimant's workers compensation injury on September 29, 2010. Dr. Johnson also placed Claimant

at maximum medical improvement with permanent work restrictions and a twenty-five (25%) percent whole person impairment rating. (R., p. 90). Mr. Harrison returned to work with Owen Steel in a supervisory position. This position provided him with lighter duty work. It also provided him with a higher wage than he was earning at the time of his accident of September 17, 2008. (R., p. 193, line 12)

At the hearing before the Hearing Commissioner held on August 1, 2014, evidence submitted by Employer showed Claimant had been involved in other accidents. Employer submitted evidence Claimant was involved in a motorcycle accident in April 2010. (R., p. 138). Mr. Harrison testified he suffered a broken clavicle, but denied any injury to the area of his spine injured in his worker's compensation accident of September 17, 2008. Employer provided no testimony or medical evidence Claimant injured his back or neck in the April 2010 accident.

Employer also provided evidence Claimant had suffered a second on the job injury to his spine on October 4, 2010, while still employed with the current Employer. Treatment was provided by Dr. Raymond Sweet who stated in a Compensation Form 14B, dated November 23, 2010, Claimant had sustained a fifteen (15) percent impairment as a result of the of accident of October 4, 2010. (R., p. 283). Based upon that impairment rating Claimant and Employer reached a settlement agreement in September 2011 with Claimant receiving compensation based on a loss of use of twenty-eight (28) percent to his back. (R., p. 121).

The Court of Appeals determined the settlement of the second workers compensation claim barred Claimant from pursuing recovery for his earlier workers compensation

accident of September 17, 2008. It concluded SC Code Section 42-9-170 barred the pursuit for the first injury to the back because Claimant had previously settled the claim for the second back injury. Employer also presented evidence of two other accidents suffered by Claimant, but these incidents were well after the reports of permanent impairment ratings issued by Dr. Holbrook and Dr. Johnson. Petitioner-Claimant respectfully submits the Court of Appeals was in error in relying on Section 42-9-170 to deny Mr. Harrison's claim.

STANDARD OF REVIEW

"The South Carolina Administrative Procedures Act governs judicial review of a decision of the workers' compensation commission." Lark v. Bi-Lo, Inc., 276 S.C. 130, 134, 276 S.E.2d 304, 306 (1982); Bass v. Isochem, 365 S.C. 454, 467, 617 S.E.2d 369, (Ct. App. 2005) cert. dismissed as improvidently granted Aug. 2007; Hargrove v. Titan Textile Co., 360 S.C. 276, 288, 599 S.E.2d 604, 610 (Ct. App. 2004). Pursuant to the APA, an appellate Court's review is limited to deciding whether the Appellate Panel's decision is unsupported by substantial evidence or is controlled by some error of law. Grant v. Grant Textiles, 372 S.C. 196, 200, 641 S.E.2d 869, 871 (2007); S.C. Code Ann. Section 1-23-380(A)(5) (Supp. 2006).

The judicial review of the Appellate Panel's factual findings is governed by the substantial evidence standard. Gadson v. Mikasa Corp., 368 S.C. 214, 221, 628 S.E.2d 262, 266 (Ct. App. 2006); Frame v. Resort Servs., Inc., 357 S.C. 520, 527, 593 S.E.2d 491, 494 (Ct. App. 2004); Corbin v. Kohler Co., 351 S.C. 613, 617, 571 S.E.2d 92, 94-95 (Ct. App. 2002); Lockridge v. Santens of America, Inc., 344 S.C. 511, 515, 544 S.E.2d

842, 844 (Ct. App. 2001). The Appellate Panel's decision must be affirmed if supported by substantial evidence in the record. Shuler v. Gregory Elec., 366 S.C. 435, 440, 622 S.E.2d 569, 571 (Ct. App. 2005) (citing Sharpe v. Case Produce, Inc., 366 S.C. 154, 160, 519 S.E.2d 102, 105 (1999)). A reviewing court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. S.C. Code Ann. Section 1-23-380(A)(5)(d)(e)(Supp. 2006), see, also, Hall v. United Rentals, Inc., 371 S.C. 69, 77, 636 S.E.2d 876, 881, (Ct. App. 2006). However, a reviewing court may reverse of modify a decision of the Appellate Panel if the findings, inferences, conclusions, or decisions of them are "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." S.C. Code Ann. Section 1-23-380(A)(5)(e)(Supp. 2006); Bass v. Kenco Group, 366 S.C. 450, 457, 622 S.E.2d 577, 580 (Ct. App. 2005); Bursey v. S.C. Dep't of Health & Envtl. Control, 360 S.C. 135, 141, 600 S.E.2d 80, 84 (Ct. App. 2004) aff'd, 369 S.C. 176, 631 S.E.2d 899 (2006).

ARGUMENT I

SC CODE SECTION 42-9-170 DOES NOT PRECLUDE PURSUIT OF CLAIMANT'S FIRST BACK INJURY CLAIM BECAUSE HE SETTLED HIS SECOND INJURY CLAIM FIRST. (ISSUE 1)

The Court of Appeals relied upon SC Code Section 42-9-170 to conclude the prior settlement of Claimant's workers compensation accident of October 4, 2010, barred Claimant's pursuit of his earlier workers compensation accident of September 17, 2008. Section 42-9-170 specifically provides that in cases in which an employee has one or

more injuries while employed with the same employer, the employer is entitled to a credit for disability compensation paid in the first claim. In other words, if an employee was compensated for 250 weeks of disability payments for an initial injury, the most employee could recover for a second injury with the same employer would be 250 weeks of disability payments for a maximum of 500 weeks. The statute is intended to ensure an employer is not required to pay more than the 500 week maximum for multiple injuries when it elects to retain an injured employee.

The Court of Appeals also relied upon Medlin v. Greenville County, 303 S.C. 484, 401 S.E.2d 667 (1991), in reaching its decision. Claimant respectfully submits Medlin, supra, does not support the conclusion reached by the Court of Appeals. The Medlin claimant suffered a workers compensation accident wherein he was awarded compensation for total loss of use of his back because he was found to have suffered a fifty (50) percent or more loss of use of the spine. This resulted in compensation totaling five hundred (500) weeks. Thereafter, he suffered a second injury a second workers compensation injury to his back with the same employer. The Medlin Court concluded the claimant had been fully compensated for the loss of use to his spine as a result of the first accident, and therefore pursuant to Section 42-9-170 the employer was not required to pay additional compensation for the loss to the back. That employer had already paid the full amount of five hundred (500) weeks as a result of the prior accidents. The ruling of the Medlin Court was entirely consistent with the intent of Section 42-9-170 as mentioned above.

Claimant respectfully submits the Court of Appeals misconstrued SC Code

Section 42-9-170 and its application to the current factual circumstances. This Section addresses only subsequent accidental injuries with the same employer and is clearly intended to prevent a claimant from receiving total compensation in excess of 500 weeks if a second injury occurs with the same employer. Its language addresses only compensation available for a second workers compensation accident and provides no direction or limitations on compensation that can be received from an initial accident such as the current Claimant suffered in September 2008. Section 42-9-170 simply has no applicability to Claimant's on the job injury claim of September 17, 2008.

In concluding Section 42-9-170 would bar Claimant's pursuit of his claim which is the subject of this appeal the Court of Appeals also discussed the effect of the opinion rendered by Dr. Raymond Sweet. After conservative treatment to the spine with no further surgery, Dr. Sweet, the authorized treating physician for the October 2010 accident, issued a Form 14B, dated November 23, 2010, stating Claimant had reached maximum medical improvement and assigned a fifteen percent (15%) impairment to the total body as a result of his second spinal injury. Dr. Sweet also changed Appellant's lifting restrictions from not over fifty (50) pounds to not over thirty (30) pounds. Furthermore, the statement noted that the date of injury or illness was October 4, 2010. (Form 14B, R., P. 283). Dr. Sweet's impairment rating was issued less than two months after the second accident. It must also be remembered the impairment report of Dr. Holbrook was issued on July 21, 2010, and the impairment report of Dr. Johnson had just been issued on September 29, 2010, less than two months before Dr. Sweet's Form 14B.

In its opinion the Court of Appeals discussed the possibility the rating by Dr.

Sweet was intended to show Claimant's spinal condition had actually improved after the second spinal accident of October 4, 2010. In other words, even though Dr. Holbrook and Dr. Johnson had issued opinions shortly before October 4, 2010, stating Claimant had suffered a twenty-five (25) percent whole person impairment, the Form 14B showing a fifteen (15) whole person impairment completed by Dr. Sweet on November 23, 2010, could be interpreted to indicate the condition of Claimant's spine had actually improved after the second workers compensation accident involving his spine.

Claimant respectfully submits the Court of Appeals misconstrued the evidence in considering Claimant's spinal condition may have improved. Even the Employer did not take the position before the Commission or the Court of Appeals the Claimant's spinal condition improved as a result of the accident of October 4, 2010. The Court of Appeals also misconstrued the purpose of the Form 14B. The Form 14B was promulgated by the Workers Compensation Commission to provide an impairment rating for a specific workers compensation accident. The Form is intended to assist in the resolution of claims. If the Form simply provided an overall assessment of impairment without reference to a specific accident the Form would be useless.

Again, even the Employer did not argue or take the position Dr. Sweet's opinion was intended to show Claimant's spine injury had improved after the accident of October 4, 2010. Such an argument is untenable as it would require a determination the second workers compensation accident actually improved the cervical discectomy with fusion performed by Dr. Holbrook. Employer did not take this position and no medical evidence was submitted to indicate the second accident actually improved Claimant's spinal

condition. In fact, Dr. Sweet changed Claimant's lifting restrictions from not over fifty (50) pounds to not over thirty (30) pounds. This is a clear indication Claimant's spinal condition was worse after the second accident.

For all of the above reasons Claimant would respectfully submit the decision of the Court of Appeals should be reversed.

CONCLUSION

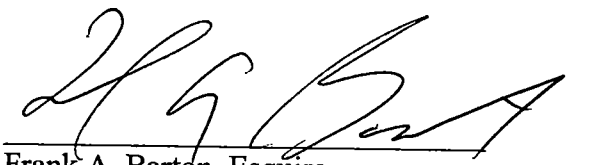
Petitioner-Claimant respectfully submits the Court of Appeals incorrectly applied S.C. Code Section 42-9-170 to bar recovery of Claimant's claim of September 17, 2008. This Section applies to subsequent accidents and simply has no application to the current claim. Furthermore, the Court of Appeals was mistaken in concluding the Form 14B of Dr. Sweet was intended to provide an overall spinal impairment rating for all injuries suffered by Claimant. Such a reading of the Form 14B would render it useless for purposes of determining workers compensation claims.

Within a few weeks of each other Dr. Holbrook and Dr. Johnson issued reports determining Claimant had suffered a twenty-five (25) percent permanent impairment to his back as a result of the workers compensation accident of September 17, 2008. Dr. Johnson's report was issued on September 29, 2010. Dr. Sweet's Form 14B was issued less than two months later. To conclude Dr. Sweet intended to include all injuries to the spine would require a finding Claimant's spine improved substantially from September

29, 2010, to November 23, 2010, even though Claimant suffered a second injury. It would also require the complete disregard of the fact Dr. Sweet change Claimant's lifting restrictions from fifty (50) pounds to thirty (30) pounds.

For all of the above reasons Claimant would respectfully submit the decision of the Court of Appeals should be reduced and the case remanded to the Workers Compensation Commission with a direction the Claimant is entitled to an award of twenty-five (25) percent impairment to the spine and continued medical treatment.

Respectfully submitted,



September 4, 2018
West Columbia, South Carolina

Frank A. Barton, Esquire
ATTORNEY AT LAW, P.A.
Post Office Box 3972
West Columbia, South Carolina 29170
803-739-1824 / fax 803-739-1888

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PROOF OF SERVICE

The undersigned does hereby certify one copy of the **BRIEF OF PETITIONER** was served in the foregoing action by depositing the same in the United States mail, with sufficient postage affixed thereon and return address clearly visible on September 4, 2018, addressed to the following:

Helen F. Hiser, Esquire
McAngus Goudelock & Courie, LLC
Post Office Box 650007
Mount Pleasant, South Carolina 29465

West Columbia, South Carolina
September 4, 2018

Frank A. Barton
Attorney for the Petitioner-Claimant