THE STATE OF SOUTH CAROLINA
In the 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.

REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI

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BRIEF RESTATEMENT OF THE CASE

In this Petition for Certiorari from the Court of Appeals' decision to reverse the Appellate Panel of the Workers' Compensation Commission, East Richland County Public Service District and its carrier the South Carolina State Accident Fund (together "Petitioners"), through their undersigned counsel, respectfully request that this Court issue a writ of certiorari for the reasons previously set forth in the original Petition, expanded upon here in the Petitioners' Reply to Return of the same, and concisely set forth in the dissenting opinion of Judge Thomas.

In her dissent, Judge Thomas concluded that the Court of Appeals was constrained by the substantial evidence standard of review and should affirm. Dent v. E. Richland Cnty. Pub. Serv. Dist., No. 2015-001702, 2018 WL 1513963, at *7 (Ct. App. Mar. 28, 2018) (Thomas, J., dissenting). Pursuant to Rule 242(b)(2), SCACR, this dissent provides the Supreme Court even more reason to grant Petitioners' Petition for Writ of Certiorari.

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 Failed to Apply the Correct Standard of Review Applicable to Appeals from the South Carolina Workers' Compensation Commission.

Respondent states that Petitioners "boldly suggest" that the Court of Appeals actually applied a *de novo* standard of review in its reversal of the Appellate Panel. (Return to Pet. for Writ of Cert., p. 5.) To be clear, Petitioners make no such "suggestion." Petitioners aver specifically that the Court of Appeals **did not** apply the substantial evidence standard of review as required, and instead, **did** apply the *de novo* standard of review while calling it by another

name. However, the *de novo* standard is strictly limited to jurisdictional issues. Thus, the Court of Appeals "boldly" overstepped its role, violated well-settled standard of review principles, and completely trampled the Full Commission's authority to act as the ultimate fact-finder.

Moreover, the only "bold suggestion" here before the Supreme Court is Respondent's statement that the Petitioners would dare to submit that "so long as there is any evidence, however tenuous, relied upon by the Commission to reach a decision, the reviewing Court must affirm." (Return to Pet. for Writ of Cert., p. 5.) Such an assertion is nothing more than a disingenuous twisting of Petitioners' actual argument.

Here, the correct standard of review on appeal from the Full South Carolina Workers' Compensation Commission is the substantial evidence standard. This standard is explicitly established by the Administrative Procedures Act 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).

Pursuant to well-established law, **"[t]he 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). Plainly, this standard is far

from "so long as there is any evidence, however tenuous, relied upon by the Commission to reach a decision, the reviewing Court must affirm." (Return to Pet. for Writ of Cert., p. 5.)

In other words. despite Respondent's erroneous restatement of Petitioners' argument, South Carolina law requires that the Court of Appeals affirm if the Full Commission's decision is supported by substantial evidence even if the Court of Appeals disagrees with the decision of the Full Commission,. Jennings, 335 S.C. at 516, S.E.2d at 458. Petitioners nowhere, or at any time, would suggest to this Court that an "any evidence" or "any competence evidence" standard should be adopted. (Return to Pet. for Writ of Cert., p. 5-6.) Indeed, the "any competence evidence" standard was superseded by the enactment of the Administrative Procedures Act decades ago.

In another tangential leap, Respondent also asserts that Petitioners present an "implied invitation for this Court to disregard the substantial evidence standard of review and replace it with the 'any competent evidence' standard." (Return to Pet. for Writ of Cert., p. 6.) However, a cursory review of the original Petition for Writ of Certiorari makes plain that just the opposite is true: Petitioners respectfully request that this Court ensure that the Court of Appeals apply the substantial evidence standard of review as it is required to do. Petitioners do not invite this Court to disregard the substantial evidence standard of review. **The Court of Appeals *already* disregarded the substantial evidence standard of review.** In short, it is the Respondent—and not the Petitioners—who invites this Court to disregard the correct standard of review.

Indeed, the Court of Appeals re-examined the Record in search of "substantial evidence" to support its desired 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). This search for "substantial evidence" to support its desired decision proved particularly attenuated as noted 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.").

In so doing, the Court engaged in a re-weighing of the evidence when it relied upon, and repeatedly cited 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 afford 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...."). Then the Court of Appeals re-labeled this evidence as more persuasive than that relied on by the Appellate Panel and made its own 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.

Notably, the Appellate Panel of the Commission—not the Court of Appeals—serves as the ultimate fact-finder. See, e.g., Hartzell v. Palmetto Collision, LLC, 415 S.C. 617, 622, 785 S.E.2D 194, 197 (2016). As well-settled precedent makes clear, such a "review" is prohibited and strips the proper standard of review of the required deference to the agency in this case. As recently ordered in Nero v. S.C. Department of Transportation, Petitioners respectfully request that this Court therefore remand this case 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. The Court of Appeals' Failure to Apply the Correct Standard of Review Unnecessarily Convolutes What was a Simple Injury to One Body Part.

Contrary to Respondent's allegation that Petitioners' argument is inconsistent with the procedural history of this case, the procedural history only bolsters Petitioners' position. Indeed, **no findings were ever made by the Commission that Respondent sustained any compensable injury beyond that to the back**. In review, the Full South Carolina Workers' Compensation Commission remanded the case to the Single Commissioner only for clarification regarding the finding that the right leg was "affected" but this was "a one body part" claim. (R. 9-12). In turn, to remove any confusion, the Commissioner withdrew language in Findings of Fact #16 and 22 that stated explicitly that the "Claimant's right leg is only minimally affected" and "this is a 'one body part' (i.e. Singleton) case." (R. 6, 8). In all other aspects, the Commissioner reaffirmed her previous findings, including 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 one body part—the back. (R. 34-36). The Appellate Panel then affirmed. (R. 53).

The very first finding that the Respondent actually sustained a second injury was made by the Court of Appeals. This is highly problematic because the Court of Appeals is not permitted to engage in fact-finding under the correct standard of review as explained above. Furthermore, this new finding is not supported by case law or the record as a whole. Case law

clearly distinguishes a second body part that constitutes an "injury" within the meaning of the Workers' Compensation Act from a second body part that is only "affected" by an injured body part. Colonna v. Marlboro Park Hosp., 404 S.C. 537, 546, 745 S.E.2d 128, 133 (Ct. App. 2013) (holding that a claimant must go further than show that another body part was "affected" but must show that another body part was "injured" for Section 42-9-10 to apply).

Moreover, South Carolina precedent plainly prohibits characterizing radiculopathy[1] 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 ever 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). However, 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.

Yet 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 and without regard to the Commissioner's findings that even the Respondent's own IME did not produce evidence of any injury to a second body part despite radicular complaints. (R. 92-97). For these reasons, the Commission never found

[1] "Radiculopathy" "describes a range of symptoms produced by the pinching of a nerve root in the spinal column." Symptoms can vary by location and name "depending on where in the spine it occurs." *Radiculopathy*, HEALTH LIBRARY, JOHNS HOPKINS MEDICINE, https://www.hopkinsmedicine.org/healthlibrary/conditions/nervous_system_disorders/acute_radiculopathies_134,11 (last visited Aug. 1, 2018).

that the Respondent sustained more than a single injury to the back and correctly limited the Respondent's award to that under the schedule in Section 42-9-30.

Obviously, Petitioners could not appeal a finding made first by the Court of Appeals until the Court of Appeals actually made it. Therefore, there preservation of issues on appeal is a nonissue, and Petitioners properly argue the same before the Supreme Court in its Petition. Respondent is ostensibly lost in the minutiae of his own nomenclature in suggesting that Petitioners would advocate that the Supreme Court re-add the Single Commissioner's Finding of Fact 22 that stated explicitly that "this is a 'one body part." (R. 68). That is simply not necessary and misses the point. It is the original fact-finding by the Court of Appeals that a second body part was injured within the meaning of the Act that Petitioners urge this Court to reverse. **The Court of Appeals' finding exceeds its role as the reviewing court under the correct standard of review and contradicts controlling case law distinguishing "affected" body parts from "injured" body parts that are compensable under the Act.** Thus, 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 and impermissibly engaged 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 nothing more than a claim for a single body part injury,

which was unnecessarily convoluted 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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August 1, 2018

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THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM SOUTH CAROLINA
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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.

CERTIFICATE OF SERVICE

I certify that I have served the Reply to Return to Petition for Writ of Certiorari on opposing counsel by depositing a copy of the same in the United States Mail, postage prepaid, on August 2, 2018, addressed to the following:

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The Honorable Daniel E. Shearouse
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Re: James Dent, Employee/ Respondent v. East Richland County Public Service District, Employer, and State Accident Fund, Carrier, Petitioners.
TPGL File No.: 04206.00189
WCC File No.: 1205879
Appellate Case No.: 2015-001702

Dear Mr. Shearouse:

Enclosed is Petitioners', East Richland County Public Service District and State Accident Fund's, Reply to Return to Petition for Writ of Certiorari in the above-referenced matter. Pursuant to Rule 242, SCACR, I have attached hereto an original and six (6) copies of the same.

By copy of this letter, I am also serving a copy on opposing counsel by United States Mail with first class postage prepaid.

Very truly yours,

Turner Padget Graham & Laney, P.A.

David H. Keller, Esquire

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