THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Unpublished Opinion No. 2018-UP-349
(S.C. Court of Appeals Filed August 1, 2018)

Verma Tedder, ... Claimant/Petitioner,

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

PETITION FOR WRIT OF CERTIORARI

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INDEX

CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally denied by the Court of Appeals on September 20, 2018.

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October ____, 2018

QUESTION PRESENTED

A. **DID THE COURT OF APPEALS ERR IN FINDING THAT THE PETITIONER'S ASSERTION OF THE PROVISIONS OF S.C. CODE §42-15-80 VIOLATED THE CONSTITUTION'S DUE PROCESS GUARANTEE; JUSTIFYING THE COMMISSION'S EXCLUSION OF OTHERWISE ADMISSIBLE EVIDENCE OFFERED BY THE PETITIONER?**

I. STATEMENT OF THE CASE

This is a Workers' Compensation claim involving an admitted accident; decided by the Workers' Compensation Commission on Defendants' Form 21 request to stop payment and determine permanency.

Claimant sustained admitted injuries to her left leg and back when, while employed by the Darlington County Community Action Agency supervising children on the playground, one of the children caused the Claimant to fall to the ground on her left side. Claimant's authorized treating orthopaedic, Dr. Robert E. Elvington, Jr., found her at maximum medical improvement for her left knee on December 5, 2013, (A. p. 348), and her authorized treating orthopaedic, Dr. W.S. Edwards, Jr., found Claimant at maximum medical improvement for her back on July 3, 2014. (A. p. 360).

Defendants filed a Form 21 request to stop payment of temporary total disability benefits and determine permanency on September 5, 2014. (A. p. 37). By notice dated September 24, 2014, the Commission scheduled a hearing on the Form 21 before Commissioner Wilkerson for October 29, 2014. (A. p. 236). That hearing was continued to allow for mediation ultimately held on February 23, 2015. (A. p. 238). Thereafter, by notice of March 5, 2015, the Defendants' Form 21 hearing was set for a second time for May 5, 2015 before Commissioner Taylor. (A. p. 241).

On April 17, 2015, the Claimant filed her pre-hearing brief and served a Notice of APA Submissions on Defendants. (A. pp. 242-402).

The second scheduled hearing was continued at the Defendants' request; Defendants' counsel being unavailable for hearing due to his commitments in the Legislature. (A. p. 403). By notice of May 4, 2015, the case was set for hearing for a third time for June 17, 2015 before Commissioner Taylor. (A. p. 404). Again that hearing was continued at the Defendants' request

due to a hearing conflict. (A. p. 405). By notice of May 5, 2015, the hearing was scheduled a fourth time for June 18, 2015 before Commissioner Taylor. (A. p. 406). Again that hearing was continued at the request of the defense. (A. p. 409). On June 23, 2015 the hearing was scheduled for a fifth occasion for July 6, 2015 before Commissioner Barden. (A. p. 410). Again the hearing was continued at the request of the defense. (A. p. 410). Finally, the hearing was scheduled on a sixth occasion on June 29, 2015 for a hearing on August 20, 2015. (A. p. 411).

On July 27, 2015, prior to the August 20, 2015 hearing, the Defendants filed a Motion to Compel the Claimant to submit to an evaluation by their vocational expert. (A. pp. 412-426). Defendants made this Motion after their hearing request had been pending for over forty-six (46) weeks and just over three (3) weeks before the case was scheduled to be heard, after having been scheduled six (6) times.

Claimant opposed the Motion to Compel, arguing that S.C. Code §42-15-80 requires that the Claimant submit to examination by a qualified "physician or surgeon" and that a vocational expert was neither. (A. pp. 427-429). Single Commissioner Barden responded on August 7, 2015 by denying the Defendants' Motion to Compel.

The Commissioner also ruled, sua sponte, that "If Claimant chooses not to submit to Defendants' evaluation, neither party's vocational report will be considered by the undersigned Commissioner." (A. pp. 3-4). The Commissioner made this ruling despite the fact that Defendants did not move to exclude Claimant's vocational report and despite the fact that the Claimant's vocational expert had been provided to the Defendants on April 17, 2015, over four (4) months before the hearing of August 20, 2015.

Claimant moved that the Commissioner reconsider that ruling at the hearing on August 20, 2015. (A. pp. 9-10). The Single Commissioner denied the Claimant's Motion for

Reconsideration; ruling: "Claimant's unwillingness to submit to a Vocational Evaluation for the Defendants causes the undersigned not to consider the Vocational Report contained in Claimant's APA No. 8." (A. p. 22). Claimant's APA No. 8 was proffered for the record.

The case was tried on August 20, 2015 before Commissioner Susan Barden.

At the hearing, the defense argued that Defendants should be entitled to stop temporary total disability benefits and a scheduled loss of use award should be made pursuant to §42-9-30. Claimant argued that she was totally and permanently disabled.

On November 23, 2015, the Single Commissioner issued an Order finding that the Claimant was not totally and permanently disabled, and, instead, awarding ten (10%) percent permanent partial disability to the knee and eight (8%) percent permanent partial disability to the spine, for a total of 43.5 weeks of compensation.

The Petitioner appealed to the Workers' Compensation Commission Appellate Panel. A divided Panel affirmed; adopting the Single Commissioner's findings. (A. pp. 26-35).

The Petitioner appealed to the Court of Appeals, which affirmed. In particular, the Court of Appeals held that:

> Tedder's refusal to submit to an evaluation by Respondents' vocational expert would have placed Respondents at an unfair disadvantage had the single commissioner or Appellate Panel considered and given any weight to Tedder's vocational report, thus depriving Respondents due process. *See id.* ("In cases where important decisions turn on questions of fact, due process at least requires an opportunity to present favorable witnesses."). (A. pp. 483-489).

The Petitioner's Petition for Rehearing was denied, this Petition followed.

II. STATEMENT OF FACTS

The Claimant, a teacher's aid for sixteen (16) years with the Darlington County

Community Action Agency, suffered an admitted injury on March 29, 2013 when, while supervising young children on the way to the playground, one of the children caused the Claimant to fall to the ground on her left side.

The Claimant initially saw McLeod Urgent Care, (A. pp. 250-280), and underwent a course of physical therapy, (A. pp. 281-306), and thereafter saw McLeod Occupational Health, (A. pp. 307-327), from which she was referred to Pee Dee Orthopaedic. (A. pp. 325).

She was initially seen at Pee Dee Orthopaedic by Dr. Robert Elvington, who diagnosed a medial meniscus tear of the left knee, (A. pp. 332-334), and ultimately performed left knee arthroscopy and partial medial meniscectomy on September 4, 2013. (A. p. 340).

The Claimant worked under a light duty restriction until, on August 29, 2013, she began receiving temporary total disability benefits in anticipation of her surgery.

After the surgery, on September 12, 2013, Dr. Elvington restricted the Claimant to no lifting or carrying over 10 pounds, no prolonged standing, walking, climbing, stooping, or crawling. (A. p. 342). Dr. Elvington's restrictions were attributable to her left knee, as he indicated on September 12, 2013, "We will address the patient's right knee symptoms at a later date." (A. p. 341).

Since the left knee surgery, the Employer has not offered work within her restrictions, (A. p. 170, lines 2-6; p. 171, lines 17-20; p. 172, lines 2-3), and she has applied for, and received, State Disability Retirement, (A. p. 402), and Social Security Disability.

On December 5, 2013, Dr. Elvington released the Claimant at maximum medical improvement for her left knee, rated her permanent physical impairment at three (3%) percent to the left knee, and continued the same restrictions. (A. pp. 348-349).

The Claimant was also seen at Pee Dee Orthopaedic with regard to her low back pain.

After a lumbar MRI, on April 17, 2014, Dr. W.S. Edwards, Jr. concluded:

> Though she has diffuse degenerative changes that were exacerbated by her work injury of last year, she was reassured that there is no evidence of any need for surgical intervention or serious pathology. (A. p. 359).

Thereafter, he released her with a 5% impairment to her spine on July 3, 2014. (A. p. 360).

A Functional Capacity Evaluation was performed by Tracy Hill, P.T., on September 12, 2014 who opined that the Claimant had limitations consistent with those set by Dr. Elvington, of lifting no more than three pounds floor to waist, eight pounds 12 inch to waist, ten pounds waist to shoulder and that she was limited to limited sedentary to limited light work. (A. pp. 372-374).

A vocational evaluation was performed by J. Adger Brown, Jr. on September 19, 2014 who opined that the Claimant was a fifty-three year old female with an Associate of Arts degree in early childhood education from Florence-Darlington Technical College, had been working as a teacher's assistant with the Darlington Community Action Agency since 1997. (A. pp. 395-399).

Mr. Brown noted that the Claimant had been awarded state disability retirement, which has as its basic standard the inability to return to former employment, and that she also has applied for and is receiving social security disability benefits because of her inability to physically perform the work the work that exists in a regional or national economy within her age, education, work experience, and physical limitations. Mr. Brown, therefore, reached the conclusion that the Claimant is totally disabled. (A. pp. 400-401).

III. ARGUMENT

A. THE COURT OF APPEALS ERRED IN FINDING THAT THE PETITIONER'S ASSERTION OF THE PROVISIONS OF S.C. CODE §42-15-80 VIOLATED THE CONSTITUTION'S DUE PROCESS GUARANTEE; JUSTIFYING THE COMMISSION'S EXCLUSION OF OTHERWISE ADMISSIBLE EVIDENCE OFFERED BY THE PETITIONER.

The Petitioner respectfully reasserts, as if reiterated herein verbatim, all of the arguments set out in her Final Brief to the Court of Appeals. In the interest of brevity, however, the Petitioner will focus, here, on the Court of Appeals' affirmation of the Commissioner's exclusion of the Petitioner's vocational report.

The Petition for Writ should be granted because the Court of Appeals erred in finding that the Petitioner's assertion of the provisions of S.C. Code §42-15-80 violated the Constitution's due process guarantee; justifying the Commission's exclusion of otherwise admissible evidence offered by the Petitioner.

It is well established that questions of law decided by the Workers' Compensation Commission, such as the decision as to whether to admit evidence, are decided de novo by this Court. See S.C. Code §1-23-380(5)(d).

The Claimant's vocational report was served on the Defendants as part of Claimant's Notice of Submissions on April 17, 2015, over four (4) months prior to the hearing. Workers' Compensation Regulation 67-612 titled "Admission of Expert Report as Evidence" requires the admission of an expert's report if it was provided to the moving party more than ten (10) days before the scheduled hearing. See R.67-612(B)(2). The Commission excluded that report from evidence contrary to the law.

The Court of Appeals held that:

> Tedder's refusal to submit to an evaluation by Respondents' vocational expert would have placed Respondents at an unfair disadvantage had the single commissioner or Appellate Panel considered and given any weight to Tedder's vocational report, thus depriving Respondents due process. [See Smith v. S.C. Dep't of Mental Health, 329 S.C. 485, 500 (Ct. App. 1997)(citing S.C. Const. Art. 1 §3).]("In cases where important decisions turn on questions of fact, due process at least requires an opportunity to present favorable witnesses.").
> (App. p. 483).

Respectfully, the Court of Appeals 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 the Court of Appeals' affirmation, were driven by dissatisfaction with the effect of the legislative 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. (A. pp. 412-415). Claimant opposed that Motion citing S.C. §42-15-80. (A. pp. 427-428). Respondents argued to the Commission that the enforcement of §42-15-80 would violate due process. (A. pp. 410, 412). The Commission, faced with the clear language of §42-15-80, denied the Respondents' Motion to Compel. (A. p. 3). 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 legislative dictates of S.C. Code §42-15-80, if followed, 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 statutory provisions 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.
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> * * *
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> By displacing traditional tort law the Legislature intended to provide a no-fault system focusing on quick recovery, relatively ascertainable awards and limited litigation.
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> * * *
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> One such cost is workers' compensation claims may not be equitable in all situations.
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> * * *
>
> 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)(emphasis added).

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, the Court of Appeals has, in effect, determined that the Petitioner's insistence upon the enforcement of a statute violated due process. Petitioner respectfully requests that the Court reconsider the implications of, in effect, finding S.C. Code §42-15-80 volitive 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 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. (A. p. 237, A. p. 5). The Respondents had the opportunity to, and did, depose the Claimant. They submitted that deposition testimony at the time of the hearing. (A. p. 7).

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 offered a vocational 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, they waited over ten (10) months after requesting the hearing to, on the eve of the hearing, compel the Petitioner to submit to vocational evaluation, contrary to statute.

The Respondents' argument, and the Court of Appeals' ruling, rests on the contention that the legislative mandates of S.C. Code §42-15-80 treat the Respondents 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. The Court of Appeals erred in so finding.

CONCLUSION

For the foregoing reasons, the Order of the Court of Appeals erroneously finds, in effect, that the application of the plain and unambiguous provisions of S.C. Code §42-15-80, is violative of the constitutional due process guarantee, and Petitioner respectfully requests that this Court grant the Petition for Writ of Certiorari and allow further briefing of the issues.

Respectfully submitted,

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October 18, 2018

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PROOF OF SERVICE

I certify that I have served the Petition for Writ of Certiorari and Appendix on Respondents, by depositing a copy of it in the United States Mail, postage prepaid, on October 18, 2018, addressed to their attorney of record, G. Murrell Smith, Jr., 126 North Main Street, Sumter SC 29151.

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