

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Appellate Case No.: 2016-002321
WCC File No.: 1205924

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SC Court of Appeals

David Lemon, (Employee/Claimant),.....Appellant,

vs.

Mt. Pleasant Waterworks (Employer), and
State Accident Fund (Carrier),..... Respondents.

RESPONDENTS' FINAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

1. Whether the Workers' Compensation Commission correctly offset Appellant's Five-Hundred (500) week maximum award for permanent and total disability by applying credit for 199 weeks of compensation benefits paid to Appellant as a result of his four (4) prior workers' compensation claims with the same Respondent Employer.

STATEMENT OF THE CASE

Appellant was involved in an admitted work accident on May 8, 2012 while pulling a device designed to provide leverage on a sewer line, causing injury to his low back, affecting his bilateral legs. Prior to his May 8, 2012 accident, Appellant was involved in four (4) previous workers compensation claims against Respondent Employer, including a March 4, 2009 injury to the back (R. p.122), an April 26, 2010 injury to the right shoulder (R. p.125), an April 13, 2011 injury to the right shoulder (R. p.,127), and an October 3, 2011 injury to the back (R. p.132). As a result of his four (4) previous claims, Appellant received 199 weeks of compensation benefits, both as temporary and permanent disability benefits. (R. pp. 78, 123-124, 126, 128, 129-130, 133-137).

Following Appellant's May 8, 2012 work accident, Respondents provided Appellant with authorized causally related medical treatment, with multiple medical providers, including but not limited to, Dr. James Aymond and Dr. Thomas Duc. On June 20, 2013, Dr. Aymond found the Appellant to be at maximum medical improvement ("MMI") and assigned 24% impairment to the Appellant's back. (R. p. 11). On February 12, 2014, Dr. Duc found the Appellant to be at MMI and assigned Appellant impairment ratings of 24% to the lumbar spine, 7% to the right lower extremity, and 7% to the left lower extremity. (R. p. 11).

On March 6, 2014, Appellant filed a Form 50 request for hearing, alleging injuries to the back and bilateral legs, and seeking an award of permanent and total disability and lifetime medical treatment. (R. p. 4). Respondents timely filed both a form 51 response and a Form 21 request for

hearing, seeking stop payment of temporary compensation, a determination of permanent disability, and a request for credit for overpayment of temporary compensation paid after the date of MMI. (R. p. 6). In addition, Respondents argued for credit for the 199 weeks of benefits Appellant received in his four (4) prior claims against Respondent Employer, to be applied as an offset against his current award of permanent disability. (R. p.6).

A hearing was before Commissioner Scott Beck (“Hearing Commissioner”), on September 11, 2014. On January 7, 2015, the Hearing Commissioner issued an order, wherein he set forth a number of findings, including the following:

1. Based upon the greater weight of the evidence, the Claimant is permanently and totally disabled pursuant to S.C. Code Ann. §42-9-10. The Claimant has sustained permanent injuries to more than one body part, namely, his back and both legs. As such, his claim for permanency is not restricted to the schedule of benefits as provided by S.C. Code Ann. §42-9-30 (R. pp. 13-14, Finding of Fact # 1);
2. Appellant is entitled to lifetime causally related medical care (R. p.13, FOF# 2);
3. Appellant’s May 8, 2012 work accident was his fifth work accident as an employee of Respondent Mount Pleasant waterworks, and he has received previously received temporary or permanent disability compensation in the amount of 199 weeks (R. p.13, Finding of Fact # 3);
4. By the date of the hearing, claimant received 122 weeks of temporary total disability benefits related to his May 8, 2012 work accident. (R. p. 13, Finding of Fact # 3).

Based on the findings above, the Hearing Commissioners ordered that Appellant was entitled to an award of permanent total disability; however, Respondents were entitled to 321 weeks of credit against the maximum five-hundred (500) week award of permanent and total disability benefits, including the 199 weeks of benefits from his four (4) prior worker’s compensation claims with the same employer pursuant to S.C. Code Ann. §42-9-170, and the 122 weeks of temporary disability benefits for the current claim. (R. p.15, Conclusion of Law #3).

On January 20, 2015, Appellant filed a Form 30 request for Full Commission review. (R. pp. 25-29). Appellant argued that the Hearing Commissioner erred as a matter of law in offsetting

Appellant's five-hundred (500) week award with credit for compensation benefits paid for as a result of his four (4) prior claims with Respondent Employer. Appellant argued that S.C. Code §42-9-170 did not apply because the Hearing Commissioner awarded Appellant permanent and total disability benefits pursuant to S.C. Code §42-9-10(A). (R. p.pp. 26-27). Appellant further argued that even if §42-9-170(B) did apply, the Hearing Commissioner erred in failing to analyze each of the settlements of the prior claims to determine if there was a separate allocation of benefits paid for temporary total disability and permanent partial disability benefits. (R. p. 27).

After the matter was briefed by both parties, the Full Commission held oral arguments on April 20, 2015. On September 11, 2015, the Full Commission remanded the case to the Hearing Commissioner for (1) a determination of the particular subsection of §42-9-10 used in the award of the present case; (2) a determination of the statutes under which prior awards were issued; and (3) any facts, analysis, conclusions of law, or order provisions that the Hearing Commissioner should deem necessary in the analysis of the §42-9-170 issue. (R. p. 67).

On May 9, 2016, the Hearing Commissioner issued a second Decision and Order in response to the Full Commission's request on remand. (R. pp. 68-81). At the outset, the Hearing Commissioner stated that all evidence received in the case was outlined in his original January 7, 2015 Order, and, along with the Appellant's testimony, remains part of the Commission's file and serves as the basis upon which the current decision was issued. (R. p. 77). The Hearing Commissioner then proceeded to go through a legal analysis of S.C. Code Ann. §42-9-10, §42-9-170, and supporting case law. (R. pp. 72-77). Following a careful consideration of the evidence in the record, the Hearing Commissioner issued several findings of fact, including a finding that all previous Findings of Fact issued via his January 7, 2015 decision and order not inconsistent with the instant opinion are hereby reaffirmed herein (R. p. 77, Finding of Fact # 1); the award in this

case is based on §42-9-10(A) (R. pp.77, Finding of Fact #2); the previous awards for injuries sustained with the same employer were awarded under §42-9-30 (05/06/16, FOF#3); and the phrase “receives a permanent injury” in §42-9-170(B) refers to the present claim and “another permanent injury in the same employment” refers to the claimant’s prior injuries.” (R. p.77, Finding of Fact #4). The Hearing Commissioner concluded that the Appellant was subject to the five-hundred (500) week cap on benefits under the Workers’ Compensation Act, and his previous reliance on §42-9-170 was further supported by his expanded research of other cases and statutes, and he was “even more convinced that the law allows that Respondents be given a credit for all indemnity benefits paid during the Appellant’s employment with Mt. Pleasant Waterworks.” (R. p. 78, Finding of Fact #6, p.81).

On May 23, 2016, Claimant filed a second Form 30 request for Full Commission review, wherein he set forth his issues on appeal and argued that the Hearing Commissioner erred by submitting a revised Decision & Order that far exceeded the questions presented on remand, and again Appellant argued that the Hearing Commissioner’s award for credit to be applied against the current disability award was not supported by the law. (R. pp. 82-85).

Following review of briefs from both parties, the Full Commission held oral arguments on August 15, 2016. On October 26, 2016, the Full Commission issued an Appellate Panel Decision and Order affirming the Single Commissioner’s May 6, 2016 Decision and Order in Full. (R. p.118). On November 9, 2016, Appellant filed his Notice of Appeal before this Court.

STANDARD OF REVIEW

In workers’ compensation cases, the South Carolina Workers’ Compensation Commission is the trier of fact. *Hunter v. Patrick Construction Co.*, 289 S.C. 46, 344 S.E.2d 613 (1986). An appellate court, in workers’ compensation appeals, may overturn a conclusion of the

Workers' Compensation Commission if that conclusion Affected by error of law or is "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 276 S.E.2d 304 (1981).

The test is whether the decision of the Commission is supported by substantial evidence. 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 that the administrative agency reached in order to justify its action.

Mullinax v. Winn-Dixie Stores, Inc., 318 S.C. 431, 458 S.E.2d 76 (Ct. App. 1995).

Therefore, unless effected by error of law, an appellate court may only overturn findings of fact of the Commission if there is no reasonable probability that the facts could be as related by the witnesses upon whose testimony the finding was based. *Lowe v. Am-Can Transport Services, Inc.*, 283 S.C. 534, 324 S.E.2d 87 (Ct. App. 1984). Further, an award cannot be based on surmise, conjecture, or speculation. *Tiller v. National Health Care Center of Sumter*, 334 S.C. 333, 339, 513 S.E.2d 843, 845 (1999).

ARGUMENT

I. The Workers' Compensation Commission Appellate Panel correctly awarded Respondents credit against Appellant's award of permanent and total disability for the benefits Appellant received as a result of his four (4) prior claims with the same employer.

Appellants May 8, 2012 work accident was his fifth (5th) work accident while working for Respondent/employer for which he received compensation benefits. Specifically, Appellant previously received a combined 25.4286 weeks of temporary disability benefits and 75 weeks of permanent partial disability ("PPD") benefits as a result of two (2) injuries by accident to his right shoulder on April 26, 2010 and April 13, 2011. (R. pp. 126, 130). In addition, Appellant received a combined 23.5714 weeks of temporary benefits and 75 weeks of PPD benefits as a

result of two (2) injuries by accident to his back on March 4, 2009 and October 3, 2011. (R. pp. 123, 133, 136). In sum, Appellant received a total of 199 weeks of compensation benefits as a result of his four (4) prior claims with Respondent Employer.

Appellant correctly asserts that the Worker's Compensation Act is created by statute, and as such, "when reading a worker's compensation statute, we strictly construe its terms, leaving it to the Legislature to amend and define its ambiguities." *Wigfall v. Tideland Utilities, Inc.* 354 S.C. 100, 580 S.E.2nd 100 (2003). Appellant incorrectly asserts that when determining compensability, the Workers Compensation Act is liberally construed in favor of the injured worker. The case law is clear that issues involving "coverage" and whether an employer is to be brought into the Act as a potential defendant is to be liberally construed in favor of the injured workers, but there is nothing in the case law that supports the position that the Workers Compensation Act is to be liberally construed in favor of the injured worker when deciding compensability.

The South Carolina Workers' Compensation Act includes a specific statute dealing with permanent injuries sustained by an employee after he or she previously sustained permanent injuries in the same employment. S.C Code Ann. §42-9-170(B) states:

If an employee *receives a permanent injury* as specified in section 42-9-30 or section 42-9-10(B) after having sustained another permanent injury in the same employment, he is entitled to compensation for both injuries, but the total compensation must be paid by extending the period and not by increasing the amount of weekly compensation, *and in no case exceeding 500 weeks*. If an employee previously has *incurred permanent partial disability* through the loss of a hand, arm, shoulder, foot, leg, hip, or eye, and by subsequent accident incurs total permanent disability through the loss of another member, the employer's liability is for the subsequent injury only, except that the employee may receive further benefits as provided under the provisions of section 42-9-35. This subsection is effective on July 1, 2008.(emphasis added)

The basis for the Legislature's inclusion of §42-9-170 is clear in light of the overall goal of the Worker's Compensation system to encourage employers to bring injured workers back to work after injuring themselves in prior Worker's Compensation claims. Without the guarantee of credit for benefits paid on previous claims against the same employer set forth in §42-9-170, there is little incentive for South Carolina businesses to continue to employ workers following an accident and resulting workers' compensation claim.

Appellant's argument that §42-9-170 does not support the Commission's award of credit for his previous claims is flawed based on a clear reading of the statute. The first sentence states that an employee must "receive a permanent "injury" as specified in §42-9-30 (scheduled members) or §42-9-10(B)(combination of multiple body parts). The statute does not say the employee must have received an award of "disability" under §42-9-30 or §42-9-10(B) as a result of his current claim after having sustained another permanent injury in the same employment in order to receive compensation for both claims. Instead, §42-9-170 states only that the injured worker "receive permanent injuries" as specified in §42-9-30 or §42-9-10(B). It is significant to note that the second sentence of §42-9-170 requires that an employee previously sustain permanent partial "disability" and not "injury" in order to determine the employer's liability for permanent disability, delineating the difference between "injury" and "disability" within the language of §42-9-170 itself.

In this case, although the Hearing Commissioner awarded permanent disability pursuant to §42-9-10(A), the question still turns on whether Appellant received a permanent injury as specified in §42-9-30 (a single schedule member injury) or §42-9-10(B)(a combination of injuries to multiple body parts) as a result of his May 2, 2012 work accident. With regard to credit for compensation Appellant received for his prior claims involving injuries to his back, the

offset against the current award of permanent and total disability is appropriate pursuant to §42-9-170 since Appellant “received permanent injuries” to the back, affecting the bilateral legs, which would qualify as permanent injuries under §42-9-30 or §42-9-10(B), after having sustained previous permanent injuries with the same employer. The Hearing Commissioner’s ultimate award of permanent “disability” under §42-9-10(A) is irrelevant in light of the language of §42-9-170, and the Commission’s decision to award Respondent credit for compensation benefits Appellant received for his prior back claims is supported by statute and should be affirmed.

With regard to Appellant’s two (2) previous claims for right shoulder injuries, the second sentence of §42-9-170 controls. Specifically, the second sentence of §42-9-170 states:

If an employee previously has incurred permanent partial disability through the loss of a hand, arm, shoulder, foot, leg, hip, or eye, and by subsequent accident incurs total permanent disability through the loss of another member, the employer’s liability is for the subsequent injury only, except that the employee may receive further benefits as provided under the provisions of section 42-9-35.

In this case, Appellant received 25.4286 weeks of temporary benefits and 75 weeks of PPD (total 100.4286 weeks of compensation benefits) for the two (2) prior right shoulder claims that he sustained on April 26, 2010 and April 13, 2011.

The Commission correctly affirmed credit for 100.4286 weeks of benefits for Appellant’s previous right shoulder injuries because Appellant sustained permanent partial “disability” for the loss of use to his right shoulder in the April 26, 2010 and April 13, 2011 accidents, and he subsequently incurred permanent total disability through the loss of use of another member, specifically the back and affected bilateral legs. Therefore, pursuant to the clear language in the second sentence of §42-9-170, Respondents’ liability is for the subsequent injury only, and the

100.4286 weeks were properly credited against the five-hundred (500) week maximum award allowed for permanent total disability.

In addition to the statutory support for the Commission's award for credit against Appellant's five-hundred (500) week award for permanent total disability, our appellate courts have addressed relevant issues in further support of the Commission's award of credit to Respondents for the 199 weeks of compensation benefits appellant received from his four (4) previous worker's compensation claims.

In *Wyndam v. R.A. & E.M. Thornley and Co.*, this Court held that although the 500 week limit on benefits does not apply to successive injuries while working for different employers, "when the legislature wished to impose a 500 week limit on successive injuries, it did so explicitly. See section 42-9-170 (limiting to 500 weeks the total compensation available for successive permanent injuries sustained in the same employment)." 354 S.E.2nd 399, 402, 291 S.C. 496 (Ct. App. 1986).

In *Hopper v. Firestone Stores*, the Supreme Court was faced with the issue of whether an injured worker who previously sustained an amputation to his right leg below the knee, and was subsequently involved in a work accident causing additional amputation above the knee, was entitled to additional permanent disability benefits to his leg. 222 S.C. 143, 152, 72 S.E.2nd 71, (1952). The Supreme Court found that the injured worker had already lost one hundred percent (100%) of his leg prior to the work injury, and therefore, "there was no basis upon which an award for permanent disability or specific loss could be computed." (*Id.*) The Court went on to state that "an examination of the entire record in the case in light of the statute leads us to no other conclusion than that the Legislature intended that the compensation here, if there is to be

such, must be based only upon the extent to which the loss or loss of use existing after the last injury exceeds that which existed prior thereto.” (*Id.* at 153).

In this case, Appellant previously sustained twenty-five percent (25%) disability to the back as a result of one of his previous workers’ compensation claims (R. p.136), and therefore the Commission correctly found that pursuant to §42-9-170 and *Hopper*, Appellant had only seventy-five percent (75%) of his back remaining to be awarded, and Respondents were properly awarded credit against the current award of permanent and total disability paid to Appellant as a result of his prior back claims.

In *Medlin v. Greenville County*, the Supreme Court dealt with an injured worker who sustained a compensable back injury while working for Greenville County, resulting in an award of permanent and total disability based on fifty percent (50%) or greater loss of use to the back. 303 S.C. 484, 401 S.E.2nd 667 (1990). After the injured worker’s case settled and Appellant received payment for permanent and total disability, the injured worker returned to work with Greenville County and sustained a second injury by accident, for which he claimed permanent and total disability. The Supreme Court held that the injured worker was not allowed to recover under the Act for the loss of use of his back, because he had already received permanent and total disability benefits for a back injury. Specifically, the Supreme Court stated that “Under *Hopper*, we find that employee is not entitled to any further benefits for loss of use to the same body part as the loss of use to his back has already been “written off” and is non-existent insofar as the Act is concerned.” (*Id.* at 487).

In addition to permanent disability benefits, the Commission also appropriately awarded credit for temporary disability benefits that Appellant received from his previous workers’ compensation claims. In *United Technologies v. South Carolina Second Injury Fund*, the issue

before the Court was whether the sixty-three (63) weeks of temporary benefits the injured worker received as a result of his accident under Michigan law at a higher compensation rate than allowed in South Carolina still counted as weeks of benefits to be included as credit against a five-hundred (500) week award of permanent and total disability. 318 S.C. 213, 456 S.E.2nd 901 (1995). The Court ruled that the sixty-three (63) weeks did count as compensation pursuant to the South Carolina Workers' Compensation Act, despite the fact that they were paid in another state at a different compensation rate. (*Id.* at 904). Further, in *Roberts v. McNair*, the Court concluded that payment of temporary partial benefits counted as full weeks of compensation, and not "half weeks" of compensation when calculated as credit against the statutory five-hundred (500) week cap on permanent disability. 366 S.C. 50, 691 S.E.2nd 453 (Ct. App. 2005).

In *Getzinger v. Owens Corning Fiberglass*, the Supreme Court dealt with an injured worker that received a thirty percent (30%) PPD award to his right foot in June of 1993, and subsequently obtained another ten percent (10%) PPD award in October of 1995. By December of 1995, the injured worker's impairment had increased to fifty percent (50%), and the injured worker was ultimately found to be totally disabled based on the combined loss of use of his foot and psychological overlay. In awarding the injured worker permanent and total disability, the Order specifically stated that the Commissioner "awarded Getzinger 500 weeks of compensation, **offset by previous payments.**" (emphasis added)(335 S.C.77, 515 S.E.2nd 104 (1999).

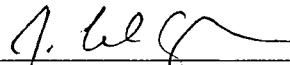
Finally, our Supreme Court has issued a number of decisions that solidify the long standing principle that unless an injured workers meets the single exception to the five-hundred (500) week cap on benefits found in §42-9-10(C) as a result of physical brain damage, paraplegia, or quadriplegia, a person injured within the Workers' Compensation Act may not receive benefits for a period exceeding 500 weeks. (see *Crisp v. Southco, Inc.*, 401 S.C. 627, 738

S.E.2nd 835 (2013)(“In general, a person injured within the act may not receive compensation for a period exceeding 500 weeks.”); *Reed-Richards v. Clemson University*, 371 S.C. 304, 678 S.E.2nd 77 (Ct. App. 2006)(“ the normal statutory maximum is 500 weeks.”).

CONCLUSION

The Workers Compensation Commission correctly held that Appellant’s five hundred (500) week maximum award of permanent and total disability resulting from his May 8, 2012 work accident was appropriately offset by credit for 199 weeks of compensation benefits Appellant received from as a result of his four (4) previous workers compensation claims with Respondent Employer, and Respondents respectfully request that this court affirm the October 26, 2016 Decision and Order of the Worker’s Compensation Commission.

Respectfully Submitted,



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