

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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APPEAL FROM COMMISSION PANEL
OF THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

SC Court of Appeals

W.C.C. NO. 0800718

Denica Powell Appellant

vs.

Petsmart, Inc. and Phoenix Insurance Co. Respondents

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

- I. The Appellate Panel of the South Carolina Workers' Compensation Commission may not vacate the single Commissioner's Decision without articulating a reason in the record.
- II. A hearing "de novo" cannot be ordered without specific reasons by the Appellate Panel.
- III. The Commission has no authority to order a "de novo" hearing without specific reasons and thus the findings of fact and law by the single Commissioner have become the law of the case.
- IV. The full Commission used an unlawful procedure in vacating the single Commissioner's opinion without a reason which was affected by an error of law.
- V. An Appellate Panel's Order reversing the single Commissioner without specific findings does not comply with the requirements of the South Carolina Worker' Compensation Act and is per se illegal.
- VI. In order to vacate the opinion of the single Commissioner, the Appellate Panel must give clear, cogent reasons and include findings of fact and conclusions of law pursuant to S.C. Code Ann. § 1-23-350 (2005).

STATEMENT OF THE CASE

This matter is before the Court based on an appeal filed by the Employee of the Appellate Panel's Decision to remand to the single Commissioner for a "hearing de novo." (R. p. 3-6). The single Commissioner issued an Order on August 11, 2012 with fourteen findings of fact and eight conclusions of law. (R. pp. 8-13). The Appellate Panel of the Workers' Compensation Commission issued its Order on April 1, 2014 remanding this matter to the single Commissioner without addressing any of the questions of law or fact cited by the single Commissioner in his written ruling in violation of S.C. Code Ann. § 1-23-350 (2005). (R. pp. 3-6).

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act (APA) S.C. Code Ann. § 1-23-350 (2005) establishes the standard of review for decisions by the Appellate Panel of the Workers' Compensation Commission. See *Carolinas Recycling Group v. S.C. Second Injury Fund*, 398 S.C. 480, 730 S.E. 2d 324, 326 (Ct.App. 2012). Under the scope of review established in the APA, the Court of Appeals may not substitute its judgment for that of the Appellate Panel as to the weight of the evidence on questions of fact, but may reverse or modify the Appellate Panel's decision if substantial rights have been prejudiced or the decision is affected by an error law or is "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." See S.C. Code Ann. § 1-23-380(5)(e) (Sup. 2012). Our Supreme Court has defined substantial evidence as evidence that, in viewing the record as a whole, would allow reasonable minds to reach the same conclusion the Appellate Panel reached. *Lark v. BiLo, Inc.*, 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981) ("the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.") *Palmetto Alliance, Inc. v. S.C. Public Service Commission*, 282 S.C. 430, 432, 319 S.E.2d 695, 696 (1984).

Further, any decision of the Appellate Panel of the Workers' Compensation Commission must include specific findings and conclusions of law to comport with S.C. Code Ann. § 1-23-350. See *Martinez v. Spartanburg County*, 394 S.C. 224, 230, 715 S.E.2d 339 (Ct.App. 2011).

ARGUMENT

I. THE APPELLATE PANEL OF THE WORKERS' COMPENSATION COMMISSION MAY NOT VACATE THE SINGLE COMMISSIONER'S DECISION WITHOUT GIVING SPECIFIC REASONS INCLUDING FINDINGS OF FACT AND CONCLUSIONS OF LAW.

In this particular case, the single Commissioner entered a well-reasoned Order on August 11, 2012 which was appealed to the Appellate Panel. The Order listed fourteen findings of fact and eight conclusions of law; and based on those findings of fact and conclusions of law, the single Commissioner held:

It is ordered that the Claimant/Employee is permanently and totally disabled, entitled to lifetime medical care, a lump sum payment, Utica-Mohawk language, and continuous medical treatment from Dr. Simon and Dr. Kang.

In making his ruling, the single Commissioner made the following Findings of Fact which are a part of the record as follows:

FINDINGS OF FACT

1. The Claimant, Denica Powell, was an employee of Petsmart, Inc.
2. The Claimant, Denica Powell, suffered an injury by accident on January 3, 2008 while employed a dog groomer.
3. The Employer, Petsmart, Inc., is subject to the Workers' Compensation Act.
4. The Claimant, Denica Powell, was assigned the task of stocking and dog grooming.
5. The Claimant's detailed testimony above is credible.
6. The treating doctors' records are convincing that Claimant is totally and permanently disabled.

7. The Claimant is entitled to lifetime medical care per the Form 14(B) report of the treating physician, Dr. Kang.

8. The medical evidence presented by the Claimant establishes by a preponderance of the evidence, and Claimant is entitled to compensation.

9. The claimant's severe depression and psychological disorder is directly caused by the severe upper extremity injury and the resultant pain.

10. The treating doctor finds that the Claimant has a 70% permanent impairment to the upper extremity.

11. The Claimant is totally and permanently disabled and entitled to lifetime medical care.

12. I find that by preponderance of the evidence, the Claimant is entitled to all benefits as provided for under the Workers' Compensation Act.

13. I find the Claimant is entitled to a lump sum payment of the commuted balance of: 500 weeks less the credit for the weeks she has been paid compensation.

14. I find the Claimant is entitled to the following Utica-Mohawk language:

The commuted value of this claim on the date of the hearing, June 12, 2012, is \$159,684.35. This lump sum is compensation for permanent impairment that will affect the Claimant for the remainder of her life. The Claimant's remaining life expectancy is 2,431 weeks. Therefore, even though paid in a lump sum, the Claimant's benefits after attorney's fees for the prosecution of this action shall be considered to be \$43.81 a week for 2,431 weeks beginning as of June 12, 2012; pursuant to Section 42-3-180 of the South Carolina Workers' Compensation Act, 1976, as amended, and as interpreted by the South Carolina Supreme Court decision in Utica-Mohawk Mills v. Orr, 227, S.C. 226, 87 S.E.2d 589 and James v. Anne's Inc., 390 S.C. 188, 701 S.E.2d 730 (S.C.2010).

The single Commissioner also made the following legal conclusions in his Order:

CONCLUSIONS OF LAW

1. The Claimant and the Employer are subject to the Workers' Compensation Act.

2. The Claimant suffered an injury by accident while employed with Petsmart, Inc.

3. The Claimant is entitled to permanent and total disability for the injuries she suffered on January 3, 2008.

4. The Claimant was in the course and scope of employment when she suffered this injury.

5. The record in this case is closed.

6. The Claimant is entitled to continuing medical treatment pursuant to the Workers' Compensation Act.

7. The Claimant is entitled to lifetime medical care and ongoing treatment from Dr. Kang and Dr. Simon.

8. The Claimant is to continue to receive all medications and other treatment to lessen her disability.

However, when the Appellate Panel of the Full Commission issued its Order it addressed no issues in the single Commissioner's Order. In fact, the findings of the Full Commission were as follows:

This matter was heard before the South Carolina Workers' Compensation Full Commission Appellate Panel during the last term

of Review.¹ The Commissioners considered the matter and **Vacated and Remanded** the matter to the Jurisdictional Commission for a hearing de novo.²

The Appellate Panel of the Workers' Compensation Commission made no findings of fact or conclusions of law in remanding and vacating the opinion of the single Commissioner for a hearing "de novo". Nor did it address the questions of law or fact regarding the Commissioner's findings. The full Commission nor any administrative body may vacate and remand a decision of a single Commissioner without specific findings of fact and conclusions of law. (See S.C. Code Ann. § 1-23-350 (2005).) A remand to the single Commissioner without reasons given is patently illegal and clearly erroneous as a matter of law. It is well settled the Appellate Panel of the South Carolina Workers' Compensation Commission must have substantial evidence to support its decision. In this case, because there is not one reason given by the Appellate Panel, the Appellant's rights are substantially affected and the Commission's decision is clearly erroneous as a matter of law. The Appellate Panel of the South Carolina Workers' Compensation Commission ordered a new hearing by a new Commissioner, but gives no reason why a new hearing should be held, nor gives any guidance as to what the new single Commissioner should do when the case is remanded to him or her for a hearing on the merits. It is axiomatic in our system of justice that an Appellate Panel which reverses a Commissioner must give legal reasons for its decision. To do otherwise affects Appellant's substantial rights and is simply a "do over" without reason which prejudices her.

¹ This Order violates *Martinez v. Spartanburg County*, 394 S.C. 224, 230, 715 S.E.2d 339 (Ct.App. 2011) ("The Findings of Fact made by the Appellate Panel must be sufficiently detailed to enable the reviewing court to determine whether the evidence supports the findings.")

² This Order makes no findings and is not supported by substantial evidence, thus, this Court should set aside the Order of the full Commission. *Lyles v. Quantum Chem. Co.*, 315 S.C. 440, 434 S.E.2d 292 (Ct.App. 1993).

In the landmark case of *Lark v. Bi-Lo*, 276 S.C. 130, 276 S.E.2d 304 (S.C. 1981) our Supreme Court was asked to determine the credibility of witnesses. The Court affirmed the Appellate Panel of the South Carolina Workers' Compensation Commission because there were sufficient reasons stated in the Appellate Panel's decision to require the case be affirmed. In this case, there is not sufficient reason nor is there any reason given for the remand. The Appellate Panel simply orders a remand without instruction and without clear and cogent reasons or guidance. Here, the Appellate Panel's decision is arbitrary and accordingly affects Appellant's substantial rights.

II. THE APPELLATE PANEL OF THE WORKERS' COMPENSATION COMMISSION MAY NOT ORDER A DE NOVO HEARING WITHOUT SPECIFIC DIRECTION TO THE SINGLE COMMISSIONER.

It is well settled in South Carolina a court may order a de novo hearing if a question of law has been raised. See *North American Rescue Products v. Richardson*, 720 S.E.2d 53, 58 (S.C. Ct.App. 2011). Here, the Appellate Panel of the South Carolina Workers' Compensation Commission raises no question of law in ordering a de novo review, nor does the Appellate Panel tell the single Commissioner what should be done at the de novo hearing. Without this guidance and instruction, the Appellate Panel's ruling cannot be sustained by this court.

A good example of an inappropriate order of the Appellate Panel of the South Carolina Workers' Compensation Commission is found in *Charlotte-Mecklenburg Hospital Association v. S.C. Dept. of Health and Environmental Control*, 387 S.C. 265, 267, 692 S.E.2d 894 (2010). In that case, unlike this one, the circuit court judge gave specific reasons for the remand. In *Charlotte-Mecklenburg*, a circuit court judge, Jackson V. Gregory, found the Commission erred by considering evidence outside the record. The employer and the

insurer appealed. The difference here is that no reason is offered for the remand. However, in *Charlotte-Mecklenburg* the court gave specific reason for the remand, *i.e.*, considering evidence outside of the record.

III. THIS COURT SHOULD AFFIRM THE DECISION OF THE SINGLE COMMISSIONER AS A MATTER OF LAW.

The Appellate Panel of the Workers' Compensation Commission issued an order in this case without any specific findings of fact or law as to why the matter should be remanded. A review of the whole record in this case indicates the matter should have been affirmed by the Appellate Panel based on the evidence presented to him.

This evidence produced at the hearing included the fact that the Claimant testified that she was in severe pain, unable to drive more than short distances (R. p. 34, line 18); had severe limitations in holding her right wrist up (R. p. 35, line 3); was right hand dominant and was in pain all the time (R. p. 35, lines 9-15); had a dorsal column stimulator implanted in her to help her pain (R. p. 35, line 20); is unable to write with her right hand (R. p. 36, lines 23-24); is unable to leave her home because she is so miserable and in constant pain (R. p. 37, lines 22-23); has been seen by Dr. Simons, a psychologist, who helps her to understand her predicament (R. pp. 37-41); has no pain relief (R. p. 38, lines 16-17); has had two nerve wrap surgeries (R. p. 38, line 19); has tried to go back to work (R. p. 39, lines 14-18); the medication she is on makes her feel foggy (R. p. 39, lines 23-24); her mother and father have to take care of her and her children (R. p. 39, lines 7-12); is helped with everything (R. p. 39, lines 12-13); is in constant all-day pain (R. p. 40, lines 24-25); has even asked that her arm be amputated so that the pain could stop (R. p. 40, lines 17-18, p. 41, lines 19-25); is unable to do anything or any activities (R. p. 41, lines 11-17); had never seen a mental health professional before this accident (R. p. 43, lines 3-6); is unable to work and

cannot function at all (R. p. 44, lines 10-12); can't type or go on the internet (R. p. 44, lines 6-9); all she thinks about is pain (R. p. 46, lines 18-19); and has had no prior worker's compensation claims (R. p. 48, lines 9-10).

The medical evidence presented at the single Commission hearing was just as powerful. Dr. Leak, the treating physician testified by deposition and through his medical records. The Form 14B indicated that the Claimant had a 70% impairment to the right upper extremity and was unable to return to her work (R. p. 175). Further, Dr. Kang opined that Ms. Powell will need future medical care including medications and a spinal cord battery replacement (R. p. 175).

Dr. Leak also testified that he had performed two nerve wrap surgeries on Powell and had exhausted all conservative treatment measures (R. p. 84).

Ms. Powell was also seen by Dr. James J. Brennan, of Florence Neurosurgery and Spine for a second opinion. Dr. Brennan diagnosed her with complex regional pain syndrome secondary to a right arm and hand injury. (R. p. 174).

Further, Ms. Powell was referred to Dr. Jonathon Simons, a licensed clinical psychologist, because of her severe depression as a result of the traumatic injury to her right upper extremity. As late as January 4, 2012, Dr. Simons wrote in his notes about Denica Powell:

About the same, chronic pain interfered with her ability to fully enjoy Christmas, not doing things with kids, feels guilty but can't bring herself to participate, not sleeping and suggest she ask Dr. Kang for more aggressive treatment of insomnia. (R. pp. 164-170).

Further, the employer/insurer, Phoenix Insurance Company, sent Denica Powell for an assessment in regard to a spinal stimulator. She was seen by Dr. Michael Grant, a psychologist on February 22, 2011. Dr. Grant wrote:

Claimant has psychological problems or characteristics that would, at this time, make a good response significantly less likely to occur than in the average pain patient. Claimant has a severe presentation of both depression and panic disorder. (R. p. 171).

Finally, Claimant is under the care of a psychiatrist, Dr. Gregory Kang, who diagnosed her with complex regional pain syndrome of the right upper extremity (R pp. 155-156). On her last visit with Dr. Kang on February 16, 2012, Dr. Kang noted:

Her right arm is pretty much non-functional. She can't use her hand for anything. I am giving her a 70% right upper extremity impairment rating. She needs Oxycontin, Seroquel, Klonopin and Gabapentin. My diagnosis is complex regional pain syndrome depression with anxiety secondary to pain. (R. p. 163).

Despite all of this evidence produced before the single Commissioner, the Appellate Panel of the Workers' Compensation Commission gives no reason for the remand. No facts, no law, no evidence is cited in the Appellate Panel's Decision. When this occurs, this Court has the duty and authority to reverse the Appellate Panel's decision.

In *Pierre v. Seaside Farms, Inc.*, 386 S.C. 534, 680 S.E.2d 615 (S.C. 2010), the Supreme Court noted that a reviewing Court must determine if the Commission's findings of fact are supported by substantial evidence in the record. Appellant's substantial evidence is not a mere scintilla of evidence but evidence which considering the record as a whole would allow reasonable minds to reach a conclusion the agency reached. *Tennant v. Beaufort County School District*, 381 S.C. 617, 620, 674 S.E.2d 488, 490 (2009).

In *Pierre*, the Court noted: "An Appellate Court can reverse or modify the Workers' Compensation Commission's decision if it is affected by an error of law or is clearly erroneous in view of the reliable, probative and substantial evidence in the whole record." The Appellant submits to the Court that the record clearly indicates that remand was not appropriate, especially without findings of fact or conclusions of law, and that as a result this

Court should affirm the single Commissioner's decision in this case. Here, the substantial evidence in the record does not support the Appellate Panel's finding of a remand as is required by law. See *Carter v. Verizon Wireless and American Home Ins. Co.*, 689 S.E.2d 615 (SC 2010) (the circuit court's determination and substantial evidence in the record does not support appellate panel's finding and is not appropriate based on the record.)

Appellant concedes that the Commission is the ultimate finder of fact in workers' compensation cases. However, when the order of remand makes no findings of fact or conclusions of law such an order is clearly erroneous. In this case, the only evidence in the record is that Claimant suffered a total and permanent disability and accordingly the Commission was without authority to issue an order of remand without a particular or specific reason. Here, reasonable minds would not allow the court to reach the conclusion the Commission reached because no evidence, finding of facts or conclusions of law have been cited in the order of remand. As a result, this Court is left with findings of facts and conclusions of law of the single Commissioner along with the substantial evidence in the record and thus must reverse the Appellate Panel of the Workers' Compensation Commission and reinstate the single Commissioner's order as the law of the case.

It is an illegal procedure for the Appellate Panel of the Workers' Compensation Commission to simply reverse and remand the order of the single Commissioner without a reason and the Administrative Procedures Act clearly provides that such a decision violates Appellant's substantial rights and is clearly erroneous. See *Burnette v. City of Greenville*, 401 S.C. 417 737 S.E.2d 200 (Ct.App. 2012) ("we conclude the Commission's findings holding Burnette neither injured or aggravated a prior injury to her lower back in the 2007 incident are not supported by substantial evidence").

In sum, where the only reasonable inference from the record is the Claimant has sustained his burden of establishing his right to compensation, the case should not be remanded but should be affirmed by this Court and should not be remanded since this Court should find as a matter of law the Claimant is entitled to benefits. See *Shealy v. Algernon Blair Inc.*, 250 S.C. 106, 156 S.E.2d 646 (S.C. 1967).

Finally, to hold otherwise and remand this matter to the Appellate Panel of the Workers' Compensation Commission is prejudicial to the employee. The record has been established and is closed. The Appellate Panel of the Commission gives no cogent or clear reason why the case should be tried de novo and the evidence establishes as a matter of law that the employee is entitled to benefits. When such is proven and the record is clear, this Court has not only the duty but the obligation to find based on the substantial evidence presented that the full Commission erred in ordering a remand. To hold otherwise allows the Appellate Panel of the Commission to remand cases without reason back to the single Commissioner thus delaying compensation and a quick resolution of the employee's compensation claim when the law provides that workers' compensation benefits should be liberally construed in favor of the employee. While the Appellate Panel of the Commission may not like a decision, an order of remand without any reason affects the employee's substantial rights and is an error of law. Thus, it is reversible as a matter of law. See *Douglas v. Spartan Mills*, 245 S.C. 265, 140 S.E.2d 173 (1967) (when evidence is not in dispute, the question of whether or not the employee sustained an injury arising out of and in the course of his employment becomes a question of law for the court). See also *Jordan v. Dixie Chevrolet*, 218 S.C. 73, 77, 615 S.E.2d 654, 656 (1950) ("upon admitted or

established facts the question of whether an accident is compensable is a question of law and this is not an invasion of the fact finding held by the commission on the part of the Court.”)

See also *Grant v. Grant Textiles*, 372 S.C. 196, 201, 641 S.E.2d 869, 872 (2007) (when under *Grant* the facts are undisputed we must examine whether the Commission’s decision...was affected by an error of law.) (This Court must be deferential to the Commission on questions of fact but this deference does not prevent the court from overturning the full commission’s decision when it is legally incorrect.) *Grant* 372 S.C. at 201, 641 S.E.2d at 872).

See also S.C. Code Ann. § 1-23-350 (2005) (a final decision shall include findings of fact and conclusions of law, separately stated. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings...). See also, *Able Communications, Inc. v. South Carolina Public Service Commission*, 290 S.C. 409, 351 S.E.2d 151 (1986) (an order of the Public Service Commission with no other findings of fact violates S.C. Code Ann. § 1-23-350).

Thus, the APA requires the full Commission to fully set forth the underlying facts upon which it relied to support its conclusion and a failure to do so mandates reversal. (*Grant v. Grant Textiles*, 372 S.C. 196, 641 S.E.2d 869 (S.C. 2007).)³

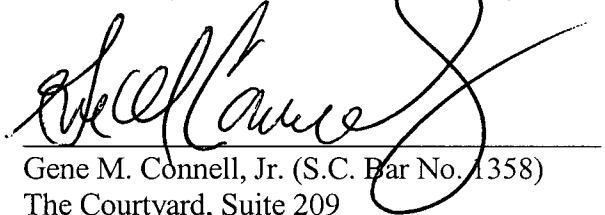
³ The full Commission does not take issue with one fact or question of law. It simply vacates a well-reasoned Order for no reason.

CONCLUSION

Accordingly, the employee requests that this Court affirm the single Commissioner's Workers' Compensation Commission Order based on the evidence presented and record on appeal consistent with the law of this case. See *Pierre v. Seaside Farms, Inc.* 386 S.C. 534, 680 S.E.2d 615 (2010) (appellate court may modify workers' compensation commission decision affected by error of law or clearly erroneous in light of the reliable and probative substantial evidence in the whole record). See also *Bazen v. Badger R. Bazen Company, Inc.*, 388 S.C. 58, 693 S.E.2d 436 (S.C. App. 2020) (if claimant's rights are prejudiced, Appellate Court may modify the Appellate Panel of the Workers' Compensation Commission's decision.) Finally, all orders of the Appellate Panel of the Workers' Compensation Commission must comply with S.C. Code Ann. § 1-23-350 (2005). Accordingly, Appellant asks for reversal and reinstatement of the single Commissioner's Order as a matter of law.

Respectfully submitted,

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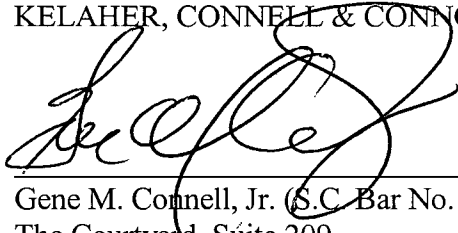
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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b) SCACR.

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