THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

APPEAL FROM APPELLATE PANEL
OF THE SOUTH CAROLINA WORKER'S
COMPENSATION COMMISSION

W.C.C. NO. 0800718

Denica Powell.....Appellant

vs.

Petsmart, Inc. and Phoenix Insurance Co. .....Defendants

RESPONDENT'S FINAL BRIEF

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SUMMARY OF EVIDENCE

On August 11, 2012, the single Commissioner issued an Order that consisted of fourteen findings of fact and eight conclusions of law. Both parties appealed. The Appellate Panel of the Workers' Compensation Commission issued an Order on April 1, 2014 vacating and remanding the matter to the single Commissioner without addressing any of the findings of fact or questions of law cited by the single Commissioner, which violates S.C. Code Ann. § 1-23-350 (2005).

Respondents do not believe it is proper to summarize the evidence of the Hearing before the single Commissioner for this Court, as no findings of facts or conclusions of law have been ordered by the South Carolina Workers' Compensation Appellate Panel for this Court to review. However, because the Appellant is alleging that "the only evidence in the record is that Claimant suffered a total and permanent disability," Respondents will summarize the evidence contradicting the Appellant's position that this Court should affirm the Order of the Single Commissioner.

The Claimant testified at the Hearing and relied on APA Submissions, including records from Strand Orthopaedic, Dr. C. Gregory Kang, Dr. Jonathan A. Simons, Dr. Michael M. Grant, Dr. James Brennan, and the deposition testimony of Dr. Robert Leak. The Defendants relied upon the records submitted pursuant to the Administrative Procedures Act as well as their own APA submission of the vocational assessment of Glenn K. Adams, MRC, CRC, CEES.

The record reveals that the Claimant injured her right wrist and arm during a fall sustained in the course and scope of her employment with Petsmart, Inc. on January 3,

2008. The Claimant was initially seen at Doctor's Care as a result of her fall on January 3, 2008. The Claimant was subsequently referred to Strand Orthopaedic Consultants for treatment and evaluation on January 16, 2008 (R. p. 90). At that time, the Claimant was placed out of work by Strand Orthopaedic Consultants (R. p. 91). The Claimant continued to be treated conservatively by Dr. Leak at Strand Orthopaedic Consultants until undergoing right carpel tunnel release and right first extensor compartment release on July 23, 2008 (R. p. 112-113). The Claimant testified she underwent a carpel tunnel release surgery; however, she stated that she did not experience significant improvement in her pain levels (R. p. 41, lines 19-25). The Claimant underwent a subsequent procedure on February 26, 2010 with Dr. Leak to include right median nerve neurolysis with nerve wrapping with synthetic tube and relocation of local FDS muscle flab to cover median nerve (R. pp. 132-133).

The Claimant began to see Dr. Kang in December 2010 on referral for pain management from Dr. Leak (R. p. 154). Dr. Kang initially saw the Claimant on December 9, 2010 and diagnosed her with complex regional pain syndrome in the right upper extremity (R. p. 155). The Claimant was also seen by Dr. James Brennan on May 26, 2011 for implant of a dorsal column stimulator (R. pp. 172- 174). The Claimant testified that she experienced no improvement as a result of the dorsal column stimulator; however, she believes the stimulator is preventing the pain from spreading further (R. p. 42, lines 11-14). Dr. Kang's note from May 24, 2011 indicates that the Claimant had 50% reduction in the pain in her hand and arm as a result of the stimulator trial (R. p. 159).

The Claimant continued to treat with Dr. Kang for medical pain management of her right arm pain. On February 12, 2012, Dr. Kang placed the Claimant at maximum medical

improvement and issued a 70% right upper extremity impairment rating (R. p. 163). Dr. Kang also completed a Form 14B on April 6, 2012 stating that the Claimant suffers from a right upper extremity injury and has sustained a 70% medical impairment to the right upper extremity and is unable to return to work at her current employment (R. p. 175). Dr. Kang's Form 14B also indicated the Claimant will need future medical care and treatment to include medications of Oxycotine, Serquel, Klonopin, and Neurotin, as well as spinal cord stimulator battery replacement; there were no other specified future medical care or treatment recommendations advised by Dr. Kang on his April 6, 2012 Form 14B (R. p. 175) or his February 16, 2012 office note placing the Claimant at maximum medical improvement (R. p. 163). The Claimant testified that Dr. Kang provides Oxycontin, Oxycodone, Gabapentin, Cymbalta and Seroquel to help control her pain (R. p. 36, lines 7-8). The Claimant went on to testify that the pain medication provided by Dr. Kang takes the edge off her pain (R. p. 40, lines 9-12).

The Claimant testified she has also been seeing Dr. Jonathan Simons for psychological care due to anxiety and depression allegedly related to her January 3, 2008 injury (R. p. 37, lines 3-10). Dr. Simons opined on April 12, 2011 that while the Claimant is still depressed, she has been able to increase her activity level (R. p. 167). The Claimant testified that Dr. Simons encourages her to be more active and get out of her house (R. p. 43, lines 18-25). As a result of the Claimant's improvement with her depression according to Dr. Simons, she was permitted to proceed with the spinal cord stimulator trial, which she had previously been denied as a result of depression (R. p. 167).

The Claimant was seen for a vocational assessment performed by Glenn Adams, MRC, CRC, CEES on May 14, 2012 (R. p. 177-187). The Claimant testified she sat for an hour

and a half for her vocational evaluation with Mr. Adams (R. p. 47, lines 3-7). Glenn Adams' vocational assessment was based on Dr. Kang's February 16, 2012 permanent restriction of no use of the dominant arm (right arm) for Claimant's future work opportunities (R. p. 183). Mr. Adams' vocational assessment indicated that the Claimant's vocational profile includes possession of a GED, possession of basic computer skills per use in an occupational setting, customer service and cash handling skills, and clerical skills (R.p.186). Mr. Adams' report indicated that Dr. Simons' treatment notes and correspondence reveal no statements prohibiting the Claimant from working from a psychological perspective (R. p. 186). This fact is confirmed upon review of Dr. Simons entire chart which makes no mention of the Claimant's inability to work from a psychological perspective; in fact, it makes no mention of her inability to work whatsoever (R. pp. 164-170). Mr. Adams' vocational assessment also reported that the Claimant qualifies for sedentary and light duty jobs, including clerical, customer service/retail, and the tourism industry (R. p. 187). Specifically, Mr. Adams' report opined that the Claimant has a current earning capacity within the range of approximately $8.00 to $10.00 an hour (R. p. 187). While Dr. Kang did opine that the Claimant could not return to her former employment (R. p. 175), there is no objective evidence indicating that the Claimant is unable to return to work in any capacity. The Claimant also testified that she had owned and operated her own business prior to her injury (R. p. 46, lines 10-12). The Claimant also testified that she had exposure working a "desk job" for a hotel/timeshare company (R. p. 46, lines 15-25, lines 3-12). The Claimant further testified that she has full use of and no pain in her left arm (R. p. 44, lines 19-24).

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.

Respondents agree with the Appellant on this issue. S.C. Code Ann. § 1-23-350 states:

> A final decision or order adverse to a party in a contested case shall be in writing or stated in the record. 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. If, in accordance with agency rules, a party submitted proposed findings of fact, the decision shall include a ruling upon each proposed finding.

The order issued on April 1, 2014 by the Appellate Panel clearly violates S.C. Code Ann. § 1-23-350 (2005) as it states no findings of fact or conclusions of law. Respondents are prejudiced by this decision as payments are still being issued and the appeal has not been properly ruled upon. Therefore, vacating and remanding the case for a de novo hearing is illegal and erroneous.[1]

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

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[1] See Drake v. Raybestos-Manhattan, Inc., 241 S.C. 116, 124, 127 S.E.2d 288, 292-93 (1962) overruled on other grounds, Hunt v. Whitt, 279 S.C. 343, 306 S.E.2d 621 (1983) (holding remand proper on a court's own motion in a workers' compensation case where the commission failed to make essential findings of fact because "[t]o hold otherwise would in such cases make the determination of the rights of the parties turn upon the neglect of the Commission to make essential findings of fact or would require the appellate court to make the omitted findings of fact which our statute forbids"); Baldwin v. James River Corporation, 405 S.E.2d 421 (Ct.App.1991) (wherein the court of appeals remanded the case to the workers' compensation commission because the commission made insufficient findings of fact as to permit appellate review of the commission's decision denying an award); 73A C.J.S. supra § 143, at 98 ("[T]he failure of an agency to make a finding to support its decision is a technical defect which the agency should be permitted to remedy."); cf. S.C.Code Ann. § 1-23-350 (1986) ("Findings of fact ... shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings.").

Respondents agree with the Appellant that a de novo hearing without guidance or instruction is improper. Respondents contend that the commission may, in its discretion, have a de novo hearing on the merits; however not specifying what the de novo hearing is would raise issues as to the scope of the de novo hearing. "Where a case that has been appealed is remanded by the court to the workers' compensation commission with specific directions, the commission must proceed in accordance with those directions." Bobo v. Marshane Corp., 302 S.C. 86 (S.C.App. 1990) citing 101 C.J.S. Workmen's Compensation § 790 at 37 (1958). "In such a case, the order limits the authority of the commission." Id. Without specifically stating the scope of the de novo hearing, the single commissioner would have no way of knowing if it is in accordance with the Appellate Panel's Order.

III. THIS COURT SHOULD REMAND THE CASE BACK TO THE APPELLATE PANEL AND NOT AFFIRM THE DECISION OF THE SINGLE COMMISSIONER

Appellant's argument that the proper remedy in this case would be to affirm the decision of the single Commissioner is unfounded. Appellant is requesting that this Court review the record of the Hearing before the single Commissioner as a whole when the Appellate Panel has not made any findings of facts or conclusions of law for this Court to review. Clearly, for this Court to affirm the single commissioner's ruling would permanently extinguish the Respondent's appeal that has not been properly ruled upon by the ultimate finder of fact. The proper action for this Court would be to remand the Hearing back to the Appellate Panel.

Appellant is asking this court to reinstate the findings of the single commissioner, which has been discussed in Baldwin v. James River Corp., 304 S.C. 485 (S.C.App. 1991). In

Baldwin, the single commissioner awarded Baldwin compensation for permanent partial disability to his right arm totaling twenty percent of that member and that Baldwin sustained a back injury as well, but awarded no permanent partial disability for that injury. Baldwin, 304 S.C. 485 (1991). Defendants appealed to the Appellate Panel, which found that Baldwin suffered no injury to his back and no permanent partial disability of his right arm as a result of the injury. Id. The Circuit court, after reviewing the evidence, found that the Appellate Panel made only conclusory findings of fact and held that it could not conclude that the decision of the Panel is in any way supported by substantial evidence. Id. The Circuit Court then reversed the panel's decision and reinstated the award of the single commissioner. Id. The Court of Appeals affirmed the circuit court's finding that the Appellate Panel's findings were conclusory and insufficient, but reversed the decision to reinstate the award of the single commissioner. Id. The Court found "[w]ithout specific and definite findings upon the evidence, a court on review of the panel's decision cannot determine whether to uphold the general finding or conclusion [of the lower court]." Id. at 422. As a result, the Court stated:

> Rather than reinstate the single commissioner's award after finding the panel's findings of fact conclusory and thus insufficient, the circuit court should have remanded the case to the commission to make definite and detailed findings of fact upon the evidence sufficient to enable a reviewing court to determine whether its findings of fact are supported by the evidence and whether it has properly applied the law to them. In effect, what the circuit court did here in reinstating the single commissioner's award was to determine the facts from conflicting evidence. Only the commission is authorized to do this. We therefore vacate the circuit court's order and remand the case to the commission for it to determine anew on the present record the issues raised by [defendants] in its grounds for review. This time the commission shall make sufficient findings of fact as to afford a reasonable basis for appellate review.

Id. at 422-423. The Appellant is asking this court to make the same error that the circuit court made in Baldwin. The proper remedy in this case is remanding the case back to the Appellate Panel to make sufficient findings of fact as to afford a reasonable basis for appellate review.

The Appellant has misinterpreted Shealy v. Algernon. Appellant seems to believe that Shealy allows the Appellate court to affirm the Single Commissioner's award if the only reasonable inference from the record is the Claimant has sustained his burden of establishing his right to compensation. Shealy v. Algernon Blair Inc., 250 S.C. 106, 156 S.E.2d 646 (S.C. 1967). However, Shealy found the complete opposite of this position, affirming the single commissioner's findings that the Claimant had not sustained its burden of proof. In Shealy, the employer appealed the opinion and award of the Commission upon the two-fold ground that it required the payment of compensation without a supporting finding of fact that the claimant suffered a disability and without any substantial evidence on which such a finding could be based. The Supreme Court of South Carolina held:

> It is the duty of the Commission to make specific findings upon which a claimant's entitlement to compensation may rest and upon which the amount of compensation due him may be calculated by one of the statutory formulae. We have held that awards without such specific findings do not comply with the requirements of the act and are illegal. Dameron v. Spartan Mills, 211 S.C. 217, 44 S.E.2d 465; Poole v. E. I. du Pont de Nemours & Co., 227 S.C. 232, 87 S.E.2d 640. Only the Commission is authorized to pass upon the weight of the evidence in a workmen's compensation case, and it is proper to remand a case to it for required findings where the record contains evidence from which such findings may be made. Drake v. Raybestos-Manhattan, Inc., 241 S.C. 116, 127 S.E.2d 288. However, a claimant has the burden of proving the facts essential to his right to compensation, and an award may not be based upon conjecture or speculation. Coleman v. Quality Concrete Products, Inc., 245 S.C. 625, 142 S.E.2d 43; Herndon v.

> Morgan Mills, Inc., 246 S.C. 201, 143 S.E.2d 376. Where the only reasonable inference from the record is that the claimant has failed to sustain this burden, it would be futile to remand the case. An award which is without support in the evidence should be reversed on appeal whether or not it is legally sufficient as to form and content.

Id. at 109-110. The full reading within the context of this ruling clearly points to the Claimant's burden, and no such burden rests on the employer. Additionally, only the employer appealed the decision in Shealy, and thus the Claimant did not have a substantial right affected by this decision. In this case, however, both parties appealed and to affirm the single Commissioner's ruling would in effect dismiss Respondent's appeal that has not been properly ruled upon by the ultimate finder of fact, which prejudices the Respondent's constitutional right to due process.

The procedural history in Shealy differs greatly from the case at hand. In Shealy, the circuit court affirmed the opinion of the South Carolina Industrial Commission, which affirmed and adopted the opinion of the hearing commissioner. This already is drastically different from the case at hand, as the Appellate Panel issued an order with findings of facts and rulings of law. The reviewing court had a record from the ultimate finder of fact that it could base its decision on. Here, there are no findings of fact or conclusions of law from the Appellate Panel for this court to review. Without such, this court has no choice but to remand the case back to the Appellate Panel.

Appellant's argument that the only evidence in the record is that the Claimant suffered a total and permanent disability is unfounded. In fact, this was the entire basis of the defendant's appeal to the Appellate Panel, and to summarily affirm the single commissioner's ruling in this case would substantially affect defendant's right to appeal. Defendants have consistently denied that the Claimant is permanently and totally

disabled, and point to many medical records and a vocational assessment completed by Glenn Adams in support of this position. In order for the Claimant to be found permanently and totally disabled pursuant to S.C. Code Ann. §42-9-10, she must establish a total incapacity to work. S.C. Code Ann. § 42-9-10 states "when the incapacity for work resulting from the injury is total, the employer shall pay, or cause to be paid, as provided in this chapter, to the injured employee during the total disability a weekly compensation ... not to exceed 500 weeks ... " In this instance, the Claimant did not demonstrate a total incapacity to work. In fact, the Claimant offered no objective evidence from any medical provider or vocational experts indicating that she was totally unable to work in any capacity. The Claimant failed to demonstrate that she is unable to perform services other than those so limited in quality, dependability, or quantity that no reasonable stable market exists Wynn v. Peoples Natural Gas Company, 238 S.C. 1, 118, S.E.2d 812 (1961).

The Claimant testified that she graduated from high school and completed a 360-hour training course for dog grooming (R. p. 34, lines 11-12). The Claimant further testified that she owned and operated her own pet grooming business prior to coming to work for Petsmart (R. p. 34, lines 15-16). Specifically, the Claimant noted that she managed this business with no employees and no help and performed all job duties to include administrative, telephone duties, booking clients, and other associated tasks (R. p. 45, lines 10-25, lines 1-15). The Claimant further testified that she previously worked at the front desk of a hotel where she performed general customer service duties, telephone duties, and other light duty and was promoted to their timeshare department and performed general office tasks to include filing, telephone duties, and other administrative work (R. p. 46, lines 15-25, lines 1-12). Finally, the Claimant noted that she does not

experience pain in her left arm (R. p. 47, lines 19-21). The Claimant further stated that she uses her left arm now to perform all duties for which she had previously used her right arm (R. pp. 47-48, lines 22-24). The Claimant's testimony indicates that she has extensive experience in light and sedentary duty office work.

Glen Adams prepared a vocational evaluation dated May 25, 2012, wherein he notes the Claimant completed high school through the majority of 12th grade and obtained her GED and believes that she had enough course credit to obtain her diploma (R. p. 179). Glen Adams' vocational evaluation further indicates the Claimant's pet grooming school consisted of 360 hours of full-time training to include book work and hands on training (R. p. 179). The vocational assessment of the Claimant further indicates that she is computer savvy based on her use of computers at Petsmart and Plantation Resort (R. p. 179). The vocational assessment also indicates the Claimant would like to be able to go back to work (R. p. 183). Glen Adams' vocational assessment concludes that the Claimant should be able to work in a sedentary to light duty capacity and that a number of occupations are available to her to include clerical and customer service/retail occupations (R. p. 187). While noting that any potential employers may have to accommodate the Claimant's impaired use of her dominant upper extremity, jobs remain available in her labor market that require minimal use of hands and arms (R. p. 187). Further, the vocational assessment indicates that the Claimant could expect to earn approximately $8.00 to $10.00 hourly based on her current physical restrictions (R. p. 187).

The Claimant offered no vocational evaluation or opinion of a vocational expert of any kind through APA Submissions or testimony at the Hearing before the single Commissioner. Further, there is no indication in Dr. Kang's medical notes that the

Claimant is permanently and totally disabled or completely unable to work in any capacity. Specifically, Dr. Kang opined that the Claimant is unable to return to work at her current employment on his April 6, 2012 Form 14B; however, he never mentions a total incapacity for another type of work in any note (R. p. 175). Further, an in-depth evaluation of Dr. Simons' notes related to his psychological treatment of the Claimant reveals no indication whatsoever of any permanent inability to work in any capacity. In fact, no statements prohibiting or restricting the Claimant from working from a psychological perspective can be found in Dr. Simons' treatment notes or correspondence. In fact, there is no medical evidence whatsoever in the record indicating that the Claimant is permanently and totally disabled and unable to work in any capacity. The Claimant relies on Dr. Kang's Form 14B indicating she cannot return to her former employment to demonstrate permanent and total disability under S.C. Code Ann. § 42-9-10. The lack of any vocational opinion indicating the Claimant is unable to return to work in any capacity and the lack of medical evidence indicating that the Claimant is unable to return to work in any capacity coupled with the Defendants' vocational evaluation indicating that the Claimant can perform light and sedentary work establishes that the Claimant is not permanently and totally disabled under S.C. Code Ann. § 42-9-10. The Claimant has not met her burden to establish permanent and total disability under S.C. Code Ann. § 42-9-10 or Wynn v. Peoples Natural Gas Company, 238 S.C. 1, 118, S.E.2d 812 (1961).

Clearly there is plenty of evidence in the record that would allow a reasonable mind to conclude that the Claimant did not sustain her burden in proving that she was permanently disabled. Respondents maintain the position that the Commissioner erred in determining that the Claimant is permanently and totally disabled, as the greater weight

of the evidence in the record shows that the Claimant can return to work in some capacity and is not permanently and totally disabled. The single Commissioner should have restricted the Claimant's award to a single scheduled body part under S.C. Code Ann. § 42-9-30 or a permanent partial disability running award under S.C. Code Ann. § 42-9-20.

CONCLUSION

Respondents agree with the Appellant that the Order on April 1, 2014 vacating and remanding this matter to the single Commissioner without addressing any of the findings of fact or questions of law cited by the single Commissioner was an error of law. Respondents also agree with the Appellant that remand ordering a de novo hearing should be accompanied by guidance or specific instructions to ensure that the single commissioner does not hear evidence outside the scope of the de novo hearing.

Respondents maintain their position that Shealy is inapplicable to the case at hand at that a review of the record before the single commissioner is improper before this court. However, if this Court finds that Shealy is applicable and a review of the record before the single commissioner is proper, it is clear that there is evidence in the record that would allow a reasonable mind to conclude that the Claimant did not sustain her burden in proving that she was permanently disabled. Therefore, even if Shealy is applicable, the proper action for this Court would be to remand the case back to the Appellate Panel with instructions to specify findings of fact and rulings of law. To affirm the single Commissioner's ruling would destroy the defendant's substantial right to have a proper appeal before the Appellate Panel.

Respectfully submitted,

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July 8, 2014

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CERTIFICATE OF COUNSEL

The undersigned certifies that all Respondent's Final Briefs filed with the South Carolina Court of Appeals in the above named matter comply with Rule 211(b) SCACR.

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