

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

RECEIVED

OCT 17 2019

Opinion No. 27920 (S.C. - Filed October 2, 2019) S.C. SUPREME COURT

Scott Ledford, (Employee/Claimant),Petitioner,

v.

Department of Public Safety (Employer), and
State Accident Fund (Carrier),.....Respondents.

PETITION FOR REHEARING

This is an appeal involving a workers' compensation case. Respondents, by and through their undersigned counsel, hereby file this Petition for Rehearing pursuant to Rule 221, SCACR. On October 2, 2019, this Court filed an opinion reversing, vacating, and remanding the South Carolina Court of Appeals' June 27, 2018 decision, wherein the Court of Appeals affirmed the Workers' Compensation Commission's findings that (1) Commissioner Barden was not required to recuse herself, (2) substantial evidence supported the Appellate Panel's decision to reverse Commissioner Barden's permanency determination; and (3) substantial evidence supported the Appellate Panel's findings that Petitioner was not credible and his landscaping business remained lucrative following the injury. Ledford v. Dept. of Public Safety, (Unpublished Opinion No. 2018-UP-280 (Ct. App. - filed June 27, 2018)). As grounds for their Petition,

Respondents respectfully argue that this Court may have overlooked or misapprehended the evidence, law, or arguments involving whether Petitioner proved evidence of prejudice or bias required by law to result in judicial bias.

I. This Court may have overlooked or misapprehended the law or arguments involving whether Petitioner has provided necessary evidence of bias or prejudice as required by law for judicial recusal.

Canon 3(E) provides that recusal may be necessary when: (1) the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding...(Canon 3(E)(1)(a)-(d), Rule 501, SCACR).

In applying Canon 3(E)(1), the South Carolina Court of Appeals has stated that movant or *petitioner must show some evidence of bias or prejudice* of the judge. (emphasis added) Lyvers v. Lyvers, 280 S.C. 361, 367, 312 S.E.2nd 590, 594 (Ct. App. 1984). "Allegations of facts that are merely frivolous or fanciful will not support a motion to disqualify on the grounds of prejudice, nor will conclusory statements, conjecture, or innuendo be sufficient to support a motion for disqualification." 46 Am. Jur. 2nd *Judges* §208 (1994). "It is not enough for a party seeking disqualification to simply allege bias; the party must show some evidence of that bias or prejudice." Roper v. Dynamique Concepts, Inc., 316 S.C. 131, 447 S.E.2nd 218 (Ct.App. 1994). "Such bias must stem from an extrajudicial source and result in decisions based on information other than what the judge learned from his participation in the case." Mallet v. Mallet, 323 S.C. 141, 145, 473 S.E.2nd 804, 807 (Ct. App. 1996). If there is no evidence of judicial prejudice, a judge's failure to disqualify himself will not be reversed on appeal. Ellis v. Proctor Gamble Dist. Co., 315 S.C. 283, 443 S.E.2nd 856 (1983).

In this case, Petitioner did not raise any question of Commissioner Barden's alleged bias or prejudice at the time of the hearing. In fact, Petitioner did not make his allegations against

Commission Barden until October 10, 2014, fifty-seven (57) days after the hearing and twenty-four (24) days after the phone conference with the parties. Petitioner should not be allowed to use a Motion for Recusal to obtain a *de novo* hearing after the Single Commissioner's decision was already made. "The purpose of the Code would be subverted if the Code were invoked by lawyers for mere tactical advantage in a proceeding." (*see* Preamble, CJC, Rule 501, SCACR). "A motion to recuse may not be predicated on the judge's ruling in the case before him." Payne v. Holiday Towers, Inc., 283 S.C. 210, 321 S.E.2nd 179 (Ct. App. 1984). Moreover, "[t]he fact a trial judge ultimately rules against a litigant is not proof of prejudice by the judge, even if it is later held the judge committed error in his rulings." (Mallett. at 147).

A judge's impartiality might reasonably be questioned when his factual findings are not supported by the record; however, in this case Commissioner's Barden's findings were supported by the evidence in the record. In fact, Commissioner's Barden's findings regarding Petitioner's credibility were affirmed by both the Full Commission Appellate Panel and the Court of Appeals.

Petitioner failed to show actual evidence of bias or prejudice as required by law. With regard to the point that bias must stem from an extrajudicial source and result in decisions based on information other than what the judge learned from his participation in the case, the only allegation of such bias comes from Temple's self-serving affidavit, which states:

- Commissioner Barden indicated that she entered into a month-long investigation of documents which were outside of the record before her, however, she did not identify those documents. She said based on her review of this and the Claimant's testimony, that she believed he perjured himself and that she had an obligation to report him to the Attorney General for prosecution. (App., p.314).

Despite multiple opportunities in both briefing and oral arguments, Petitioner has yet to identify what extrajudicial source of information resulted in a decision based on information

other than what Commissioner Barden learned from her participation in the case. Petitioner has failed to demonstrate that any of Commissioner Barden's findings were not supported by the record. Quite simply, Petitioner has not introduced any cogent evidence of bias or prejudice by the Single Commissioner as required by the case law set forth above.

Still, this Court focuses on Temple's allegation that Commissioner Barden threatened criminal proceedings unless the case settled. Respondents assert this Court may have overlooked or misapprehended the law or arguments involving Commissioner Barden's ability to even refer Petitioner for criminal prosecution. As stated in S.C. Code Ann. §42-9-440, the Commission shall report all cases of suspected false statement or misrepresentation the Attorney Generals for investigation and prosecution, "*if warranted.*" (emphasis added). It is the duty of the Attorney General, not the Commission, to investigate the allegations. It is the duty of the Attorney General, not the Commission, to decide what action, if any, should be taken after investigation.

Regardless, the only evidence the Court cites in support of that allegation is Temple's affidavit, which states the following:

- Commissioner Barden indicated, however, that if the parties were able to resolve the claim, she would not have a duty to report the claimant to the Attorney General's office for prosecution. In fact, Commissioner Barden said that her notes for the proposed order contain a statement at the beginning the claimant would be referred to the Atty. Gen.'s office for prosecution. This statement was made with defense counsel on the phone. (App. p.314).
- Commissioner Barden went on to say that she realized that by having this conference call, the State Accident Fund would probably make a minimal offer, however, if the claimant did not accept their offer and resolve this claim, Commissioner Barden would have an ongoing duty to report to the Atty. Gen. for prosecution. In other words, if the claimant did not settle his claim for whatever was offered, Commissioner Barden would report him to the Atty. Gen. for prosecution. At the conclusion of the phone conference, the undersigned immediately repaired a memo detailing the conference. (App., p.314).
- After the call, the State Accident Fund made Ledford a minimal offer to settle a claim that, in my opinion, has exposure to the carrier of at least \$200,000.00. (App., p.315).

This Court stated that Ms. Sutusky, counsel for Respondents, corroborated the contents of Temple's statement. Respondents adamantly deny that Sutusky corroborated the contents of Temple's statement, as set forth above. Sutusky was questioned directly by this Court during oral arguments about her recollection of the telephone conference. This Court first asked Ms. Sutusky about Respondent's decision not to file anything to contradict formally what Mr. Temple alleges transpired in his Motion for Recusal and supporting affidavit. Ms. Sutusky accurately pointed out that Respondents' failure to file a response to Petitioner's motion is deemed a general denial pursuant to S.C. Code Ann. Reg. 67-215(F). Ms. Sutusky went on to make the following statement:

My recollection of what happened on the telephone conference is that she called and asked to speak to the parties, and we were the only three parties on the phone, Mr. Temple, myself, and Commissioner Barden, and she indicated that she had reviewed all the evidence in the record, she had written her order instructions and made her decision, and before she issued them to be written into an order by an attorney, that she wanted to let us know that she had serious questions about the claimant's credibility, and those questions, she felt, triggered the duty to make a referral to the Attorney General's office for suspected misrepresentation, and she felt that was her duty under...for a case that was pending before her, and she reminded us that we have the right to settle, and if the case settles, that the case was not pending before her, and that that duty would not exist.

The other evidence in the case, Commissioner Barden's response to Temple's allegations set forth in her denial of the motion for recusal, specifically deny the allegations set forth by Temple; however, without any further explanation, this Court simply labels the statements of Commissioner Barden as a "false affidavit."

Despite both the Full Commission and Court of Appeals' decisions that Commissioner Barden was not required to recuse herself, decisions made applying the same set of facts, this Court took it upon itself to weigh the conflicting evidence of what transpired during the telephone conference

between the parties and reach its own conclusion that the statements in Temple's affidavit were the only true statements. Not only do Respondent's disagree with this Court's conclusion, but Respondents assert that it was not this Court's place to weigh the conflicting evidence at all. This Court's own well settled law states the Court shall not substitute its judgment for that of an agency as to the weight of the evidence on questions of fact. As this Court stated, "[w]hile reasonable minds could have reached a different conclusion based on the record, we must not engage in fact-finding that would disregard the Commission's factual finding on these issues." Hartzell v. Palmetto Collision, 415 S.C. 617, 623, 785 S.E.2nd 194, 197 (2016).

II. This Court may have overlooked or misapprehended the law or arguments involving the implications of Full Commission's order as the law of the case and whether remand is a proper remedy.

Regardless of Respondents' arguments set forth above, and despite this Court's feelings about the alleged conduct of Commissioner Barden during the telephone conference, Respondents further argue that this Court may have overlooked or misapprehended the law, evidence, or arguments in this case involving the Full Commission's Decision and Order as the law of the case and whether Petitioner's complaints against Commissioner Barden were in fact remedied by his appeal to the Full Commission and its resulting decision.

"The final determination of witness credibility and weight to be accorded to evidence is reserved to the Full Commission." Muir v. C.R. Bard, Inc., 336 S.C. 266, 519 S.E.2nd 583 (Ct. App. 1999) (emphasis added). At a hearing, a Single Commissioner is charged with the responsibility to take testimony, review evidence, and make decisions regarding the weight to be assigned to a particular piece of evidence, and to draw conclusions based on such evidence. If a party disagrees with a conclusion the single Commissioner draws from a particular piece of

evidence, the law provides that party a remedy pursuant to §42-17-50. Pursuant to S.C. Code Ann. §42-17-50, if an application for review is made to the Full Commission, “the commission shall review the award and, if good grounds shown therefor, reconsider the evidence, receive further evidence, rehear the parties or their representatives and, if proper, amend the award.

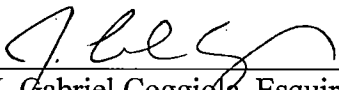
The law of the case in this matter is the decision of the Full Commission, which was affirmed by the Court of Appeals, and not the decision of the Single Commissioner. Putting aside any notion of alleged misconduct on the part of Commissioner Barden, the Petitioner has never raised an allegation of misconduct or impropriety on the part of any members of the Full Commission who decided the case actually pending before the Court. Under the standard of a *de novo* review of the record of the case, the Full Commission reversed Commissioner Barden’s rulings regarding the extent of permanent disability and the amount of credit awarded to Respondents, but it affirmed the findings of Petitioner’s lack of credibility.

This Court concluded the proper remedy for Commissioner Barden’s conduct is to remand for a new hearing before a single commissioner. Based on briefs as well as oral arguments presented to the Court, the Petitioner simply wants the evidence reviewed in the absence of alleged bias, but the Petitioner has never argued the decision of the Full Commission failed to apply a *de novo* standard or was otherwise tainted. Basically, the relief the Court seeks to provide the Petitioner has already been granted by the Workers’ Compensation appeal process and the *de novo* standard of review applied by the Full Commission. The Petitioner’s allegation of bias against Commissioner Barden is a red herring because Commissioner Barden’s allegedly tainted Decision and Order is neither the law of the case nor pending before this Court. The allegations raised against Commissioner Barden have made for drama not otherwise seen in workers’ compensation cases, and regardless of the merit or motivation behind them, the Petitioner has

never argued he failed to receive a fair *de novo* hearing by the Full Commission on the evidence of the record. Based on the lack of any such argument, the relief purportedly sought by the Petitioner and granted by this Court has already been given and received without complaint.

CONCLUSION:

Based on the arguments set forth above, Respondents respectfully submit that this Court may have overlooked or misapprehended the evidence, law, or arguments involving whether Petitioner provided sufficient evidence of bias or prejudice as required by law to support a motion for recusal and the significance of the Full Commission's decision as the law of the case in the matter. For the foregoing reasons, Respondents request this Court grant the petition for rehearing, reconsider this Court's original opinion, and affirm the judgment of the South Carolina Court of Appeals.



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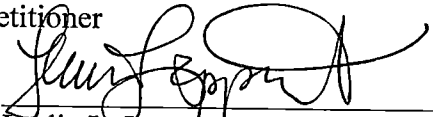
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PROOF OF SERVICE

The undersigned certifies that on the date indicated below, she served counsel for Petitioner with a copy of **Respondents' Petition for Rehearing** by mailing copies of the same by United States Mail postage prepaid on October 17, 2019 to the following addresses:

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