

THE STATE OF SOUTH CAROLINA

In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Court of Appeals Opinion No. 2019-UP-305

(Filed August 21, 2019, Rehearing Denied October 1, 2019)

Billy Wayne Herndon, Employee, Claimant.....Respondent,

v.

G&G Logging, Inc., Employer, and Palmetto Timber
S.I. Fund c/o Walker, Hunter & Associates, Inc., Carrier.....Petitioners.

REPLY TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

- I. Whether the Court of Appeals correctly held the Commission relied on surmise, speculation and conjecture in determining exceptional reasons existed to deviate from the standard calculation of the claimant's average weekly wage and compensation rate, correctly reversed the credit awarded by the Commission, and correctly remanded the case?
- II. Whether the Court of Appeals correctly affirmed with modifications the Commission's finding that the claimant was entitled to recover under the economic model?
- III. Whether the Court of Appeals correctly affirmed the Commission's finding the Claimant was permanently and totally disabled.

STATEMENT OF THE CASE

Billy Wayne Herndon ("the Claimant") requested a hearing in this admitted workers' compensation claim on August 18, 2015 against G&G Logging, Inc. ("the Employer") and its workers' compensation carrier Palmetto Timber Self Insurance Fund (collectively "the Petitioners"). At a hearing on May 3, 2016, the Claimant argued his average weekly wage was \$695.00 with a resulting compensation rate of \$463.36 based on the actual wages he had earned with the Employer. (R. p. 65, lines 18-19) He further argued the admitted accident had rendered him permanently and totally disabled, entitling him to all benefits arising therefrom. (R. p. 63, line 25-p. 65 line 13)

At the hearing, the Petitioners argued exceptional reasons existed to deviate from the standard wage calculation, and the Claimant was not permanently and totally disabled. (R. p. 67, line 1-p. 70 line 9) By order dated July 26, 2016, the Single Commissioner found (1) the standard wage calculation as found on the Form 20 was correct, (2) the Petitioners had not contested the standard wage calculation for over two years, and (3) the Claimant was permanently and totally disabled. (R. p. 18-25) The Petitioners appealed.

By order dated February 23, 2017, the Full Commission affirmed the finding of permanent and total disability and reversed the finding regarding the wage calculation. (R. p. 49-50) The Full Commission found exceptional reasons existed to deviate from the standard wage calculation and found the Claimant's average weekly wage to be \$297.69 with a resulting compensation rate of \$198.47. (R. p. 48) The Full Commission also awarded the Petitioners a credit for overpayment of benefits totaling \$36,527.82. (R. p. 49) The Claimant filed a Notice of Appeal to the Court of Appeals on March 21, 2017.

The Court of Appeals reversed in part, affirmed with modifications in part, and affirmed in part. The Court of Appeals found the Commission relied on surmise, speculation, or conjecture in finding exceptional reasons existed to deviate from the standard wage calculation and also reversed the credit. The Court of Appeals affirmed with modifications the finding that the claimant could pursue disability pursuant to § 42-9-10 (the economic model) because his injury affected other body parts. Finally, the Court of Appeals affirmed the Commission's finding that the Claimant was permanently and totally disabled, as the finding was supported by substantial evidence in the record.

The Petitioners timely filed a motion for rehearing that was denied on October 1, 2019. The Petitioners filed a Petition for Writ of Certiorari.

FACTS

The Claimant sustained an admitted injury by accident arising out of and in the course and scope of his employment on May 12, 2014. (R. p. 43) The Claimant was involved in an accident while driving a logging truck. He sustained an injury to his neck that affected his left shoulder, left arm, left hand and fingers. (R. p. 48)

The Claimant worked as a logging truck driver for over twenty years. (R. p. 93, lines 4-11) In 2012, he attempted to retire, thinking at the time his Social Security would be enough to live. (R. p. 99, lines 17-19) Because his Social Security check did not prove adequate, he returned to work later in 2012 with Bootle, his previous employer. (R. p. 99, lines 21-23) He drove for Bootle whenever he was called to help. (R. p. 100, lines 1-4, p. 119 lines 1-9) In 2012, he earned approximately \$7,700 and in 2013, he earned approximately \$8800. (R. p. 118, lines 7-22) He did not have any plan to limit his earnings with Bootle. (R. p. 118, line 23-p. 119 line 9) He testified that once he decided to return to work, he was going to work whenever he was needed. (R. p. 119, lines 1-9)

In 2014, the Claimant began working for the Employer. (R. p. 119, lines 10-12) He worked until the accident in May. (R. p. 119, lines 13-14) During the time he worked, he earned \$9,285. (R. p. 119, lines 15-18) Because the Claimant began drawing Social Security benefits before his full retirement age, he was subject to the Social Security earnings test. 42 U.S.C. § 403; 20 C.F.R. 404.401 *et. seq.* If he earned over a certain amount, Social Security would withhold certain amounts and return them once he reached full retirement age. *Id.* The Claimant testified regarding the earnings test threshold:

Q. And was it your intention in 2014 then to earn as much as you could without reducing your retirement benefits?

A. Yes, sir.

Q. And did you tell that information to George Page during your vocational evaluation?

A. I don't remember whether I did or I didn't.

Q. Okay. If he put it in his report do you have any reason to believe that he made that up or would that have been sometime [*sic*] you may have talked about?

A. No, we may have talked about it. I just – I don't remember for sure.

Q. Did you discuss that arrangement with Greg Gruber? [the employer]

A. Me and Greg talked about what I could make and then what we would do after I made that. We would make that decision when we got to that point.

Q. Okay. So y'all had a discussion about giving you work up to a certain point and that was about \$15,000?

A. And then we would discuss what we was going to do from then on.

(R. p. 119, line 19-p. 120, line 16)

On the day of the accident, the Claimant presented to Dr. Brian Thompkins complaining of left upper arm pain and elbow pain. (R. p. 247). Dr. Thompkins noted "tenderness primarily in the left upper arm" and "some limited range of motion on the left shoulder." (R. p. 247). On May 27, 2014, the Claimant returned to Dr. Thompkins with "left neck/ left shoulder pain." (R. p. 249). The Claimant also reported swelling, numbness and tingling in the left upper extremity. (R. p. 249). On exam, Dr. Thompkins noted "tenderness primarily on the C-spine paraspinal muscles on the left trapezius area and into the left shoulder." (R. p. 249). He also noted decreased strength in the left arm that may be due to pain. (R. p. 249).

On June 10, 2014, the Claimant saw Dr. Thompkins with complaints of neck pain with left-sided shoulder and arm radiation. (R. p. 249). Dr. Thompkins noted the Claimant had radiation into the left arm and appeared to have decreased grip strength and decreased flexion and extension. Dr. Thompkins ordered an MRI of the cervical spine. (R. p. 250).

On June 19, 2014, the Claimant was admitted to Colleton Medical Center complaining of chest pain. (R. p. 256). The emergency room physician noted “the patient complains of neck pain with tingling down the arm ever since a motor vehicle accident six weeks ago.” (R. p. 256). On June 20, while in the hospital, the Claimant had a cervical MRI. (R. p. 257-258).

On June 23, 2014, the Claimant saw Dr. Thompkins. He reviewed the MRI and on the physical exam noted tenderness primarily on the left side with left upper extremity radiation. (R. p. 264). Dr. Thompkins diagnosed neck pain and left upper extremity radiculopathy. (R. p. 264). Dr. Thompkins referred the Claimant for a neurosurgical evaluation. (R. p. 264).

The Claimant eventually saw Dr. Pacult, a neurosurgeon. (R. p. 214). Dr. Pacult noted the Claimant had cervical radiculopathy on the left side. (R. p. 215). He noted the “MRI of the cervical spine shows significant disc degeneration at multiple levels, and on the left C6/C7 there is a foraminal stenosis with impressive left sided osteophyte formation compressing as expected C7 nerve root.” (R. p. 215). Dr. Pacult recommended surgery, and the Claimant underwent a cervical fusion on January 13, 2015. (R. p. 218).

The Claimant continued to treat with Dr. Pacult following surgery. On February 2, 2015, Dr. Pacult ordered physical therapy for the cervical spine and left shoulder. (R. p. 219). On March 16, 2015, Dr. Pacult noted the Claimant was “complaining of cervical pain into the shoulder and into the arm on the left side.” (R. p. 221). On April 27, 2015, Dr. Pacult found the Claimant had reached maximum medical improvement and recommended a referral to a specialist for an impairment rating. (R. p. 224). He stated the Claimant was unable to return to truck driving due to pain. (R. p. 224).

The Petitioners sent the Claimant to Dr. Gee at Industrial Medicine in Sumter for an impairment rating. On June 11, 2015, Dr. Gee noted the Claimant described cervical pain and pain

into his shoulder muscles. (R. p. 184). Furthermore, Dr. Gee noted a left grip strength deficit and that the Claimant's range of motion in his left shoulder was "significantly decreased." (R. p. 184). Dr. Gee found the Claimant had cervical radiculopathy, agreed the Claimant was at maximum medical improvement, and assigned a 9% impairment rating to the whole person. (R. pp. 183-185). Dr. Gee further gave the Claimant work restrictions of "limit 'heavy' work & strain." (R. p. 183).

On June 30, 2015, the Claimant saw Dr. Donald Johnson in Mt. Pleasant for an independent medical evaluation. Dr. Johnson noted the Claimant had complaints of "neck pain with radiating pain, paresthesias and numbness down the left arm to the left hand." (R. p. 269). He noted the Claimant had symptoms down into the index and forefinger and along the brachioradialis. (R. p. 269). Dr. Johnson opined:

Per the fifth edition AMA Guides, I would assign a 26% impairment to the whole person per page 392, table 15-5. This is a whole person rating. However, the patient has decreased functional use of his left arm secondary to radiculopathy with residual numbness and weakness of the left arm and hand.

In regards to work, the patient may not return to his previous vocation. If he tries to do so, I think it is inevitable that he will injure a disc above his cervical fusion. Work restrictions of avoiding heavy lifting and strain are impossible in the line of work this gentleman is currently employed by [sic].

Work restrictions would involve no work from shoulder level above with limited extension of his neck and no lifting from shoulder level to above greater than 15 to 20 pounds. Again, I am worried about the adjacent levels of this patient's cervical fusion.

(R. p. 270).

The parties deposed Dr. Pacult. Dr. Pacult testified he did not know Dr. Gee. (R. p. 275, (p.12, lines 14-16)). When asked if he was in agreement with the impairment rating given by Dr. Gee, Dr. Pacult testified "[w]ell, like I say, this certainly doesn't sound unreasonable, but I don't do those ratings for that one reason. I don't have the knowledge how to assign the impairment rating. There's special book that pain managing physicians have and AMA guidelines. I don't

have that.” (R. p. 277 (p. 18, ll. 1-6)). Dr. Pacult testified Dr. Johnson had a good reputation and would be a competent individual to give an impairment rating. (R. p. 282 (p.40, ll.1-10)). Dr. Pacult testified several times he thought the Claimant was reliable. (R. p. 275 (p. 11, l. 10), p. 278 (p. 24, ll.23-24, p. 25, ll. 1-10)). Dr. Pacult testified the Claimant’s limitations are based on his pain. (R. p. 276). He further testified that it was not uncommon for an individual with the Claimant’s injury to be experiencing ongoing pain. (R. p. 276 (p. 15, ll. 17-25)).

The Claimant underwent vocational evaluations. On August 31, 2015, Dixon Pearsall, Ph.D., opined:

[The Claimant’s] current access to competitive employment (employability) is negligible (>1%). Essentially and practically there are no positions represented in significant numbers in the regional or national economies consistent with the residual functional/vocational capacities of [the Claimant]. It is “highly likely” and “very probable” that Mr. Herndon will not return to gainful employment in any capacity. This would include all full and part-time competitive positions represented in significant numbers in the national economy at any and all exertion or skill levels. As such, [the Claimant] is not competitively employable in the national economy.

(R. p. 300).

On February 2, 2016, George Page, MS, CVE, CDMS, PVE, opined there were jobs available that the Claimant could perform. (R. pp. 290-291). He further found the Claimant was capable of earning a wage between \$9 and \$10 per hour. (R. p. 291). Dr. Pearsall provided a supplemental report wherein he addressed and disagreed with the findings of Mr. Page. (R. pp. 305-311).

At the hearing before the Single Commissioner, the Claimant’s wife testified the Claimant was a “totally different man” since the accident. (R. p. 73, lines 8-24). She testified the medications the Claimant takes make him drowsy for most of the day. (R. p. 79, lines 3-9). He sits in a recliner all day. (R. p. 79, lines 10-22). He now has no patience and does not like to be around a lot of people. (R. p. 79, line 23-p.80, line 11).

The Claimant testified he has problems with his neck and with his left arm and left hand. (R. p. 91, lines 1-9). He did not graduate from high school and has no computer skills. (R. p. 91, line 10-p. 92, line 21). The Claimant testified he has spent most of his life driving log trucks. (R. p. 92, line 22-p. 94, line 13). He has also worked as a carpenter. (R. p. 94, lines 8-10). The Claimant testified the medicine he takes because of the accident makes him sleepy and groggy and therefore unable to drive long distances. (R. p. 89, lines 7-20). The Claimant testified he can only stand still for approximately 10 minutes. (R. p. 110, lines 3-10). He can only walk a “couple hundred yards.” (R. p. 110, lines 11-13). He testified he can only sit comfortably for about 30 minutes. (R. p. 110, lines 14-17). He stated that although he can do some bending, stooping, squatting, and kneeling, he cannot do half of what he used to do before the accident. (R. p. 110, lines 18-24).

The Claimant testified he can lift approximately 10 pounds with his left arm. (R. p. 110, line 25-p. 111, line 2). He has trouble reaching, twisting, and pulling. (R. p. 111, lines 3-13). He testified he has no patience now, affecting his ability to deal with the public. (R. p. 112, lines 3-8). The medications make it difficult for him to focus and concentrate on a task. (R. p. 112, lines 9-12). Furthermore, the Claimant testified he is lying in his bed or sitting in his recliner approximately five or six hours out of an eight-hour day. (R. p. 114, lines 12-20).

ARGUMENTS

- I. The Court of Appeals correctly found the Commission relied on surmise, speculation, or conjecture in finding exceptional reasons existed to deviate from the standard calculation of the Claimant’s average weekly wage and compensation rate and also correctly reversed the credit.

Because the Court of Appeals correctly found the Commission had relied on surmise, speculation, or conjecture in finding exceptional reasons existed to deviate from the standard

calculation of the Claimant's average weekly wage and compensation rate, it correctly reversed Commission on the issue and reversed the credit.

Section 42-1-40 of the Workers' Compensation Act governs calculation of the average weekly wage:

"Average weekly wage" must be calculated by taking the total wages paid for the last four quarters immediately preceding the quarter in which the injury occurred as reported on the Department of Employment and Workforce's Employer Contribution Reports divided by fifty-two or by the actual number of weeks for which wages were paid, whichever is less. When the employment, prior to the injury, extended over a period of less than fifty-two weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages shall be followed, as long as results fair and just to both parties will be obtained. . . .

When for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury.

S.C. Code Ann. § 42-1-40.

In Herndon v. Morgan Mills, Inc., 246 S.C. 201, 143 S.E.2d 376 (1965), this Court held "awards of the Industrial Commission may not rest upon surmise, conjecture or speculation but must be founded upon substantial evidence, and . . . if the evidence is all one way, or if the findings of the Commission are based on surmise, speculation or conjecture, then the issue becomes one of law for the court and not of fact for the Commission." Id. at 210, 143 S.E.2d 376, 381 (1965). Furthermore, the question of whether exceptional reasons existed to deviate from the standard calculation is an issue of law. Elliot v. S.C. Dept. of Transportation, 362 S.C. 234, 237, 607 S.E.2d 90, 92 (Ct. App. 2004). Even if the issue were a mixed matter of law and fact, the Commission may not rest its decision on surmise, conjecture, or speculation.

At the hearing below, the Petitioners argued the Claimant's average weekly wage and compensation rate should be based on the amount of the earnings threshold, not the Claimant's

actual earnings with the employer. Surprisingly, however, the Petitioners admit in their Petition for Certiorari that “there is no evidence—only speculation as to: what ‘decision’ would be made once claimant reached [the] cap.” That is exactly the point. The Commission speculated as to what decision the Claimant would make based on what the Petitioners agree is “no evidence.” The Claimant could just have easily decided to continue working. Because both parties agree there was no evidence as to what the claimant would do when he reached the earnings threshold and that it was sheer speculation as to what his decision would be, the Commission’s finding that the claimant would stop working once he reached the threshold was improper surmise, speculation, or conjecture.

Furthermore, the statute provides the Commission can grant a deviation if “for exceptional reasons” the standard calculation “would be unfair, either to the employer or employee.” Petitioners submitted no evidence from the employer regarding the unfairness of the standard calculation. No one from the employer testified. The petitioners did not submit any documentary evidence on the issue.

This case is properly distinguished from Bennett v. Gary Smith Builders, 271 S.C. 94, 245 S.E.2d 129 (1978). In Bennett, the claimant, due to Social Security’s earnings test threshold, worked for a few months and then quit for the rest of the year once he reached the threshold. He did this for nine years. The Commission’s decision in Bennett was not based on speculation or surmise; it was based on the evidence that for nine years the claimant would stop working once he reached the threshold. In the case at bar, it is the law of the case that the Claimant’s testimony was credible. The Claimant testified he worked for Bootle in 2012 and 2013 with no plan to limit his earnings to the Social Security threshold, but rather just when Bootle needed someone to work. (R. p. 118 line 23-p.119 line 9) This testimony is uncontradicted in the record and is further

bolstered by the fact there is no evidence the Claimant stopped working during 2012 or 2013. The only evidence in the record is he earned the amounts he did with Bootle because that is all the work Bootle offered to him.

The Claimant left Bootle and went to work for the Employer. The Claimant testified that he and his Employer discussed the earnings test threshold, discussed that once the threshold was reached, they would further discuss and decide what the Claimant would do at that point. This testimony was deemed credible. There was no evidence that the Claimant stopped working due to the earning test threshold even for one year, much less nine years like the claimant in Bennett. The decision of the Court of Appeals is not in conflict with the decision in Bennett.

Furthermore, in Bennett, this Court stated: “[t]he objective of wage calculation is to arrive at a fair approximation of the claimant’s probable future earning capacity. His disability reaches into the future, not the past; his loss as a result of injury must be thought of in terms of its impact on probable future earnings.” Id. at 98-99, 245 S.E.2d at 132. Whether the claimant was aware of it or not, the earnings test threshold—the one upon which the Petitioners rely—would only apply to the Claimant’s earnings for approximately six more months from the date of the accident. Due to its temporary nature, therefore, the earnings test threshold did not represent the Claimant’s future earning capacity.

As to the remand, the Court of Appeals found the Commission’s ruling regarding the average weekly wage and compensation rate was based on speculation and remanded for a determination of whether any *other* reasons existed since the Full Commission order to support a deviation from the standard calculation.

- II. The Court of Appeals correctly held the Claimant could pursue disability under the economic model (§ 42-9-10).

In order to pursue permanent and total disability under § 42-9-10, a claimant must prove additional body parts have been affected beyond a lone scheduled injury. See Wigfall v. Tideland Utilities, Inc., 354 S.C. 100, 106, 580 S.E.2d 100, 103 (2003). The Court of Appeals found “the Full Commission appeared to find Claimant suffered a second, separate injury to his left upper extremity. . .” and therefore affirmed--but modified--the Commission’s findings regarding the additional body parts to reflect the original injury had a disabling effect on the additional body parts, not that there was a separate injury.

The Commission’s ruling, however, can easily be read as a finding that additional body parts were affected: “Claimant sustained an admitted injury to his neck by accident arising out of and in the course of his employment. The additional body parts of left shoulder, left arm, left hand and fingers are causally related to his admitted work injury.” Therefore, even if the Court of Appeals’ modification was somehow error, it was harmless error. The Commission plainly found the original injury, the neck injury, caused problems with additional body parts. This finding is supported by substantial evidence.

The record is replete with evidence the Claimant’s shoulder, arm, and hand have been affected by his neck injury. All of Dr. Thompkins records mention issues with the shoulder or upper extremity, including decreased grip strength. After the Claimant’s surgery, he continued to have problems with his left shoulder and arm. On February 2, 2015, Dr. Pacult ordered physical therapy for the cervical spine and left shoulder. On March 16, 2015, Dr. Pacult noted the Claimant was “complaining of cervical pain into the shoulder and into the arm on the left side.”

At the IME performed by Dr. Gee, the doctor noted the Claimant described cervical pain and pain into his shoulder muscles. Furthermore, Dr. Gee noted a left grip strength deficit and that the Claimant’s range of motion in his left shoulder was “significantly decreased.” (R. p. 184).

When the Claimant saw Dr. Johnson, Dr. Johnson noted the Claimant had complaints of “neck pain with radiating pain, paresthesias and numbness down the left arm to the left hand.” (R. p. 269). He noted the Claimant had symptoms down into the index and forefinger and along the brachioradialis. Dr. Johnson opined the Claimant “has decreased functional use of his left arm secondary to radiculopathy with residual numbness and weakness of the left arm and hand.” (R. p. 269).

The Claimant testified he was still having problems with his left arm and hand. The Commission found the Claimant credible. All of the medical evidence supports the Claimant has a physical deficiency down the left side (significantly decreased range of motion to the shoulder, weakness in the left hand) and that his shoulder, arm, and hand have been affected by the radiculopathy stemming from his neck injury. The medical evidence in combination with the Claimant’s credible testimony clearly establish a “second body part” such that the Claimant was entitled to pursue a disability award under § 42-9-10.

Finally, although there is more evidence of the claimant’s upper extremity being affected in addition to his complaints of pain, contrary to the Petitioner’s argument, credible complaints of pain can indeed be sufficient evidence that another body part is affected.

III. The Court of Appeals correctly affirmed the Commission’s finding the Claimant was permanently and totally disabled.

“The final determination of witness credibility and the weight to be accorded evidence is reserved to the Full Commission.” Shealy v. Aiken Cty., 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000). Giving more weight to a medical report because it is later in time is a legitimate exercise of the Commission’s power to weigh evidence. Furthermore, the Court of Appels correctly pointed out the Commission’s decision was supported by substantial evidence in the record. Even without

the medical records of Dr. Gee and Dr. Johnson, the record included the claimant's credible testimony, the claimant's wife's testimony, and the opinions of Dr. Pacult.

The Claimant underwent a cervical fusion, resulting in limited range of motion in his neck. He continues to have pain in his neck and in his left shoulder, arm, and hand. Dr. Pacult, the authorized treating physician, testified the Claimant's return to work is limited by his pain. He further testified several times that he found the Claimant to be reliable.

The Claimant testified regarding his limitations due to his injury, including difficulty standing, walking, sitting, lifting, bending, stooping, squatting, kneeling and that the medication he takes makes him drowsy. The Claimant and his wife both testified as to how much of the day he spends lying down or sitting in his recliner. The Commission found the Claimant's testimony to be credible based both on the record and on the Single Commissioner's finding that the Claimant was "very credible."

The Commission's finding regarding permanent and total disability was supported by substantial evidence in the record, and the Court of Appeals correctly affirmed the Commission.

CONCLUSION

For the forgoing reasons, the Court should dismiss the Petition for Certiorari.

December 2, 2019

Respectfully submitted,



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APPEAL FROM THE SOUTH CAROLINA
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PROOF OF SERVICE

I certify that I have served the Respondent's Reply to the Petition for Writ of Certiorari by depositing a copy of it in the United States Mail, postage prepaid, on December 2, 2019, addressed to the attorney of record,

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