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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The 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 OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENTS

I. The Court of Appeals erred in reversing the Commission's determination that exceptional circumstances exist in this case and that Claimant's average weekly wage was $297.63, in denying Petitioners a credit for overpayment, and then remanding for additional evidence regarding the same issues.

At the outset, Claimant Billy Wayne Herndon ("Claimant") appears to concede that determining whether exceptional circumstances is a mixed question of fact and law. (Cl. Reply[1] p. 11 ("[e]ven if the issue were a mixed matter of law and fact ...")). As explained in the Petition, the actual holding in Elliott v. South Carolina Dept. of Transp., 362 S.C. 234, 237, 607 S.E.2d 90, 92 (Ct. App. 2004), which involved stipulated facts, is that "[t]he determination of *whether Elliott's raise constitutes an 'exceptional reason'* for purposes of applying the standard wage calculation method provided by the Workers' Compensation Act is a question of law." 362 S.C. at 237, 607 S.E.2d at 92 (emphasis added). Consistent with the resolution of any other issue under the Workers' Compensation Act where the facts are not in dispute, *e.g.*, Nicholson v. South Carolina Dep't of Soc. Servs., 411 S.C. 381, 769 S.E.2d 1, 5 (2015) (deciding as a matter of law whether fall was causally related to employment where the facts were not in dispute), the determination of whether exceptional reasons exist becomes a matter of law where the facts are stipulated, as was the case in Elliott.

However, where the facts are in dispute, as is the case here, the Commission is the ultimate fact finder. *E.g.*, McGuffin v. Schlumberger-Sangamo, 307 S.C. 184, 186, 414 S.E.2d 162, 163 (1992) ("the findings of the Full Commission are presumed correct and can be set aside only if unsupported by substantial evidence or based on an error of law"). Thus, while the

[1] While Claimant's opposition technically should be titled a "Return" to the Petition for Writ of Certiorari, *see* Rule 242(f), SCACR, he has styled his opposition as a "Reply" and, in order to avoid confusion, Petitioners refer herein to his response as "Cl. Reply."

determination of whether the underlying facts as found by the Commission constitute exceptional reasons is a question of law, the determination of the underlying facts, where they are in dispute, is reserved to the Commission. Shealy v. Aiken County, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000) ("the Full Commission, not the reviewing court, is the ultimate fact finder in workers' compensation cases").

Here, the relevant evidence admittedly is in conflict. On one hand, Claimant testified that he intended to work for Bootle whenever he was needed, that "[i]t wasn't really no limit on what I was going to work," (R. p. 119, lines 2-4), and that, once he reached the earnings threshold in 2014, he and his employer had discussed what "we would do after I made [the earnings limit]. We would make that decision when we got to that point." (R. p. 120, lines 9-11). On the other hand, there is testimony and evidence that, in 2014, Claimant planned to only "earn as much as [he] could without reducing [his] retirement benefits." (R. p. 119, lines 19-22). There is both testimony and evidence from Mr. Page that Claimant understood he could earn up to $15,000 per year without being penalized and that "he would work until he reached $15,000 and not work the rest of the year." Claimant reported to Mr. Page that he had, "retired at age 62 and began working part-time and revealed he could make up to $15,000 per year. He noted he would work until he reached the $15,000 and not work the rest of the year." (R. p. 140, lines 3-12; p. 141, lines 5-8; R. p. 288). This statement is not limited to 2014.

Conversely, there is **no** evidence, only speculation, to support the Court of Appeals' conclusion that Claimant would have earned over the $15,000 earnings cap in 2014 or any subsequent year. (*See* Appx. p. 11). Claimant either misunderstands or misconstrues Petitioners' position on this point, suggesting that "[s]urprisingly" Petitioners have admitted the Commission determination is based on speculation. (Cl. Reply p. 12). Petitioners have

conceded no such thing. In short, Claimant's statement that he and Greg had had a discussion about how much he could make and that they would make a decision once they got to that point, (R. p. 120, lines 9-16), is speculative and cannot serve as a legitimate basis for determining Claimant's average weekly wage ("AWW"). What is **not** speculative, but instead, is supported by substantial evidence, are the Commission's findings: (1) that during the two years that he worked for Bootle after his retirement, Claimant earned about $7,700 in 2012 and $8,800 in 2013 (R. p. 42; *see* R. p. 118, lines 7-13); (2) that "Claimant testified that it was his intention in 2014 following his voluntary retirement to limit his earnings up to the Social Security retirement offset cap of $15,480.00 so as to avoid his retirement benefits being offset" (R. p. 42; *see* R. p. 119, lines 19-22); and (3) that he informed Mr. Page of his prior and future plans to limit his income in order to avoid the earnings cap (R. p. 42; *see* 119, lines 19-22; R. p. 140, lines 3-12; p. 141, lines 5-8; R. p. 288). The Commission did not engage in speculation as to what Claimant would do once he reached the earnings limit but, instead, relied on the above-referenced evidence to conclude "that exceptional reasons exist in this claim." (R. p. 42). It is this set of facts, which, because they are supported by substantial evidence must be upheld on appeal, from which the determination of whether exceptional reasons exist must be made. And because this set of facts is substantively similar to those in Bennett v. Gary Smith Builders, 271 S.C. 94, 245 S.E.2d 129 (1978), that case is controlling.

Although the Court of Appeals held that "Claimant also argued the Social Security earnings threshold would have changed for him six months after the accident to be above the compensation rate as calculated using the standard wage calculation," (Appx. p. 11), that was a legal argument raised by Claimant's counsel. There is no testimony or evidence that Claimant was aware of this change, which he appears to concede at this point. (Cl. Reply p. 13 (arguing

that "whether the claimant was aware of it or not, the earnings test threshold ... would only apply to the Claimant's earnings for approximately six more months from the date of the accident")). In fact, Claimant's interview with Mr. Page took place on January 22, 2016, (R. p. 286), over a year and a half after his May 12, 2014 injury. Claimant made no mention to Mr. Page that he was aware of the change in the earnings limit. (R. p. 288). The May 3, 2016 hearing before Commissioner R. Michael Campbell, II, occurred almost two years after the injury by accident. While Claimant testified that he planned to work up to the cap and not exceed it, (R. p. 42; *see* R. p. 119, lines 19-22; R. p. 140, lines 3-12; p. 141, lines 5-8), and even that he and his employer had discussed what to do when he reached the cap, (R. p. 120, lines 9-16), there is no evidence to support the Court of Appeals' suggestion that he was aware of or would have made any other decision due to the change in the Social Security earnings threshold.

The Court of Appeals' determination that the Commission's finding was based on speculation is itself based on three findings, none of which hold up. First, the Court of Appeals looked to Claimant's testimony, discussed above, that he "would have continued to work past the Social Security earnings threshold when he was at Bootle ..." (Appx. p. 11). What the Court of Appeals fails to note is that there also is evidence that Claimant earned well under that threshold in 2012 and 2013, (R. p. 118, lines 7-13), and that Claimant told Mr. Page that he "retired at age 62 and began working part-time and revealed he could make up to $1500 per year." (R. p. 288). That latter comment is not confined to 2014 but, read fairly, includes the prior years he worked part-time for Bootle.[2] There also is no evidence that Claimant was unable to earn more money by driving for someone else in addition to Bootle during 2012 and/or 2013, if Bootle did not

[2] Thus, contrary to Claimant's assertion otherwise, this information reported to Mr. Page does contradict Claimant's testimony that he had no plan to limit his earnings while working with Bootle. (Cl. Reply p. 12).

have enough work for him. Claimant certainly was free to present any such evidence to the Commission, but he did not.

The second finding by the Court of Appeals, that Claimant "may have continued to work past the Social Security earnings threshold at G&G Logging," (Appx. p. 11), is inherently speculative, employing the helping verb "may." In addition, as explained above, there is conflicting testimony that supports the Commission's conclusion that it was Claimant's intention to limit his earnings so as to not exceed the earnings cap. (R. p. 42; R. p. 119, lines 19-22; R. p. 140, lines 3-12; R. p. 141, lines 5-8; R. p. 288).

Third, the Court of Appeals points to the fact that the earnings limit would have changed for Claimant six months after his accident. (Appx. p. 11). As explained above, there is no evidence whatsoever that Claimant was aware of this change, which was merely argument (not evidence) raised by his counsel and constitutes pure speculation by the Court of Appeals. Furthermore, as noted above, there is no evidence (only speculation) that Claimant would have earned over $15,000 even if he was aware of the change in the earnings cap but, instead, there is testimony by Claimant that he intended to limit his earnings. (R. p. 119, lines 19-22; R. p. 140, lines 3-12; R. p. 141, lines 5-8; R. p. 288).

Claimant's attempts to distinguish this case from Bennett are ineffective. As noted above, Bennett was decided under nearly identical facts and is, therefore, controlling. The fact that the claimant in Bennett earned under the Social Security earnings threshold for nine years, 271 S.C. at 96, 245 S.E.2d at 130, whereas Claimant only did so for three years is not a meaningful distinction, particularly given Claimant's testimony and the statements he made to Mr. Page. In fact, and contrary to Claimant's suggestion otherwise, there is substantial evidence in this case that Claimant did limit and intended to limit his earnings so as to not exceed the

$15,000 earnings cap. (R. p. 42; R. p. 119, lines 19-22; R. p. 140, lines 3-12; R. p. 141, lines 5-8; R. p. 288).[3]

Claimant argues that Petitioners failed to offer any proof that the standard calculation would be unfair to them. (Cl. Reply p. 12). Patently, being ordered to pay weekly compensation based on an AWW that is artificially high is inherently unfair. *See* Bennett, 271 S.C. at 98, 245 S.E.2d at 131 (holding it would be "grossly unfair to the employer to require payments of almost twice" the proper AWW); Brunson v. Wal-Mart Stores, Inc., 344 S.C. 107, 112, 542 S.E.2d 732, 735 (Ct. App. 2001) (finding it "grossly unfair to Wal-Mart to require payments based on Brunson's dual employment status since he did not intend to work both jobs after the holidays").

Finally, Claimant does little to ameliorate the Court of Appeals' problematic remand instruction to the Commission to reopen the record "to allow either party to present evidence as to the AWW or that exceptional reasons *have arisen since the Full Commission's order* to deviate from the standard wage calculation and to recalculate Claimant's AWW." (Appx. pp. 12, 17) (emphasis added). As explained in more detail in their Petition, it is hard to image what facts the Court of Appeals envisions may have arisen since the Commission Decision that would be relevant to this issue. Instead, it appears the Court of Appeals is attempting to afford Claimant a second attempt to prove his case, which is unfair and should be rejected. *See* Therrell v. Jerry's, Inc., 370 S.C. 22, 30, 633 S.E.2d 893, 896 (2006) (no reason to remand to the Commission to allow the claimant a "second bite at the apple"); Spruill v. Richland County Sch. Dist. 2, 363 S.C. 61, 65, 609 S.E.2d 524, 526 (2005) (upholding the Commission's interpretation of S.C.

[3] And, as explained in detail in their Petition, Bennett and this case are in substantively similar postures with respect to when the cap no longer would apply and the treatment of the withheld amounts. *See* Larry DeWitt, SSA Historian, "Special Study #7: The History and Development of the Social Security Retirement Earnings Test, August 1999, p. 3. (Appx. p. 38) (Pet. p. 15).

Code Reg. § 67-609 because, "it reflects a sound policy decision not to permit disgruntled claimants a second 'bite at the apple'").

The Commission already has resolved the conflicting facts on this issue and held, based on substantial evidence, that Claimant earned well under the Social Security earnings cap in 2012 and 2013; that he intended to earn up to the cap in 2014; and, that "it was his intention in 2014 following his voluntary retirement to limit his earnings up to the Social Security retirement offset cap of $15,480.00," which he relayed to Mr. Page. (R. p. 42). Thus, the Commission properly found, based on the its resolution of conflicting facts, which must be upheld on appeal, Anderson v. Baptist Med. Ctr., 343 S.C. 487, 492-93, 541 S.E.2d 526, 528 (2001) (where there is a conflict in the evidence, either by different witnesses or the testimony of the same witness, the factual findings of the Commission are conclusive); McGuffin, 307 S.C. at 186, 414 S.E.2d at 163 "the findings of the Full Commission are presumed correct and can be set aside only if unsupported by substantial evidence or based on an error of law); Shealy, 341 S.C. at 455, 535 S.E.2d at 442 (the Commission is the ultimate fact finder), that exceptional reasons exist to deviate form the standard wage calculation. Patently, neither the Court of Appeals nor Claimant has identified any error of law in the Commission's determination that exception reasons exists; instead, they engage in impermissible post-decision fact finding in order to reach the result they seek. There is no need to remand, and the Commission's resolution of this issue should be affirmed.

II. The Court of Appeals erred in upholding the Commission's award to Claimant of total and permanent disability under Section 42-9-10 because the Court had to engage in independent fact finding in order to do so, as Claimant failed to prove an injury to a second body part.

Claimant characterizes the Court of Appeals' engagement in independent fact finding as a mere "modification" of the Commission's determination that Claimant injured body parts other than his cervical spine. In support of this attempted "sleight of hand," and citing to the page of the Commission Decision that addressed his left shoulder, left arm, left hand and fingers, (R. p. 48), Claimant suggests that the Commission actually found that his compensable neck injury "affected" those body parts. (Cl. Reply p. 4). However, both Finding of Fact No. 18 and Conclusion of Law No. 1, (R. pp. 46, 48), conclude that Claimant's alleged "additional body parts" including his "left shoulder, left arm, left hand and finger are causally related to his admitted work injury." These are the very findings and conclusions that led Court of Appeals to hold that the Commission "appeared to find Claimant suffered a second, separate injury to his left upper extremity as a basis for finding Claimant totally and permanently disabled pursuant to Section 42-9-10." (Appx. p. 15). The Court of Appeals noted that "substantial evidence supports *a finding* that Claimant's admitted cervical spine injury had a disabling effect on" his other body parts. (Appx. p. 14) (emphasis added). Note that the Court of Appeals did not hold that substantial evidence supported the Commission's finding with regard to the other parts but instead, engaging in in its own independent fact finding, that the evidence supported a different finding. The Court of Appeals specifically rejected the Commission's determination and held that, "Claimant did not suffer a separate injury *but, instead*, his initial injury had a disabling effect on his left upper extremity entitling him to total and permanent disability under section 49-2-10 [sic], we affirm as modified." (Appx. p. 15) (emphasis added). It is facially apparent that,

in order to reach this "modified" conclusion, the Court of Appeals had to reject the Commission's finding and craft its own.

Claimant's suggestion that the Commission's ruling on this point "can easily be read as a finding that additional body parts were affected," (Cl. Reply p. 14), is both incorrect and highlights the error in the Court of Appeals' decision. Had the Court of Appeals ruled that the Commission really meant that the other body parts were affected, as opposed to injured, it would have stated that. It did not. Instead, the Court of Appeals clearly held that the Commission "appeared to find Claimant suffered a second, separate injury to his left upper extremity," (Appx. p. 15), and then proceeded to engage in its own factual resolution of this issue. Claimant's recitation of facts that he believes supports the Court of Appeals' resolution of this issue, (Cl. Reply pp. 14-15), appears to be an invitation to this Court to do likewise.

As explained in more detail in their Petition, the Court of Appeals exceeded its appellate role by engaging in independent fact finding. *See, e.g.*, Lark v. Bi-Lo, 276 S.C. 130, 136, 276 S.E.2d 304, 307 (1981) (cautioning "the Bench and Bar" that "the substantial evidence test 'need not and must not be either judicial fact finding or a substitution of judicial judgment for agency judgment'"); *see also* Rogers v. Kunja Knitting Mills, Inc., 312 S.C. 377, 381, 440 S.E.2d 401, 403-404 (Ct. App. 1994) (a reviewing court is "not at liberty to decide the case as if there had been no decision by the workers' compensation commission" and is limited to determining whether the Commission's factual findings are supported by substantial evidence); Bartley v. Allendale County Sch. Dist., 392 S.C. 300, 310-311, 709 S.E.2d 619, 624 (2001) (a "reviewing court may not make findings of fact as to basic issues of liability for compensation, where, to do so, would impose upon the court the function of determining such facts from conflicting evidence"). Because the Court of Appeals engaged in its own, independent fact finding in order

to uphold the Commission, this Court should grant the Petition and reverse the award of total and permanent disability pursuant to S.C. Code Ann. § 42-9-10.

III. The Court of Appeals erred in upholding the Commission's assignment of greater weight to Dr. Johnson and little weight to Dr. Gee based on an arbitrary and capricious consideration.

Claimant's abbreviated response to Petitioners' third appeal point does not present a compelling argument. Given that Claimant has raised only a brief, one-sentence response on this point, ("[g]iving more weight to a medical report because it is later in time is a legitimate exercise of the Commission's power to weight evidence") (Cl. Reply p. 15), his opposition to Petitioner's third argument should be deemed abandoned. In the Matter of the Care and Treatment of McCracken, 346 S.C. 87, 92, 551 S.E.2d 235, 238 (2001) (a cursory and unsupported argument is deemed abandoned on appeal).

Instead of addressing the arbitrariness and capriciousness of the Commission's decision to afford greater weight to Dr. Johnson than to Dr. Gee, Section IV.A of the Court of Appeals' Opinion, Claimant rephrases his third argument to broadly assert he is permanently and totally disabled, which was Section IV.C of the Court of Appeals' Opinion.[4] Claimant's failure to

[4] As to the substance of Claimant's argument regarding whether he proved he is permanently and totally disabled, Claimant mischaracterizes Dr. Pacult's testimony and medical records. While Claimant suggests that Dr. Pacult believed Claimant was unable to return to truck driving, (Cl. Reply p. 7), what Dr. Pacult's medical records state is that, "[p]atient has reached maximal medical improvement and no farther [sic] treatment is suggested and recommended and the patient is *according to him* due to pain unable to return to truck driving." (R p. 224) (emphasis added). At his deposition, Dr. Pacult testified that his opinion regarding Claimant's ability to return to work was based solely on Claimant's "subjective complaint of pain," explaining, "[n]ow, is this real or not? I don't know. I'm not a detective. But if the patient says he cannot do it because of so and so, we believe him, and that's what it states." (R. p. 278, Pacult Dep. p. 22, line 20 – p. 23, line 16). In fact, Dr. Pacult's notes specifically state that, in Dr. Pacult's opinion, in "a few weeks patient will be able to return to his occupation [as] truck driver," (R. p. 218), an opinion he confirmed at his deposition. (R. p. 218; R. p. 276, Pacult Dep. p. 14, lines 8-

mount a substantive defense is an apparent concession that weighting a physician's opinion more heavily based on a less than three week difference in time, without more, is arbitrary and capricious. Quite possibly, Claimant recognizes that this issue can and will cut both ways, both in favor of and against an injured worker in any given case. While there is no dispute that the Commission is empowered to determine witness credibility and the weight to assign to evidence, Shealy, 341 S.C. at 455, 535 S.E.2d at 442, to do so on an arbitrary and/or capricious basis, as is the case here, is impermissible and constitutes reversible error. S.C. Code Ann. § 1-23-380(A)(5)(f) (Commission decisions should be reversed where they are "arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion").

This Court should grant the Petition and hold that, while the Commission is empowered to weight the evidence, it cannot do so on bases – such as minor differences in timing or geographical distance, without more – that are arbitrary and capricious.

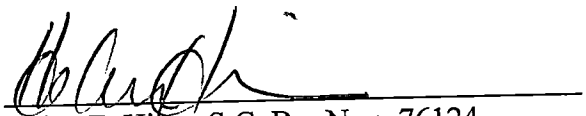
9; R. p. 278, Pacult Dep. p. 22, lines 23-25 ("Patient is unable to return to work as a result of *subjective* complaint of pain. *Otherwise, he would be able to*")) (emphasis added). Thus, Dr. Pacult's records and deposition testimony make it clear that his statement about Claimant's ability to return to work is simply recording what Claimant told him. It is not a professional medical opinion that Claimant is physically unable to return to work.

CONCLUSION

For all the reasons stated in their Petition and herein, Petitioners respectfully request that this Court grant their Petition and reverse the Court of Appeals' Opinion No. 2019-UP-305, and: 1) hold that the Commission properly determined exceptional reasons exist to deviate from the standard method of calculating Claimant's AWW, which is a mixed finding of fact and law, affirm the Commission's determination of Claimant's AWW as $297.63, and affirm the award of a credit to Petitioners; 2) reverse the Court of Appeals' independent finding of fact that Claimant's neck injury affected his left upper extremity and hold that Claimant failed to meet his burden of proving he is totally and permanently disabled pursuant to S.C. Code Ann. § 42-9-10; and 3) affirm the Court of Appeals' determination that affording greater weight to one medical opinion over another based on slight geographical differences is arbitrary and capricious, but reverse the Court of Appeals' affirmation of the Commission's decision to assign greater weight to Dr. Johnson's medical opinion than to Dr. Gee's medical opinion based solely on one being less than three weeks later than the other, as that decision is arbitrary and capricious.

Respectfully submitted,

McAngus Goudelock & Courie



December 11, 2019

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PROOF OF SERVICE

I certify that I have served the Petitioners' **Reply to Opposition to Petition for Writ of Certiorari** on Billy Wayne Herndon by depositing a copy of it in the United States Mail, postage prepaid, on December 11, 2019, addressed to his attorney of record:

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