THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Full Commission Appellate Panel Order

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SC Court of Appeals

WCC File No.:1315719

Appellate Case No.: 2019-001851

Nathanial Spann , Employee.....Appellant,

v.

Professional Systems, Employer,

AND

Liberty Mutual, Carrier.....Respondents.

RESPONDENTS' INITIAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

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STATEMENT OF THE CASE[1]

Nathaniel Spann (Appellant) sustained a work-related injury to his back on or about September 12, 2013. As such, Professional Systems, Employer, and Liberty Mutual, Carrier, (Respondents) provided Appellant with appropriate medical treatment with various physicians, including back specialists, and temporary total disability (TTD) compensation while he was out of work for his injury.

Dr. Michael Peelle reviewed Appellant's medical records and treated him before releasing him at maximum medical improvement (MMI) with a 0% impairment rating on August 29, 2014.

Appellant filed a Form 50 Request for Hearing[2] on November 14, 2014, requesting a doctor's appointment to obtain an additional impairment rating. Respondents subsequently filed a Form 21[3] Request for Hearing on December 16, 2014, seeking to stop temporary total compensation, credit for overpayment of temporary total compensation and a determination as to a disability award, if any, to Appellant's back.

A hearing was held before Commissioner Campbell on March 31, 2015. During the pre-hearing conference, Appellant did **not** dispute he reached MMI. He requested to be sent to another doctor to obtain an impairment rating *higher* than that assigned by Dr. Peelle on August 29, 2014.

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[1] Clearly, Appellant takes no issue with Respondents' view of the case up until this point, as evidenced by Appellant adopting the entirety of the contents of Respondents' "Statement of the Case" submitted in Respondents' brief to the Appellate Panel. (Brief of Defendants/Respondents, Full Commission, dated 8/15/19). Respondents respectfully submit that Appellant's action bolsters Respondents' argument that Appellant is simply unhappy with the result of his claim.

[2] The South Carolina Workers' Compensation Commission Form 50 is an Employee's Notice of Claim and/or Request for a Hearing.

[3] The South Carolina Workers' Compensation Commission Form 21 is an Employer's Request for a Hearing.

At the March 31, 2015 hearing, Respondents argued Appellant had a long history of back issues stemming from previous workers' compensation claims, and the accident on September 12, 2013, did not cause any additional permanent impairment to Appellant's back. Additionally, Respondents argued Appellant did not have a permanent partial disability beyond Dr. Peelle's impairment rating. Respondents argued Dr. Peelle's impairment rating was properly assigned to a reasonable degree of medical certainty under the AMA Guides. Respondents also argued they were entitled to credit for overpayment of TTD dating back to August 29, 2014, which is when Appellant reached MMI.

After the March 31, 2015 hearing, Commissioner Campbell determined: (1) Appellant sustained 4% permanent partial disability to his back; (2) Appellant was not entitled to additional medical treatment; and (3) Respondents were entitled to credit for overpayment of temporary compensation benefits paid to December 16, 2014. Appellant appealed the Order; however, the Full Commission Appellate Panel affirmed the Order on April 25, 2016.

Appellant subsequently appealed to the Court of Appeals, but the Court of Appeals dismissed the appeal on July 7, 2016. Subsequent to the dismissal, Appellant filed a new Form 50, and a hearing was scheduled for April 12, 2018. Prior to the hearing, the Appellant withdrew his Form 50.

Thereafter, Appellant filed yet another Form 50 Request for a Hearing on November 8, 2018. Appellant's Form 50 requested a finding that Appellant was entitled to TTD benefits and that he is permanently and totally disabled.

Appellant was granted another hearing before single Commissioner Wilkerson on March 4, 2019. According to the Order dated May 2, 2019, Commissioner Wilkerson barred Appellant's

claim pursuant to the doctrine of *res judicata*. Appellant subsequently filed a Form 30[4] on May 21, 2019. Thereafter, Appellant was heard before another Full Commission Appellate Panel which again affirmed the single Commissioner's Order barring the claim.

In pertinent part, the Full Panel's findings of fact include:

> " 3. At the Hearing, the Appellant admitted that he was simply pursuing this claim again because he disagreed with Commissioner Campbell's order filed on December 1, 2015. He offered no evidence to support a change of condition claim..."

Additionally, in pertinent part, the Full Panel's conclusions of law include:

> " 2. Pursuant to *Johnson v. Greenwood Mills, Inc.*, 317 S.C. 248, 452 S.E.2d 832 (1994) and other relevant statutes, regulations, and case laws, the claim is barred by the doctrine of *res judicata*."

(Appellate Panel Decision and Order dated Oct. 3, 2019).

STANDARD OF REVIEW

In workers' compensation cases, the South Carolina Workers' Compensation Commission is the trier of fact. *Hunter v. Patrick Constr. Co.*, 289 S.C. 46, 344 S.E.2d 613 (1986). The South Carolina Administrative Procedures Act, S.C. Code Ann. § 1-23-380(A)(6) (1976), establishes the "substantial evidence rule" as the standard for judicial review of a decision of the Commission:

> The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the administrative agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are:
>
> (d) affected by other error of law; [or]
> (e) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record.

In workers' compensation appeals, an appellate court may overturn a conclusion of the

[4] The South Carolina Workers' Compensation Commission Form 30 is a Request for Commission Review.

Workers' Compensation Commission if that conclusion is "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 276 S.E.2d 304 (1981).

> The test is whether the decision of the Commission is supported by substantial evidence. Substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached in order to justify its action.

Mullinax v. Winn-Dixie Stores, Inc., 318 S.C. 431, 458 S.E.2d 76 (Ct. App. 1995).

Therefore, an appellate court may only overturn findings of fact of the Commission if there is no reasonable probability that the facts could be as related by the witnesses upon whose testimony the finding was based. *Lowe v. Am-Can Transp. Servs., Inc.*, 283 S.C. 534, 324 S.E.2d 87 (Ct. App. 1984). Further, an award cannot be based on surmise, conjecture, or speculation. *Tiller v. Nat'l Health Care Ctr. of Sumter*, 334 S.C. 333, 339, 513 S.E.2d 843, 845 (1999); *see also*, *McDowell v. Stilley Plywood Co.*, 210 S.C. 173, 41 S.E.2d 872 (1947) (holding testimony that is based on surmise, conjecture, and speculation has no probative value). While a finding of fact of the Commission will normally be upheld, such a finding may not be based upon surmise, conjecture, or speculation; instead, it must be founded on evidence of sufficient substance to afford a reasonable basis for it. *Edwards v. Pettit Constr. Co.*, 273 S.C. 576, 257 S.E.2d 754 (1979).

ARGUMENT[5]

I. THE WORKERS' COMPENSATION COMMISSION APPELLATE PANEL PROPERLY FOUND THAT APPELLANT'S CLAIM IS BARRED UNDER THE DOCTRINE OF *RES JUDICATA*.

[5] Respondents respectfully submit that Appellant's petition for a writ of certiorari may be dismissed for failing to adhere to the procedural rules of the South Carolina Appellate Court Rules to date, including, but not limited to, various subsections of Rule 208(b)(1), SCACR. However, out of an abundance of caution, Respondents also assert Appellant's argument(s) fails on the merits.

It is well-established in South Carolina that "*res judicata* bars a subsequent suit by the same parties on the same issues." *Johnson v. Greenwood Mills, Inc.*, 317 S.C. 248, 452 S.E.2d 832 (1994). Further, "[*r*]*es judicata* bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties," and "[u]nder the doctrine of *res judicata*, a litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit." *Rodney v. Wal-Mart Stores East, L.P.*, 422 S.C. 344, 348, 811 S.E.2d 785, 786 (2018) (citing *Plum Creek Dev. Co. v. City of Conway*, 344 S.C. 30, 34, 512 S.E.2d 106, 109 (1999)) (internal citations omitted).

Appellant's brief includes a litany of complaints directed at the Commission and the appellate courts, including violations of due process, mishandling and exclusion of key evidence, and the fact that "the appellant [*sic*] courts has [*sic*] always addressed the wrong issues." (Appellant's Brief, p. 5). Respondents contend Appellant's grievances are unfounded and unsubstantiated by **any** evidence. In fact, Appellant has included in his "Designation of Matter to be Included in the Record on Appeal," documents that Respondents have never seen or been made aware of, including a "Complaint" and "Answer." (Appellant's Designation of Matter to be Included in the Record on Appeal). If there has been any violation of due process, it would be that Respondents have never seen documents Appellant is now submitting to this Court for review on appeal.

Notwithstanding that issue, however, Respondents point to Appellant's own brief to support their argument that this claim falls squarely within the legal doctrine of *res judicata*. By Appellant's own admission, he is asking this Court for "reconsideration" of "old evidence" that can be re-heard to potentially "render[] a different decision." (Appellant's Brief, pp. 5, 7).

In addition to his attempt to re-litigate this issue at the appellate level, Appellant admitted at the Full Commission Panel Hearing that he was simply unhappy with the results of the single Commissioner's order dated December 1, 2015. In pertinent part, the following exchange occurred:

> Q: Mr. Spann, as I understand that, you are here today because you want the commission to review the - - the decision that was made back in 2015; is that correct?
> A: Correct.
> Q: And at that hearing, one of the points of contention was your disagreement with Dr. Peele's zero percent (0%) impairment rating; is that correct?
> A: Correct.
> Q: All right. And - - and that's what you want Commissioner Wilkerson to review today to - - you're going to show him where there was an error back in 2015; is that right?
> A: Correct.
> Q: And that's why we're here today, correct?
> A: Correct.
> Q: All right. So, this is the - - you're making the same arguments today that you made back in 2015, and now you've got some - - some evidence you're going to hand him today to show him; is that right?
> A: Correct.

(Hearing Transcript, pg. 9, ll. 3-22)

Based on the foregoing and contrary to Appellant's assertions, Appellant has had ample opportunity to present evidence to the Commission and have his arguments considered. Again, in direct contrast to Appellant's contention, the above-referenced questions were very specific and not a "general and broad opening question" that was "assumed to be his case." (Appellant's Brief, p.5).

In sum, since 2015, it is clear Appellant has been attempting to re-litigate the original decision issued by Commissioner Campbell and to this end, the Full Commission Panel

appropriately found that the claim was barred by *res judicata*.

CONCLUSION

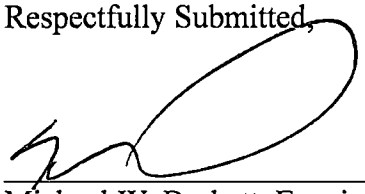
Appellant has had his claim heard in some fashion by six out of the seven Commissioners on the South Carolina Workers' Compensation Commission; twice through hearings by single Commissioners and twice at Full Panel Commission hearings. Notably, all six Commissioners have come to the same result. Appellant has thoroughly litigated and attempted to re-litigate the same work-related injury he sustained almost seven years ago because he is simply unhappy with the monetary benefits awarded to him. To that end, Respondents have paid for his medical care, have paid him for the time that he missed work, and the Commission even awarded Appellant a permanency award based on a 4% disability, despite the fact that Appellant's authorized treating physician had given him only a 0% rating.

Appellant has failed to present **any** evidence to support the multitude of claims that he continues to make. Respondents submit Appellant's actions exemplify precisely the type of waste of judicial economy and resources that the doctrine of *res judicata* seeks to prevent. A litigant does not get to continue to litigate his claim because he disagrees with the result.

Finally, the substantial evidence in the record leads to the conclusion that the Appellate Panel properly found Appellant's claim is barred under the doctrine of *res judicata*. Accordingly, Respondents respectfully request that Appellant's petition for a writ of certiorari be denied and the Order of the Appellate Panel be upheld.

[Signature page to follow]

Respectfully Submitted,



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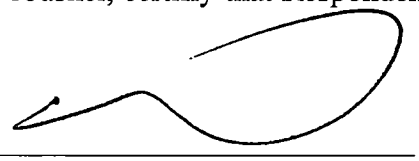
CERTIFICATE OF COUNSEL

Respondents, by and through their undersigned cousnel, certifiy that Respondents' Initial Brief complies with Rule 208(b)(2), SCACR.



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PROOF OF SERVICE

I certify that I have properly served **Respondents' Initial Brief, Certificate of Compliance and Designation of Matter to be Included in the Record on Appeal**, by mailing a copy of the same by United States Mail with first class postage prepaid to the following addresses on February 12, 2020:

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