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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 APPELLATE PANEL

R. Michael Campbell, III, Commissioner

Appellate Case Number 2020-000481
W.C.C. 1205924

Opinion No. 5703
Heard April 1, 2019 - Filed Decemeber 31, 2019

David B. Lemon, Employee/Claimant,.....Respondent,

-vs.-

Mt. Pleasant Waterworks, Employer, and
State Accident Fund, Carrier,.....Petitioners.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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Respondent, by way of Return to Petition for Writ of Certiorari, responds as follows.

Arguments

I. Claimant did not stipulate the Petitioners were entitled to a credit for his prior back claim and the Court of Appeals did not ignore this fact. The Court of Appeals could not "ignore" an issue that had not been raised below.

II. The Court of Appeals did not err as a matter of law by concluding that S.C. Code Ann. § 42-1-170 is inapplicable to Lemon's claim.

III. The Ruling of the Court of Appeals does not contradict the holding of *Medlin v. Greenville County.*

IV. The Court of Appeals did not misconstrue S.C. Code Ann. § 42-1-170 so as to create an exception for the 500 week maximum mandated by S.C. Code Ann. § 42-9-10.

V. The Court of Appeals' decision did not produce an absurd result.

Counter Statement of The Case

This matter is before the Court upon the Petition for Writ of Certiorari. The Respondent maintains the Petitioners have failed to show any compelling reason for the Court to grant the Writ of Certiorari. The decision by the Court of Appeals was simply based upon a construction of a straight-forward statute, namely, S.C. Code Ann. § 42-9-170 (B). This code section is entitled "permanent injury after sustaining another permanent injury in the same employment; entitlement to compensation; extension of period of payment."

This code section applies to cases in which there is an award to an injured employee for a permanent injury who has sustained prior permanent injuries while working for the same employer. In the designated cases, the employer can claim a credit for prior awards to the injured worker while working for the same employer.

In the present case, David Lemon, employed by Mt. Pleasant Waterworks, had prior workers' compensation claims for which he had been awarded benefits. In May, 2012, while working for Mt. Pleasant Waterworks, he sustained injuries to his back and legs and at a hearing before the Single Commissioner he claimed he was permanently and totally disabled. The basis

for his claim was that the combination of the injuries to his back and legs resulted in a total loss earning capacity. (A. p. 5). He did not seek benefits for permanent partial disability because of injuries to the individual parts of his body. The Employer argued that Mr. Lemon was not permanently, totally disabled and maintained that his award should be limited to a finding of injuries to his separate body parts. Additionally, the Employer claimed a credit for the prior awards the Claimant had received as an employee working for the same company. (A. p. 6).

The Single Commissioner awarded the Claimant permanent total disability benefits pursuant to S.C. Code Ann. § 42-9-10, the general disability statute, and found that the basis for the disability was an injury to more than one body part and his lost earning capacity. (A. pp.13-14; Finding of Fact 1). The Commissioner then granted the Employer a credit for the prior awards the Claimant had received pursuant to S.C .§ 42-9-170 and specifically concluded as a matter of law that "there is no need to look any further than the plain language of § 42-9-170 to determine the number of weeks of credit the Defendant is entitled to receive." (A. p.16).

Claimant appealed the credit to the full Commission. The Appellate Panel remanded the claim back to the Single Commissioner to make a finding as to which subsection of S.C. Code Ann. § 42-9-10 applied in this instance, since there are two subsections. Since the credit had been awarded pursuant to S.C. Code § 42-9-170 and since this subsection referenced S.C. Code § 42-9-10 (B) as a possible basis to award the credit, the Appellate Panel wanted the Single Commissioner to determine whether the award for permanent total disability was pursuant to S.C. Code § 42-9-10 (A) or S.C. Code § 42-9-10 (B). The Appellate Panel also gave the Single Commissioner, on remand, the discretion to support his prior award for the credit with other authority, in addition to S.C. Code § 42-9-170. (A. p.67).

The Single Commissioner, on remand, specified that the award for permanent total disability was pursuant to S.C. Code § 42-9-10 (A); but still awarded the credit pursuant to S.C. Code § 42-9-170 and also provided additional authority for the award. (A. pp.77-81). This decision was affirmed by the Appellate Panel for the Commission.

Claimant appealed the Appellate Panel's decision for the credit to the Court of Appeals. The Court of Appeals affirmed the finding of permanent total disability pursuant to S.C. Code § 42-9-10 (A) but also found that the award for the credit to the Employer pursuant to SC § 42-9-

170 was an error of law, based upon the strict construction of said statute. The Court also affirmed the finding that the Employer was entitled to a credit for the temporary total disability benefits that had been paid for the specific May, 2012 accident. The Claimant had always conceded the Employer was entitled to a credit for the temporary total disability benefits that had been paid for the May, 2012 accident, pursuant to SC § 42-9-10 (A), but challenged the award for the credit. The Court of Appeals also found the case law submitted by the Employer did not support the award for the credit.

The Employer petitioned for a rehearing before the Court of Appeals. This petition was denied and the Employer has now petitioned this Court for a Writ of Certiorari.

The issues presented in the Petition for Writ of Certiorari are basically the same issues presented before the Court of Appeals for a rehearing. The Respondent takes issue with the fact that most, if not all, of the issues that were presented to the Court of Appeals in the Petition for Rehearing and to this Court were raised for the *first time* in the Petition for Rehearing. This will be more fully set out below.

In its Statement of the Case, Petitioners stated "Lemon appealed, arguing the statutory 500 week maximum does not apply to him." This is not true. Mr. Lemon has always conceded the 500 week maximum applies with respect to the past payment of temporary total disability benefits for the May, 2012 accident. However, this does not preclude him from receiving an award for permanent total disability benefits. Additionally, he has consistently challenged the Commission's crediting the Employer for his prior claims. This is the whole basis for this appeal.

Arguments

I. Claimant did not stipulate the Petitioners were entitled to a credit for his prior back claim and the Court of Appeals did not ignore this fact. The Court of Appeals could not "ignore" an issue that had not been raised below.

For the first time raised during the appellate process in this case, the Petitioner now argues the Respondent "stipulated" the Petitioner was entitled to a credit for 20.5714 weeks due to a prior back claim with the Employer. This matter has been appealed, briefed and heard by the Appellate Panel on two separate occasions. It was then appealed, briefed and argued before the

Court of Appeals. The first time this issue was raised was in its Petition for Rehearing to the Court of Appeals.

Our Court has consistently held: "an issue that was not preserved for review should not be addressed by the Court of Appeals, and the court's opinion should be vacated to the extent it addressed an issue that was not preserved. Hendrix v. Eastern Distribution, Inc., 320 S.C. 218, 464 S.E.2d 112 (1995)." "No point will
be considered which is not set forth in the statement of issues on appeal. Rule 208(b)(1)(B), SCACR; *State v. Bray*, 342 S.C. 23, 535 S.E.2d 636 (2000)(it is error for an appellate court to consider issues not raised to it); *State v. Prioleau*, 345 S.C. 404, 548 S.E.2d 213 (2001). An issue that was not preserved for review should not be addressed by the Court of Appeals, and the court's opinion should be vacated to the extent it addressed an issue that was not preserved. *Hendrix v. Eastern Distribution, Inc.*, 320 S.C. 218, 464 S.E.2d 112 (1995)."

There were only two stipulations before the Single Commissioner, namely, "(1) No objection to the jurisdiction or venue. (2) The Claimant's average weekly wage is $636.04, yielding a compensation rate of $424.05." (A. p.4). There is no record of the alleged stipulation by Claimant's counsel. There is only a reference in the Single Commissioner's statement of the case about the assertion that the Defendant is entitled to only a credit of 20.5714 weeks due to a prior back claim with the Employer. (A. p.4). This "assertion" is not a stipulation. Nor, is it evidence in the case. In fact, if anything, it was an expression of an alternative position in the event the Commissioner found the Claimant was not entitled to permanent, total disability pursuant to S.C. Code § 42-9-10, or awarded permanent benefits pursuant to S.C. Code § 42-9-30.

This alleged stipulation was not included in the Commissioner's Findings of Fact (A. pp. 12-15). Nor was it included as a Conclusion of Law or part of the Commissioner's Order and Award. (A. pp.16-17).

In the Single Commissioner's Remand Order, his "Statement of the Case" makes no reference, whatsoever, to an alleged "stipulation" by the Claimant as to the entitlement to a credit for a prior award for the back. And in the Remand Order of the Single Commissioner under the

section entitled "Claimant's Position Regarding the Credit," there is no reference to an alleged stipulation as to the prior award for the back. (A. pp. 69-70).

Even assuming there was such an assertion that was referenced in the first Order of the Single Commissioner, the second Order of the Single Commissioner superceded the first Order and that is the Order from which this appeal arises. There is no reference whatsoever to an alleged "stipulation" by the Respondent as to the Petitioner's entitlement to a credit for a prior back claim.

Although the Petitioner claims this "stipulation" was not (and could not be) properly challenged on appeal and is the law of the case; the issue certainly could have been raised in its two appellate briefs filed with the Commission and during its two oral arguments with the Commission. It could have and should have been raised in its brief before the Court of Appeals and could have been raised during oral argument before the Court of Appeals. This issue, which is truly a non-issue based on the Record, was not properly preserved below. Although the Petitioner claims the Court of Appeals erred as a matter of law in ignoring this "stipulation," the Respondent maintains the Court of Appeals did not ignore the stipulation, at all. It could not ignore something not raised or brought to its attention. To the contrary, it was not a stipulation and secondly, it was not brought to the Court's attention or raised as an issue during the appellate process. The Petitioners' failure to properly and timely raise this issue below results in a waiver.

II. The Court of Appeals did not err as a matter of law by concluding that S.C. Code Ann. § 42-1-170 is inapplicable to Lemon's claim.

The Court of Appeals correctly found that S.C. § 42-9-170 does not apply to the present case because the code section, entitled "Permanent injury after sustaining another permanent injury in the same employment," provides that "if an Employee receives a permanent injury as specified in section **42-9-30** or section **42-9-10 (B)** after having sustained another permanent injury in the same employment...." In the present case, the Claimant received a permanent injury as specified in section **42-9-10 (A)** and therefore this subsection does not apply. If the Claimant

had been awarded benefits pursuant to S.C. § 42-9-30 or S.C. § 42-9-10 (B), then the result would be different.

According to the Court of Appeals, "Claimant correctly asserts that the Act is created by statute, and as such, when "reading a workers' compensation statute, we strictly construe its terms, leaving it to the Legislature to amend and define its ambiguities." (Citations omitted). "Workers' Compensation law is to be liberally construed in favor of coverage in order to serve the beneficent purpose of [The Act]; only exceptions and restrictions on coverage are to be strictly construed." (A. p.190).

In its brief, the Petitioner argues S.C. § 42-9-170 (B) applies to the present case. The contention is that the code section applies because Lemon sustained an injury as a result of the May 8, 2012 accident that is both permanent and specified in S.C. § 42-9-30 after sustaining another permanent injury in the same employment. However, Lemon did not sustain an injury in the present case as specified in S.C. § 42-9-30. To the contrary, he sustained a permanent injury and resulting disability as specified in S.C. § 42-9-10 (A) due to injuries to his back and legs resulting in total loss earnings capacity, pursuant to S.C. § 42-9-10 (A) and not pursuant to S.C. § 42-9-30. One of the reasons the claim was remanded by the Appellate Panel to the Single Commissioner was to make a determination as to which code section applied as the basis for the finding of permanent total disability, S.C. § 42-9-10 (A) or S.C. § 42-9-10 (B). The Single Commissioner affirmed the award was based on S.C. § 42-9-10 (A).

The Single Commissioner also found the claim for permanency is not restricted to the scheduled benefits as provided by S.C. § 42-9-30. (Finding of Fact 1, A. p.12). This latter finding defeats the Petitioner's claim that the award was based on S.C. § 42-9-30.

Petitioner also makes a "hairsplitting" disingenuous argument that S.C. § 42-9-170 (B) does not apply to awards and only applies to specific injuries; however, the code section would not make any sense at all if it did not apply to awards. The code section specifically states that "if an employee receives a permanent injury as specified in Section 42-9-30 or Section 42-9-10 (B) after having sustained another permanent injury in the same employment, he is entitled to

compensation for both injuries...." The fact that the code section refers to an entitlement for compensation, establishes the purpose of the section is to identify those awards in which the employer may claim credit for prior injuries as opposed to those awards the employer is not entitled to claim a credit. Simply stated, if the Claimant "is entitled to compensation" (an award for compensation) for both injuries and the successive permanent injury is one that is specified in section 42-9-30 or S.C. § 42-9-10 (B), then the Employer would be entitled to a credit for the prior awards. However, if the Claimant is awarded permanent total disability compensation based upon section 42-9-10 (A) [or S.C. § 42-9-20], then the employer is not entitled to a credit for the prior award. This is based upon the economic model of compensation as opposed to the medical model of compensation. This issue was thoroughly briefed in the Respondent's Appellant's Brief before the Court of Appeals. (A. pp. 152-153). Wigfall v. Tideland Utilities, Inc., 354 S.C. 101, 580 S.E. 2d 100 (2003).

In addition to the above, the entire second argument presented by the Petitioner was never briefed or argued to the Court of Appeals or to the Commission during the pendency of this appeal. The first time it was raised was in the Petition for Rehearing before the Court of Appeals. This is another example of waiver because of failure to raise in the Court below.

III. The Ruling of the Court of Appeals does not contradict the holding of *Medlin v. Greenville County.*

In its brief, Petitioner misstates the basis for the Workers' Compensation Commission's granting the Employer a credit for temporary total disability compensation for the 179 weeks pursuant to S.C. § 42-9-10 (A). The basis for the credit is that S.C. § 42-9-10 (A) provides that the maximum number of weeks of compensation a Claimant can receive for an injury is 500 weeks pursuant to S.C. § 42-9-10 (A), which is the basis for the award in the present case. The Respondent has always conceded that the Employer was entitled to this credit pursuant to said statute. However, by conceding that the maximum number of weeks the Claimant could receive for his May 2012 accident was 500 weeks, including temporary total and permanent total

disability benefits, the Respondent in no way conceded the Employer was also entitled to a credit for prior awards pursuant to S.C. § 42-9-170.

The Medlin case is easily distinguishable from the case at bar. As the Court of Appeals correctly stated "*Medlin v. Greenville County* does not dictate a different result. There, the claimant suffered a work-related injury to his spine in 1983 and was found to have sustained a greater than 50% loss of use of his back, therefore entitling him to the maximum compensation of five hundred weeks for total and permanent disability under 42-9-10 and 42-9-30 (19) of the South Carolina Code....Thereafter, the Claimant returned to work for Greenville County....In 1985, the claimant sustained a second work-related injury and again filed a claim for workers' compensation benefits, seeking total and permanent disability benefits....Although the County admitted the second accident occurred, it denied the claimant was entitled to receive an award for permanent disability due to the prior award of total disability benefits for injury to the same body part injured in 1983." (A. p.193, emphasis added).

Basically, Medlin stands for the proposition if an injured worker receives permanent total disability for a body part such as his back, he cannot receive an additional award for the same body part, his back. Once the body part is totaled, he cannot receive a successive award for the same body part. That makes common sense.

To the contrary, in the present case, the Claimant had only received permanent partial disability awards for some body parts. However he was still gainfully employed. Due to the accident of May, 2012, he injured both his back and legs and was rendered permanently and totally disabled because the effect the injuries had on his earning capacity. Again, the basis for the award was the economic model and not the medical model of disability. The reason S.C. § 42-9-10 (A) and S.C. § 42-9-20 are excluded from S.C. § 42-9-170 is because these awards are based on the economic, lost earning capacity model for disability compensation. To the contrary, S.C. § 42-9-170 only applies to awards based upon the medical model for injuries to body parts pursuant to S.C. § 42-9-30 and S.C. § 42-9-10 (B). In addition to the above, it should be noted the Wyndham and Medlin cases and all of the other cases relied upon by the Petitioner preceded the 2007 Amendment of S.C. § 42-9-170. In 2007, this code section was basically rewritten

because the Second Injury Fund had been, for all practical purposes, abolished. None of the Petitioner's cited cases are on point with the present case.

IV. The Court of Appeals did not misconstrue S.C. Code Ann. § 42-1-170 so as to create an exception for the 500 week maximum mandated by S.C. Code Ann. § 42-9-10.

The Petitioner claims the Order of the Court of Appeals misconstrues the plain terms of S.C. § 42-9-170 by holding that it provides an exception to the 500 week maximum prescribed by S.C. § 42-9-10. This is simply not true. Nowhere did the Court of Appeals find that S.C. § 42-1-170 is an exception to the 500 week maximum prescribed by S.C. § 42-9-10. To the contrary, the Court of Appeals distinguished S.C. § 42-9-10 (A) from S.C. § 42-9-170. The Court correctly held that the maximum number of weeks that an injured employee can receive for any one accident is 500 weeks (Sec. 42-9-10 (A)). That is why the Employer was given a credit for the prior temporary total disability benefits that had been paid to the Claimant. The Court then analyzed S.C. § 42-9-170 and simply found that it did not apply in the present case because the award was made pursuant to S.C. § 42-9-10 (A), which is not included as one of the statutory provisions that would allow a credit for prior awards to the injured employee. Again, the first time the Petitioner presented this argument was in its Petition for Rehearing to the Court of Appeals.

V. The Court of Appeals' decision did not produce an absurd result.

Contrary to the Petitioner's argument, the Court of Appeals' decision did not produce an absurd result. The Court of Appeals did not misconstrue the benefits provided by S.C. § 42-9-10 (A). The Respondent maintains the Court of Appeals correctly decided the issues presented on appeal. The only misconstruction of the applicable statutes is on the part of the Petitioner. There are two code sections that were addressed in the Court of Appeals' decision. S.C. § 42-9-10 (A) provides for the maximum number of weeks of compensation that can be awarded for any one

accident and S.C. § 42-1-170 (B) provides for certain credits for prior awards that simply do not apply in the present case. If the Legislature had intended for the Employer to have been given a credit for prior awards in the present case, then the Legislature would have included S.C. § 42-9-10 (A) in the first paragraph of SC § 42-9-170 (B).

Conclusion

Most, if not all, of the arguments raised by the Petitioner in its brief were never raised below. As such, they are deemed waived. Secondly, the Petitioner has tortured the language in two code sections that are not nearly as complex as suggested.

The Court of Appeals decision in the present case correctly found, as a matter of law, S.C. § 42-9-10 (A) mandates the maximum number of weeks the Claimant could receive for his May 2012 accident was 500 weeks. It correctly credited the Employer for the number of temporary total disability weeks that had been paid. The Court then held that based upon strict construction of S.C. § 42-9-170 (B), the Employer was not entitled to a credit for prior awards because the award in the present case was pursuant to S.C. § 42-9-10 (A) and that code section is not mentioned or referenced in said statutory sub-section.

Based upon the above, Petitioner maintains the decision of the Court of Appeals should be affirmed in its entirety.

Respectfully Submitted,

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Dated at Charleston, South Carolina
This 13 day of April, 2020