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 No. 2020-000481
W.C.C. File No. 1205924

Opinion No. 5703
Heard April 1, 2019 – Filed December 31, 2019

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

v.

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

REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI

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Questions Presented

I. Does the 500 week limitation mandated by S.C. Code Ann. § 42-9-10 apply equally to all total disability claims?

II. Is an assertion against interest made on the record at a hearing by a party's attorney binding?

III. Are arguments preserved for appeal if they are timely raised?

Counter-Arguments

I. The 500 week limitation mandated by S.C. Code Ann. § 42-9-10 applies equally to all total disability claims.

Lemon argues that the Workers' Compensation Act's 500 week maximum limit of benefits only applies to successive claims where disability is presumed (*i.e.*, the "medical model" of S.C. Code Ann. § 42-9-30), but not to claims where there is disability in fact (*i.e.*, the "economic model" under S.C. Code Ann. § 42-9-10). However, the Workers' Compensation Act makes no such distinction and the 500 week limitation is actually mandated by S.C. Code Ann. § 42-9-10 itself. According to Lemon, because he is entitled to benefits under S.C. Code Ann. § 42-9-10(A), he is not subject to the 500 week limitation contained therein. This argument is nonsensible.

When an award is made under S.C. Code Ann. § 42-9-30 for physical loss of use of a scheduled body member, "disability" or "lost earning capacity is conclusively presumed." Wigfall v. Tideland Utilities, 354 S.C. 100, 580 S.E.2d 100 (2003). As a result of Lemon's prior workers' compensation claims, he had lost 199 weeks of earning

capacity prior to the present claim. Because this degree of disability was permanent, it could not be lost, and should not be compensated, a second time. Lemon now seeks additional disability benefits; however, S.C. Code Ann. § 42-9-10(A) – the very statute under which he seeks benefits -- specifically caps such benefits for "total" disability at 500 weeks. There is no statute that permits disability benefits in excess of 500 weeks and neither Lemon, nor the Court of Appeals have cited any authority for the proposition that total disability in his case is not limited to the 500 weeks provided by statute, but is instead 699 weeks.

Because the 500 week limitation is contained in the general disability/economic model statute, S.C. Code Ann. § 42-9-10, the Supreme Court has specifically addressed whether the 500 week limitation applies in successive claims of scheduled disability/medical model claims under S.C. Code Ann. § 42-9-30. Such was the case in Hopper v. Firestone Stores, where the Supreme Court held that in calculating a disability award, the Commission "must find any permanent disability which existed" prior to the accident and subtract that from the award, subject to the 500 week maximum. 222 S.C. 143, 72 S.E.2d 71 (1952). The Supreme Court expanded on this analysis in Medlin v. Greenville County and reiterated that the 500 week maximum applied in successive claims, even when the awards are based upon a presumption of disability. This is because an employee is only "entitled to compensation for the degree of disability which would have resulted from the later accident." 303 S.C. 484, 401 S.E.2d 667 (1991).

Here, the Commission properly determined that the degree of disability resulting from Lemon's 5th workers' compensation claim must take into account the 199 weeks of pre-existing permanent disability, which the Commission discounted accordingly,

subject to the 500 week maximum. Not only is this factual determination supported by substantial evidence, but the legal analysis is supported by the plain language of S.C. Code Ann. § 42-9-10 and the rationale proffered by the Supreme Court in Hopper and Medlin. Therefore, the Petitioners respectfully request that the tortious constructs of the Court of Appeals and their finding that total disability for Lemon is 699 weeks, not 500 weeks as prescribed by statute, should be reversed.

II. Lemon's "assertion" at the September 11, 2014 hearing is a binding "stipulation" and cannot be reversed on appeal.

According to the Workers' Compensation Commission, Lemon "*asserts* that Defendant is entitled to only a credit for 20.5714 weeks due to a prior back claim." (A. p.4) (emphasis added). Lemon now argues that his "assertion" is not a "stipulation" and is not binding upon him. However, a "stipulation" is defined as "an agreement, admission or concession made in judicial proceedings by the parties thereto or their attorneys." Kirkland v. Allcraft Steel Co., 329 S.C. 389, 392, 496 S.E.2d 624, 626 (1998) (citations omitted). Certainly, an assertion against one's interest made at a hearing before a Workers' Compensation Commissioner by one's own attorney on the record is properly considered an "admission" or "concession" and thus a "stipulation."

"Stipulations, of course, are binding upon those who make them." Id. Because counsel for Lemon admitted that any award should be offset "for 20.5714 weeks due to a prior back claim," the Court of Appeals erred in failing to regard this fact as being conclusively proved. *See* BLACK'S LAW DICTIONARY 1415 (6th ed. 1990) (defining a stipulation as a "[v]oluntary agreement between opposing counsel concerning disposition of some relevant point so as to obviate need for proof or to narrow range of

litigable issues."); *See also*, Kirkland, *supra* (holding that once a concession is made, it is binding and must be affirmed on appeal).

III. The Petitioners did not waive any argument.

The Respondent, David B. Lemon, asserts that "[m]ost, if not all, of the arguments raised by the Petitioner in its brief were never raised below." Obviously, the Petition for Rehearing and Petition for Writ of Certiorari raised arguments germane to the December 31, 2019 Order of the Court of Appeals, which reversed the unanimous decision of the Workers' Compensation Commission, because the Petitioners could not address legal conclusions on appeal prior to their existence. The Petitioners respectfully contend that it timely preserved all of the arguments raised to the Supreme Court by raising them in a Petition for Rehearing to the Court of Appeals.

For example, the Workers Compensation Commission concluded that the case of Medlin v. Greenville County, 303 S.C. 484, 401 S.E.2d 667 (1991) was controlling and limited Lemon to 500 weeks of compensation for successive injuries. (A. p.12). In his brief to the Court of Appeals, Lemon raised no argument with respect to the applicability of Medlin. (A. pp.140—158). *See* Rule 208(b)(1)(B), SCACR (stating "[o]rdinarily, no point will be considered on appeal which is not set forth in the statement of the issues on appeal"). Because Lemon failed to preserve this issue for review by the Court of Appeals, the Court erred in addressing it. *See* State v. Austin, 306 S.C. 9, 19, 409 S.E.2d 811, 817 (Ct.App.1991) (holding that "appellate courts, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked."). This alone constitutes reversible error.

In addition, by reversing the Commission's conclusion the Court of Appeals held for the first time in the history of this claim that "*Medlin* is inapplicable." It was not until the Court of Appeals issued this decision on December 31, 2019 that an assignment of error could be raised. Furthermore, there is no requirement that the Petitioners make pre-emptive arguments about the applicability of *Medlin* when not even the Appellant, Lemon, raised such an issue.[1] Therefore, arguments were necessarily raised in the Petition for Rehearing and Petition for Writ of Certiorari that address why Medlin is not only applicable, but controlling, based upon the Medlin decision and its procedural history, as well as the language of the very statutes which the Medlin Court construed. These arguments were simply not relevant until the Court of Appeals created the issue with their ruling. Clearly, the Petitioners have preserved for review all issues as to why the Commission's Decision and Order should be affirmed and why the Order of the Court of Appeals should be reversed.

Conclusion

Based upon the arguments presented in the Petition and herein above, Mount Pleasant Waterworks and the South Carolina State Accident Fund respectfully request that the Supreme Court grant the Petition for Writ of Certiorari, review the issues presented, reverse the Order of the Court of Appeals dated December 31, 2019, and affirm the unanimous Decision and Order of the South Carolina Workers' Compensation Commission in accordance with undisputed evidence in the record and the applicable law. Not only does the decision of the Court of Appeals conflict with prior decisions of

[1] Lemon argues that Medlin is inapplicable for the first time in his Reply Brief to the Court of Appeals, which is improper.

the Supreme Court, but also conflicts with the plain language of the South Carolina Workers' Compensation Act and provides benefits in excess of those permitted by the Legislature.

Respectfully submitted,

Mount Pleasant, S.C.
May 13, 2020

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