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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Mark Hayes, II, Circuit Court Judge

Case No. 2017-CP-42-03726

Raquel Martinez, Respondent,

v.

Spartanburg County and S.C. Association of Counties Self-Insurance Fund, Appellants.

INITIAL REPLY BRIEF OF APPELLANTS

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I.

RESPONDENT ERRONEOUSLY CONTENDS APPELLANTS FAILED TO ADDRESS THE CIRCUIT COURT'S "ALTERNATIVE GROUNDS FOR REVERSAL."

Martinez asserts in her brief that in addition to reversing the decisions of the South Carolina Workers' Compensation Commission's Appellate Panel ("Appellate Panel") on the grounds that the decisions were not supported by substantial evidence, "[t]he Circuit Court also reversed the Commission's decisions [1] as affected by an error of law because the Commission focused on the usual and ordinary conditions of Martinez's employment to the exclusion of the unusual and extraordinary conditions she encountered on November [sic][1] 4, 2005 and [2] as arbitrary because the Commission deliberately refused to consider the testimony of the only witnesses who testified on compensability or the case law cited by the Circuit Court." (Brief of Respondent, p. 20). Martinez contends that Appellants failed to address these "alternative grounds for reversal" by the Circuit Court; however, this contention is erroneous.

First, Martinez's allegation throughout this claim is that her prior "relationship", or her "law enforcement relationship," with Johnson, a *former* officer with the Spartanburg County Sherriff's Department, is what transformed her employment condition on the day of the investigation into the unusual and extraordinary. Thus, if the Appellate Panel "excluded" Martinez's alleged unusual and extraordinary conditions in its compensability analysis, as both the Circuit Court and Martinez allege, the Appellate Panel would have had to fail to consider the "law enforcement relationship" of Martinez and Johnson in its analysis. However, as Appellants specifically addressed in their Initial Brief, the Circuit Court erred in its determination that the

[1] In her Brief, Martinez mistakenly references the date the investigation as November 4, 2005. This appears to be a Scrivener's error, as it is undisputed that the investigation in question occurred on April 4, 2005.

Appellate Panel's "finding that Deputy Martinez did not have a law enforcement relationship with Johnson is unsupported by the substantial evidence on the whole." *See* Amd. Brief of Appellants, p. 33 (citing 12/3/2015 Order, p. 23).

Again, the Circuit Court's decision that the Appellate Panel found Martinez and Johnson did not have a law enforcement relationship is completely inaccurate. The Appellate Panel never made a finding that "Martinez did not have a law enforcement relationship with Johnson." Instead, despite the Circuit Court's holding that the Appellate Panel excluded Martinez's alleged unusual and extraordinary conditions (i.e., the "law enforcement relationship" of Martinez and Johnson) in its compensability analysis, the Appellate Panel performed a thorough analysis of their relationship and made multiple findings regarding the same, including:

- Johnson only worked for the Spartanburg County Sheriff's Office for approximately one year, and during that time, Martinez and Johnson were never partners and worked in different zones;
- Johnson left the Spartanburg County Sheriff's Office 2 to 3 ½ years prior to the toddler's death;
- Martinez and Johnson were not close friends;
- Martinez had never socialized with Johnson or been to his house prior to the date of the toddler's death;
- Martinez did not talk to/console Johnson when she arrived on scene on April 4, 2005;
- Martinez had never met Johnson's child, and there was no evidence Martinez had ever seen a picture of his child at any point during the child's life;
- Martinez was not a friend of Johnson's wife, and Martinez could not recall ever meeting Johnson's wife;
- Martinez only knew Johnson in a "law enforcement way" as a fellow officer who formerly worked for the Spartanburg County Sheriff's Office; and
- Martinez's relationship with Johnson on the date of the child's death was, at most, an acquaintance (or loosely defined 'friend')

(2/24/15 Order, pp. 12-15; 8/22/2017 Order, pp. 8-10). The Appellate Panel specifically found Martinez's "fellow law enforcement officer relationship" with Johnson was insufficient to make

the investigation in question unusual or extraordinary. (2/24/15 Order, p. 13; 8/22/2017 Order, p. 9).

As added evidence of the depth of the Appellate Panel's analysis regarding the "law enforcement relationship", the Appellate Panel went even further and offered its opinion as to what additional facts may have produced a different result:

> "Although a friendship (something more abiding or meaningful than simply seeing/exchanging pleasantries with someone at work) or a present--or perhaps even former--law enforcement partnership might produce a different outcome with regard to compensability, those circumstances are not applicable in the case before us."

(2/24/15 Order, pp. 13-14; 8/22/2017 Order, p. 9). Clearly, the Appellate Panel thoroughly considered what Martinez's alleged as the unusual and extraordinary conditions she encountered on April 4, 2005 and did not simply "[focus] on the usual and ordinary conditions of Martinez's employment".

Martinez also asserts that Appellants failed to address the Circuit Court's reversal of the Appellate Panel's decision "as arbitrary because the Commission deliberately refused to consider the testimony of the only witnesses who testified on compensability or the case law cited by the Circuit Court." (Brief of Respondent, p. 20). However, Appellants did in fact argue that Judge Hayes erred by reversing the Appellate Panel's decision on the grounds that the Appellate Panel "did not include any of the quoted testimony supporting compensability" and "ignored the case law on compensability cited" in his previous order. *See* Amd. Brief of Appellants, p. 32. (citing 12/3/2015 Order, p. 15).

II.

RESPONDENT NEGLECTS THE SUBSTANTIAL EVIDENCE IN THE RECORD WHICH SUPPORTS THE APPELLATE PANEL'S DECISION REGARDING CAUSATION.

Martinez cites factual evidence from the record that favors her position on medical causation and characterizes it as "undisputed" and "unanimous," presumably in an effort to shift this Court's focus away from the "substantial evidence" standard of review. (*See* Brief of Respondent, p. 25). It is certainly true that this Court can set aside findings of the Commission that are controlled by an error of law; however, in this case, Martinez is attempting to distract this Court from examining the body of factual evidence upon which the Appellate Panel relied on—and the Circuit Court ignored—in determining she failed to meet her burden of proving her mental breakdown was proximately caused by her investigation on April 4, 2005.

In her Brief, Martinez re-tells the story of her mental breakdown and sets out medical evidence which she believes is supportive of her version of the facts of the case. It is clear Martinez is asking this Court to reweigh the facts and medical evidence rather than seek out what the Appellate Panel focused on in making its findings. For example, in her Brief, Martinez makes only passing mention of the death of her "cousin."[2] Martinez completely overlooks all of the evidence in the record regarding the death of her "cousin" and the timing of her psychological issues, which Appellants previously discussed in their Initial Brief. (*See* Amd. Initial Brief of Appellants, pp. 15-26). However, this was part of the medical evidence upon which the Appellate Panel relied when it found Martinez had experienced other, non-work-related stressors.

[2] The "cousin" – Michael Adger Roberts – is actually Martinez's ex-husband's cousin, but Martinez referred to him at the hearing as "my cousin." (Tr. 25). She also referred to him in the medical records as her "cousin," "brother," "best friend," and "very close friend and relative." (*See* 8/22/17 Order, p. 10).

The Appellate Panel is given discretion to weigh and consider all the evidence, both lay and expert, when deciding whether causation has been established. Potter v. Spartanburg School Dist. 7, 395 S.C. 17, 23, 716 S.E.2d 123, 126 (Ct. App. 2011). Martinez argues that the medical evidence regarding causation is "unanimous" and "undisputed", so the Appellate Panel is not allowed to ignore it. However, the Appellate Panel did not ignore the medical evidence. Rather, the Appellate Panel determined there was other competent evidence that discredited the medical causation opinions, which was well within the Appellate Panel's authority. "While medical testimony is entitled to great respect, the fact finder may disregard it if other competent evidence is presented." Potter, 395 S.C. at 23, 716 S.E.2d at 126 (Ct. App. 2011).

In her Brief, Martinez suggests there is no competent evidence to support the Appellate Panel's decision that she failed to establish her mental breakdown was proximately caused by her investigation on April 4, 2005, and she urges this Court to not allow the Commission to turn its back on the unanimous opinions of the medical experts. (Brief of Respondent, pp. 24-25). Appellants acknowledge that if viewed in a vacuum—absent the other evidence in the record—the opinions of the physicians Martinez references would likely support a finding of causation. However, medical evidence should not be held to be conclusive, irrespective of other evidence. *See* Ballenger v. Southern Worsted Corp., 40 S.E.2d 681, 683 (1946). Expert opinions are to be considered just like any other evidence. *See* Sharpe v. Case Produce, Inc., 336 S.C. 154, 519 S.E.2d 102 (1999).

The four doctors Martinez alludes to in her brief are Dr. Wieder, Dr. Diehl, Dr. Sherbondy, and Dr. Abess. As clearly evidenced by its Orders, the Appellate Panel considered each doctor's opinion regarding causation, but determined that other evidence in the record, including other medical evidence, outweighed these opinions. The Appellate Panel actually gave

the greatest weight of all the medical evidence to the 2005 treatment records of Dr. Weider, Martinez's family physician, which span more than two and a half months after the April 4, 2005 investigation. (*See* 8/22/2017 Order, p. 11). On April 7, 2005, *three days after the accident investigation*, Martinez saw Dr. Wieder for her high blood pressure and headaches, and she also reported she was having stress at work, specifically mentioning having to work alternating shifts. (APA #1, p. 2). **However, there is no mention in this report of the accident investigation on April 4, 2005.** Id. On April 19, 2005, *two weeks after the accident investigation and one day after her "cousin" died*, Martinez returned to Dr. Weider for blood pressure and grief due to a "very close friend and relative, a cousin with whom she was very close to over the years, passed away yesterday." Id. Dr. Wieder prescribed Martinez Xanax and took her out of work. Id. There was no mention of the accident investigation or the toddler's death in Dr. Wieder's April 19, 2005 report. Id. Dr. Wieder subsequently examined Martinez on eight other occasions between April 25, 2005 and June 24, 2005, and there is not a single mention of April 4, 2005 accident investigation or the toddler's death in any of the reports from those visits. (*See* APA #1, pp. 4-10).

Despite presenting to Dr. Wieder for treatment on ten separate occasions in the two and a half months after the April 4, 2005 accident investigation, Martinez never told Dr. Wieder about the investigation. Following her visit on June 24, 2005, Martinez did not see Dr. Wieder again until May 3, 2006, more than ten months later and after she had retained counsel to pursue her workers' compensation claim. At that visit, Martinez told Dr. Wieder for the first time about the accident investigation, and Dr. Wieder opined that the accident investigation was the "final straw." (APA #1, p. 11). However, regarding Dr. Wieder's causation opinion, the Appellate Panel specifically found:

> 34. Because the May 2006 record of Dr. Wieder (a) does not "track" his prior treatment records, and (b) contains two **salient misstatements of fact,** we accord it *de minimis* weight. Although the record states that the toddler's death was the "final straw," the death of Claimant's cousin/brother/best friend/close friend was in fact the "final straw," as the cousin's death occurred after the toddler's death, and was the reason for which the Xanax was first prescribed. Dr. Wieder's second misstatement (based upon Claimant's statement to Dr. Wieder) is that after the toddler died in early April 2005, Claimant was totally unable to work. This is erroneous. **In fact, Claimant admits that she worked until August 6, 2005** (when she experienced her Xanax withdrawal delirium, and/or manic episode, as referenced *infra*). Further, Claimant's inability to work in April/May/June 2005 was based primarily upon her hypertension; Dr. Wieder would not allow Claimant to return to work until **June 7, 2005**, when her blood pressure had stabilized. **Dr. Wieder himself released Claimant's to full duty work in June 2005 as a forensic investigator.** Further, in the 2006 record, Dr. Wieder discusses Claimant's physical conditions as disabling factors as well, including lack of motor control of Claimant's hands due to numbness and pain; foot drop "indicating deep nerve damage;" and a 10-lb. lifting restriction, and a restriction on climbing ladders/stairs because of Claimant's hip, back, and neck, including "nerve root compression."

(8/22/2017 Order, p. 14).

Regarding the causation opinions of Dr. Diehl and Dr. Sherbondy, the Appellate Panel made the following findings:

> 77. We are not persuaded by Dr. Sherbondy's opinion of June 2006--that the forensic investigation of the toddler's death caused Claimant's alleged injury--as the opinion is inaccurately premised in part upon the "patient's *personal* involvement with the family" [emphasis added]. Dr. Sherbondy cites a combination of 3 factors as a basis for his opinion: (a) Claimant "knew" the father; (b) the "severity of the child's injuries," and (c) Claimant's "personal involvement with the family." As Claimant has never actually worked side by side with the father, had never worked in the same zone as the father, had never socialized with the father outside of work, had never been to the father's home, and never met the toddler's mother, and had never met the toddler, the opinion regarding "personal involvement" is too flawed to be persuasive. Claimant did not testify that she had ever even seen a photograph of the toddler, evidence that might demonstrate a least a somewhat closer relationship than just between two fellow law enforcement officers. The Appellate Panel notes that Dr. Sherbondy's opinion is not premised upon "the fact that the patient and the victim's father were fellow law enforcement officers," but rather that Claimant has "personal" involvement with the family. Regardless, Dr. Sherbondy's opinion does not

> (and cannot) address the "extraordinary/unusual" legal question that falls to the Commission.

(8/22/2017 Order, pp. 22-23).

> 78. Similar to Dr. Sherbondy, Dr. Diehl cites Claimant's "personal" involvement involving the father (rather than describing the father as a "fellow law enforcement officer that Claimant knew through work"). Dr. Diehl has either not read (or not carefully read) the 2005 family physician's records, the emergency room records of April 24, 2005, the April 25, 2005 hospitalization records, or the hospitalization records from August 7-9, 2005, as not one of these records includes any mention of the toddler's death, a death at work, or a death other than the cousin's death. The focus in these temporal records is the death of the cousin/brother/close friend.

(8/22/2017 Order, p. 23).

Out of all the experts, the Appellate Panel gave the greatest weight to Dr. Abess. (*See* 8/22/2017 Order, p. 24). Dr. Abess opined that both the accident investigation and the subsequent death of Martinez's cousin were factors in the exacerbation of Martinez's pre-existing bipolar disorder and that "[t]he discontinuation of the Xanax along with initiation of the antidepressant Zoloft was the actual precipitant for the development of a manic manifestation of her bipolar disorder." (APA #7, p. 164). However, regarding Dr. Abess's opinion the Appellate Panel specifically found:

> 86. The only salient deficiency in the report of Dr. Abess is a lack of exploration of the nature of the relationship between Claimant and her cousin/**best friend**, to whom Dr. Abess simply refers as Claimant's "ex-husband's cousin." It as the cousin's death which caused Claimant, crying and grieving, to seek treatment with her family physician on April 19, 2005—the day after the cousin died, on which date Claimant received a prescription of Xanax; by contrast, Claimant is not noted to have cried or to have appeared upset at the appointment occurring 3 days after the toddler's death.

(8/22/2017 Order, p. 25).

Despite Martinez's suggestion to the contrary, it is more than evident that the Appellate Panel carefully considered each of the medical causation opinions in the record. However, the

Appellate Panel ultimately determined that the greater weight of the other competent evidence in the record outweighed the medical opinions.

In an attempt to distract this Court from the actual facts in this case, Martinez also calls attention to the Court of Appeals' decision in Burnette v. City of Greenville, 401 S.C. 417, 737 S.E.2d 200 (Ct. App. 2012), and this Court's recent decision in Crane v. Raber's Discount Tire Rack, Opinion No. 27951 (S.C. Sup. Ct. filed April 29, 2020), and she specifically references the errors the Courts found Commissioner Barden made in those cases. Presumably, Martinez makes specific reference to Commissioner Barden because she was one of the Commissioners on the Appellate Panel in this matter. This scapegoating attempt is nothing more than a red herring. The underlying decisions made by Commissioner Barden in Burnette and Crane have no bearing on the Appellate Panel's decision in this case. The truth is, this case has been heard by *six* different Commissioners,[3] and *all six* Commissioners have determined the claim is not compensable under the South Carolina Workers' Compensation Act because Martinez's investigation of the accident on April 4, 2005 (1) was not an unusual or extraordinary condition of her employment and (2) was not the proximate cause of her mental condition.

The Appellate Panel's findings of fact regarding the probative value of the medical causation opinions and Martinez's failure to prove that her mental condition was proximately caused by the April 4, 2005 accident investigation are supported by substantial evidence. Martinez seeks for this Court to reweigh the evidence in the record with the hope that her position will be accorded greater weight. Even if there is conflicting evidence in the record, "the Commission's findings of fact are conclusive." Sharpe v. Case Produce, Inc., 336 S.C. 154, 160,

[3] The six commissioners who have heard this case during its long history are: Commissioner R. Michael Campbell; Commissioner Avery B. Wilkerson, Jr.; Commissioner Susan S. Barden; former Commissioner G. Bryan Lyndon; former Commissioner David W. Huffstetler; and former Commissioner Andrea P. Roche.

519 S.E.2d 102, 105 (1999). If this Court reviews the entire record, it will find substantial evidence to support the findings of the Appellate Panel.

III.

RESPONDENT'S ASSERTION THAT THIS COURT SHOULD DECLINE TO HEAR APPELLANTS' CONSTITUTIONAL ARGUMENTS PERTAINING TO BONE IS WITHOUT MERIT.

In this claim, in which compensability is disputed, this Court's decision in Bone v. U.S. Food Services, 404 S.C. 67, 744 S.E.2d 552 (2013), requires that opposing litigants in the *same* litigation receive disparate treatment in a workers' compensation appeal. "The *sine qua non* of an equal protection claim is a showing that similarly situated persons received disparate treatment." Town of Hollywood v. Floyd, 403 S.C. 466, 744 S.E.2d 161 (2013). In her Brief, Martinez argues that Appellants' equal protection argument is hypothetical and abstract. However, while Martinez was allowed to appeal the Appellate Panel's decision denying the claim, when the Circuit Court reversed the Appellate Panel's decision at the very next appellate level, Bone denied Appellants the opportunity to an appeal. Thus, Appellants' equal protection argument is neither hypothetical nor abstract.

Martinez argues that the rule prohibiting interlocutory appeals was applied equally to both parties in this matter because this Court previously dismissed her prior Petition for Certiorari as interlocutory in Martinez v. Spartanburg County, 406 S.C. 532, 753 S.E.2d 436 (2014). Yet, the reality of this Court's previous decision was that it dismissed Appellants' prior appeal from the Circuit Court to the Court of Appeals and vacated the Court of Appeals' previous decision that substantial evidence supported the Appellate Panel's decision that Martinez did not suffer an unusual or extraordinary condition of her particular employment on April 4, 2005. Id.

Martinez also contends that Appellants' due process argument is tenuous and contingent; however, there is nothing tenuous about a remand in this case, under Bone, changing the application of the standard of review for future appeals. The Appellate Panel issued its final order concluding that Martinez did not sustain a compensable mental injury under the Act and that the proximate cause of her mental condition was not the investigation in question, but rather the subsequent death of a relative. Since the Appellate Panel's Order finally decided compensability, the issue on appeal should be whether substantial evidence supports the Commission's findings that Martinez did not sustain a compensable injury. However, if the appeal in this claim is deferred and the Appellate Panel is forced to adopt the unlawful "findings" of the Circuit Court and issue an Order finding the claim compensable, then the issue on appeal in the future becomes whether substantial evidence supports the Commission's findings that Martinez sustained a compensable injury. This clearly places an additional burden on Appellants and violates Appellants' due process. *See* Tiller v. Nat'l Health Care Ctr., 334 S.C. 333, 513 S.E.2d 843 (1999) (the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence).

Furthermore, in her Brief, Martinez asserts that this Court's holding in Russell v. Wal-Mart Stores, Inc., 426 S.C. 281, 826 S.E.2d 863 (2019), renders Appellants' equal protection and due process arguments moot because under Russell, relief can be granted when the rule against interlocutory appeals results in a cycle of appeals and remands denying a timely resolution of a worker's compensation claim. However, as Appellants' previously mentioned in their Brief, Russell dealt with an appeal under Section 1-23-**380** of the Administrative Procedures Act ("APA") [4] and remands by the Commission, and not Section 1-23-**390** of the APA[5] and remands

[4] S.C. Code Ann. § 1-23-380 (Supp. 2018)
[5] S.C. Code Ann. § 1-23-390 (Supp. 2018)

by the circuit court. (*See* Amd. Brief of Appellants, p. 49). Section 1-23-380 of the APA governs appeals from the administrative agency to the judiciary and provides that "[a] party who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review..." S.C. Code Ann. § 1-23-380 (Supp. 2018). Section 1-23-380 also provides that "[a] preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy." Id. However, Section 1-23-390 of the APA, which governs further appellate review within the judiciary, and provides:

> An aggrieved party may obtain review of a final judgment of the circuit court or the court of appeals pursuant to this article by taking an appeal in the manner provided by the South Carolina Appellate Court Rules as in other civil case."

S.C. Code Ann. § 1-23-390 (Supp. 2007). Pursuant to this Court's interpretation of Section 1-23-390 in Bone, Section 1-23-390 limits appeals to final judgments and does not allow for interlocutory appeals. As such, this Court's holding in Russell does not render Appellants' equal protection and due process arguments moot.

CONCLUSION

For the foregoing reasons, as set forth in Appellant's Initial and Reply Briefs, Appellants respectfully ask the Court to reconsider this Court's previous decision in Bone and its application to the present case, and issue a decision holding: (1) the Circuit Court has repeatedly exceed its scope of review, (2) these errors nullify the Circuit Court's prior Orders, and (3) substantial evidence supports the Commission's consistent decision to deny the claim on the grounds that Martinez did not encounter an unusual or extraordinary condition in her particular employment on April 4, 2005 and that the events of April 4, 2005 did not proximately cause Martinez's

mental condition. this Court should reverse the Circuit Court's Order and reinstate the Decision and Order of the South Carolina Workers' Compensation Commission.

Respectfully submitted,

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PROOF OF SERVICE

I hereby certify that I have served the Initial Reply Brief of Appellants on Raquel Martinez by depositing a copy of it in the United State Mail, postage prepaid, on May 21, 2020, addressed to her attorneys of record, Chadwick D. Pye, Esquire, Chadwick D. Pye, LLC, P.O. Box 6346, Spartanburg, South Carolina 29304 and J. Kevin Holmes, Esquire and David T. Pearlman, Esquire, The Steinberg Law Firm, P.O. Box 9, Charleston, South Carolina 29402.

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