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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 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 BRIEF OF THE PETITIONERS

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I. May the Supreme Court affirm the Workers' Compensation Commission's award based upon any reason appearing in the record considering the Petitioner was the prevailing party?

II. Is the Supreme Court's reasoning in Medlin v. Greenville County equally applicable to the case *sub judice*?

Counter-Arguments

I. All arguments raised by the Petitioners are properly before the Supreme Court and preserved for appeal.

Lemon complains that certain issues, such as his stipulation regarding the Petitioners' entitlement to a credit for benefits paid in a prior back claim (A. p.4), are not before the Supreme Court because they were not specifically addressed by the Commission's Appellate Panel or the Court of Appeals. What Lemon fails to recognize is that the Petitioners were the prevailing party in their appearances before the Appellate Panel and the Court of Appeals, given that the Workers' Compensation Commission had agreed with Petitioners' argument that Lemon was only entitled to a maximum award of 179 weeks of compensation under S.C. Code Ann.§ 42-9-10 as a result of his fourth work

accident on May 8, 2012. As the prevailing party, the Petitioners were not required to argue additional *sustaining* grounds in order to preserve them for appellate review.[1]

As explained by this Court, at length, in I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 405, 526 S.E.2d. 716 (2000), in accordance with our current Appellate Court Rules,

> "a respondent — the 'winner' in the lower court — may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court. It would be inefficient and pointless to require a respondent to return to the judge and ask for a ruling on other arguments to preserve them for appellate review. It also could violate the principle that a court usually should refrain from deciding unnecessary questions." (internal citations omitted).

In addition,

> "it is not always necessary for a respondent — as the winning party in the lower court — to present his issues and arguments to the lower court and obtain a ruling on them in order to preserve an issue for appellate review. This approach is in keeping with the view, as expressed in Rule 220(c), SCACR, that an appellate court may affirm the lower court's judgment for

[1] Lemon admits that all issues raised by the Petitioners were raised in their Petition for Rehearing filed with the Court of Appeals. (*See* Respondent's Brief to the Supreme Court p.8).

> any reason appearing in the record on appeal. An affirmance promotes judicial economy and finality in private and public affairs, which are important public policies. *E.g.*, Kreutner v. David, 320 S.C. 283, 465 S.E.2d 88 (1995) (appellate court may affirm for any reason appearing in the record); State v. Johnson, 278 S.C. 668, 301 S.E.2d 138 (1983) (same).") I'On, L.L.C. v. Town of Mount Pleasant, *supra*, 338 S.C. 405, 420, 526 S.E.2d. 716, 723.

Moreover, the Petitioners could not have anticipated the ruling of the Court of Appeals, so as to pre-emptively preserve legal arguments in response to conclusions that were not actually elucidated until their decision was issued on December 31, 2019. There can be no serious argument that the Petitioners are not entitled to review of the decision of the Court of Appeals on any ground raised in the Petition for Rehearing and Petition for Writ of Certiorari. Therefore, the Petitioners respectfully contend that the "issue preservation" and "waiver" arguments proffered by Lemon are without merit.

II. The Supreme Court's holding in *Medlin* is applicable because that case is factually and legally indistinguishable from the case *sub judice*.

Lemon argues that the Supreme Court's holding in Medlin v. Greenville County, 303 S.C. 484, 401 S.E.2d 667 (1991), is inapplicable because his pre-existing disability was only valued at 199 weeks prior to fourth work injury, whereas Medlin had already received 500 weeks of compensation prior to his second injury. Respectfully, this is a distinction without a difference, at least as to the applicable legal principals. The legal

principals espoused in *Medlin* apply regardless of whether the pre-existing permanent disability was total or partial.

In Medlin, the employee sustained a scheduled injury to his back and was awarded 500 weeks of benefits under S.C. Code Ann. § 42-9-30 for permanent loss of use of his back before sustaining a second injury in the same employment for which he claimed a permanent and total loss of wage-earning capacity under S.C. Code Ann. § 42-9-10. The Supreme Court held that, having already received the maximum 500 weeks of compensation under the Act for his first injury, Medlin was obviously not entitled to *any* additional benefits for permanent disability as a result of his second injury, reasoning that those 500 weeks of pre-existing disability were now "non-existent" as far as the Act's compensation provisions are concerned because 500 weeks is the statutory maximum. The Medlin court specifically relied on Hopper v. Firestone Stores, et al., 222 S.C. 143, 72 S.E.2d 71 (1952), which reasoned that

> "the Legislature intended that the compensation here, if there is to be such, must be based only upon the extent to which the loss or loss of use existing after the last injury exceeds that which existed prior thereto."

Therefore, this issue – the question of excess -- is a factual one reserved to the Workers' Compensation Commission and applies in all cases, regardless of the degree of the pre-existing disability. Medlin simply does not espouse, as Lemon suggests, a mechanical, legal "offset" to be applied only in cases where there has been a previous award of permanent and total disability.

In accordance with the Medlin and Hopper courts' sound reasoning, the issue addressed by the Workers' Compensation Commission in the case *sub judice* was the extent to which Lemon's permanent disability after his fourth injury on May 1, 2012 exceeded that which existed prior thereto. Having concluded that Lemon's permanent disability as a result of his fourth injury exceeded his prior disability by 179 weeks based upon substantial evidence in the record (including evidence of his multiple prior, permanently-disabling injuries resulting in 199 weeks of compensation and the stipulated credit for 122 weeks of temporary compensation for the 2012 injury) and based upon the plain language of S.C. Code Ann. § 42-9-10 (which limits an employee to 500 weeks of compensation in the absence of paraplegia, quadriplegia, or physical brain damage), the Commission's final Decision and Order is supported by substantial evidence in the record and the applicable law. As such, the Supreme Court should affirm the Commission's award of 179 weeks of compensation in accordance with the Administrative Procedures Act.[2]

[2] The appellate court must affirm the Workers' Compensation Commission's findings of fact made if they are supported by substantial evidence. Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981). Substantial evidence is that which, considering the record as a whole, would allow reasonable minds to reach the conclusion the agency reached. Grayson v. Carter Rhoad Furniture, 317 S.C. 306, 454 S.E.2d 320 (1995). Importantly, where there is a conflict in the evidence, either by different witnesses or in the testimony of the same witness, the findings of fact of the Commission are conclusive. Glover v. Columbia Hospital, 236 S.C. 410, 114 S.E.2d 565 (1960). Indeed, the possibility of drawing two inconsistent conclusions from the evidence does not prevent the

Conclusion

Based upon the arguments contained in their Brief filed on November 15, 2020 and those presented herein above, the Petitioners, Mount Pleasant Waterworks and the South Carolina State Accident Fund, respectfully request that the Supreme Court 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 the substantial and undisputed evidence in the record and the applicable law.

Respectfully submitted,

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Commission's findings from being supported by substantial evidence (*see* Moore v. City of Easley, 322 S.C. 455, 472 S.E.2d 626 (1996)) because an appellate court may not substitute its judgment for that of the Commission as to the weight of the evidence unless the agency's findings are clearly erroneous in view of the reliable, probative, and substantial evidence on the record. Rodney v. Michelin Tire Corp., 320 S.C. 515, 466 S.E.2d 357 (1996).