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Aug 30 2021

SC Court of Appeals

**THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

**APPEAL FROM THE SOUTH CAROLINA
'WORKERS' COMPENSATION COMMISSION**

**Gene McCaskill, Commissioner
Avery B. Wilkerson, Jr., Commissioner
R. Michael Campbell, II, Commissioner**

W.C.C. FILE NO.: 1215681

APPELLATE CASE NO.: 2018-000359

Vickie Rummage, Employee, Appellant,

vs.

**BGF Industries, Employer, and Great American Alliance Insurance Co., Carrier,
..... Respondents.**

**APPELLANT'S REPLY TO RESPONDENTS'
RETURN TO
PETITION FOR REHEARING**

Pursuant to Rule 240 (f), SCACR, Appellant, Vickie Rummage, respectfully submits the arguments advanced through Respondents', BGF Industries' and Great American Alliance Insurance Company's, August 23, 2021 Return: (a) completely misconstrue both fact and law in asserting the issue relative to their compliance with the standard of proof prescribed by S.C. Code Ann. Section 42-9-35 (2015) was not preserved when the ultimate fact finder, following specific consideration of this issue, determined otherwise; (b) similarly, misapprehends the fundamental concept that evidence, though admissible, must nonetheless satisfy the governing standard of proof to be effective; (c) wholly ignores the "clearly erroneous" introduction of the March 5, 2008

Decision and Order improperly assailed “the credibility of . . . [Dr. Fred D. McQueen, Jr.,] a key medical provider in the present case”, impugning the character of an essential medical expert whose unique perspective as to the core issue in dispute was conspicuously absent from both the single commissioner’s and appellate panel’s analyses; and (d) mistakenly overlooks Ms. Rummage’s previous contention they had waived any right to contest ruling on the basis of issue preservation by failing to seek reconsideration of the panel’s February 1, 2008 Order per the provisions of S.C. Code Ann. Section 1-23-380 (1) (Supp. 2017).

LEGAL ARGUMENT

1. The Appellate Panel’s determination Ms. Rummage adequately preserved the issue relative to Respondents’ noncompliance with Section 42-9-35 is not only supported by substantial evidence, but also consistent with relevant case law.

“The South Carolina Administrative Procedures Act establishes the substantial evidence standard for judicial review of decisions by the Commission.” Canteen v. McLeod Regional Medical Center, 400 S.C. 551, 735 S.E. 2d 246, 249 (Ct. App. 2012); Wofford v. City of Spartanburg ex rel. South Carolina, 415 S.C. 152, 781 S.E. 2d 146, 148 (Ct. App. 2015). Substantial evidence is “not a mere scintilla of evidence nor the evidence viewed blindly from one side of the case, but . . . evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached or must have reached in order to justify its action.” Frampton v. S.C. Department of Natural Resources, 432 S.C. 247, 851 S.E. 2d, 714, 719 (Ct. App. 2020); Patel v. BVM Motel, LLC, 433 S.C. 337, 857 S.E. 2d 564, 567 (Ct. App. 2021). “In a workers’ compensation case, the appellate panel is the ultimate fact-finder.”

Turner v. SAIA Construction, 419 S.C. 98, 796 S.E. 2d 150, 154 (Ct. App. 2016); Provins v. Spirit Construction Services, Inc., 433 S.C. 17, 855 S.E. 2d 318, 322 (Ct. App. 2021).

Notwithstanding Respondents' contrary contention, inspection of her December 17, 2018 Final Reply Brief and Petition for Rehearing confirms Ms. Rummage has never attempted to avoid "addressing the fundamental question", but instead attempted to explain: (a) when confronted with a factual dispute involving the breadth of her appeal, the appellate panel determined her exceptions adequately preserved the contention Dr. Gualtieri's report did not satisfy the requirements of Section 42-9-35; (b) the appellate panel's ruling is not only amply supported by the contents of the hearing record, but also a plethora of legal authorities cited in both her Reply Brief and Petition for Rehearing; and (c) as the ultimate fact finder not only agreed the issue was properly raised, but also ruled on it, she has certainly satisfied the longstanding criteria for issue preservation recognized by this Court.

Additionally, Respondents' suggestion the mere introduction of Dr. Gualtieri's report into evidence absolved them of the obligation to comply with Section 42-9-35 conveniently ignores: (a) the fundamental distinction between admissibility and satisfaction of the requisite standard of proof; and (b) several previously-cited rulings verifying evidence (though unchallenged) failed to satisfy a heightened standard of proof.

Ms. Rummage again respectfully requests the Court to grant her Petition, withdraw/amend its prior decision, rehear the matter and issue a new decision reversing the Appellate Panel's Order, which remains the product of an unlawful adjudication process premised upon incompetent evidence that does not satisfy the standard of proof requirement established by Section 42-9-35.

2. The “clearly erroneous” admission of the March 5, 2008 Order, which unquestionably/inappropriately attacked “the credibility of Dr. McQueen, a key medical provider” whose unique perspective on the central issue in dispute was certainly crucial in this instance, does not constitute harmless error.

As noted by the Court, Respondents offered the March 5, 2008 Order to not only “establish . . . [Ms. Rummage] had been untruthful in a prior workers’ compensation case”, but also to undermine rather crucial opinions expressed by Dr. McQueen as to the medical causation of her current psychiatric distress. While the record may well include sufficient evidence to otherwise “support. . . the single commissioner’s credibility determination” (as adopted by the appellate panel) relative to certain aspects of her testimony, it contains nothing that cures the inappropriate/unwarranted attempt to discredit Dr. McQueen through the impermissible introduction of this extrinsic proof.

Given the medically-driven nature of the ultimate issue in dispute, Ms. Rummage respectfully submits: (a) the prejudicial impact of this “troubling” legal error is inescapable; (b) it is likewise undeniable “key” evidence of this nature could “reasonably have affected the result” of this litigation before the Commission (See, State v. Mitchell, 286 S.C. 572, 336 S.E. 2d 150, 151 (1985); State v. Johnson, 432 S.C. 653, 855 S.E. 2d 305, 309 (Ct. App. 2021)); (c) the profoundly adverse effect of this fundamental error on Dr. McQueen’s testimony cannot be characterized as harmless; and (d) introduction of this extrinsic evidence constitutes reversible error, regardless of any presumably harmless impact on assessment of Ms. Rummage’s credibility.

As a consequence, Ms. Rummage again respectfully requests the Court grant her Petition, withdraw/amend its prior decision, rehear the matter and issue a new decision determining the Commission committed reversible error in allowing introduction of the March 5, 2008 Order.

3. Ms. Rummage previously raised Respondents' failure to contest the appellate panel's rejection of their preservation argument.

Following Respondents' assertion of their preservation argument, Ms. Rummage argued:

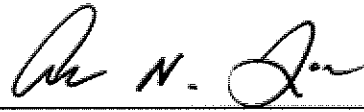
Frankly, if Respondents believed the Appellate Panel's/Commission's ruling on the scope of the appeal was erroneous, it would appear they were not only entitled, but obliged, to seek reconsideration per S.C. Code Ann. Section 1-23-380 (1) (Supp. 2017). Their failure to do so should operate as a waiver of any right to raise the issue at this stage. (See, Appellant's Final Reply Brief, p. 3).

Although inartful, Ms. Rummage unquestionably maintained Respondents' failure to seek rehearing before the appellate panel on the heels of its rejection of their preservation argument constituted a waiver of any right to contest Ms. Rummage's entitlement to pursue appeal of this issue.

In this regard, she respectfully submits: (a) her respective references to issue abandonment are certainly consistent; and (b) Respondents' current argument on this point smacks of the "pot calling the kettle black".

Accordingly, Ms. Rummage respectfully requests the Court to grant her Petition, withdraw/amend its prior decision, rehear the matter and issue a new decision reversing the Appellate Panel's Order, which is unquestionably the product of an unlawful adjudication process premised upon incompetent evidence that does not satisfy the standard of proof requirement established by Section 42-9-35.

Respectfully submitted,



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Attorney for Appellant

Columbia, South Carolina
August 30, 2021

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..... Respondents.**

CERTIFICATE OF SERVICE

Paula F. Bregovi, paralegal for the firm of Andrew N. Safran, LLC, Attorney at Law, with offices at Columbia, South Carolina, hereby certifies that on the 30th day of August, 2021, she served Appellant's Reply to Respondents' Return to Petition for Rehearing in the following fashion:

To: **VIA EMAIL & U.S. MAIL**
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August 30, 2021

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The Honorable V. Claire Allen
Deputy Clerk
South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

RE: Vickie Rummage v. Great American Alliance Insurance Company
Appellate Case No.: 2018-000359
Opinion No.: 5822

Dear Claire:

Attached please find Appellant's Reply to Respondents' Return to Petition for Rehearing, which I am filing on behalf of Ms. Vickie Rummage relative to the above-referenced matter.

By copy of this letter, I am serving this Reply on Mike Farry and Jeremy Summerlin, counsel for Respondents. As always, in the event they have any questions or comments concerning this matter, I invite them to contact me.

Thank you for your cooperation.

With kindest regards, I am

Very truly yours,


Andrew N. Safran

ANS/pfb
Enclosures

cc: Michael A. Farry, Esquire (via email and U.S. Mail)
Jeremy R. Summerlin, Esquire (via email and U.S. Mail)