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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court Of Common Pleas

G. EDWARD WELMAKER, Circuit Court Judge

Unpublished Opinion No. 2013-UP-071 (Ct. App. Filed 2/13/2013)

Maria E. McGaha,Respondent,

v.

Honeywell International, Inc., Employer
And Zurich North America, CarrierPetitioners.

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the South Carolina Court of Appeals on March 22, 2013.

QUESTION PRESENTED

Pursuant to Rule 242 of the South Carolina Rules of Appellate Procedure, Petitioners, Honeywell International, Inc. ("Employer" or "Honeywell") and Zurich North America ("Carrier" or collectively "Petitioners") hereby petition this Court for a *Writ of Certiorari* to the Court of Appeals to review that Court's Decision in this matter. In making this Petition, Petitioners respectfully assert that the Court of Appeals erred in affirming the Decisions of the South Carolina Workers' Compensation Commission and the Greenville Court of Common Pleas via an Unpublished Decision and Order filed on February 13, 2013, and that this Court should review the following issue:

1. Should this Court grant *certiorari* to correct the erroneous ruling by the Court of Appeals with respect to affirming the Appellate Panel of the South Carolina Worker's Compensation Commission and its findings that Respondent Maria McGaha sustained a compensable injury to her neck and is entitled to temporary total disability compensation benefits in absence of any evidence to support the legal ruling?

STATEMENT OF THE CASE

The South Carolina Workers' Compensation Commission [hereinafter the "Commission"] found that Maria E. McGaha, Employee/Claimant [hereinafter "Respondent"] had sustained compensable injuries to her neck, left shoulder, and left hand. The Commission also found that Respondent had proven by a preponderance of the evidence that she is entitled to payment of temporary total disability compensation benefits beginning from March 4, 2005 to the present. (App. pp. 28-31). Petitioners appealed the Commission's findings and conclusions to the Greenville County Court of Common Pleas. The Circuit Court affirmed the Commission's findings and conclusions in an Order dated January 19, 2011. Thereupon Petitioners appealed to the South Carolina Court of Appeals, which affirmed the Commission's findings and conclusions in an Unpublished Opinion filed on February 13, 2013. The Petition for Rehearing was timely filed. On March 22, 2013, the Court of Appeals promulgated an Order denying Petitioners Request for Rehearing.

FACTS

Maria E. McGaha, Respondent, began working at Honeywell International, Inc. on March 23, 1998. (App. pp. 178-180, 205). McGaha alleged a work-related injury to her neck, left hand, and left shoulder on or about August 1, 2003. (App. pp. 24, 45). McGaha first received treatment from Mountain View Family Practice, wherein she was diagnosed as having carpal tunnel syndrome of the left hand. (App. pp. 64-71). McGaha presented a medical note from

Mountain View Family Practice to her supervisor indicating the left carpal tunnel syndrome was work related. (App. p. 70). The note authorized McGaha to remain off work for two weeks. (App. pp. 70, 195). Honeywell did not dispute the diagnosis of left carpal tunnel syndrome. (App. p. 80, 184). Honeywell referred McGaha to WorkWell for additional medical treatment, evaluation and assessment. (App. pp. 108-115).

McGaha underwent nerve conduction studies to verify the initial diagnosis of carpal tunnel syndrome. Dr. Kent Kistler, neurologist, opined the nerve conduction studies were normal. (App. pp. 80, 160 and 163). Dr. Kistler advised McGaha that the normal nerve conduction studies confirmed that she did not suffer from carpal tunnel syndrome of the left hand. (App. p. 109).

Because of continued complaints of left hand and arm pain, McGaha continued to treat with physicians at WorkWell. WorkWell physicians later diagnosed McGaha as having degenerative disc disease, but determined that the condition was not related to McGaha's occupational duties. (App. pp. 114-121).

Because conservative treatment consisting of anti-inflammatory medications, physical therapy, and a brace did not alleviate McGaha's left arm maladies, she underwent a MRI of the cervical spine. (App. pp. 108-114). The MRI revealed degenerative disc disease at C4-5 through C6-7 with evidence of hypertrophic foraminal encroachment. (App. pp. 114-116). McGaha then began treating with Dr. Michael Bucci, a neurosurgeon. (App. pp. 122-128). Dr. Bucci concluded McGaha's cervical spine problems did not warrant surgery and was not

causing left shoulder pain. (App. pp. 163-164). On January 21, 2004, McGaha began treating with Dr. Stephen Geary, who diagnosed McGaha as having impingement of the left shoulder, along with a component of arthritis of the AC joint. Dr. Geary administered an injection to the AC joint. (App. pp. 132-134).

Dr. Geary completed a medical questionnaire dated February 9, 2005. Dr. Geary opined that McGaha's left shoulder problems had been aggravated by her work-related activities at Honeywell International. (App. p. 135).

McGaha next treated with Dr. Robert Schwartz, a physiatrist or pain management physician. Dr. Schwartz provided medical treatment for McGaha's left shoulder problems. (App. pp. 136-138). Dr. Schwartz noted in a report dated February 22, 2005, McGaha's shoulder problems may result from an automobile accident that occurred during the 1990's. Dr. Schwartz reached this conclusion because of McGaha's inability to identify the cause or etiology of her shoulder, hand, and neck complaints. (App. pp. 154-161). Dr. Schwartz was the last physician to treat McGaha. Neither Drs. Schwartz nor Geary authorized Respondent to remain out-of-work due to left shoulder pain and problems.

Despite McGaha's allegation of an alleged work related accident of August 1, 2003, the initial Form 50, dated July 9, 2004, was not prosecuted by McGaha until she requested a hearing by virtue of a Form 50 dated September 11, 2008. (App. pp. 34-36).

At the hearing, McGaha testified that she sustained an injury to her neck, left and right arms, left and right shoulders, and left hand, because of her

employment duties. (App. pp. 206-208). According to McGaha, her neck and left hand problems have resolved since she last worked at Honeywell in August 2003. (App. p. 146; p. 219, lines 8-17; p. 225, lines 18-20). McGaha no longer suffers from left carpal tunnel syndrome. (App. p. 146; p. 219; lines 13-17). Despite having last worked in 2003, McGaha alleges she presently suffers only with left shoulder pain. McGaha attributes the left shoulder problems to her past work related activities. (App. p. 221, lines 8-15).

McGaha did not prosecute her claim for a compensability determination of the denied left shoulder and neck injury claims or the payment of temporary total disability compensation benefits for five years. (App. pp. 34-36). McGaha admitted that during this five-year span she was preoccupied with her spouse's poor health. (App. pp. 222-225). In particular, McGaha's spouse has suffered with colon cancer, liver cancer, heart attacks, paralysis, and strokes. (App. p. 213, lines 2-24). McGaha's spouse was also in a coma for a substantial period of time and had been hospitalized on the date of the workers' compensation hearing in 2009. (App. p. 213, lines 23-24). McGaha admitted that her husband's poor health required her to provide him with medical assistance 24 hours a day/7 days a week due to chemotherapy treatments. (App. pp. 223-225).

Although Respondent no longer suffers with neck pain or hand/wrist pain (carpal tunnel syndrome), and no physician has ever medically authorized Respondent to remain out of work beginning on March 4, 2005, the Order of the

Commission awards McGaha temporary total disability compensation benefits from March 4, 2005 to the present.

ARGUMENTS

I. *CERTIORARI* REVIEW IS WARRANTED BECAUSE THE OPINION OF THE COURT OF APPEALS FAILS TO ADDRESS PETITIONER'S ARGUMENT THAT THE AWARD OF TEMPORARY TOTAL DISABILITY COMPENSATION BENEFITS FROM MARCH 4, 2005 IS NOT SUPPORTED BY EVIDENCE, THEREFORE, THE AWARD RESTS ON SURMISE, SPECULATION AND CONJECTURE.

The record is absolutely devoid of medical evidence, medical report or expert testimony opining Respondent has been temporarily and totally incapacitated from gainful employment from March 4, 2005, to the present. As such, the Order of the Court of Appeals cites no evidence in support of its Decision to affirm the Commission's order. In the absence of any corroborating evidence, other than Respondent's self-serving statements, the Commission's award of temporary total disability compensation benefits is based upon complete speculation, conjecture, surmise, and self-serving statements.

As a matter of fact, the Commission's Order states in stipulation number 5 that the Commission's records cannot consist of self-serving declarations or unstipulated medical reports." A review of the record reflects that Respondent's self-serving statements are the only proof in support of the award.

Accordingly, Petitioners submit it is entitled to the grant of *certiorari* to the Court of Appeals to review the affirmation of the Commission's Decision to award

temporary total disability compensation beginning from March 4, 2005 to the present.

Section 42-1-120 defines the term "disability" as the incapacity to earn wages because of a work related injury. *S.C. Code Ann. § 42-1-120* (2010). Temporary total disability compensation is not awarded for the physical injury as such, but rather for "disability" produced by such injury. The disability is to be measured by the employee's capacity to earn wages which he/she was receiving at the time of the injury Outlaw v. Johnson Service Co., 254 S.C. 486, 176 S.E.2d 152 (1970).

McGaha waited five years before she requested an adjudicatory hearing to decide the issue of temporary total disability compensation. Although workers' compensation laws constitute a form of social legislation and is afforded a liberal construction and furtherance of the beneficial purposes for which it is designed, the Workers' Compensation Act is not to be converted into a form of welfare insurance. Phillips v. Dixie Stores, Inc., 186 S.C. 374, 195 S.E. 646 (1938). See also, Price v. B. F. Shaw Co., 224 S.C. 89, 77 S.E.2d 491 (1953).

McGaha's five (5) year delay in adjudicating her claim was as a consequence of Ms. McGaha's justified pre-occupation with her spouse's serious and critical health conditions and illnesses. Unlike the situation in the case of Orr v. Elastomeric Products, 323 S.C. 342, 474 S.E.2d 448 (Ct. App. 1996), the alleged injury did not prolong the period for which McGaha could not work, rather it was McGaha's choice not to work during this period of time in order to

care for her ailing spouse. *Id.* McGaha was not under the care of a physician during this very extensive time period. There is no medical note or any evidence excusing her from work but for the shoulder injury. There is no indication McGaha has been temporarily and totally disabled beginning on March 4, 2005. *S.C. Code Ann. § 42-1-120 (2009)*. McGaha's ability to provide care for her spouse is proof that she was not totally incapacitated. (App. pp. 224-225).

Aside from McGaha's self-serving testimony, there is no medical evidence of McGaha's **total incapacity** to work because of a left shoulder malady caused by work activities at Honeywell. None of the physicians cited in the record opine that McGaha is totally incapable of engaging in gainful employment. Also, not one physician has ever authorized McGaha to remain off of work because of left shoulder problems.

The objective and credible medical evidence does not support the South Carolina Workers' Compensation Commission's decision to award temporary total disability compensation benefits to McGaha beginning on March 4, 2005.

Dr. Robert Schwartz had ordered the Musculoskeletal Ultrasonography, a diagnostic test, in order to obtain an image of the cervical spine and shoulder. Although the Commission relies upon the last medical report of Dr. Schwartz dated March 4, 2005, as the basis for ordering temporary total disability compensation benefits, the report does not authorize McGaha to remain out-of-work or excuse her from performing occupational activities. (App. p. 159). The report simply addresses the diagnostic test results.

The Commission's award of temporary total disability compensation benefits is not supported by any evidence much less substantial evidence as is required by law. Hucks v. Green's Fuel of S.C., 247 S.C. 457, 148 S.E. 2d 149 (1966). In order to affirm the Commission's award of temporary total disability compensation benefits, clearly the Circuit Court and the Commission engaged in speculation, conjecture, and surmise, in absence of evidence corroborating the Commission's award of temporary total disability compensation benefits. See Hucks v. Green's Fuel of S.C., (Supra.).

Because the Commission's award of temporary total disability compensation benefits from March 4, 2005, is not supported by substantial evidence, it was legal error for the Circuit Court to affirm the Commission's Decision. *Id.* Accordingly, Petitioners respectfully request that this Court review the issue of payment of temporary total disability compensation benefits.

II. THE MARCH 4, 2005 NOTE OF DR. ROBERT G. SCHWARTZ ADDRESSES THE RESULTS OF A DIAGNOSTIC MUSCULOSKELETAL ULTRA SONOGRAPHY AND IS NOT MEDICAL AUTHORIZATION TO REMAIN OFF OF WORK OR AN OPINION REGARDING TOTAL INCAPACITY FROM WORK.

The only medical evidence repeatedly pointed out by Respondent to justify the Commission's Decision does not in any way support an award of temporary total disability compensation benefits to McGaha beginning on March 4, 2005. A medical report dated February 24, 2005, is a Diagnostic Musculoskeletal Ultrasonography from Dr. Robert Schwartz, the last physician to

provide medical treatment. (App. p. 159). Dr. Schwartz had ordered the Musculoskeletal Ultrasonography, a diagnostic test, in order to obtain an image of the cervical spine and shoulder. Dr. Schwartz's clinical impression questions the etiology of the left shoulder problems and longstanding cervical spine problems. (App. p. 137). Although the Commission relies upon this last medical report as the basis for ordering temporary total disability compensation benefits, the report does not authorize McGaha to remain out-of-work or excuse her from performing occupational activities. (App. p. 159). It is simply a diagnostic report and nothing more.

The Commission's award of temporary total disability compensation benefits is not supported by any evidence much less substantial evidence as is required by law. Hucks v. Green's Fuel of S.C., 247 S.C. 457, 148 S.E. 2d 149 (1966). In order to affirm the Commission's award of temporary total disability compensation benefits, clearly the Circuit Court and the Commission engaged in speculation, conjecture, and surmise, in absence of evidence corroborating the Commission's award of temporary total disability compensation benefits. See Hucks v. Green's Fuel of S.C., (Supra.).

Because it is obvious that the Commission's award of temporary total disability compensation from March 4, 2005 is not supported by any evidence, it is clearly error for the Appellate Courts to have affirmed such an erroneous decision. Accordingly, Petitioners respectfully request that this Court grant its

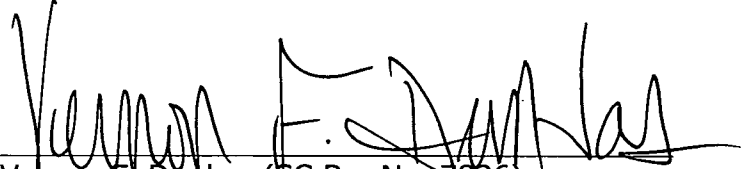
Petition seeking a review of the Court of Appeal's Decision based upon an obvious error of law.

CONCLUSION

For all of the reasons stated herein, Petitioners request this Court to grant its petition for a writ of *certiorari*.

Respectfully submitted,

By:



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vs.

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CERTIFICATE OF COUNSEL AND COMPLIANCE

The undersigned hereby certifies that this Petition for a Writ of Certiorari and Appendix to the Record on Appeal complies with Rule 211(b), SCACR.

The undersigned also certifies that this Petition for a Writ of Certiorari and Appendix to the Record on Appeal complies with the South Carolina Supreme Court's Order dated April 20, 2011, concerning personal data identifiers and other sensitive information.

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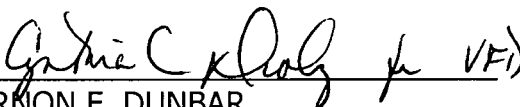
vs.

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and Zurich North America, Carrier.....Petitioners

CERTIFICATE OF SERVICE

I certify that I have served the ***Petition for a Writ of Certiorari and Appendix to Record on Appeal and Certificate of Service*** on Maria E. McGaha, Respondent, by depositing a copy of it in the United States Mail, postage prepaid, on April 19, 2013, addressed to the attorneys of record, Kathryn L. Williams, Esquire, and Donald E. Kamb, Jr., Esquire, Post Office Box 10693, Greenville, SC 29603; and The Honorable Jenny Abbott Kitchings, Clerk of Court – South Carolina Court of Appeals, 1015 Sumter Street, Columbia, SC 29201.

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