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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeal

APPEAL FROM THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Gene McCaskill, Commissioner
R. Michael Campbell, II, Commissioner
T. Scott Beck, Commissioner

SCWCC File No. 1508995

Appellate Case No. 2018-001964

Samuel Paulino, Claimant……..Respondent

v.

Diversified Coatings, Inc., Employer, and AmGuard Ins. Co., Carrier…….Appellants.

Appellant's Return to Respondent's AMENDED Petition for Rehearing

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Pursuant to the Court's request, and in accordance with SCACR 240 (e), Appellants hereby file the ensuing Return to Respondent's AMENDED Petition for Rehearing following the Court's dispositional Opinion in this matter filed on March 9, 2022.[1] Appellants respectfully submit the AMENDED Petition should be denied/dismissed because it fails to explain how the Court "overlooked" or "misapprehended any argument/issue as required by SCACR 221 (a). The purpose of a petition for rehearing is not to have the case tried in the appellate court a second time. Kennedy v.

[1] Appellants Moved to Strike portions of Respondent's original Petition for Rehearing containing arguments and evidence that was not part of the Record on Appeal contrary to SCACR 210 (h). The Court granted the Motion and Respondent filed the AMENDED Petition.

S.C. Ret. Sys., 349 S.C. 531, 564 S.E.2d 322 (2001). Specifically, the Petitioner should not get a "second bite at the apple" for the Court to *reconsider* what it has already ruled upon. Rather, the purpose of Rehearing is to allow the Court to *consider for the first* time an issue that was overlooked or misapprehended. In sum, Petition for Rehearing before the appellate court should not be akin to a Motion to Reconsider under SCRCP 59 (e) before the circuit court.

In this case, Respondent simply reframes and reargues the same issues previously made by the parties during Briefing and Oral Arguments that the Court properly considered and disposed of in its March 9, 2022 Opinion. Respondent does not identify any argument that the Court "overlooked" or "misapprehended." Respondent is essentially asking the Court to "reconsider" its prior Opinion, which does not satisfy the aforementioned standard of review. As such, the Court should summarily dismiss the AMENDED Petition for Rehearing. Nevertheless, for the sake of clarity and completeness, Appellants remind the Court of the following points supporting its decision.

I. THE COURT PROPERLY HELD THAT THE COMMISSION'S FINDING OF GREATER THAN 50% LOSS OF USE OF THE BACK WAS NOT SUPPORTED BY "MEDICAL EVIDENCE" IN THE RECORD.

Relying on Clemmons v. Lowe's Home Centers, Inc., 420 S.C. 282, 803 S.E.2d 268 (2017), this Court held "the Commission erred in affirming the single commissioner's determination that Claimant's back is impaired greater than fifty percent because "there is no *medical evidence* in the record that supported" that finding. Paulino v. Diversified Coatings, Inc., Unpublished Op. No. 2022-UP-096 at p. 2.

Clemmons holds that "medical evidence" of impairment is virtually outcome determinative of a claimant's entitlement to PPD compensation under § 42-9-30 (21). 803 S.E.2d 268 at p. 271. In that case, the claimant had a multi-level cervical fusion and was assigned a 25% whole person impairment rating by the authorized treating physician. That rating converted to a 71% regional impairment per the *AMA Guides to the Evaluation of Permanent Impairment*. The Commission awarded claimant PPD

benefits based on 48% loss of use of the back. Despite evidence in the record confirming claimant returned to full duty work as a cashier at Lowes performing tasks indicative of *less than* fifty-percent loss of use of his back, the Supreme Court reversed the Commission's award, finding "there is ***no*** evidence in the record that Clemmons suffered anything less than a fifty percent impairment to his back. Every doctor and medical professional who assigned an *AMA Guides* impairment rating indicated Clemmons lost more than seventy percent of the use of his back." (emphasis added).

In the instant case, the Court correctly noted that the undisputed "medical evidence" confirms back impairment ratings of only 13% from Dr. McHenry and 12% from Dr. Math. These impairments are obviously significantly less than 50%. Even if the medical impairment rating alone is not outcome determinative of "loss of use" under § 42-9-30 (21), there can be no doubt that the rating is the paramount factor for the commission's consideration in light of the Supreme Court's preoccupation with the impairment rating in Clemmons, particularly the Court's reference to the term "medical evidence" on no less than four occasions throughout its Opinion.

Further, the Court correctly rejected the Commission's finding that the impairment ratings in the instant case were "low based on a poor surgical result" as being unsupported by competent "medical evidence." *See* Burnette v. City of Greenville, 401 S.C. 417, 428-429, 737 S.E 2d 200, 206-207 (Ct. App. 2012)(a commission finding regarding a medical issue that does not originate from a medical provider is not supported by substantial evidence as a matter of law). For these reasons, the Court properly held that the medical impairment ratings in this case are unrefuted, and the Commission's award of total disability based on greater than 50% loss of use of the back was thus wholly unfounded.

The question now becomes what other "medical evidence," if any, justifies a PPD award higher than the medical impairment rating denotes? Appellants point to additional "medical evidence" in the Record confirming that Claimant has sustained less than 50% impairment to the back, including the following: 1) Dr. Math noted on her initial physical examination that Claimant's gait and strength in the lower extremities are "NORMAL." She noted restricted range of motion of the lumbar spine due

to subjective complaints of pain, but his straight leg test was negative. [R. p. 22]; 2) In March 2017, Dr. Math referred Claimant back to Dr. McHenry for an updated assessment on further surgery. Dr. McHenry ordered another MRI to assess his post-surgical status. On April 12, 2017, Dr. McHenry stated the following: "I reviewed images from the most recent MRI lumbar scan and compared with his previous post-op and the pre-op MRI. The disc herniation at L3-4 is no longer present. He has persistent degenerative changes but no focal impingement that correlates with his persistent radicular leg symptoms" [R. p. 132]; 3) Claimant returned to Dr. Math in June 2017. Dr. Math noted that his clinical progression remains unchanged with estimated maximum pain level of only 5 out of 10. She continued Gabapentin and Flexeril, but discontinued narcotic pain medication, and ordered a functional capacity exam (FCE) [R. pp. 22-23]; 4) Claimant performed the FCE with Elite Physical Therapy on November 20, 2017. Significant findings from the FCE include: consistent effort without high pain focus**, overall MEDIUM duty** lifting capacity with OCCASIONAL maximum lift of 50 pounds and FREQUENT lift capacity of 15 pounds [R. p. 23], CONSTANT level (greater than 40 minutes/hour) for sitting, walking, and standing [R. p. 100], FREQUENT level (20-40 minutes/hour) for lumbar flexion (i.e. bending) and rotation (i.e. twisting), and OCCASIONAL level (less than 20 minutes per hour) for kneeling, squatting, and overhead lifting. [R. p. 101].

In sum, the Court correctly held that the "medical evidence" in this case does not come close to supporting the Commission's award of total disability based on greater than 50% loss of use of the back under S.C. Code §42-9-30 (21). As such, Respondent's Petition for Rehearing must be DENIED.

II. THE COURT PROPERLY HELD THERE IS NO OTHER SUBSTANTIAL EVIDENCE IN THE RECORD REGARDING THE "CHARACTER" OF CLAIMANT'S INJURY SUPPORTING THE COMMISSION'S FINDING OF GREATER THAN 50% LOSS OF USE OF HIS BACK.

Under the "medical model" of compensation per § 42-9-30, the nature and character of the injury controls. *See* Stephenson v. Rice Services, 323 S.C. 113, 473 S.E.2d 699 (SC 1996) (with scheduled disability injuries the compensation depends on the "character of the injury" rather than loss

of earnings). Moreover, a permanent disability award pursuant to S.C. Code § 42-9-30 "need not be shown with mathematical exactness," but it still must only be founded on evidence of sufficient substance to afford a reasonably determinable basis for it. *See* Bundrick v. Powell's Garage and Wrecker Service, 248 S.C. 496, 151 S.E.2d 437 (SC 1966) (the award may not rest on surmise, conjecture or speculation; it must be founded on evidence of sufficient substance to afford a reasonable basis for it).

In the instant case, the Court correctly noted that Claimant presented only sparse testimony regarding the nature and extent of his physical injuries. There is no subjective testimony that refutes the objective medical evidence confirming impairment of less than 50% of the back. As such, the speculative nature of the Commission's finding that Claimant sustained a greater than 50% loss of use of the back is self-evident. The Commission never even determined what Claimant's actual loss of use of his back was; it merely found the impairment was some unknown factor **over four times greater** than the impairment ratings. This is clearly erroneous because there is no evidence of "sufficient substance" to support it. *See* Bundrick *supra.* Although the Court in Clemmons found there was no evidence of impairment/loss of use less than 50%, thus implicitly holding claimant was presumed to be totally disabled, it nevertheless remanded the case to the Commission with instructions to determine the actual impairment. Clemmons, 420 S.C. at pp. 489-490. A finding of the actual impairment/loss of use is clearly required. Otherwise, the award is award nothing but conjecture and cannot stand. As such, the Court correctly reversed the Commission's generic finding that Claimant's impairment is simply greater than the threshold for a presumption of total disability.

Finally, if the medical impairment rating must be the primary factor for purposes of compensation under the "medical model" as the Supreme Court clearly mandates in Clemmons, then other non-medical evidence regarding the character of the injury cannot logically supersede the proportion the impairment rating bears to the ultimate total loss of use award under S.C. Code § 42-9-30 (21), or at least not to the extent exercised by the Commission here. Although the award need not

be shown with "mathematical exactness," an award of total disability based on an undetermined loss of use of the back **OVER FOUR TIMES GREATER** than the medical impairment ratings, and unsupported by other medical evidence and/or lay testimony regarding the character of the injury, is "inexact" to say the least. Such an award is not only out of the proverbial ballpark of what the facts could possibly justify, the reasoning behind it suggests the Commission is not even playing the right sport in this case. The Court correctly reversed.

CONCLUSION

For all the aforementioned reasons, the Court should DISMISS/DENY Respondent's AMENDED Petition for Rehearing.

On a final note, Appellants respectfully request that the Court amend its Opinion to clarify the scope of Remand back to the Commission. The concern is the Commission may be inclined to try this case *de novo* before another Hearing Commissioner, an Order and award from which may then have to be appealed again to the Full Commission Appellate Panel. Such a convoluted process could potentially violate the law of the case doctrine and unnecessarily delay/complicate a timely adjudication of this matter.

The Supreme Court has harshly condemned similar procedural quagmires resulting from unnecessary single commissioner hearings and full commission remands. *See* Russell v. Wal-Mart Stores, Inc, 426 S.C. 281, 826 S.E.2d 863 (2019). In that case, the Court stated:

> While the Court of Appeals did not provide the commission with specific remand instructions, the commission should have been able to determine that its error was in the appellate panel's review of the commissioner- not in the work of the commissioner. It was completely unnecessary, therefore, for the commission to require that the case be reheard by a second commissioner. Rather, given the clear description of the error committed by the appellate panel in reversing the original commissioner, the only task for the commission after the court of appeals' decision was to complete a renewed review of the original commissioner's order under proper principles of law. *Id* at 426 S.C. p. 289.

Although the Full Commission affirmed the Hearing Commissioner's award in this case, the timely adjudication principles espoused in Russell still apply here. It is elementary that the Full Commission,

not the single commissioner, is the ultimate finder of fact in workers compensation matters and only decisions from the Full Commission are appealable to the Courts. *See* Ross v. American Red Cross, 298 S.C. 490, 381 S.E.2d 728 (SC 1989). As such, it is not necessary for a single commissioner to enter a new PPD award. Therefore, the Court should clarify that on Remand the Full Commission should enter a PPD award consistent with "proper principles of law" set forth in the Court's March 9, 2022 Opinion.

Respectfully submitted,

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PROOF OF SERVICE

I certify that I have served the **Appellant's Return to Respondent's AMENDED Petition for Rehearing** on Samuel Paulino, with postage prepaid and with the envelope addressed to his attorney, Stephen N. Garcia (604 Pettigru Street, Greenville, SC 29601) as well as by electronic service (stephen@scgarcialaw.com).

June 6, 2022

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June 6, 2022

The Honorable Jenny Abbot Kitchings (via email)
Clerk of Court for the SC Court of Appeals
Post Office Box 11629
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RE: ***Samuel Paulino v. Diversified Coating System***
Appellate Case No. 2018-001964

Dear Ms. Kitchings:

Enclosed for filing, please find the Appellant's Return to Respondent's AMENDED Petition for Rehearing in the above-referenced matter. By copy of this letter to the Respondent's attorney, Stephen Garcia, Esquire, I am serving him with a copy of the Motion.

Sincerely,

George D. Gallagher
GDG/rco
Enclosures
cc: Stephen Garcia, Esquire (w/encl) via email
Kristie Ozark (w/encl) via email