IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Judge Deadra L. Jefferson, Circuit Court Judge

Opinion No. 2010-4737 (S. C. Ct. App. filed September 8, 2010)

FRANKLIN HUTSON, Claimant, ... Appellant/Petitioner,

v.

S.C. STATE PORTS AUTHORITY, Employer,
and STATE ACCIDENT FUND, Carrier, ... Respondents.

BRIEF OF PETITIONER

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QUESTIONS PRESENTED

I. **Did the Court of Appeals err in holding there was substantial evidence in the record to support a finding that Claimant was capable of running a restaurant and, therefore, did not suffer wage loss under S.C. Code Ann. § 42-9-20 (1976) based solely on Claimant's speculative testimony concerning possible future employment?**

II. **Did the Court of Appeals err in holding the Appellant did not take issue and appeal his denial of total disability compensation where the Record on Appeal is replete with the Appellant's position that he is permanently and totally disabled under either S.C. Code Ann. § 42-9-10 or § 42-9-30(21)?**

STATEMENT OF THE CASE

This matter came before the South Carolina Workers' Compensation Commission on a Form 50 and a stop pay. Claimant, Franklin Hutson (hereinafter referred to as Petitioner) contended he was permanently and totally disabled under § 42-9-10/42-9-30 or, in the alternative, suffered a wage loss under § 42-9-20 as a result of his accepted on-the-job injury of October 21, 2004.

The Defendants (hereinafter referred to as Respondents) contended the Appellant had only suffered a loss of use and disability to his back and should receive benefits solely under § 42-9-30.

This matter was heard August 1, 2006, by a single Commissioner. An additional hearing was held on August 25, 2006. An Order was issued January 11, 2007, finding the Petitioner should receive a thirty percent permanent partial disability for the loss of use to his back under § 42-9-30, and the Respondents should receive a credit for overpayment of temporary total benefits from August 31, 2005 to December 9, 2005 and from June 26, 2006 forward.

The Petitioner timely filed a Form 30 Request for Commission Review. On May 9, 2007, the Commission issued an Order sustaining the Single Commissioners Order in its entirety.

The Petitioner timely filed an appeal with the Court of Common Pleas in Charleston County on June 1, 2007. On March 11, 2008, a hearing was held. On April 17, 2008 an Order was issued affirming the findings of the full Commission.

The Petitioner timely filed a Notice of Appeal to the South Carolina Court of Appeals on May 13, 2008. In its published Decision and Order filed September 8, 2010, the Court of Appeals affirmed in part and remanded the case back to the South Carolina

Workers' Compensation Commission. Specifically the Court of Appeals affirmed the lower courts holding that the Petitioner failed to show that he suffered any loss of earning capacity entitling him to benefits under § 42-9-20. However, the Court of Appeals also held that Petitioner may be entitled to additional compensation under § 42-9-30 for the symptoms he was experiencing with his leg and therefore remanded the case back to the Commission for further findings of fact on that issue.

The Court of Appeals denied the Petitioners Petition for Rehearing by Order dated October 29, 2010. The Petitioner timely filed a Petition for a Writ of Certiorari with the Supreme Court of South Carolina on November 23, 2010. The Respondent's did not file a Petition for a Writ of Certiorari therefore the questions presented above are the sole issues for adjudication before the Supreme Court of South Carolina and all other holdings are the law of the case. The Supreme Court of South Carolina granted the Petitioner's Petition for Writ of Certiorari by Order dated December 15, 2011.

ARGUMENT

1. The Court of Appeals erred in misapprehending the record below and the law governing a wage loss claim under S.C. Code Ann. § 42-9-20 (1976)

§ 42-9-20 governs the amount of compensation for partial disability. That section states in pertinent part:

> Except as otherwise provided in § 42-9-30, when the incapacity for work resulting from the injury is partial, the employer shall pay, or cause to be paid, as provided in this chapter, to the injured employee during such disability a weekly compensation equal to sixty-six and two-thirds percent of the difference between his average weekly wages before the injury and the average weekly wages which he is **able to earn thereafter** . . .

S.C. Code Ann. § 42-9-20 (1976) (emphasis added).

In its opinion dated September 8, 2010, affirming in part and remanding the Decision and Order of the Trial Court, the court of Appeals overlooked the record below and misapprehended the applicable law governing the awarding of wage loss benefits under S.C. Code § 42-9-20 of the South Carolina Workers' Compensation Act.

The Petitioner argues that the substantial evidence in the record below established he suffered a significant wage loss and is entitled to benefits under § 42-9-20.

It is well settled that the Workers' Compensation Act should be liberally construed in favor of the Claimant. "The Workmen's Compensation Act is entitled to a liberal construction in furtherance of the beneficial purposes for which it was designed." Carter v. Penny Tire & Recapping Co., 261 S.C. 341, 349, 200 S.E.2d 64, 67 (1973). "The general policy in South Carolina is to construe the Workers' Compensation Act in favor of coverage, and any reasonable doubts as to construction should be resolved in favor of the claimant." Hall v. Desert Aire, Inc., 376 S.C. 338, 350, 656 S.E.2d 753, 759 (Ct. App. 2007).

". . . An 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." Wynn v. People's Natural Gas Co. Of South Carolina, 238 S.C. 1, 12, 110 S.E.2d 812, 818 (1961). According to Webster's New World Dictionary 4th Edition, to Speculate is "to ponder; esp., to conjecture." The 4th Edition goes on to define Conjecture as "an inferring, theorizing, or predicting from incomplete evidence; guesswork."

In the case at bar the single Commissioner, whom the Appellate Panel, Circuit Court, and Court of Appeals have affirmed, based his decision that the Petitioner had no loss of earning capacity solely on the Petitioner's guesswork that he could probably run a restaurant although he had never tried to do this type of work before. However the uncontroverted vocational expert evidence stated that without vocational training the Petitioner would be relegated to at or near minimum wage ($5.15 - $6.50 per hour)(R. p. 289). The Commissioner even stated that the Petitioner's "confidence runs contrary to the greater weight of the other evidence in the record." (R. p. 15, lines 24-25).

The finding that the Petitioner could work in the restaurant business and had not suffered a wage loss under § 42-9-20 is speculative on two grounds and should be

either reversed or remanded for findings by the Workers' Compensation Commission to determine if the Petitioner can work in a restaurant and in what capacity and what the Petitioner is capable of earning in which job to establish benefits under § 42-9-20. The Court is speculating, conjecturing and predicting from incomplete evidence in the findings that had previously been made. The Petitioner had worked as a crane operator for twenty-four of the previous twenty-five years. Petitioner learned to be a crane operator from his father (R. p. 7). At the time of the hearing, he was forty-four years of age (R. p. 6). He had been a crane operator since the age of nineteen. All he had ever done was operate a crane except work as a rigger for one year. He had taken a couple of food courses at Trident Tech and never finished and never received a degree in Culinary Art. To find that he was employable in the restaurant business is predicting from incomplete evidence. If he could work in the restaurant business, what could he do? Could he own a restaurant? Could he manage a restaurant? Could he be the chef? Could he be a waiter? Could he be a busboy? There is absolutely no evidence anywhere in the record establishing what he could do in the restaurant and if he had any skills to work in a restaurant. This finding was pure speculation.

Secondly, even if Petitioner could work in a restaurant, there must be a finding that he could earn the same wages as he earned as a crane operator otherwise he is entitled to benefits under § 42-9-20 if that would maximize his recovery. "Generally, an injured employee may proceed under either the general disability sections § 42-9-10 and § 42-9-20 or under the scheduled member section § 42-9-30 in order to maximize recovery under the South Carolina Workers' Compensation Act." Bass v. Kenco Group, 366 S.C. 450, 463, 622 S.E.2d 577, 583-584 (Ct. App. 2005). The Petitioner had injuries to the back that affected his leg therefore § 42-9-20 would be an appropriate section to award benefits. Even if the Court of Appeals believed there was evidence in the record to support he could work in a restaurant there is no evidence what he could do in the restaurant. You would then have to make a finding as to what he could earn in

the restaurant to render a valid decision that § 42-9-20 did not apply because he had not suffered a loss of earning capacity or his earnings were going to be so close to his previous earnings that it would not be beneficial for him to pursue benefits under § 42-9-20. There is no evidence about this in the record. How could there be a finding that § 42-9-20 does not apply when even if you can assume he could work in a restaurant, there is nothing in the record about how much money he would make. How much money would he make busing tables, how much would he make as a waiter, how much would he make as a manager, how much would he make as a chef, how much would he make as an owner. He was making $89,960.00 per year as a crane operator. If he could work in the restaurant industry, there has to be a finding as to what he could earn. If he could make $25,000.00 a year as a manager, he would still be entitled to benefits under §42-9-20 because he had suffered a substantial wage loss. If he could make $35,000.00 as a chef, he would still be entitled to benefits under § 42-9-20.

The Petitioner has the right to pick the appropriate section to maximize his recovery. The ONLY evidence in the record is that he could earn $5.15 to $6.50 per hour if he did not complete the vocational rehabilitation program. He did not complete the program. Again, the only evidence in the record, which is uncontradicted by the Respondents, is that he could make $5.15 to $6.50 per hour. This is $13,520.00 a year. The Court of Appeals Decision should be reversed and these figures should be the income for calculation under § 42-9-20. All other evidence in the record is conjecture, speculation and predicting from incomplete evidence.

If the finding is that Petitioner can work in a restaurant, the case should then be remanded back to the Full Commission to determine what he could do in a restaurant and what that rate of pay would be to calculate his benefits under § 42-9-20. From the Wynn case, the Court has stated, "The increasing tendency to accept awards unsupported by medical testimony should not be allowed to obscure the basic necessity of establishing medical causation by expert testimony in all but simple and routine

cases." Wynn v. Peoples Natural Gas Co. of S.C., 238 S.C. 1, 13, 118 S.E.2d 812, 818 (1961). Here, the expert testimony clearly shows the Petitioner is employable at a maximum earning capacity of $5.15 to $6.50 per hour and the Court of Appeals has taken the Petitioner's testimony (which was total guesswork) to refute the evidence of the only expert when that testimony was simply speculation, conjecture and a prediction from incomplete evidence.

"The whole philosophy of our Workers' Compensation Act is to compensate for, or relieve from, the loss or impairment of an employee's capacity to earn or from the depravation of support from his earnings and not to indemnify for any physical impairment or impairment as such, except in the classes of cases specifically provided in the Act . . ." Jewel v. R.V. Pond, 198 S.C. 86, 15 S.E. 684, 686 (S.C. 1941).

The Court of Appeals erred in not reversing the case as there was substantial evidence that the Petitioner suffered a significant wage loss under § 42-9-20 based on the expert medical and vocational evidence. However, even if the Court of appeals agreed with the lower courts that the Petitioner could work in a restaurant environment the case should have been remanded to the Full Commission to determine what Appellant could earn working in a restaurant then calculate his benefits under § 42-9-20.

2. The Court of Appeals erred in misapprehending the record below and misstated that the Appellant did not take issue and appeal his denial of total disability compensation.

In its opinion dated September 8, 2010, affirming in part and remanding the Decision and Order of the Trial Court, the Court of Appeals stated "Appellant does not take issue with the denial of compensation for total disability; however he asserts he is entitled to recover for partial disability." This was a misapprehension of the record below and a material misstatement by the Court of Appeals.

The Record on Appeal is replete with the Petitioner's position that he is permanently and totally disabled under either S.C. Code Ann. § 42-9-10 or § 42-9-30(21).

Subsequent to the Single Commissioner's Decision and Order the Petitioner filed a request for Full Commission Review on January 19, 2007 and argued that the Single Commissioner erred in not finding the Claimant was permanently and totally disabled under § 42-9-10 or 42-9-30(21) (R. p. 41). This was again argued in the Appellant's Brief to the Appellate Panel (R. p. 46). After the Appellate Panel rendered their Decision and Order the Petitioner again argued that he was permanently and totally disabled under § 42-9-10 or 42-9-30(21) in his Appeal to the Court of Common Pleas Charleston County on May 30, 2007 (R. p. 64).

The Petitioner's issue on appeal # 2 to the South Carolina Court of Appeals stated, "the Court of Common Pleas Charleston County committed an error of law in affirming an award that limited Claimant's recovery to the back under S.C. Code Ann. § 42-9-30 (1976) (R. p. 338)." This issue encompasses the argument that Petitioner was either totally disabled under § 42-9-10/§ 42-9-30 or suffered a wage loss under § 42-9-20. To hold otherwise would unduly burden a workers' compensation Claimant in having to specifically argue for benefits under every possible section in the Act. Finally, the Petitioner specifically stated in the Final Appellant Brief to the South Carolina Court of Appeals that "the Order of the Court of Common Pleas Charleston County affirming the single commissioner and the Commission Appellate Panel's Orders should be reversed or modified with instructions that Claimant receive either ***total disability*** under § 42-9-10/42-9-30 or wage loss under § 42-9-20" (R. p. 346) (emphasis added). The Petitioner again argued he was entitled to total disability benefits in his Reply Brief as well (R. p. 366).

Therefore, the Court of Appeals opinion dated September 8, 2010 should be reversed to hold that the Petitioner did indeed take issue and appeal his denial of total disability compensation.

CONCLUSION

Taking into consideration the record as a whole as well as the principle that the Workers' Compensation Act should be construed liberally in favor of the injured Claimant, Petitioner requests this Court either reverse the Court of Appeals Decision and hold that Petitioner suffered a wage loss under § 42-9-20 based upon the vocational expert evidence or remand the issue of whether or not Petitioner suffered wage loss under § 42-9-20 to the South Carolina Workers' Compensation Commission for further findings of fact in accordance with the above cited statutory and case law. Additionally Petitioner requests the Court of Appeals Decision be reversed by this Court to hold that Petitioner did indeed take issue and appeal his denial of total disability compensation.

_____

Respectfully submitted,
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PROOF OF SERVICE

I certify that I have served Petitioner's Brief on the Respondent by depositing copies of same in the United States Mail, postage prepaid, on January ____, 2012, addressed to their attorneys of record, Margaret Mary Urbanic, Esquire at Clawson & Staubes, LLC., 126 Seven arms Drive, Suite 200, Charleston, SC 29492 and Cynthia Polk, Esquire, State Accident Fund, PO Box 102100, Columbia, SC 29221-5000 as well as the Clerk of Court of the S.C. Supreme Court Daniel E. Shearouse, P.O. Box 11330, Columbia, SC 29211.

January ___, 2012

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