THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Deadra L. Jefferson, Circuit Court Judge

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

Franklin Hutson
Claimant

Appellant,

v.

South Carolina State Ports Authority,
Employer

State Accident Fund
Carrier, Respondents.

BRIEF OF RESPONDENTS

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S.C. Code Ann. § 42-9-30 (1976)………………………...(referenced, never directly cited)

QUESTIONS PRESENTED

1. THE COURT OF APPEALS WAS CORRECT IN HOLDING THAT THERE WAS SUBSTANTIAL EVIDENCE TO SUPPORT THE COMMISSION'S FINDINGS THAT THE CLAIMANT DID NOT SUFFER A WAGE LOSS UNDER § 42-9-20.

2. THE COURT OF APPEALS WAS CORRECT THAT THE Petitioner DID NOT TAKE ISSUE AND APPEAL HIS DENIAL OF TOTAL DISABILITY COMPENSATION.

STATEMENT OF THE CASE

This matter came before the South Carolina Workers' Compensation Commission on August 1, 2006. A hearing was held pursuant to Forms 50/51 and Form 21. (R. pp. 31-34). Respondents' filed a Form 21 on August 31, 2005 requesting a credit for overpayment from the date of maximum medical improvement.

This case involves an admitted injury to the Petitioner's back that occurred in the course and scope of his job at the South Carolina State Ports Authority. At the hearing on August 6, 2006, Petitioner alleged that he suffered a wage loss under § 42-9-20 or that he was permanently and totally disabled under § 42-9-10 and/or § 42-9-30(19). Petitioner claims that he suffered an injury to his back and legs, primarily his right leg and alleges a date of maximum medical improvement as of September 20, 2005. (R. pp. 69-70, lines 24-9). Respondents had admitted an injury to the back. It was the position of the Respondents' that the Petitioner reached maximum medical improvement as of June 25, 2005. Respondents asked to stop temporary total benefits and asked for a credit for overpayment of benefits paid after the date of maximum medical improvement and alleged that the Petitioner is only entitled to permanent partial disability under § 42-9-30. Respondents denied that the Petitioner is permanently and totally disabled or that he suffered a wage loss under § 42-9-20. (R. p.70, lines 10-18).

The Single Commissioner found that Petitioner was not permanently and totally disabled and that the Petitioner did not suffer a wage loss. The Single Commissioner found that Petitioner had a 30% permanent partial disability to his spine. (R. pp. 10-18). Petitioner appealed the Order to the Full Commission which affirmed the Order. (R. pp. 19-22). Petitioner then appealed the Order to the Circuit Court which also affirmed the

Order in its entirety. (R. pp. 23-29). The Court of Appeals affirmed in part and remanded the case in part.

1. THE COURT OF APPEALS WAS CORRECT IN HOLDING THAT THERE WAS SUBSTANTIAL EVIDENCE TO SUPPORT THE COMMISSION'S FINDINGS THAT THE CLAIMANT DID NOT SUFFER A WAGE LOSS UNDER § 42-9-20.

The Court of Appeals was correct in finding that there is substantial evidence to support the finding that Petitioner did not suffer a wage loss as the record is full of testimony regarding the Petitioner's plan to open a restaurant. The court may reverse or modify the decision of the Commission only if the claimant's substantial rights have been prejudiced because the decision is affected by an error of law or is clearly erroneous in view of the reliable, probative and substantial evidence. Substantial evidence is not a mere scintilla of evidence nor evidence viewed from one side, but such evidence, when the whole record is considered, as would allow reasonable minds to reach the conclusion reached by the Full Commission. Jane Doe v. Department of Disabilities and Special Needs, 364 S.C. 411, 613 S.E. 2nd 785, (Ct. App. 2005).

Petitioner now argues that the Court should either reverse or remand the case to determine if the Petitioner can work in a restaurant and in what capacity and what the Petitioner is capable of earning in order to establish benefits under § 42-9-20. Petitioner is essentially asking the Court to ignore his testimony and to allow him to retry his case. Petitioner argues that there is no evidence in the record establishing what he could do in a restaurant. The record does contain evidence what kind of work the Petitioner could do in a restaurant. Petitioner testified that if he "established that something like that I can supervise other people to work for me and make, you know, a decent salary."

(R. p. 87, lines 17-20). Petitioner studied culinary arts and food sanitation at Trident Technical College. (R. p. 72, lines 7-11). Petitioner testified that his family has been in the restaurant business all his life and that he has several aunts and uncles in the restaurant business. (R. p. 87, lines 12-20). Petitioner testified that he had been researching locations, getting menu selections and pricing equipment to determine what it would take to set up an establishment. (R. pp. 87-88, lines 21-3). Petitioner testified that he had several potential locations that he was looking at in the Goose Creek/Moncks Corner area. (R. p. 91 lines 15-18). Petitioner testified that he would be able to sit and figure out menus; sit and figure out how to write checks and pay the bills and would stand if he had to work the register. (R. p. 96, lines 7-21). Petitioner testified that he would be able to help in the restaurant. (R. p. 96, lines 18-20). Petitioner testified that he had spoken to his family members and they told him that it took long hours to run a restaurant, including manual labor. (R. pp. 100-101, lines 19-6). Petitioner testified that he plans to be either the manager or owner of a restaurant. (R. p. 91, lines 7-14). Clearly, the Petitioner's testimony that he could operate a restaurant was extensive if not overwhelming on this issue of what he could do at a restaurant.

Petitioner argues that the evidence that the he could run a restaurant is speculative. However, the basis for finding that Petitioner is capable of running a restaurant is based on the Petitioner's **own** testimony. The final determination of witness credibility and the weight to be accorded evidence is reserved to the Commission and it is not the task of the court to weigh the evidence as found by the Commission." Sharpe v. Case Produce, Inc., 336 S.C. 154, 519 S.E.2d 102 (1999). Petitioner is asking the Court to disregard his entire testimony in order to find that he

suffered a wage loss. As the Court of Appeals noted, the Petitioner has the burden of proving his case and he was the one who brought forth all the testimony about working on the restaurant. It is contradictory for the Petitioner to ask the courts to ignore his own testimony with regards to what he is capable of doing.

Petitioner argues that if the decision is that the Petitioner can work in a restaurant then the case should be reversed to determine what he could do in a restaurant and to calculate his wage loss under § 42-9-20. At the hearing in front of the Single Commissioner, Petitioner was asked if he had looked into the revenues a restaurant could generate. (R. p. 91, lines 19-25). Petitioner testified that he was unable to determine how much a restaurant grosses. (R. pp. 91-92, lines 19-5). Petitioner had that opportunity to present evidence of potential earnings but chose not to provide this evidence at the hearing in front of the Single Commissioner even though one of the issues Petitioner plead on his Form 58 was whether Petitioner suffered a wage loss under § 42-9-20. (R. p. 35). In the order of the Single Commissioner, there is a finding of fact that "[c]laimant was unable to testify as to what his productive earnings would be in the restaurant business, therefore, there is absolutely no way for this Commissioner to determine any loss of earning capacity based on the testimony of the Claimant." (R. p. 15). Again, Petitioner is attempting to put in evidence that he failed to present at the original hearing. The law is well established that the burden is on the claimant to prove such facts and an award must not be based upon surmise, conjecture or speculation. Gosnell v. Bryant, 240 S.C. 215, 125 S.E.2d 405 (1962). As previously noted, Petitioner had the burden of proof and failed to show that running a restaurant would result in lower wages than a crane operator. Petitioner failed to provide any evidence regarding

what earnings he could earn in the restaurant business and therefore, the Court was correct in making an award under § 42-9-30.

In Sellers v. Pinedale Residential Center, 350 S.C. 183, 554 S.E.2d 694 (Ct. App. 2002), the Court of Appeals found that it was appropriate for the Commission to use the compensation rate for an electrician, although Sellers was not working as a electrician at the time of the injury. The Commission relied on the testimony of Sellers in determining Sellers' future earnings about what he would have earned as electrician. The Commission was found to be correct to consider the future earnings of Sellers. Likewise, in the case at bar, the Commission was correct in considering the future earnings of the Petitioner based on the Petitioner's own testimony about his plans to open a restaurant.

Petitioner argues that there is uncontradicted expert vocational evidence that he can not earn above minimum wage and has no transferable skills. However, the vocational evidence is contradicted by the Petitioner's own testimony as it is in sharp contrast to the vocational report. Regardless, the Commission has the ability to weigh the evidence and make the final determination as to the weight of evidence is reversed for the Commission. Where there is a conflict in the evidence, the Commission's findings of fact are conclusive. Sharpe at 105. The Commission was neither required to accept or rely on the report of Jean Hutchinson, the Petitioner's vocational expert.

At the hearing, Petitioner testified extensively about his ability to run a restaurant. The Commission obviously put more weight on the testimony of the Petitioner than the vocational opinion. The vocational report does not reference the opinion of Dr. Stovall who found that Petitioner could engage in medium work. The Court of Appeals noted

that there was vocational evidence by way of Dr. Stovall's opinion that Petitioner "should be able to carry on a moderate level of activity at the medium work capacity." (R. p. 156). Furthermore, the vocational report does not mention or address, Petitioner's plan to open a restaurant. (R. pp. 282-289). Therefore, it is not surprising that Commission placed little weight on the vocational expert's opinion and clearly there is substantial evidence to support the Commission's decision.

Petitioner argues that as he has the right to chose between sections 42-9-20 or 42-9-30 in order to maximize his recovery and that as there is no specific finding as to how much Petitioner would earn at a restaurant, Petitioner is therefore entitled to an award under § 42-9-20 based on his vocational report that states he would only be able to earn $5.15 to $6.15 an hour. The law does allow an injured employee to proceed under either the general disability sections or the scheduled member section in order to maximize recovery but this does not allow the injured employee to shift the burden and require the employee to demonstrate how much he may earn. Petitioner then jumps to the conclusion that he can only earn between $5.15 to $6.50 an hour based on a vocational report that does not include the possibility of him working at a restaurant. Petitioner was asked several times at the Single Commissioner hearing as to how much money he expected to earn in the restaurant business and he never gave a specific number. (R. pp. 91-92, lines 19-6, 102, lines 12-15). Petitioner clearly had the opportunity to testify as to how much he might earn. He even admitted to having talked to people about how much he could earn. "I just went by what my cousin and my aunt and uncles told me, you know, what they bring in as far as gross income and overhead projections." (R. p. 91, lines 22-25). To allow the Petitioner, to benefit from his failure to

provide a specific amount as to what he might earn in the restaurant business when he failed to do at the Single Commissioner's hearing would not only the Petitioner to shift the burden of proof but to allow him to retry his case.

Therefore, the Court of Appeals was correct in holding that the Petitioner did not prove a wage loss under § 42-9-20.

2. THE COURT OF APPEALS WAS CORRECT THAT THE PETITIONER DID NOT TAKE ISSUE AND APPEAL HIS DENIAL OF TOTAL DISABILITY COMPENSATION.

The Court of Appeals did not overlook the records or misstate the Petitioner's position. The Petitioner stated three issues on appeal in his briefs:

I. Did the Court of Common Pleas Charleston County 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 § 42-9-30 (1976) when it was found the Claimant's injury affected his back and leg?

II. Did the Court of Common Pleas Charleston County commit an error of law in affirming an award limiting Claimant's recovery to the back under S.C. Code Ann. § 42-9-30 (1976) when it was found the Claimant's injury affected his back and leg.

III. Did the Court of Common Pleas Charleston County commit an error of law in not remanding the claim to the Commission to make findings of fact sufficient to for appellate review as to the Claimant's current capacity and/or the extent of his loss or loss of use of his back, leg and/or whole person?

The opinion of the Court of Appeals clearly discusses all of these issues in the opinion. Petitioner did not appeal the denial of compensation for permanent and total disability. In the Petitioner's arguments section of the second issue, Petitioner specifically argues that the commission erred in failing to make a ruling as to Petitioner's loss of use to his

right leg. (R. p. 342). Petitioner never argued the denial of total disability in his brief to the Court of Appeals. Petitioner only briefly references § 42-9-10 in his "Conclusion" paragraph of his brief. An issue is deemed abandoned on appeal and not presented for review, if it is argued in a short, conclusory statement without supporting authority. Fields v. Melrose Ltd, Partnership, 312 S.C. 439, S.E. 2d 283 (Ct. App. 1993). Therefore, the Petitioner did not raise and appeal the issue of the denial of compensation for permanent and total disability.

CONCLUSION

Therefore, the Court of Appeals was correct in finding that there was substantial evidence to affirm the finding that the Petitioner was not permanently and totally disabled and that he did not suffer a wage loss.

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