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ADMINISTRATIVE LAW

I. WORKERS' COMPENSATION AND THE SUBSTANTIAL EVIDENCE TEST UNDER THE SOUTH CAROLINA ADMINISTRATIVE PROCEDURES ACT

A. Judicial Review of Industrial Commission Award Limited to Substantial Evidence Test

The South Carolina Administrative Procedures Act (APA)[1] provides for judicial review of administrative agency decisions. A court may reverse an agency's decision "if substantial rights of the appellant have been prejudiced because the administrative findings . . . are . . . clearly erroneous in view of the reliable, probative and substantial evidence on the whole record."[2] The South Carolina Supreme Court has interpreted this language to espouse the "substantial evidence rule" as the appropriate standard of review.[3] Substantial evidence is " 'not a mere scintilla of evidence nor evidence viewed blindly from one side of the case, but is 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.' "[4]

1. S.C. CODE ANN. §§ 1-23-10 to -400 (1986).
2. *Id.* § 1-23-380(g)(5).
3. Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981).
4. *Id.* at 135, 276 S.E.2d at 306 (quoting Law v. Richland County School Dist. No. 1, 270 S.C. 492, 495-96, 243 S.E.2d 192, 193 (1978)).

In *Webber v. Michelin Tire Corp.*[5] the South Carolina Court of Appeals reversed a circuit court determination that the Industrial Commission's decision was not supported by "substantial evidence." The appellant, Mary Anne Webber, filed a workers' compensation claim for a back injury. The single commissioner found that Mrs. Webber suffered a permanent disability consisting of a forty-five percent loss of use of her lower back and awarded her compensation for 135 weeks. The full Commission amended this award to provide compensation for up to 500 weeks for total permanent disability. The respondent, Michelin Tire Corporation, filed a petition for judicial review.[6]

The circuit court, relying largely upon the lack of credibility of the witness, found that the full Commission's finding was not supported by substantial evidence. The medical evidence before the commission consisted of the opinions of the treating physician, an examining physician, and a vocational rehabilitation expert. The trial judge noted that each opinion was based upon the claimant's contention of bodily pain and limitation. In contrast, the respondent offered a six-minute movie, showing Mrs. Webber attending a sports event and vacuuming her car.[7]

The court of appeals reversed, holding that the court violated the APA by substituting its judgment as to the weight of the evidence. The court reasoned that the standard of review exercised by the circuit court violated the supreme court's pronouncement that the "substantial evidence test 'need not and must not be either judicial fact finding or a substitution of judicial judgment for agency judgment.' "[8] Furthermore, the court noted that a judgment upon which reasonable men might differ will not be set aside. The court also found that the possibility of drawing two inconsistent conclusions from the evidence does not prevent a finding that the administrative agency ruling is supported by substantial evidence.[9]

The South Carolina legislature patterned its APA after the Model State Administrative Act[10] and intended to give the

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5. 285 S.C. 581, 330 S.E.2d 547 (Ct. App. 1985).

6. *Id.* at 582, 330 S.E.2d at 547.

7. *Id.* at 583-84, 330 S.E.2d at 548.

8. *Lark*, 276 S.C. at 136, 276 S.E.2d at 307 (quoting Dickinson-Tidewater, Inc. v. Supervisor of Assessments, 273 Md. 245, 256, 329 A.2d 18, 25 (1974)).

9. 285 S.C. at 584, 330 S.E.2d at 548.

10. *See Administrative Law, Annual Survey of South Carolina Law*, 30 S.C.L. REV.

courts greater appellate authority over an agency's finding.[11] Under the Model Act, some courts "will reverse if the findings are against the clear weight of the evidence . . . even though there is evidence [supporting the findings] that by itself would be substantial."[12] Although the South Carolina Supreme Court has acknowledged the legislative intent to broaden the standard of review,[13] the courts, as a practical matter, seem to apply a standard which more closely resembles the "mere scintilla" test used prior to the enactment of the APA.

Webber exemplifies the broad discretion given to an administrative agency. Although the South Carolina courts continue to adhere to the narrow interpretation given to the standard of review under the APA, this interpretation of the substantial evidence rule may be unduly restrictive.

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B. Claimant's Testimony May Be Sufficient to Pass Substantial Evidence Test when Injury Is Not "Technically Complicated"

In *Linen v. Ruscon Construction Co.*[14] the South Carolina Supreme Court held that the Industrial Commission properly relied upon the claimant's testimony in a workers' compensation action in which the claimant disagreed with doctors about the extent of his disability. The court found that the claimant's testimony, taken in conjunction with the other evidence on the record, provided substantial evidence to support a fifty percent disability award.[15]

Linen initiated the action for compensation for a back injury sustained while in the course and scope of his employment with Ruscon. The commissioner awarded a twenty percent per-

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1 (1979).

11. 276 S.C. at 136, 276 S.E.2d at 305.

12. *See, e.g.*, Application of Kauai Elec. Div. of Citizens Util. Co., 60 Haw. 166, 186, 590 P.2d 524, 538 (1978); *accord* Hayes v. Yount, 87 Wash. 2d 280, 286, 552 P.2d 1038, 1042 (1976).

13. Ellis v. Spartan Mills, 276 S.C. 216, 277 S.E.2d 590 (1981).

14. 286 S.C. 67, 332 S.E.2d 211 (1985).

15. A finding of 50% disability is particularly relevant because it constitutes total disability. S.C. CODE ANN. § 42-9-30(19) (1976).

manent disability to Linen. On appeal, however, the full Industrial Commission raised the award to a fifty percent disability. This higher award was subsequently affirmed by the circuit court and the supreme court.

The evidence reviewed by the Industrial Commission included the testimony of the claimant, a neurologist, an orthopaedic surgeon, and a vocational rehabilitation counselor. The neurologist had found a fifteen percent permanent impairment to the claimant's back. This injury was subject to aggravation by repetitive bending and lifting. The orthopaedic surgeon estimated that the impairment was twenty to thirty percent. According to the surgeon, the impairment was subject to aggravation by heavy manual labor. Linen maintained that he had suffered a seventy-five percent loss of the use of his back, including an inability to stand or sit in one position for a prolonged period of time, difficulty in sleeping, and general back pain which increased upon bending or lifting. The vocational expert testified that Linen was not employable. Despite the disagreement on the extent of the disability, the claimant and the doctors agreed that he was unable to return to his former job.[16]

On appeal Ruscon argued that the full Commission's finding of fifty percent disability was not supported by substantial evidence because the medical testimony supported an award of no more than thirty percent. Therefore, Ruscon argued, the fifty percent award was improperly based upon the claimant's testimony. The supreme court rejected this argument, ruling that lay testimony is admissible if the injury in question is not so technically complicated that it requires exclusively expert testimony.[17] Thus, the court found that there existed substantial evidence to support the fifty percent disability award.[18]

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16. 286 S.C. at 68-69, 332 S.E.2d at 212.

17. *See* Bundrick v. Powell's Garage, 248 S.C. 496, 151 S.E.2d 437 (1966).

18. In finding that the evidence in this case was capable of supporting the award, the court distinguished Wynn v. Peoples Natural Gas Co., 238 S.C. 1, 118 S.E.2d 812 (1961) and McLeod v. Piggly Wiggly Carolina Co., 280 S.C. 466, 313 S.E.2d 38 (Ct. App. 1984). In *Wynn* the court refused to find substantial evidence supporting an award of total disability (resulting from a heart attack) when the claimant's doctors testified that the claimant was able to return to work. 238 S.C. at 12-13, 118 S.E.2d at 818. In the instant case, both the doctors and the claimant agreed that the claimant could not return to his former job. In *McLeod* the court of appeals found that the injury to the back and the presence of a congenital defect required more evidence than merely the testimony of a general practitioner and the claimant. 280 S.C. at 471, 313 S.E.2d at 40-41. In the

In considering a disability award in a workers' compensation action, the dual component nature of the award must be recognized. The award is a combination of medical and earning impairment.[19] Medical impairment includes limitations on range of motion and loss of strength or coordination. Earning impairment includes the ability of the claimant to find similar or substitute employment. In *Linen* the doctors' testimony related to the claimant's medical impairment.[20] Linen's testimony and the testimony of the vocational expert were more closely tied to the earning impairment component of the disability. Although the medical impairment ratings assigned by the doctors were substantially less than fifty percent, the evidence regarding inability of the claimant to return to his former job and his future employment appeared to indicate a substantial earning impairment. The evidence presented, including the testimony of the claimant, provided an ample basis for the Industrial Commission's award.[21]

The decision in *Linen* indicates a willingness of the South Carolina Supreme Court to allow claimants to testify about the extent and effects of their injuries. Although such testimony may conflict with expert opinions, especially opinions regarding medical impairment, the claimant's evaluation of his condition could prove to be helpful in determining the overall extent of disability.[22]

Charles M. Black, Jr.

II. Hearing Commissioner in Workers' Compensation Action Has Discretion to Reopen Proceedings to Take Additional Evidence

In *Brown v. La France Industries*[23] the South Carolina Court of Appeals found that a hearing commissioner did not

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instant case, however, the doctors were experts.

19. *See* 21 Larson, Workmen's Compensation Law § 57.11 (1986).

20. 286 S.C. at 68-69, 332 S.E.2d at 211-12.

21. *Id.* at 70, 332 S.E.2d at 212.

22. For a discussion of reasons for allowing lay testimony, even in contradiction of expert medical testimony, see 3 Larson, Workmen's Compensation Law § 79.53 (1986).

23. 286 S.C. 319, 333 S.E.2d 348 (Ct. App. 1985).

abuse his discretion in reopening a workers' compensation case in order to take additional medical testimony after the scheduled hearing had concluded.[24] Before *Brown*, neither the court of appeals nor the Supreme Court of South Carolina had ruled on a hearing commissioner's discretionary right to take further evidence by reopening proceedings. The court's ruling is in accord with most jurisdictions that have addressed this issue.[25]

On October 29, 1979, Brown, a weaver for La France, collapsed and died of a heart attack at his work station.[26] The claimants, decedent's wife and child, filed for maximum benefits under the South Carolina Workers' Compensation Law,[27] contending that Brown died as a result of an accidental injury to his heart arising out of and in the course of his employment.

The single commissioner heard the case in two separate hearings. At the conclusion of the second hearing, the commissioner left the case open for the sole purpose of allowing the claimants to take and submit the deposition of Dr. Walker. Approximately two months after submitting Dr. Walker's deposition and before the commissioner rendered his decision, the claimants moved before the single commissioner for an order authorizing them to take the deposition of Dr. Hodge. They asserted that their attorney had inadvertently failed to request that the matter be left open for this purpose. The commissioner granted the claimants' motion and concomitantly authorized La France to take expert medical testimony in response to Dr. Hodge's deposition. Neither the full commission nor the circuit court found an abuse of discretion in allowing the proceedings to be reopened. The court of appeals affirmed.

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24. Other issues on appeal related to the admission of certain medical expert testimony and to the sufficiency of the evidence to support the finding that Brown died as a result of an injury by accident arising out of and in the course of his employment.

25. "It may be said as a general rule that the right to reopen proceedings to take further evidence in workmen's compensation hearings is within the sound discretion of the hearing officer." Crump v. Fields, 251 Miss. 864, 871, 171 So. 2d 857, 859 (1965)(citing 100 C.J.S. *Workmen's Compensation* § 596 (1958)); *see* Sanchez v. Industrial Comm'n, 13 Ariz. App. 82, 474 P.2d 441 (1970); Cameron v. American Can Co., 120 Ga. App. 236, 170 S.E.2d 267 (1969).

26. Brown had a history of rheumatic fever as a child and suffered from vascular heart disease. 286 S.C. at 332, 333 S.E.2d at 350. There is also evidence that, on the day of his death, Brown cut firewood before reporting to work and told a fellow worker that he was exhausted. Despite this evidence, the commissioner ruled that Brown died as a result of unusual work conditions. *Id.* at 328, 333 S.E.2d at 353.

27. S.C. CODE ANN. §§ 42-1-10 to 42-19-40 (1976).

According to the *Brown* court, it is a well-established rule in South Carolina "that the decision of the trial judge to allow a party to reopen his case will not be reversed unless the opposing party was prejudiced thereby."[28] The court of appeals reasoned that since La France was expressly authorized to present rebuttal testimony and failed to do so, the defendant suffered no prejudice by the reopening of the case.[29]

The *Brown* court adopted the rule that "when the claimant inadvertently omits production of . . . [necessary medical evidence], an opportunity should be afforded the claimant to supply such omission in the interests of justice."[30] The authority relied upon by the court, however, does not support the adoption of the rule under the present facts.[31] The claimants in *Brown* made no mention of their intention to depose Dr. Hodge until approximately two months after the case had been closed. It appears that the first time claimants' counsel considered deposing Dr. Hodge was after Dr. Walker testified in deposition that he could not say what had caused Brown's death.[32]

In upholding a claim of inadvertence in *Brown*, the court of appeals has endowed hearing commissioners with a questionable degree of discretion in taking additional evidence after a hearing

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28. 286 S.C. at 324, 333 S.E.2d at 351. The court stated that "[a] trial judge enjoys considerable latitude and discretion in these matters." *Id.* at 325, 333 S.E.2d at 351. The court also stated that "similar discretion reposes with the single commissioner." *Id.* (citing Exxon Co. v. Alexis, 370 So. 2d 1128 (Fla. 1978)).

29. 286 S.C. at 325, 333 S.E.2d at 351.

30. *Id.* at 324, 333 S.E.2d at 351 (citing Independent School Dist. No. 1 of Tulsa v. Albus, 572 P.2d 554 (Okla. 1977)). This ruling is in clear derogation of S.C. Indus. Comm'n R., S.C. CODE ANN. (R. & REG.) 67-31 (1976), which states:

> Adjournment may be allowed only for presenting additional evidence when such evidence is in existence, identified, and necessary for decision and when notice and motion for adjournment has been filed with the hearing Commissioner and the opposing party three days before the scheduled hearing.

Id. The court of appeals, however, has recently decided that "[u]nder . . . Rule [67-31], the single commissioner is given discretionary power with respect to the taking of additional testimony." Holcombe v. Dan River Mills/Woodside Div., 286 S.C. 223, 225-26, 333 S.E.2d 338, 340 (Ct. App. 1985).

31. *Compare Brown with* Exxon Co. v. Alexis, 370 So. 2d 1128 (Fla. 1978)(claimant, through inadvertence, failed to present any evidence or testimony bearing on a primary issue in the case) *and with* Croteau v. Harvey & Landers, 99 N.H. 264, 109 A.2d 553 (1954)(claimant sought to introduce newly discovered medical testimony) *and with* Bowling v. Blackwell Zinc Co., 359 P.2d 731 (Okla. 1960)(evidence offered to show change for the worse in condition of claimant). The facts of *Brown* reveal no similarly compelling reason for reopening the case to take further evidence.

32. Brief of Appellant at 4.

has been closed.[33] After *Brown*, a party whose evidence fails to carry his burden of proof may continue to search for supportive evidence after the matter is purportedly closed and then claim inadvertence in an effort to introduce such evidence. These efforts are likely to be successful where the sympathies of the hearing commissioner are with the moving party. In the interests of finality, administrative efficiency, and fairness, the rule of law set forth in *Brown* should apply only to claims of inadvertence supported, not contradicted, by the facts.

J. Mark Jones

III. FEE DISPUTES BOARD NOT AN "AGENCY" AS DEFINED BY THE APA

In *Kores Nordic (USA) Corp. v. Sinkler, Gibbs & Simons*[34] the South Carolina Court of Appeals held that a decision of the Resolution of Fee Disputes Board, a division of the South Carolina Bar, was not reviewable pursuant to the South Carolina Administrative Procedures Act (APA).[35] The court based this ruling on the determination that the Fee Disputes Board is not an "agency" as defined by the APA, and, therefore, is not subject to APA provisions.[36]

The dispute in this case arose after Kores Nordic engaged Sinkler, Gibbs & Simons to collect a disputed debt of $205,000. A settlement was reached in which Kores Nordic received $10,000 less than its claim. In the absence of a formal written agreement, Sinkler, Gibbs & Simons claimed that it was entitled to a contingency fee based on the amount of the debt collected. Kores Nordic, however, asserted that the fee should be calculated according to the time devoted by Sinkler to representing Kores Nordic. Instead of litigating the matter, Kores Nordic vol-

33. The very purpose of S.C. Indus. Comm'n R., S.C. CODE ANN. (R. & REG.) 67-31 (1976) is to promote finality and administrative efficiency by establishing parameters whereby evidence may be admitted after a hearing is closed. Brief of Appellant at 4. Broadly interpreting a hearing commissioner's discretionary power with respect to taking additional evidence may render Regulation 67-31 ineffectual and create an intolerable degree of uncertainty in evidentiary matters.

34. 284 S.C. 513, 327 S.E.2d 365 (Ct. App. 1985).

35. S.C. CODE ANN. §§ 1-23-310 to -400 (1986).

36. 284 S.C. at 516, 327 S.E.2d at 365.

untarily submitted the dispute to the Fee Disputes Board and agreed to be bound by the Board's disposition of the matter. Kores Nordic, however, was dissatisfied with the Board's decision and attempted to appeal to the circuit court pursuant to the APA.[37] Sinkler's motion to dismiss the appeal was granted by the circuit court before Kores Nordic filed its case and exceptions.[38] The court of appeals affirmed the circuit court's order dismissing the appeal.[39]

The court of appeals reasoned that the APA's requirement that a final decision be rendered by an "agency" before judicial review may be sought,[40] coupled with the statutory exclusion of the legislature and the courts from the definition of "agency,"[41] shielded Fee Disputes Board decisions from the appeal provisions of the APA. According to the court of appeals, the Fee Disputes Board falls within the exclusion of the courts because the Board "is a creature of the South Carolina Bar,"[42] which is authorized to "act as an administrative agency of the Supreme Court of South Carolina."[43] Thus, the Fee Disputes Board is an agency of "the courts" and within the statutory exclusion embodied in the APA.

The South Carolina courts have interpreted "agency," for the purposes of the APA, to include such entities as the Alcoholic Beverage Control Commission,[44] the Industrial Commission,[45] the Coastal Council,[46] and the Employment Security Commission.[47] These agencies, however, are organized under the executive branch of government. The Fee Disputes Board, as an arm of an agency of the supreme court, clearly falls within the

37. *Id.* at 514, 327 S.E.2d at 366.

38. *Id.* at 514-15, 327 S.E.2d at 366.

39. *Id.* at 516, 327 S.E.2d at 366.

40. *See* D. SHIPLEY, SOUTH CAROLINA ADMINISTRATIVE LAW 5-4 (1983).

41. S.C. CODE ANN. § 1-23-310(1) (1986) defines "agency" as "each state board, commission, department or officer, *other than the legislature or the courts*, authorized by law to make rules or to determine contested cases." (emphasis added).

42. 284 S.C. at 515, 327 S.E.2d at 366.

43. S.C. CODE ANN. § 40-5-20(e) (1986).

44. Schudel v. S.C. Alcoholic Beverage Control Comm'n, 276 S.C. 138, 276 S.E.2d 308 (1981).

45. Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981).

46. Guerard v. Whitner, 276 S.C. 521, 280 S.E.2d 539 (1981).

47. Todd's Ice Cream, Inc. v. S.C. Employment Sec. Comm'n, 281 S.C. 254, 315 S.E.2d 373 (Ct. App. 1984).

statutory exclusion.[48] Furthermore, parties voluntarily seek relief before the Fee Disputes Board and agree to be bound by the decision of the Board. The purpose of the Fee Disputes Board is to provide an alternative to litigation of disputes. *Kores Nordic* reaffirms this principle since appeal of Board decisions to the courts pursuant to APA provisions would defeat this purpose.

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48. The reasoning of the *Kores Nordic* court would probably be extended to other entities operating under the South Carolina Supreme Court. This would preclude the application of the APA to such entities as the Board of Law Examiners, the Board of Commissioners on Grievances and Discipline, and the Commission on Continuing Lawyer Competence. 284 S.C. at 515 n.2, 327 S.E.2d at 366 n.2.